

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON USA INC.,

Petitioner,

v.

NIKE, INC.,

Patent Owner.

Case IPR2024-00460

Patent No. 8,266,749

PATENT OWNER'S PRELIMINARY RESPONSE

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EXHIBITS

Exhibit No.	Description
2001	Excerpts of Prosecution History for U.S. Patent No. 8,266,749
2002	Declaration of Dr. Christopher M. Pastore

I. INTRODUCTION

Patent Owner Nike, Inc. (“Nike”) submits this Preliminary Response to the Petition of lululemon usa inc. (“lululemon”) challenging the patentability of Claims 1–21 (the “Challenged Claims”) of U.S. Patent No. 8,266,749 (the “’749 patent”; Ex. 1001). The Board should deny institution for two independent reasons: (1) all six grounds in lululemon’s Petition involve the same or substantially the same prior art and arguments the Patent Office previously considered during prosecution of the ’749 patent; and (2) lululemon has not established a reasonable likelihood that it will prevail for any claim in any ground raised in the Petition.

The ’749 patent recites methods of manufacturing footwear by knitting textile uppers. The ’749 patent has two independent claims (1, 13) and nineteen dependent claims. The claims generally recite methods of (i) simultaneously knitting a textile element and a different, surrounding textile structure; (ii) removing the textile element from the surrounding textile structure; and (iii) incorporating the textile element into an article of footwear. *E.g.*, Ex. 1001 at 11:43–14:5. *See also* Fig. 9; 7:38–9:4.

lululemon presents six grounds of invalidity. Only two grounds—Grounds 1 and 3—challenge the independent claims. Both grounds advance an anticipation theory. Ground 1 alleges anticipation based on International Patent Publication No.

WO 92/22223 (“Nishida”; Ex. 1005). Ground 3 alleges anticipation based on U.S. Pat. No. 2,047,724 (“Zuckerman”; Ex. 1008).

The remaining four grounds—Grounds 2, 4, 5, and 6—challenge only dependent claims. All four grounds advance an obviousness theory based on Nishida and/or Zuckerman. Ground 2 alleges obviousness based on Nishida in view of a POSA’s general knowledge. Ground 4 alleges obviousness based on Zuckerman in view of a POSA’s general knowledge. Ground 5 alleges obviousness of claim 12 only based on Zuckerman in view of U.S. Patent No. 2,675,631 (“Doughty”; Ex. 1017). Ground 6 alleges obviousness of claims 11 and 21 only based on Nishida in view of Zuckerman.

lululemon’s Petition is precisely what Congress sought to prevent when it enacted 35 U.S.C. § 325(d). *See In re Vivint, Inc.*, 14 F.4th 1342 at 1346 (Fed. Cir. 2021). The Patent Office already considered all three prior art references presented in lululemon’s Petition. The Zuckerman and Doughty references were cited by the applicant and considered by the Examiner. And the Nishida reference—which lululemon asserts in half of its grounds—served as the basis for two separate

Examiner rejections, both of which Nike overcame without amendment.¹ The Patent Office then considered Nishida a third time when adidas presented the reference in a 2016 petition for *inter partes* review. IPR2016-00922. Simply put: nothing in lululemon’s petition presents a new question of patentability.

The Board should also deny institution because lululemon has not shown a reasonable likelihood of prevailing on any of its six recycled grounds. Neither Nishida nor Zuckerman anticipate independent claims 1 or 13 because neither reference discloses “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,” as recited in claims 1 and 13².

For these reasons and those discussed below, Nike respectfully requests that the Board decline to institute review.

¹ During prosecution, the Examiner twice rejected Nike’s application as anticipated by U.S. Patent No. 5,345,638 (“Nishida-US”; Ex. 1013). Nishida-US is virtually identical to the foreign counterpart that lululemon asserts in this Petition. Nike provides a detailed comparison of the two references below.

² Claim 13 recites a substantially similar limitation.

II. THE '749 PATENT

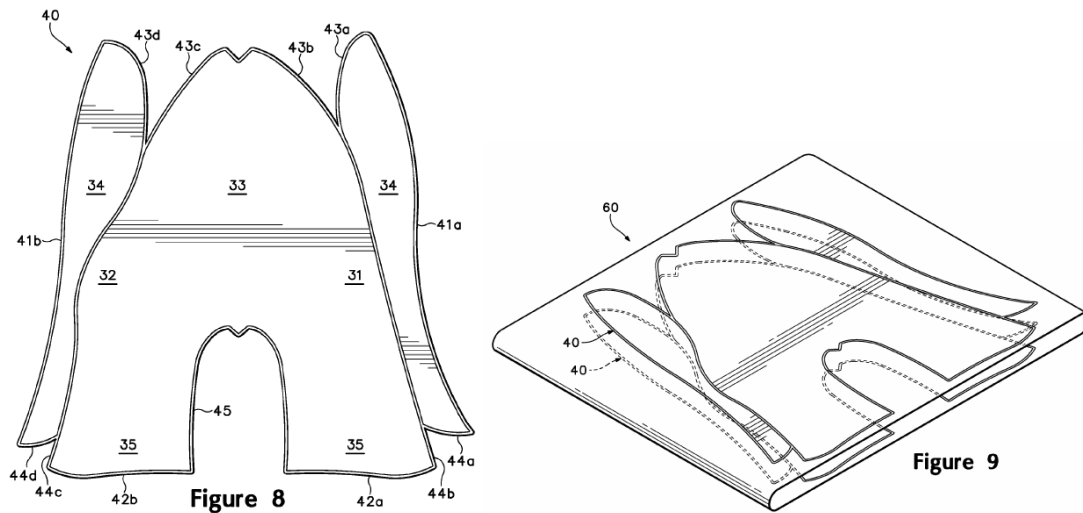
A. Overview of the '749 patent

The '749 patent lists Bhupesh Dua and Edward Nathaniel Thomas as inventors. The '749 patent, now expired, claims priority back to U.S. Patent Application No. 10/791,289, filed March 3, 2004 (now U.S. Patent No. 7,347,011, “the '011 Patent”).

The '749 patent relates to methods of manufacturing footwear by knitting textile uppers. Specifically, the '749 patent recites methods of knitting textile elements at the same time as a surrounding textile structure. *E.g.*, Ex. 1001 at 11:43–14:5. The knitted textile elements have at least one texture that is different from the texture of the surrounding textile structure. *Id.* The knitted textile elements are then removed from the surrounding textile structure and incorporated into articles of footwear. *E.g.*, *id.* at Figure 9, 7:38–9:4, 11:43–14:5. Independent claims 1 and 13 recite these steps.

The claimed methods offer many advantages over traditional methods of manufacturing shoes. For example, the claimed methods increase sourcing and manufacturing efficiency by limiting the required number of suppliers, machinery, or different assembly line techniques used to cut or otherwise prepare the material for incorporation into the footwear. *E.g.*, Ex. 1001 at 3:4–23 11:6–9. The claimed

methods also reduce the number of steps in the manufacturing process and reduce the number of seams in the final footwear product. *Id.*



Figures 8 and 9 of the '749 patent

Figure 8 (reproduced above) shows an example of a textile element with the general shape and form of a footwear upper (or portion of a footwear upper). Figure 9 (reproduced above) shows an example of a tube-shaped cylindrical textile structure “formed with a wide-tube circular knitting machine.” Ex. 1001 at 7:38–39. Figure 9 further shows that “the types of stitches vary throughout textile structure 60 so that a pattern is formed with the outline of textile element 40 . . . [and] differences in the stitches within textile structure 60 form an outline with the shape and proportions of textile element 40.” *E.g., id.* at 7:38–45.

