

1 UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT AND APPEAL BOARD

2 Reference IPR2024-00460

Patent 9,730,484

3 -----X

LULULEMON ATHLETICA CANADA, INC. and

4 LULULEMON USA, INC.,

5 Petitioners,

6 - against -

7 NIKE, INC.,

8 Patent Owner.

9 -----X

10 October 18, 2024

8:54 a.m.

11
12 VIDEOTAPED DEPOSITION of DR. DAVID
13 BROOKSTEIN, held at the offices of Knobbe
14 Martens Olson & Bear LLP, located at 1155
15 Avenue of the Americas, New York, New York
16 10036, before Anthony Giarro, a Registered
17 Professional Reporter, a Certified Realtime
18 Reporter and a Notary Public of the State
19 of New York.

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21
22
23 lululemon v. NIKE, Inc.
24 IPR2024-00460
Patent No. 8,266,749
25 Ex. 2004

1 A P P E A R A N C E S :

2
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13
14
15 ALSO PRESENT:

16 BOB RUDIS, Videographer
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S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED,
by and among counsel for the respective
parties hereto, that the filing, sealing
and certification of the within deposition
shall be and the same are hereby waived;

IT IS FURTHER STIPULATED AND AGREED
that all objections, except as to form of
the question, shall be reserved to the time
of the trial;

IT IS FURTHER STIPULATED AND AGREED
that the within deposition may be signed
before any Notary Public with the same
force and effect as if signed and sworn to
before the Court.

* * *

1 THE VIDEOGRAPHER: Good
2 morning. We are going on the record
3 at 8:54 a.m. on October 18th, 2024.
4 Please note the microphones are
5 sensitive and may pick up whispering
6 and private conversations. Please
7 mute your mobile phones at this time.
8 Audio and video recording will
9 continue to take place unless all
10 parties agree to go off the record.

11 This is Media Unit 1 of the
12 video-recorded deposition of Dr.
13 David Brookstein, taken by counsel
14 for patent owner, in the matter of
15 lululemon USA Inc. versus Nike, Inc.,
16 filed in the United States Patent and
17 Trademark Office, Before the Patent
18 and Appeal Board, Case Number
19 IPR2023-01460. The location of the
20 deposition is Knobbe, Martens, Olson
21 & Bear LLP, 1155 Avenue of the
22 Americas, New York, New York.

23 My name is Robert Rudis.
24 I'm the videographer. The court
25 reporter is Anthony Giarro. And we

1 represent the firm Veritext Legal
2 Solutions.

3 I'm not related to any party
4 in this action, nor am I financially
5 interested in the outcome.

6 If there are any objections
7 to proceeding, please state them at
8 the time of your appearance.

9 Counsel and all present will
10 now please state their appearances
11 and affiliations for the record,
12 beginning with the noticing attorney.

13 MS. STAUBACH: I'm Lindsey
14 Staubach of Arnold & Porter on behalf
15 of the patent owner, Nike, Inc.

16 MR. RAZAI: Good morning.
17 This is Ali Razai from Knobbe Martens
18 on behalf of the petitioner,
19 lululemon.

20 THE VIDEOGRAPHER: Would the
21 court reporter please swear in the
22 witness. And then counsel may
23 proceed.

24 D R. D A V I D B R O O K S T E I N,
25 after having first been duly sworn by a

1 Notary Public of the State of New York, was
2 examined and testified as follows:

3 EXAMINATION BY

4 MS. STAUBACH:

5 MS. STAUBACH: I think the
6 read-on of the case number might have
7 been wrong. I believe you said
8 01460, but it should be
9 IPR2024-00460.

10 Q Good morning, Dr.
11 Brookstein.

12 A Good morning.

13 Q Thank you for joining us
14 again today, joining me again today. I
15 know you've been through this before.
16 But as always, I'll just run through a
17 few ground rules.

18 So if you don't hear me, let
19 me know, and I'm happy to repeat my
20 question. If you don't understand a
21 question, let me know, and I can rephrase
22 or repeat. If you do answer, I will
23 assume that you heard me and you
24 understood and you answered to the best
25 of your ability. Does that make sense?

1 A Makes sense.

2 Q Today's deposition will be
3 transcribed. So please only provide
4 verbal answers. No nodding or mm-hmm.

5 A I understand.

6 Q And I'll plan to take a
7 break about every hour. If you need a
8 break, let me know. I'm happy to oblige.
9 I'll just ask that we don't break while a
10 question is pending.