B. Relevant File History

The Patent Office has already considered all three prior art references now presented in lululemon's Petition. The Examiner considered Zuckerman and Doughty after Nike identified those references in an Information Disclosure Statement. *See* Petition at 86. And the Patent Office considered the Nishida disclosure *multiple times*—both before and after it granted the '749 patent. *See id.*

1. Office Actions Based on Nishida

During original prosecution of the '749 patent, the Examiner twice rejected claims 1–8, 11–18, and 21 as anticipated by Nishida-US. Ex. 2001 at 12, 35. As noted above, Nishida-US is virtually identical to its foreign counterpart, Nishida (WO 92/22223), which lululemon asserts in this Petition. Exs. 1004, 1005.

In response to the first rejection, Nike argued that Nishida-US fails to disclose “a knitted textile element *simultaneously* formed with a knitted textile structure during a knitting process.” Ex. 2001 at 29–31. Unlike the claims of the '749 patent, Nike explained, Nishida-US “discloses that layouts 2 are printed, embroidered, woven, or knitted onto a *pre-existing* backing material 4.” *Id.* at 30. The Examiner initially rejected this argument and issued a final Office Action. *Id.* at 35–37.

Nike and the Examiner then held an interview. *See id.* at 40. “[A]fter further consideration,” the Examiner accepted Nike's argument. *Id.* “Nishida may disclose a web of material having different textures,” the Examiner explained, “but there is

no clear disclosure . . . that the textile element and the surround [sic] structure are simultaneously knitted.” *Id.*

In subsequent remarks, Nike explained that “Nishida discloses that the backing 4 for the web of material 1 must be formed prior to the production of the layouts.” Ex. 2001 at 43. Thus, “Nishida fails to disclose a knitted textile element *simultaneously* formed with a knitted textile structure, having a differing texture, during a knitting process.” *Id.* The Examiner then allowed the claims without amendment. *Id.* at 49.

2. *Inter Partes* Review Based on Nishida

On April 19, 2016, adidas filed a petition for *inter partes* review challenging the ’749 patent. Ex. 1018. adidas challenged claims 1–9, 11–19, and 21 as obvious over the combination of Nishida-US and U.S. Patent No. 3,985,003 (“Reed”). In an effort to avoid discretionary denial under 35 U.S.C. § 325(d), adidas relied on Reed alone as disclosing limitation 1[b]—“simultaneously knitting a textile element with a surrounding textile structure.” *Id.* at 14. adidas relied on Nishida-US for the other limitations of claims 1 and 13. *Id.* at 16–19. The Board ultimately upheld the patentability of all challenged claims of the ’749 patent. Ex. 1022 at 70.

III. Alleged Prior Art References

A. Nishida

Nishida is an English translation of International Publication No. 92/22223, titled “Method of Producing a Shaped Shoe Part From a Strip of Fabric, And a Shaped Shoe Part Produced by This Method.” Nishida was published on December 23, 1992. Nishida claims priority to Japanese patent application P4119911.1, which was filed on June 17, 1991. Nishida-US—the reference that the Patent Office already considered multiple times—claims priority to the same Japanese patent application. The disclosure of Nishida and Nishida-US are virtually identical.

Nishida is directed to a method of manufacturing shoe components including a shoe upper and an associated sole part. *See, e.g.*, Ex. 1005 at 4, 9. Nishida discloses removing a patterned element of the desired shoe components from a “material web,” and then shaping and seaming the patterned element for incorporation into footwear. *See, e.g., id.* at 9. As shown in Figure 2 (reproduced below), Nishida’s material web 1 has two primary components: “unwound web parts” 2 (i.e., the patterned pieces) and a “material web base” 4.

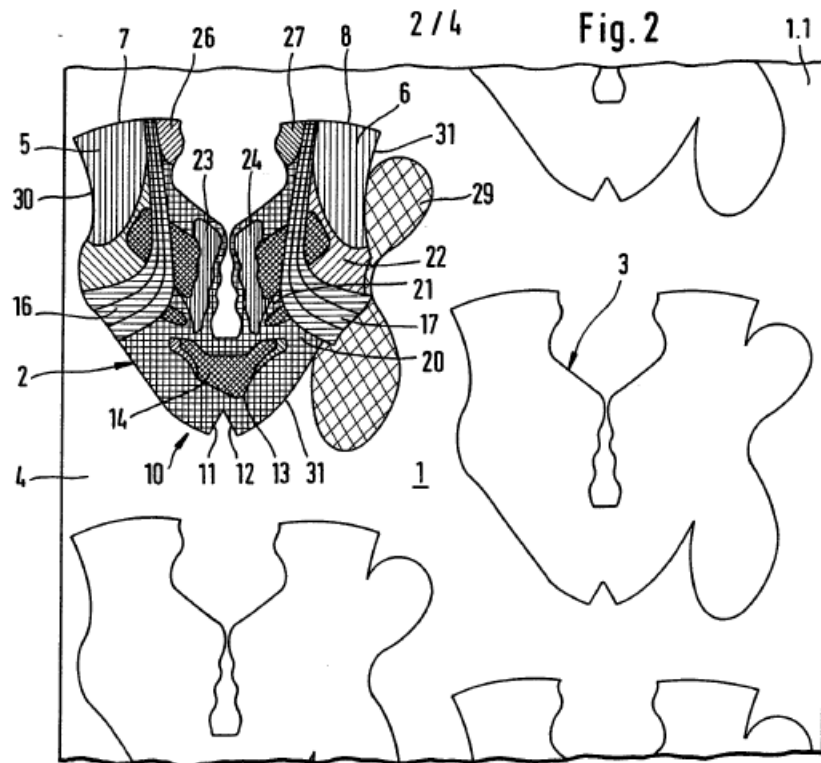


Figure 2 of Nishida

Unlike the '749 patent, Nishida does not disclose that unwound web parts 2 and material web base 4 are “simultaneously knit[ed].” Nishida instead teaches a two-step process. In the first step, the material web base is formed as a separate, preexisting base. Ex. 1005 at 4–5. The preexisting material web base “may be a common woven or knitted fabric, e.g, consisting of warp and weft.” *Id.* at 5. In the second step, after the material web base is fully formed, the unwound web parts are printed (with a fabric printing process) or produced (with a textile production process) on top of that preexisting base. *Id.* at 4–5, 7–8, 9 (claiming that “unwound