11 A I understand.

12 (The above-referred-to
13 document was marked as Brookstein
14 Exhibit 1 for identification, as of
15 this date.)

16 Q Do you recognize this, Dr.
17 Brookstein?

18 A I recognize this.

19 Q What is it?

20 A It's your patent owner's
21 notice of deposition of me, Dr. David S.
22 Brookstein.

23 Q And this is also Paper 10 in
24 the IPR proceeding.

25 Do you understand, Dr.

1 Brookstein, that you are under oath
2 today?

3 A I certainly do.

4 Q And you understand that's
5 the same as if you were in a courtroom
6 before a judge?

7 A I understand.

8 Q Is there any reason you
9 can't provide truthful testimony today?

10 A No.

11 Q We could put that away.
12 Thank you.

13 (The above-referred-to
14 document was marked as Brookstein
15 Exhibit 2 for identification, as of
16 this date.)

17 Q Do you recognize this
18 document?

19 A I do recognize this
20 document.

21 Q What is it?

22 A It's my declaration in
23 support of petition for the IPR of U.S.
24 Patent 8266749.

25 Q Would you turn with me to

1 the back of this document, page 117?

2 A Yes.

3 Q Is that your signature?

4 A It's my signature on
5 January 10th, 2024, yes.

6 Q Do you remember about how
7 long you spent preparing this
8 declaration?

9 A No.

10 Q Do you have a ballpark
11 estimate?

12 A I do.

13 Q What is it?

14 A About 80 to 100 hours.

15 Q This isn't the first time
16 you've considered the '749 patent; is
17 that right?

18 A That is correct.

19 Q When else have you
20 considered the '749 patent?

21 A For the SDNY District Court
22 case.

23 Q The case between Nike and
24 lululemon?

25 A Yes.

1 Q Any other time?

2 A Not that I can recall. No.

3 I have.

4 Q When was that?

5 A I looked at this patent also
6 for another IPR -- for another IPR.

7 Q Which IPR was that?

8 A I don't know the number.

9 But the petitioner was New Balance
10 Athletics. You said this declaration or
11 this IPR?

12 Q The '749 patent.

13 A Yes. That is correct.

14 Q Are you aware of any
15 inaccuracies in your declaration?

16 A There is one inaccuracy.
17 There's a misspelling. I can't find it.
18 It's where the word is stitch. I spelled
19 it S-T-I-C-H. It should have been
20 S-T-I-T-C-H. But I don't remember where
21 it is in here.

22 Q And apart from that, no
23 other inaccuracies that you're aware of?

24 A Not that I'm aware of.

25 Q Are all of your opinions in

1 this IPR included in this declaration?

2 A They are.

3 Q Are any of your opinions
4 omitted from this declaration?

5 A They are not.

6 Q Are there any changes you'd
7 like to make to your declaration at this
8 point?

9 A No.

10 Q Let's turn to paragraph 2.
11 Here, you say, "This
12 declaration is provided after my review
13 and analysis of the '749 patent, the
14 prior art, relevant background
15 technology, and is also based on my
16 education and experience, as well as
17 additional materials identified herein."

18 Do you see that?

19 A I do.

20 Q Does this list everything
21 that you considered in putting together
22 this declaration?

23 A Yes.

24 Q What relevant background
25 technology did you consider?

1 A Spencer, which would be
2 1009; excerpts of Man-Made Fiber, 1010.
3 I think that's -- oh. And Wingate, 1023,
4 from Fairchild's Dictionary of textiles.

5 Q Have you read the entire
6 '749 patent?

7 A Many times.

8 Q What does many times mean?

9 A Between 10 and 20 times.

10 Q When's the last time you
11 read the '749 patent?

12 A Yesterday.

13 Q And did you read the '749
14 patent specifically for purposes of
15 putting together this declaration?

16 MR. RAZAI: Objection, form.

17 A I read it for this
18 declaration. And I also read it -- for
19 this declaration, yes.

20 Q Have you read the
21 prosecution history of the '749 patent?

22 A I read parts of the
23 prosecution history that had technical
24 content, but not for what I'll call
25 transactional things, like when an office

1 action was given, what date it was,
2 things like that.

3 Q How times did you read those
4 portions of the prosecution history?

5 A I don't recall.

6 Q More than once?

7 A More than once.

8 Q When's the last time you
9 looked at the prosecution history?

10 A In the last week or so. But
11 I don't remember what particular day.

12 Q When you were rendering your
13 opinions in this declaration, did you
14 consider the Nishida reference in its
15 entirety?

16 A Yes, I did.

17 Q Did you consider the
18 Zuckerman reference in its entirety?

19 A Yes, I did.

20 Q And did you consider the
21 Doughty reference in its entirety?

22 A Yes, I did.

23 Q I'm going to go ahead and
24 enter a few exhibits that we'll use.

25 (The above-referred-to

1 document was marked as Brookstein
2 Exhibit 3 for identification, as of
3 this date.)

4 Q Do you recognize this
5 document?

6 A I do.

7 Q What is it?

8 A U.S. Patent 8266749, titled
9 Article of Footwear Having a Textile
10 Upper.

11 Q And that is Exhibit 1001 to
12 this proceeding --right?-- which is
13 stamped on the bottom right?

14 A Yes.

15 Q Thank you. You could set it
16 to the side for now. We'll just do a few
17 of these.

18 A Thank you.

19 (The above-referred-to
20 document was marked as Brookstein
21 Exhibit 4 for identification, as of
22 this date.)

23 Q Is this the Nishida
24 reference which is Exhibit 1005 in the
25 IPR proceeding?

1 A Yes.

2 Q And that's an English
3 translation of a German document; is that
4 right?

5 A To my understanding, the
6 German document is part of the whole
7 exhibit package. But I only read the
8 English part.

9 Q So the German portion isn't
10 in the back of the packet?

11 A That's the way I see it,
12 yes.

13 Q Thank you. We could put
14 that to the side for now.

15 (The above-referred-to
16 document was marked as Brookstein
17 Exhibit 5 for identification, as of
18 this date.)

19 Q Is this the Zuckerman
20 reference that is Exhibit 1008 in the IPR
21 proceeding?

22 A It is.

23 Q We could put that to the
24 side for now.

25 (The above-referred-to

1 document was marked as Brookstein
2 Exhibit 6 for identification, as of
3 this date.)

4 Q Is this the Doughty
5 reference that is Exhibit 1017 in this
6 IPR proceeding?

7 A Is that a question?

8 Q Yes.

9 A Yes.

10 Q Thank you.

11 How did you prepare for this
12 deposition today?

13 MR. RAZAI: Objection. I'd
14 caution the witness not to disclose
15 the substance of any conversations
16 with counsel or the collection of any
17 documents that counsel provided. You
18 may answer.

19 A Could you ask the question
20 again, please?

21 Q Sure.

22 How did you prepare for this
23 deposition today?

24 A I was given various prior
25 art from counsel. And I was asked to

1 look at it and prepare it against the
2 claims of the 749 and from that, write a
3 declaration.

4 Q I'm not talking about
5 putting your declaration together. I
6 mean specifically preparing for today's
7 deposition.

8 A Oh. Preparing for today, I
9 spent approximately two weeks, on and
10 off, reviewing all the materials.

11 Q Did you have any meetings?

12 A I had met with Mr. Razai
13 Wednesday and Thursday, yes.

14 Q Anyone else?

15 A I think Brandon Smith was on
16 some of those via Zoom.

17 Q So two meetings to prepare?

18 A Two that I can remember. I
19 don't recall if I spoke to Brandon on
20 Zoom prior to that two-week period.

21 Q How long were those
22 meetings?

23 A I didn't time them. But
24 they were under an hour.

25 Q But you spent a couple of

1 weeks reviewing materials?

2 A Right after I got notice of
3 deposition, yes.

4 MR. RAZAI: I just want to
5 lodge an objection to the question
6 about how long were those meetings as
7 vague as to the pronoun of those
8 meetings.

9 Q So you said you had a
10 meeting on Wednesday and a meeting on
11 Thursday; is that right?

12 A That is right.

13 Q How long was your meeting on
14 Wednesday?

15 A Approximately three hours.

16 Q And how long was your
17 meeting on Thursday?

18 A Approximately three hours.

19 Q Dr. Brookstein, did you
20 originally identify any of the Nishida,
21 Zuckerman or Doughty references?

22 A No.

23 Q Let's turn to paragraph 20
24 in your declaration.

25 A Yes.

1 Q Paragraph 20?

2 A I thought you said page 20.

3 Excuse me.

4 Q It's on page 9.

5 A Okay. I got it.

6 Q So beginning on
7 paragraph 20, this is a section titled
8 Overview of the '749 Patent; is that
9 right?

10 A That's right.

11 Q And so here, you give kind
12 of a brief overview of the technology of
13 the '749 patent?

14 A Yes.

15 Q And at the top of page 10,
16 you have an annotated Figure 9 from the
17 '749 patent; is that right?

18 A That's right.

19 Q So in Figure 9, there are
20 two item numbers. One is 40, and one is
21 60. Do you see that?

22 A I do.

23 Q Is 40 a textile element?

24 A Yes.

25 Q And is 60 a surrounding

1 textile structure?