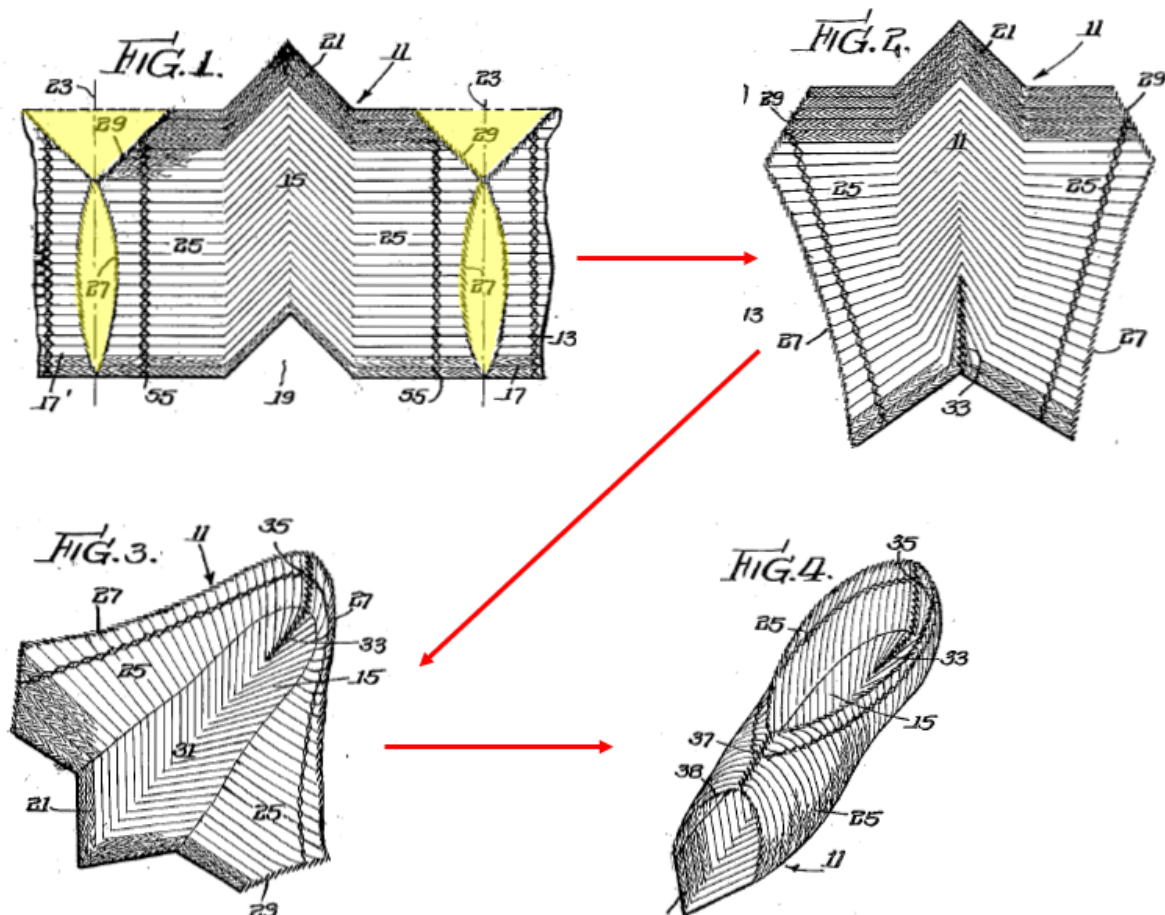
web part (2)” and “sole part (29)” are “produced by a print process on the material web (1) and/or by a textile production method within the material web.”).

Surface areas 1.1 of the material web represent the areas free from unwound web parts. *See* Ex. 1005 at Fig. 1. After the unwound web parts are produced on the material web base, they are cut from the material web and assembled into an article of footwear. *See, e.g., id.* at 5.

B. Zuckerman

U.S. Patent No. 2,047,724 (“Zuckerman”; Ex. 1008) is titled “Knitted Article and Method of Making Same” and issued almost a century ago on July 14, 1936. During prosecution of the ’749 patent, the Examiner considered Zuckerman after Nike included Zuckerman in an Information Disclosure Statement. Ex. 2001 at 3.

Zuckerman is directed to knitted footwear and methods for making the same. *See, e.g.,* Ex. 1008 at 1(L):1–4. Zuckerman describes that an object of the invention is “to form a knitted article, shaped to fit the foot, from a knitted blank of inexpensive form requiring a minimum of folding and stitching to provide the finished article.” *Id.* at 1(L):5–11. Zuckerman’s Figures 1–4 (reproduced below) depict a progression of turning a strip of knitted material into a finished shoe.



Figures 1-4 of Zuckerman

Figure 1 depicts a knitted strip 13 including blank 11 used to form the shoe. Within blank 11, element 15 becomes the sole of the shoe and elements 25 form the lateral and medial sides of the upper. Ex. 1008 at 1(L):27–32; 2(L):35–52. The highlighted portions of Figure 1 represent scrap material in knitted strip 13. Figure 2 shows the blank 11 after removal from strip 13 along lines 27 and 29 and after seam 33 is joined. *Id.* at 1. Figure 3 shows blank 11 after heel seam 35 is joined,

thereby forming a “rounded heel portion in the sole.” *Id.* at 2(L):54–56. Finally, Figure 4 shows edges 29 adjoined to form a slipper. *Id.* at 1.

C. Doughty

U.S. Patent No. 2,675,631 (“Doughty”) is titled “Footwear of the Slipper-Sock Type” and was issued on April 20, 1954. During prosecution of the ’749 patent, the Examiner considered Doughty after Nike included Doughty in an Information Disclosure Statement. Ex. 2001 at 3.

Doughty is directed to a sock having “a separately made foot bottom or sole section” that is joined to “a knitted instep portion” in a “readily detachable” fashion. Ex. 1017 at 1:22–29. Doughty’s Figure 1 (reproduced below) shows a sock with “knitted instep portion 2,” “ribbed ankle section 9,” and detachable sole portion 3. *Id.* at 2:37–38, 3:8–11.

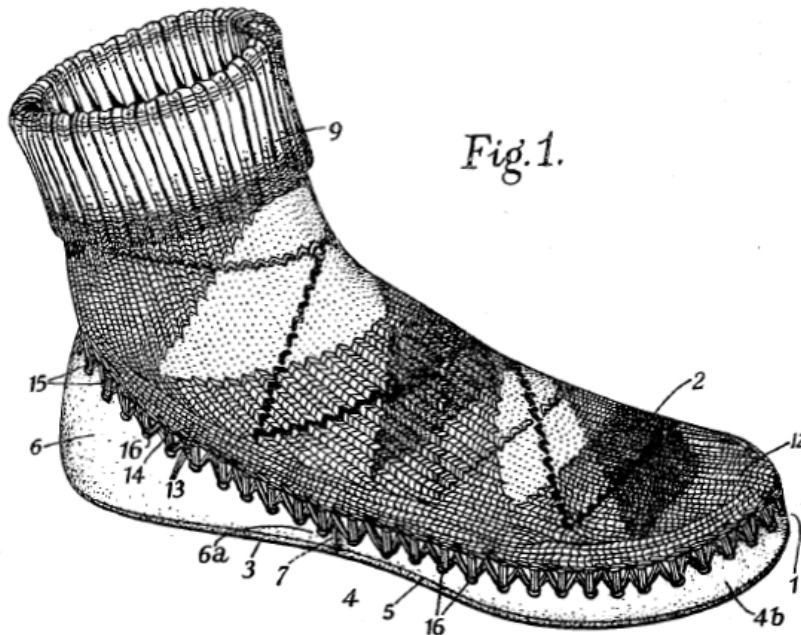


Figure 1 of Doughty

The knitted instep portion and sole portion may be attached “by any conventional method of stitching, sewing, or seaming” or by means of a “lacing thong or thread.” Ex. 1017 at 3:73–4:1, 4:16–20. Doughty describes advantages of its footwear as permitting washing of the knitted sock and protecting the bottom of the knitted sock from wear. *Id.* at 1:33–52.