2 A Yes.

3 Q How do you know that the
4 purple portion of Figure 9 is a
5 surrounding textile structure?

6 MR. RAZAI: Objection, form.

7 A It was defined in the patent
8 as a surrounding textile structure.

9 Q Is there anything about this
10 figure that lets you know that it's
11 surrounding the textile element?

12 A There are purple parts that
13 are adjacent to the edges of the textile
14 element.

15 Q For a surrounding textile
16 structure, to surround a textile element,
17 does it need to have adjacent material
18 around all of the edges?

19 A No.

20 Q Is there a particular
21 percentage of the periphery of a textile
22 element that needs to be adjacent to a
23 textile structure for that textile
24 structure to be surrounding?

25 A I can't give you a number

1 like that. I haven't calculated that.

2 Q Well, let me ask you.

3 In looking at Figure 9, if
4 Textile Element 40 only had material
5 adjacent to its edges on 30 percent of
6 its edges, would that be surrounding?

7 A It would be surrounding
8 those edges, yes.

9 Q So surrounding those edges,
10 but would it be surrounding the textile
11 element?

12 MR. RAZAI: Objection, form.

13 A It would be surrounding the
14 elements of the textile element.

15 Q Would it be surrounding the
16 entire textile element?

17 MR. RAZAI: Objection, form.

18 A I would answer that it would
19 only be surrounding where it is touching
20 the textile element.

21 Q In this figure, Figure 9, is
22 there a knitted outline in the fabric?

23 A Yes.

24 Q What's the point of knitting
25 an outline in a fabric?

1 A I can only point of knitting
2 an outline in this particular fabric, in
3 this particular structure.

4 Q What's that point?

5 A It helps guide where the
6 cutting would be of the material web that
7 you're going to cut out.

8 Q Is there any other purpose
9 to knitting an outline?

10 A Not that I can recall for
11 this structure.

12 Q But as a POSITA, can you
13 think of any other purpose for knitting
14 an outline of a textile element?

15 A Yes.

16 Q What is that purpose?

17 A There are a lot of garments,
18 apparel items that are made, what they
19 call cut-and-sew. So you'd want to know
20 where to cut before you sew it into a
21 final product.

22 Q Isn't that the same as
23 helping guide where to cut?

24 A It could.

25 Q What do you mean it could?

1 A Well, nowadays, they use
2 laser cutting machines which are
3 programmed. So they don't have to follow
4 the fabric. It's put into the system.

5 Q So a machine that uses
6 lasers doesn't need a knitted outline; is
7 that what you mean?

8 A Not necessarily.

9 Q What did you mean?

10 A That's what I meant, not
11 necessarily. It would be preprogrammed
12 where to cut.

13 Q So you wouldn't necessarily
14 need a knitted outline because a laser
15 would be programmed where to cut the
16 material?

17 A Nowadays, yes.

18 Q Was there a time before
19 knitting an outline with a knitting was
20 possible?

21 A Can you ask that question
22 again, please?

23 Q Sure. I'll rephrase.

24 In knitting, was there a
25 time when using a machine to knit an

1 outline in a surrounding structure was
2 not possible?

3 A You have to be more
4 specific.

5 Q So how is an outline knitted
6 in a surrounding textile structure?

7 A One way is to change the
8 stitch.

9 Q And how do you actually do
10 that using a knitting machine?

11 A You use, for instance, a
12 tuck stitch.

13 Q And when did programming
14 like that become possible?

15 A I don't recall the date.

16 Q Do you know what decade?

17 A No. I don't know the
18 decade.

19 Q But there was a time when
20 programming a knitting machine to knit an
21 outline was not yet possible; is that
22 true?

23 A Ask that question again.

24 Q There was a time when
25 programming a knitting machine to knit an

1 outline was not yet possible?

2 A Yes. There was a time.

3 Q So before knitting machines
4 were programmed to knit outlines, how
5 would textile elements have been cut out
6 of a surrounding material?

7 A A person that was going to
8 make a garment would have what they call
9 a marker which is a piece of cardboard.
10 And then they would use an electric knife
11 to cut out the part.

12 Q So a marker and an electric
13 knife.

14 What about a cutting dye?

15 A That could be another way,
16 yes.

17 Q When you say marker, is that
18 the same thing as a market lay?

19 A It's just a piece of
20 cardboard, or it could be just a piece of
21 cardboard.

22 Q Are you familiar with the
23 term market lay or fabric lay?

24 A In what context?

25 Q Fabric processing.

1 A Fabric processing or apparel
2 making?

3 Q Apparel making.

4 A I don't know if I heard it
5 called that. But I think I know what
6 you're talking about, that cardboard that
7 I'm talking about or some other rigid
8 material.

9 Q So a lay would be like a
10 piece of cardboard or another rigid
11 material placed on top of a fabric to
12 form kind of a pattern from which you
13 would cut around?

14 A Which a person who is
15 cutting the fabric would use as a guide
16 to use his or her electric knife to cut
17 out the part.

18 Q Would using a cutting dye,
19 for example, be simpler than programming
20 a knitting machine to knit an outline of
21 a textile element?

22 A I can't answer that
23 question. Simpler is a relative term.

24 Q So in your opinion -- I'm
25 just imagining someone working in a

1 factory -- taking a dye and kind of
2 setting it down on a piece of fabric,
3 that's not simpler than having an
4 engineer program a knitting machine?

5 MR. RAZAI: Objection, form.

6 A Is there a question there?

7 Q Yes.

8 A And the question is?

9 Q In your opinion, would
10 someone working in a factory taking a dye
11 and setting it down on a piece of fabric
12 not be simpler than having an engineer
13 program a knitting machine?

14 MR. RAZAI: Objection, form.

15 A That would be simpler.

16 Q Let's turn to paragraph 63
17 of your declaration which is on page 38.
18 But I'd like to turn to page 39, please.

19 A Okay. Yes, ma'am.

20 Q You have a chart here that
21 lists Grounds 1 through 6.

22 Are these all of the alleged
23 invalidity grounds that you offer
24 opinions about?

25 A That is correct.

1 Q And every ground in this
2 chart is based on either Nishida or
3 Zuckerman; is that right?

4 MR. RAZAI: Objection, form.

5 A No.

6 Q What's not right about that?

7 A Well, No. 5 is Zuckerman and
8 Doughty. You didn't mention Doughty.

9 Q So when I say based on, I
10 mean the first reference listed here in
11 each one of these grounds is either
12 Nishida or Zuckerman. Do you agree with
13 that?

14 A The first reference, you're
15 talking about Ground 1?

16 Q I'm talking about the first
17 reference listed in each ground is either
18 Nishida or Zuckerman.

19 A Oh. I see what you're
20 saying. Except for Zuckerman and
21 Doughty, yes.

22 Q Let's turn to paragraph 130.

23 A Counsel, it'll make it
24 easier if you could also tell me the
25 page.

1 Q I will. I have to find it
2 myself. Page 78.

3 A All right. I have it.

4 Q Are you there?

5 A I am.

6 Q So on page 78, you have a
7 heading here that says, "Ground 3:
8 Zuckerman Anticipates Claims 1 through 3,
9 5 through 8, 11, 13 through 17 and 21."
10 You see that?

11 A I do see that.

12 Q This section spans until
13 paragraph 180 which is on page 102. Do
14 you see that?

15 A I do.

16 Q And are all of your opinions
17 for Ground 3, Zuckerman anticipation,
18 included in paragraphs 130 through 180?

19 A They are.

20 Q Let's look at paragraph 131
21 which is also on page 78.

22 A I see it.

23 Q Let's actually turn to the
24 next page, 79.

25 So you have reproduced

1 Zuckerman's Figure 1 here; right?

2 A Correct.

3 Q And Figure 1 of Zuckerman
4 shows a knitted Strip 13; is that right?

5 A That's correct.

6 Q Just under this figure, you
7 have a sentence that says, "Zuckerman
8 explains that its continuous Strip 13
9 comprises several blanks with each blank
10 having multiple textures."

11 Do you see that?

12 A Well, it says several
13 blanks. And then in the square,
14 parentheses, 11.

15 Q Thank you for that
16 correction.

17 Otherwise, did I read it
18 correctly?

19 A Otherwise, you read it
20 correctly.

21 Q So looking back at Figure 1,
22 there are these sort of cutaway edges on
23 the side that indicate that the strip
24 would keep going; is that right?

25 A Which side are you talking

1 about?