IV. DEFINITION OF A PERSON OF ORDINARY SKILL IN THE ART

For the purposes of this Preliminary Response only, Nike applies lululemon's proposed level of skill in the art: a POSITA for the '749 patent would have had at least a bachelor's degree in textile engineering, mechanical engineering, or similar technical degree and at least 3 years of experience working with knitted textiles for

use in fabric-based articles. Petition at 14–15; Ex. 1003 at ¶37. For individuals with different educational backgrounds, a person could still be of ordinary skill in the art provided that person’s additional experience compensates for any differences in that person’s education as stated above. *Id.* Nike reserves the right to further address lululemon’s formulation of a POSITA if trial is instituted.

V. CLAIM CONSTRUCTION

Claims challenged in *inter partes* review proceedings “shall be construed using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. [§] 282(b).” 37 C.F.R. § 42.100(b). Under this standard, claims “are generally given their ordinary and customary meaning,” as understood by a person of ordinary skill. *Phillips v. AWH Corp.*, 415 F.3d 1303 at 1312–13 (Fed. Cir. 2005) (citation omitted).

For purposes of this IPR, Nike contends that no terms require construction. All terms and phrases in the ’749 patent claims have their ordinary and customary meanings, which are readily apparent, and no further construction is required.

VI. THE BOARD SHOULD EXERCISE ITS DISCRETION TO DENY INSTITUTION UNDER 35 U.S.C. § 325(d)

Institution of *inter partes* review (“IPR”) is discretionary. *See Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356 at 1367 (Fed. Cir. 2016). As part of the America Invents Act, Congress enacted 35 U.S.C. § 325(d) to prevent petitions that present

“the same or substantially the same prior art or arguments previously [] presented to the Office.” *See In re Vivint, Inc.*, 14 F.4th 1342 at 1346 (Fed. Cir. 2021); *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 at 8 (PTAB Feb. 13, 2020) (precedential).

lululemon’s Petition is precisely what Congress sought to avoid. lululemon’s Petition presents *nothing but* prior art and arguments “previously [] presented to the Office.” *See* 35 U.S.C. § 325(d).

Within this framework, the Board considers several non-exclusive factors:

- (a) the similarities and material differences between the asserted art and the prior art involved during examination;
- (b) the cumulative nature of the asserted art and the prior art evaluated during examination;
- (c) the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection;
- (d) the extent of the overlap between the arguments made during examination and the manner in which petitioner relies on the prior art or patent owner distinguishes the prior art;
- (e) whether petitioner has pointed out sufficiently how the examiner erred in its evaluation of the asserted prior art; and
- (f) the extent to which additional evidence and facts presented in the petition warrant reconsideration of the prior art or arguments.

See Becton, Dickinson & Co. v. B. Braun Melsungen AG, IPR2017-01586, Paper 8 at 17–18 (PTAB Dec. 15, 2017) (precedential as to § III.C.5, first para.). *See also Advanced Bionics*, Paper 6 at 9–11. Factors (a), (b), and (d) relate to whether the art or arguments presented in the petition are the “same or substantially the same” as those previously presented to the Office. *Advanced Bionics*, Paper 6 at 10. Factors (c), (e), and (f) “relate to whether the petitioner has demonstrated a material error by the Office” in its prior consideration of that art or arguments. *Id.* The threshold for “material error” is high: “[i]f reasonable minds can disagree regarding the purported treatment of the art or arguments, it cannot be said that the Office erred in a manner material to patentability.” *Id.* at 9.

A. *Advanced Bionics* step 1: The same art, or substantially the same art, was previously before the Office during prosecution

The Board should deny institution because every ground in lululemon’s Petition constitutes the “same or substantially the same prior art or arguments previously presented to the Office.” *See* 35 U.S.C. § 325(d). lululemon’s arguments based on Zuckerman and Doughty (Grounds 3–6) are a quintessential second bite at the apple. The Patent Office already considered both references during prosecution after Nike cited them in an Information Disclosure Statement. lululemon’s arguments based on Nishida (Grounds 1–2, 6) are a *fourth bite* at the apple. The

Patent Office already considered Nishida-US—a virtually identical reference—*on three separate occasions*: in two separate office actions and in an IPR proceeding.

Becton, Dickinson factor (a) takes into account “the similarities and material differences between the asserted art and the prior art involved during examination.” *Becton, Dickinson*, Paper 8 at 17. There is no dispute that there is virtually no difference between the asserted art and the prior art involved during examination. Indeed, this is the rare case in which every single reference presented in lululemon’s petition was previously involved during examination.

lululemon admits that Zuckerman and Doughty were cited in an Information Disclosure Statement and considered by the Examiner. Petition at 86. There is thus no dispute that Zuckerman and Doughty were “previously presented” to the Office and “involved during examination.” *See Advanced Bionics*, IPR2019-01469, Paper 6 at 7–8. lululemon also admits that the Patent Office previously considered a domestic equivalent of Nishida, i.e., “a corresponding U.S. national phase entry (Nishida-US).” Petition at 86. There are no meaningful differences between Nishida and its domestic equivalent, Nishida-US. Nishida and Nishida-US contain identical figures. *Compare* Ex. 1005 (Figs. 1–5) *with* Ex. 1013 (Figs. 1–5). And aside from translational differences (Nishida is a translation from German to English), the written disclosures are identical. *Id.* As shown below, each and every paragraph of

Nishida relied upon by lululemon also exists in Nishida-US—virtually verbatim (aside from translational differences).

lululemon's citations to Nishida (Ex. 1005)	Parallel citation in Nishida-US (Ex. 1013)
“production of a shoe upper” (Nishida at Abstract)	“production of a shoe upper” (Nishida-US at Abstract)
“placed in an adhesive, injection or casting mold, in which a midsole 33 and an outsole 34 are formed by known methods” (Nishida at 6)	“brought into a gluing, injection or casting mold, in which a midsole 33 and an outsole 34 are molded by known measures” (Nishida-US at 4:43–45)
“producing a shaped shoe part ..., cutting ... and sewing the shoe uppers ..., and attaching the associated sole part.” (Nishida at 9)	“production of a plurality of shoe shaped parts... cutting... stitching parts of the layout of the cut-out unit on provided seams to form an upper of the shoe shaped part, and then fastening the associated sole part” (Nishida-US at 6:4–39)
“when the strip of material (1) is manufactured, the patterns (2) of the uppers are produced, at the same time as the strip of material” (Nishida at Abstract)	“a web of material (1) is used to produce layouts (2) by different production measures... at the same time with the production of web of material (1)” (Nishida-US at Abstract)
“patterns can already be produced directly during the production of the material web” (Nishida at 4)	“patterns already can be produced directly in the production of the web of material” (Nishida-US at 2:29–30)
“a material web which, during its production by a method customary in the textile industry, e.g., by weaving and/or knitting and/or embroidery, is provided with a single or a plurality of unwound web part(s) 2 for the shoe upper shape 3” (Nishida at 5)	“a web of material... is produced by a conventional textile process, tier example, by weaving and/or knitting and/or embroidering... can be provided with a single or with a plurality of layouts 2 of the shape of a shoe upper 3” (Nishida-US at 3:6–11)