2 Q The right and left sides,
3 the very edge of Figure 1 on the right
4 and left.

5 A Yes. Those are cutaway
6 drawings or drawings that they use in
7 engineering to say something and to use
8 them on.

9 Q But Strip 13 would continue
10 on, such that more iterations of Blank 11
11 are to the right and left; is that right?

12 A That is right.

13 Q And so to the right and
14 left, there would be identical versions
15 of Blank 11?

16 A Yes. It would be
17 repetitions.

18 Q Blanks 11 would be cut out
19 at intervals; is that right?

20 A That's my understanding.

21 Q And it might be easier to
22 look at page 80 to your annotated version
23 of Zuckerman's Figure 1. Do you see
24 that?

25 A I do.

1 Q So the portions colored in
2 purple, those are the portions that are
3 cut away from Strip 13 to make Blank 11;
4 is that right?

5 A I think Blank 11 is the
6 whole blank. But, yes, you cut away the
7 purple. You cut away the purple.

8 Q It's your opinion that the
9 purple portions surround Blank 11; is
10 that right?

11 A That is correct. They
12 surround the edges of Blank 11, yes.

13 Q Do they surround all the
14 edges of Blank 11?

15 A They surround where there's
16 a triangle and where there's an ellipse,
17 yes.

18 Q Sorry.

19 What do you mean by ellipse?

20 A Well, I don't know if that's
21 really an ellipse. It's that purple part
22 that's not the triangle.

23 Q So you're saying that
24 essentially, lines 29 and 27, the purple
25 material next to those lines surrounds

1 only those edges of Blank 11?

2 MR. RAZAI: Objection, form.

3 A What I'm saying is that on
4 the purple part where there's a No. 29
5 and where there is a purple Part No. 27,
6 they surround the green part.

7 Q But they only surround the
8 green part which they abut; right?

9 A They're surrounding that
10 part that they abut, yes.

11 Q They don't surround the
12 triangular peak at the top edge of Blank
13 11; is that right?

14 A They're not surrounding
15 that. We're using surrounding as an
16 adjective which is how it's used in the
17 patent.

18 Q So the purple portions are
19 not surrounding the triangular peak or
20 apex at the top of Blank 11. Do you
21 agree with that?

22 A Not in Figure 1, correct.

23 Q And they're not surrounding
24 kind of the inverted peak at the top of
25 Blank 11?

1 MR. RAZAI: Objection, form.

2 A Give me a number where
3 you're talking about the inverted peak.

4 Q It's next to Part No. 19.

5 A Okay.

6 Q So I'll ask the same
7 question.

8 They're not surrounding the
9 portion, the lower portion of Blank 11
10 which is next to what's shown as Part
11 No. 19?

12 A They're not surrounding that
13 textile element.

14 Q We talked about this a
15 little bit earlier.

16 And you said that you
17 couldn't put a number on how much of a
18 periphery would need to be abutted by
19 textile structure for the textile
20 structure to be surrounding a textile
21 element; is that right?

22 A Correct.

23 Q But conceivably, it could be
24 40 percent?

25 A It's a speculation. I can't

1 answer that question.

2 Q It's not out of the
3 question, though; right?

4 A I can't answer when you
5 start giving me numbers like that, unless
6 I have something to measure against.

7 Q Well, let's look at Figure 1
8 again on page 80.

9 A Okay.

10 Q And if you would imagine
11 with me that only one side of a Blank 11
12 was cut away, so let's say that the
13 purple on the left side of Figure 1 isn't
14 there, and in order to make a blank,
15 we're only going to cut away the purple
16 on the right side, would the Blank 11 be
17 surrounded by the purple portion only on
18 the right side of the figure?

19 MR. RAZAI: Objection to
20 form.

21 A The textile element would be
22 a surrounded textile element on the -- I
23 don't know if you said the left side or
24 the right side. But that side that the
25 purple's on.

1 Q On the right side.

2 A Off the right side.

3 Q Would you turn with me to
4 paragraph 149?

5 A Again, can I indulge you to
6 give me a page number?

7 Q Yes. Page 87.

8 A Thank you.

9 Q Are you there?

10 A I am.

11 Q So here, we're looking at
12 Limitation 1C which you've listed as
13 incorporating the knitted textile element
14 into the article of footwear. Do you see
15 that?

16 A I do.

17 Q And is it your opinion that
18 Zuckerman discloses incorporating its
19 blank into an article of footwear?

20 A I would agree that it
21 incorporates the knitted textile into the
22 element of footwear as the limitation
23 says.