lululemon's citations to Nishida (Ex. 1005)	Parallel citation in Nishida-US (Ex. 1013)
“using different manufacturing techniques, such as ... different yarn material ... [or] different material thickness” (Nishida at Abstract)	“used... different production measures, such as different... yarn material... [or] material thickness” (Nishida-US at Abstract)
“only those parts of the material web corresponding to the pattern or an area of a pattern of the shoe upper or the associated sole part are produced in the required quality, thickness, multilayered, or the like” (Nishida at 4)	“only just those parts of the web of material are produced in the necessary quality, thickness, multilayers or the like which correspond to the pattern or to an area of a pattern of the shoe upper or the related sole part” (Nishida-US at 2:11–15)
“divided into different individual parts or areas, which are distinguished from each other ... by different fibers or threads, e.g., of wool, wool with metal threads, silk, silk with metal threads, or wool with synthetic fibers, and the like, and/or ... differently formed fiber strands or fiber strand compositions, such as twisted, processed in parallel, and the like” (Nishida at 5)	“divided into different individual parts or areas, which differ from one another... by being of different fibers or yarns, for example, from wool, wool with metal yarns, silk, silk with metal yarns, wool with plastic fibers or the like and/or by being formed of... differently designed fiber extrudates or fiber extrudate compositions, such as twisted, processed parallel or the like.” (Nishida-US at 3:15–26)
“ha[s] a lower quality and/or density and/or a lower weight” (Nishida at 10)	“of a lower quality, density and weight” (Nishida-US at 7:20–21)
“consist[s] of a lightweight fabric quality being as simple and inexpensive as possible” and “can be produced in the manner of a gauze or with a low to very low number of warps and/or wefts and/or, e.g., thin-threaded or the like” (Nishida at 7–8)	“consist of a lightweight material quality that is as simple and economical as possible” and “can be produced like a gauze or with low to very low warp and/or filling gauge and/or, for example, by being thin-spun or the like” (Nishida-US at 5:48–52)

lululemon's citations to Nishida (Ex. 1005)	Parallel citation in Nishida-US (Ex. 1013)
“[a]fter cutting out the unwound web part 2 from the material web 1” (Nishida at 5)	“After cutting out layout 2 from the web of material 1” (Nishida-US at 3:31–32)
“offcut resulting from the cutting” (Nishida at 4)	“cutting waste accumulating with cutting out” (Nishida-US at 2:20–21)

There is no material difference between Nishida and Nishida-US. *See Intel Corp. v. Inst. of Microelectronics of the Chinese Academy of Sciences*, IPR2019-00834, Paper 11 at 8–12 (PTAB Oct. 4, 2019) (finding no material differences between domestic patent and PCT counterpart). lululemon does not point to a single difference between Nishida and Nishida-US.

In sum, there are no differences—let alone any material differences—between the art asserted in lululemon’s Petition and the prior art involved during examination.

This factor thus strongly weighs in favor of the Board exercising its discretion to deny institution. *See Becton, Dickinson*, Paper 8 at 17.

***Becton, Dickinson* factor (b)** takes into account “the cumulative nature of the asserted art and the prior art evaluated during examination.” *Becton, Dickinson*, Paper 8 at 17. In the rare case like this—where all of the asserted prior art references were evaluated during examination—the Board “need not consider *Becton*

Dickinson factor (b).” *Puma NA, Inc. v. Nike, Inc.*, IPR2019-01042, Paper 10 at 11 (PTAB Oct. 31, 2019) (informative).

But even if the Court does consider this factor, it strongly weighs in favor of the Board exercising its discretion to deny institution. *See Becton, Dickinson*, Paper 8 at 17.

***Becton, Dickinson* factor (d)** takes into account “the extent of the overlap between the arguments made during examination and the manner in which Petitioner relies on the prior art.” *Becton, Dickinson*, Paper 8 at 17.

Because the “same or substantially the same prior art” was previously presented to the Office, the Board “need not reach” whether the “same or substantially the same arguments” were previously presented to the Office. *Advanced Bionics*, Paper 6 at 20. But if the Board does reach this factor, there is substantial overlap between the arguments made during examination and the manner in which the Petitioner relies on the prior art.

During prosecution, the Examiner asserted that Nishida-US anticipates claims 1–8, 11–18, and 21. *See supra* § II.B.1. In other words, the Examiner asserted that Nishida discloses every limitation of those claims. After a full round of prosecution, including multiple remarks and an interview, the Examiner was persuaded by Nike’s arguments that Nishida-US fails to disclose a textile element knitted

“simultaneously” with a surrounding textile structure. *See id.* In view of those arguments, the Examiner allowed claims 1–21 without amendment. *See id.*

adidas then raised similar arguments during a subsequent *inter partes* review proceeding. adidas argued that Nishida-US, in combination with Reed, rendered claims 1–9, 11–19, and 21 obvious. *See* Ex. 1018 at 9. adidas explicitly couched its arguments under an obviousness theory to avoid discretionary denial. *Id.* at 59–60. (arguing that “the examiner did not consider ... the obviousness of combining Reed with Nishida” to disclose the features “Nike argued were ... missing from Nishida to overcome the examiner’s reliance on Nishida as anticipating”). From claim 1, adidas argued that Nishida-US disclosed “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,” and “incorporating the textile element into an upper of the article of footwear.” Ex. 1018 at 16–18. adidas argued that Nishida-US disclosed similar features recited in independent claim 13. *Id.* at 20–21.

lululemon now makes the same arguments previously made during examination and the IPR proceeding—relying on the same aspects of the prior art. Like the Examiner and adidas, lululemon argues that: (i) Nishida’s layouts disclose the claimed “textile element,” Ex. 2001 at 20–27, 40–45; Ex. 1018 at 14–16; Petition

at 25–26 (ii) Nishida’s backing material discloses the claimed “surrounding textile structure,” Ex. 2001 at 36–37; Ex. 1018 at 14–16; Petition at 25–26; and (iii) that Nishida teaches “simultaneously knitting” the textile element and surrounding textile structure, Ex. 2001 at 36–37; Ex. 1018 at 14–16; Petition, 25. In each instance, lululemon relies on the same disclosure in Nishida relied upon by the Examiner and adidas.

There is thus substantial overlap between the arguments lululemon now advances for lululemon’s Nishida-based grounds and the arguments raised during prosecution.

This factor thus strongly weighs in favor of the Board exercising its discretion to deny institution. *See Becton, Dickinson*, Paper 8 at 17.

B. *Advanced Bionics* step 2: lululemon does not demonstrate that the Office erred

At *Advanced Bionics* step 2, the Board considers *Becton, Dickinson* factors (c), (e), and (f) to determine “whether the petitioner has demonstrated a material error by the Office.” A material error may be “misapprehending or overlooking specific teachings of the relevant prior art where those teachings impact patentability of the challenged claims.” *Advanced Bionics*, IPR2019-01469, Paper 6 at 8–9 n.9. Or a material error may be an error of law, such as misconstruing a claim term, where the construction impacts patentability of the challenged claims.” *Id.*

lululemon has not met its burden of demonstrating a material error with respect to Zuckerman or Doughty. lululemon offers no arguments for factors (c), (e), or (f) at all. For Zuckerman, lululemon merely makes the conclusory statement that “the Examiner materially erred by failing to reject any claim over Zuckerman.” Petition at 87. lululemon never explains why.³ And for Doughty, lululemon never even argues that the Office erred. Thus, lululemon has not demonstrated that the Office materially erred by granting the ’749 patent in view of Zuckerman or Doughty.

lululemon has also not met its burden of demonstrating a material error with respect to Nishida-US. According to lululemon, the Examiner “wrongly accepted” Nike’s arguments distinguishing the ’749 patent over Nishida-US. Petition at 11. lululemon does not argue that the Examiner “misapprehend[ed]” or “overlook[ed]” the teachings of Nishida-US—nor does lululemon argue that the Examiner committed a legal error. *See Advanced Bionics*, Paper 6 at 8–9 n.9. Instead, lululemon simply points to dicta in a subsequent Board decision. Petition at 12–14.