24 Q But in your opinion,
25 Zuckerman's Blank 11 is the knitted

1 textile element; is that right?

2 A Yes.

3 Q Does an article of footwear
4 have a sole and an upper?

5 A Not necessarily.

6 Q In what situation would an
7 article of footwear not have a sole and
8 an upper?

9 A A slipper, for instance.

10 Q Is it your opinion that
11 Zuckerman's slipper doesn't have a sole
12 and an upper?

13 A Well, the bottom part is the
14 sole.

15 Q So Zuckerman's Blank 11 is
16 both the sole and the upper; is that
17 right?

18 A To my understanding, yes.

19 MR. RAZAI: Objection, form.

20 MS. STAUBACH: Could we take
21 a break for like five minutes?

22 THE VIDEOGRAPHER: Off the
23 record at 9:37, ending Media Unit
24 No. 1.

25 (A short recess was taken.)

1 THE VIDEOGRAPHER: On the
2 record at 9:43, marking the beginning
3 of Media Unit No. 2.

4 Q Welcome back, Dr.
5 Brookstein.

6 If we could just pull up the
7 '749 patent which is Exhibit 3.

8 A Yes.

9 Q In your opinion, is the '749
10 patent directed to methods for
11 manufacturing shoes?

12 MR. RAZAI: Objection, form.

13 A It's directed to measuring
14 footwear. So footwear shoes, yes.

15 Q But, for example,
16 Figure 1 --

17 A Yes.

18 Q -- that's a shoe; right?

19 A That's a shoe.

20 Q And if you would turn with
21 me to Column 1, lines 25 through 26.

22 A Okay. Give me a minute.
23 Yes.

24 Q This says, "Conventional
25 articles of athletic footwear including

1 two primary elements, an upper and a sole
2 structure."

3 Do you see that?

4 A I do.

5 Q So when the '749 patent is
6 talking about footwear, is it talking
7 about footwear that has an upper and a
8 sole structure?

9 MR. RAZAI: Objection, form.

10 A That's what the sentence
11 says, yes. Can you repeat that question?

12 Q We could move on.

13 A Okay.

14 Q Let's look back at your
15 declaration, paragraph 149. So let's
16 look at page 87 and 88.

17 A Okay. Give me a second.
18 Okay.

19 Q And it's your opinion that
20 Zuckerman discloses incorporating the
21 knitted textile element into the article
22 of footwear because Zuckerman discloses
23 additional components besides Blank 11;
24 is that accurate?

25 A Will you repeat the

1 question?

2 Q Sure.

3 It's your opinion that
4 Zuckerman discloses incorporating the
5 knitted textile element into the article
6 of footwear because Zuckerman discloses
7 additional components besides Blank 11;
8 is that accurate?

9 A It's footwear before, as is
10 other pieces.

11 Q So it's already footwear
12 before the addition of the Pom Pom 51,
13 for example?

14 A It's my opinion, yes.

15 Q And is it footwear before
16 the addition of Part No. 53 which is like
17 a fringe?

18 A I don't see 53.

19 Q It's at the top.

20 A Oh.

21 Q At the heel.

22 A Yes.

23 Q And is it your opinion also
24 that Zuckerman discloses footwear before
25 the addition of a toe covering portion?

1 A Yes.

2 Q Let's look at paragraph 152
3 which is on the next page, 89.

4 And Claim 3, if you want to
5 look at the '749 patent, just for context
6 here for the Claim 3 language, we could
7 look at Column 11, line 56 of the '749
8 patent.

9 A Okay. Give me a second.
10 Simultaneously knitting the textile
11 element. What I have in 152 matches the
12 patent, Column 11, line 53 -- excuse me.
13 Well, Claim 3, yes.

14 Q So Claim 3 recites the step
15 of knitting an outline of the knitted
16 textile element; is that right?

17 A It does.

18 Q Your opinions for this claim
19 are in paragraphs 152 and 153; is that
20 right?

21 A That's right.

22 Q Aside from Figure 1, do you
23 cite any disclosures in Zuckerman in
24 paragraphs 152 or 153?

25 A Can you repeat the question,

1 please?

2 Q Sure.

3 Aside from Figure 1 of
4 Zuckerman, do you cite any disclosures in
5 Zuckerman, other than that, in paragraphs
6 152 and 153?

7 A For Claim 3?

8 Q Yes.

9 A For Claim 3, no.

10 Q So you've annotated Figure 1
11 here by drawing a red line around Blank
12 11; is that fair?

13 A It's fair.

14 Q And the sentence below,
15 annotated Figure 1 says, "This figure
16 shows varying stitches throughout
17 continuous Strip 13, forming an outline
18 of the knitted textile element (Blank 11)
19 along lines 27 and 29."