³ As Nike explains below with respect to Ground 3, Zuckerman fails to disclose various features of independent claims 1 and 3. The Patent Office did not err in granting the ’749 patent in view of Zuckerman.

As a preliminary matter, the cited Board statements in the *adidas IPR* should be afforded little weight because they were “unnecessary to the [Board’s] decision.” *See Kastigar v. U.S.*, 406 U.S. 441 at 454–55 (1972); *see also Nat’l Am. Ins. Co. v. U.S.*, 498 F.3d 1301 at 1306 (Fed. Cir. 2007) (“Dicta, as defined by this court, are statements made by a court that are unnecessary to the decision in the case, and therefore[,] not precedential.”). The petitioner in the *adidas IPR*, adidas, never argued that Nishida anticipated the claims of the ’749 patent. Ex. 1019 at 16. adidas only argued that the ’749 patent was rendered obvious in view of the combination of Nishida and Reed. *Id.* The panel rejected that argument and declined to find the ’749 patent unpatentable. Ex. 1022 at 49–50. The Board’s observations about arguments *not raised by adidas* are thus dicta. *See Curver Lux., SARL v. Home Expressions Inc.*, 938 F.3d 1334 at 1342 (Fed. Cir. 2019) (“[W]e note that the statement about anticipation in *Glavas* is dictum and thus not binding. Because the *Glavas* court was asked only to review a determination of obviousness, the statement about anticipation was unnecessary to reach its holding about obviousness.”).

But more importantly, the Board’s observations—even if considered—cannot demonstrate that the Examiner committed a “material error.” This is true for two reasons. First, the Examiner’s findings were part of an anticipation analysis, whereas the Board’s observations were part of an obviousness analysis. Ex. 2001 at

12, 35; Ex. 1022 at 49–50. Because these two analyses have different legal standards, the Board’s findings about what Nishida-US “teaches or suggests” under an obviousness analysis cannot be viewed as findings about what Nishida “discloses” under an anticipation analysis. *See Curver Lux.*, 938 F.3d at 1342. Second, even if the Board’s dicta is considered, and even if the different legal standards for anticipation and obviousness are overlooked, the Board’s observations merely show that “reasonable minds can disagree.” *Advanced Bionics*, Paper 6 at 10. As a matter of law, “it cannot be said that the Office erred in a manner material to patentability” simply because a petitioner shows that “reasonable minds can disagree regarding the purported treatment of the art or arguments.” *Id.* at 9.

Indeed, the Examiner did not “misapprehend” or “overlook” the teachings of Nishida-US. The Examiner discussed Nishida-US at length over the course of two office actions and an interview with Nike. *See supra* § II.B.1. In view of those discussions and the arguments raised by Nike, the Examiner determined that Nishida’s disclosure (five columns in total) failed to teach a textile element knitted “simultaneously” with a surrounding textile structure. *See id.* lululemon’s request—based solely on dicta—that it be allowed to subject the ’749 patent to a *third challenge* over Nishida should be rejected.

For these reasons, lululemon has not demonstrated a material error by the Patent Office.

**VII. LULULEMON HAS NOT ESTABLISHED A REASONABLY
LIKELIHOOD OF PREVAILING FOR ANY CHALLENGED CLAIM**

lululemon bears the burden on institution of “demonstrating a reasonable likelihood that it will prevail in showing the unpatentability of at least one claim.” *SMIC, Ams. v. Innovative Foundry Techs., LLC*, IPR2020-00837, Paper 13 at 13–14 (PTAB Oct. 9, 2020) (citing 35 U.S.C. §§ 314(a) and 312(a)(3)). In making this showing, lululemon’s Petition must identify “the evidence that supports the grounds for the challenge to each claim.” *Id.* lululemon has not met that burden here.

lululemon alleges that independent claims 1 and 13 of the ’749 patent are invalid as anticipated under 35 U.S.C. § 102. Anticipation requires “that a single prior art reference discloses each and every element of a claimed invention.” *Silicon Graphics, Inc. v. ATI Techs., Inc.*, 607 F.3d 784 at 796 (Fed. Cir. 2010). A reference must not only explicitly or inherently disclose every claimed element, but those elements must also be arranged within that reference as they are in the claim. *See Net MoneyIN, Inc. v. Verisign, Inc.*, 545 F.3d 1359 at 1369–71 (Fed. Cir. 2008). Disclosures from multiple, distinct embodiments of a prior art reference cannot be combined to anticipate the challenged claim. *See id.* at 1371. And “differences

between the prior art reference and a claimed invention, however slight, invoke the question of obviousness, not anticipation.” *Id.*

Here, lululemon has not shown a reasonable likelihood of success for any challenged claim under any ground of unpatentability. The Board should thus deny institution.

A. Ground 1: lululemon Fails to Show A Reasonable Likelihood That Nishida Anticipates Claims 1–8 and 12–18

lululemon fails to show a reasonable likelihood that Nishida anticipates any challenged claim in Ground 1. Ex. 2002 at ¶32.

1. Nishida does not disclose “simultaneously knitting” a “textile element” with a “surrounding textile structure” as recited in Claims 1 and 13

Nishida does not disclose “simultaneously knitting a textile element with a surrounding textile structure,” as recited in claim 1. Nishida also fails to disclose a substantially similar limitation recited in independent claim 13.⁴ Ex. 2002 at ¶33.

lululemon incorrectly argues that Nishida discloses this “simultaneously knitting” limitation because it provides that the “patterns (2)” can be produced “at the same time as” or “during the production of” “material web (1).” Petition, 24–

⁴ Independent claim 13 recites “knitting a first textile element and a second textile element simultaneously with knitting a surrounding textile structure.”

25. As described above in the overview of Nishida, material web 1 has two primary components: “unwound web parts 2” (i.e., pattern elements) and “material web base 4.” Ex. 1005 at 5. Nishida’s Figure 2 (reproduce below) shows each of these item numbers.

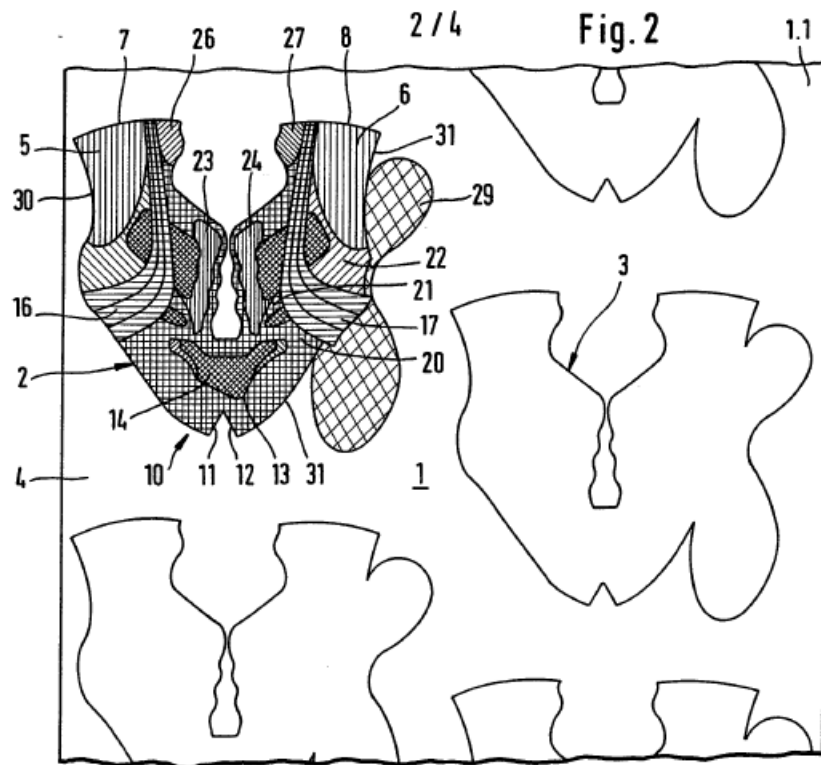


Figure 2 of Nishida

Nishida does not disclose that unwound web parts 2 and material web base 4 are “simultaneously knit[ted].” Ex. 2002 at ¶¶34–35. Nishida states that “the present invention is intended to achieve the object of further developing” the “prior-art method” for making shoe parts disclosed in German Patent No. 627878 to Guenther (“Guenther Patent”). The Guenther Patent discloses producing a web of material

with successive strips of different weaves. Ex. 1005 at 3; Ex. 2002 at ¶35. The Guenther Patent then discloses printing patterns in the shape of shoe uppers onto that preexisting web of material. *Id.*; Ex. 2002 at ¶35. After the upper patterns are printed, they are cut out, and then folded and seamed together to create an upper. *Id.* Nishida explains that it seeks to further develop the disclosure of the Guenther Patent by simultaneously creating a “related sole part” with a shoe upper. *Id.* at 4 (“[T]he present invention is intended to achieve the object of further developing this prior-art method such that a shoe upper together with the associated sole part can be designed.”).

Nishida achieves that objective by producing the unwound web parts having sole portion 29 on a preexisting base. Ex. 1005 at 4–5; Ex. 2002 at ¶36. The base “may be a common woven or knitted fabric, e.g, consisting of warp and weft.” *Id.* at 5. After the base is formed, Nishida teaches printing or producing unwound web parts on the preexisting base just like the Guenther Patent. The unwound web parts are printed (with a fabric printing process) or produced (with a textile production process) onto the preexisting base. *Id.* at 4–5, 7–9; Ex. 2002 at ¶36.

Nishida explains that “the shoe upper or the associated sole part are produced in the required quality, thickness, multilayered, or the like,” while the “remaining area of the material web,” i.e. “surface areas 1.1,” are made of “simple, lightweight

or inexpensive fabric quality.” Ex. 1005 at 4, 7. Surface areas 1.1 may be formed, for example, from “gauze or with a low to very low number or warps and/or wefts.” *Id.* at 7. The difference in quality between surface areas 1.1 and unwound web parts 2, including the different number of layers in each component, results from unwound web parts 2 and material web base 4 being formed in separate processes. Ex. 2002 at ¶37. For at least these reasons, Nishida fails to disclose this limitation. Ex. 2002 at ¶38.

B. Ground 2: lululemon Fails to Show A Reasonable Likelihood That Nishida In View Of A POSITA’s General Knowledge Renders Obvious Claims 9–10 and 19–20

For at least the reasons discussed above with respect to Ground 1, Nishida does not disclose independent claims 1 and 13. For at least the same reasons, Nishida in view of a POSITA’s general knowledge does not teach or suggest dependent claims 9–10 and 19–20.

C. Ground 3: lululemon Fails to Show A Reasonable Likelihood That Zuckerman Anticipates Claims 1–3, 5–8, 11, 13–17, and 21

lululemon fails to show a reasonable likelihood that Zuckerman anticipates any challenged claim in Ground 3. Ex. 2002 at ¶39.

1. Zuckerman does not disclose simultaneously knitting a textile element with a “surrounding textile structure” as recited in claims 1 and 13

Zuckerman does not disclose “simultaneously knitting a textile element with a surrounding textile structure,” as recited in claim 1. Zuckerman also fails to disclose a substantially similar limitation recited in independent claim 13.⁵ Ex. 2002 at ¶40.

lululemon alleges that Zuckerman meets this limitation by disclosing “blanks 11” (i.e., textile elements) that are removed from “knitted strip 13.” *See* Petition at 57–59 (citing Ex. 1003 at ¶139). lululemon’s annotated version of Zuckerman’s Figure 1 (reproduced below) depicts knitted strip 13 containing blanks 11. *Id.* at 59.

⁵ Independent claim 13 recites “knitting a first textile element and a second textile element simultaneously with knitting a surrounding textile structure.”

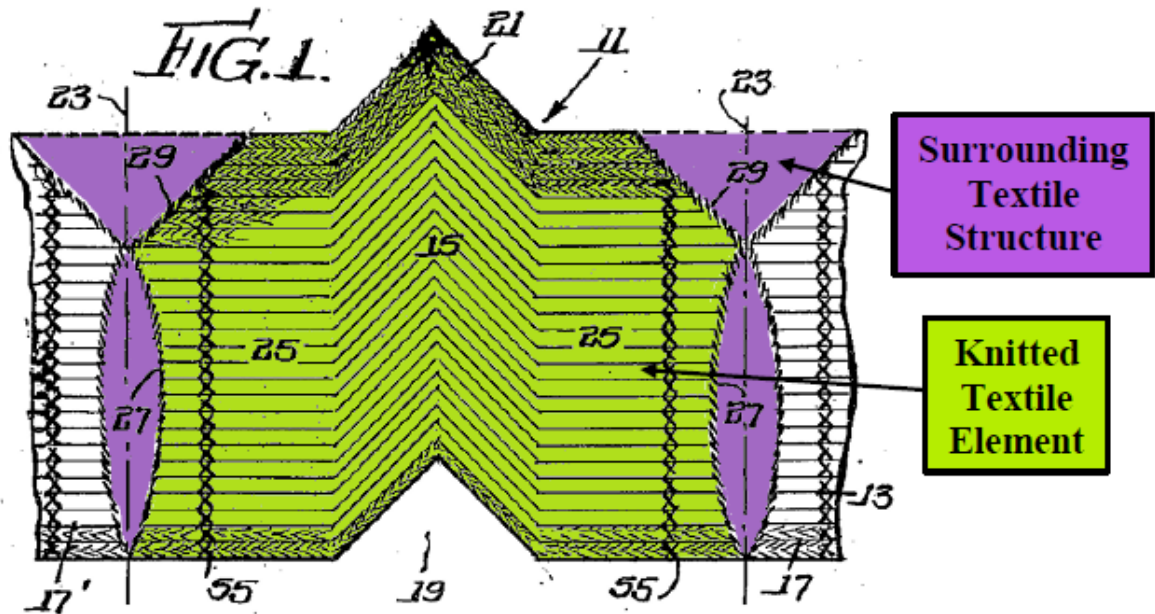


Figure 1 of Zuckerman

lululemon argues that the “portion of continuous strip 13 that surrounds blank 11” [purple] is “a surrounding textile structure to the knitted textile element” [green]. Petition at 59.

But Zuckerman’s blank 11 is not knitted with a *surrounding* textile structure, it is knitted with two separate textile structures adjacent the blank—one on each side. As Dr. Pastore explains, a POSITA would not have understood Zuckerman’s textile structures (one adjacent the blank on each side) to be a textile structure “surrounding” the blank. Ex. 2002 at ¶41–43. Thus, Zuckerman fails to disclose this limitation. Ex. 2002 at ¶43.

2. Zuckerman does not disclose “removing” the “textile element” from the “surrounding textile structure” as recited in Claims 1 and 13

Zuckerman does not disclose “removing the knitted textile element from the surrounding knitted textile structure,” as recited in claim 1 or claim 13.⁶ Because Zuckerman fails to disclose knitting a textile element with a “surrounding textile structure” (*see supra* § VII.C.1), Zuckerman also fails to disclose removing the textile element from a “surrounding textile structure.” Ex. 2002 at ¶44.

3. Zuckerman does not disclose “incorporating the knitted textile element into the article of footwear” as recited in Claims 1 and 13

Zuckerman does not disclose “incorporating the knitted textile element into the article of footwear,” as recited in claim 1. Zuckerman also fails to disclose a substantially similar limitation recited in independent claim 13.⁷ Ex. 2002 at ¶45.

Zuckerman’s blank 11 (i.e., knitted textile element), is not incorporated into an article of footwear—it is an article of footwear. Ex. 2002 at ¶45. In particular,

⁶ Independent claim 13 recites “knitting the first and second knitted textile elements from the knitted textile structure.”

⁷ Independent claims 13 recites “incorporating at least one of the first and second knitted textile elements into the article of footwear.”

Zuckerman is a slipper. Ex. 1008 at 1(R):24–27. Zuckerman describes its objective is “to form a knitted article, shaped to fit the foot, from a knitted blank of inexpensive form requiring a minimum of folding and stitching to provide the finished article.” *Id.* at 1(L):5–11; *see also id.* at Fig. 4. Zuckerman’s knitted blank 11 forms both the upper and sole of the slipper. *See, e.g., Id.* at 1(L):27–32. As the ’749 patent explains, “an upper and a sole structure” make up the “two primary elements” of a shoe. Ex. 1001 at 1:25–26; Ex. 2002 at ¶¶46–47.

lululemon argues that, in one embodiment, Zuckerman’s slipper may be “formed of components in addition to blank 11.” *See* Petition at 62–63 (citing Ex. 1008 at 2(R):17–37, 1(R):31–36). lululemon points to Zuckerman’s Figure 7 (reproduced below) to illustrate these additional components. *Id.* at 63.

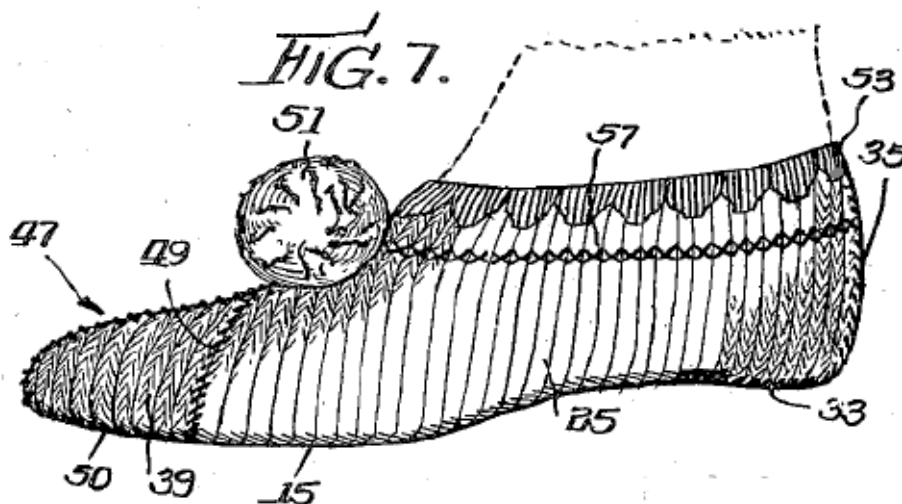


Figure 7 of Zuckerman

The other components shown in Figure 7 include a toe covering portion 47, edge finishing materials 53, and a pom-pom 51. These finishing materials or other adornments are incorporated into Zuckerman's slipper—not the other way around. Ex. 2002 at ¶48. This is far different from the way the claimed “textile element” of the '749 patent is incorporated into an article of footwear. *See, e.g.*, Ex. 1001 at 3:40–53; Ex. 2002 at ¶49. The “textile element” claimed in the '749 patent is attached to a separate sole structure to form a shoe. *See e.g.*, Fig. 12, item 120, 10:8–31. Thus, Zuckerman fails to disclose this limitation. Ex. 2002 at ¶49.

D. Ground 4: lululemon Fails to Show A Reasonable Likelihood That Zuckerman In View Of A POSITA's General Knowledge Renders Obvious Claims 3, 9–10, 14, and 19–20

For at least the reasons discussed above with respect to Ground 3, Zuckerman does not disclose independent claims 1 and 13. For at least the same reasons, Zuckerman in view of a POSITA's general knowledge does not teach or suggest dependent claims 3, 9–10, 14, and 19–20.

E. Ground 5: lululemon Fails to Show A Reasonable Likelihood That Zuckerman In View Of Doughty Renders Obvious Claim 12

For at least the reasons discussed above with respect to Ground 3, Zuckerman does not disclose independent claim 1. For at least the same reasons, Zuckerman in view of Doughty does not teach or suggest dependent claim 12.

F. Ground 6: lululemon Fails to Show A Reasonable Likelihood That Nishida In View Of Zuckerman Renders Obvious Claims 11 and 21

For at least the reasons discussed above with respect to Ground 1, Nishida does not disclose independent claims 1 and 13. For at least the same reasons, Nishida in view of Zuckerman does not teach or suggest dependent claims 11 and 21.

VIII. CONCLUSION

For the reasons set forth above, Nike respectfully requests that the Board deny institution of the Petition for all Challenged Claims of the ‘749 patent.

Dated: May 13, 2024

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CERTIFICATE OF WORD COUNT

Under the provisions of 37 C.F.R. § 42.24(d), the undersigned hereby certifies that the Microsoft Office word count including all footnotes for the foregoing Patent Owner's Preliminary Response, excluding the table of contents, table of authorities, certificate of word count, appendix and certificate of service, totals 7,298 words, which is less than the 14,000 words allowed under 37 C.F.R. § 42.24(b)(1).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies service on the Petitioner, pursuant to 37 C.F.R. § 42.6(e) and by agreement of counsel, by electronic (e-mail) delivery of a true copy of the foregoing **PATENT OWNER'S PRELIMINARY RESPONSE**, which was served on May 13, 2024 to the following Counsel for Petitioner via e-mail:

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