20 Do you see that?

21 A Yes.

22 Q Can you point to anything in
23 Zuckerman that says that lines 27 and 29
24 are knitted outlines?

25 A I'd have to go back and look

1 at Zuckerman.

2 Q Let's do that.

3 A Okay. Which is?

4 Q Exhibit 5.

5 A And what is your question?

6 Q Sure.

7 Can you point to anything in
8 Zuckerman that says that lines 27 and 29
9 are knitted outlines?

10 A I will need time to read
11 27 -- I mean to read Zuckerman because I
12 don't have it memorized.

13 Q I can point you to the
14 columns where it's discussed. It would
15 be page 2, the left and right columns.

16 A Yup. The whole left and
17 right columns?

18 Q You could start at line 22
19 of the left column.

20 A The left column. Okay. Am
21 I allowed to mark on the exhibits?

22 Q Sure.

23 A I'm just going to put a
24 parentheses.

25 Q Whatever you mark will be

1 entered.

2 A That's fine. I'm going to
3 mark where you tell me. So where did you
4 tell me?

5 Q Line 22.

6 A Where it starts, "The
7 opposite cut edges"?

8 Q Right. I could give you
9 some portions if it'll make things
10 simpler for you.

11 A It'll be.

12 Q 22 through 34 in the left
13 column.

14 A Okay. Let me mark that.

15 Q And lines 27 through 31 in
16 the right column.

17 A Okay. Let me mark that. 27
18 through what line?

19 Q 31.

20 A Okay. Got it.

21 Q And there's also a mention
22 of Part No. 29 in the right column at 38
23 through 45.

24 A Now, could you repeat the
25 question? And I'll read those three

1 sentences.

2 Q Sure.

3 Can you point to anything in
4 Zuckerman that indicates that lines 27
5 and 29 are knitted outlines?

6 A Okay. Give me a minute.
7 Could you repeat the question?

8 Q Sure.

9 Can you point to anything in
10 Zuckerman that indicates that lines 27
11 and 29 are knitted outlines?

12 A They don't use the word
13 knitted outlines. But they used the
14 word -- they changed the stitch.

15 Q Where is that?

16 A Well, for instance, left
17 Column 2 on line 25, it talks about a
18 herring bone portion. And the herring
19 bone portion is different than the
20 textile element that's surrounded. So at
21 that -- where that stitch changes, that
22 would be an outline.

23 Q But doesn't that say the
24 edges being curved inwardly toward the
25 Herring Bone Portion 15?

1 A Right. And the edges
2 they're talking about are the part that
3 are cut away.

4 Q So let's look at Figure 1.

5 A Okay.

6 Q Part No. 15 is in the
7 middle; right?

8 A Right.

9 Q So when it says "toward
10 Herring Bone Portion 15," that just means
11 it's angled towards Portion 15; right?

12 A Well, 15 also would include
13 that gray part that they don't have a
14 number on that because that picture is a
15 herring bone, or that part of this blank
16 is a herring bone knit.

17 Q But that part is not
18 indicated by Part No. 15; right?

19 A I think it is.

20 Q Based on what?

21 A Because they're saying 15 is
22 a herring bone. And that drawing to me
23 and a POSA would look like a herring bone
24 knit.

25 Q Is Part No. 15 the sole

1 portion of Zuckerman's slipper?

2 A Part of Part 15 is a sole
3 portion, yes.

4 Q You're saying that just by
5 looking at Figure 15?

6 A I'm saying that a POSA would
7 look at Figure 1 and see that that gray
8 area at the top is a herring bone, yes.

9 Q And this is not in your
10 declaration; is that right?

11 A That is not in my
12 declaration. That's correct.

13 Q Let's turn to paragraph 155.
14 Are you there?

15 A Yes, I am.

16 Q So in paragraph -- actually,
17 let's look at 154 where you list the
18 claim limitation.

19 And this says, "Claim 5
20 depends on Claim 1 and recites wherein,
21 the knitted textile element has a
22 substantially plainer configuration upon
23 removal from the surrounding knitted
24 textile structure."

25 Did I read that right?

1 A You read it from here right.
2 Last time, you asked me to look at the
3 patent and make sure --

4 Q If that makes you
5 comfortable, we can do that.

6 A Well, that's not precisely
7 what it says for 15. Claim 5 -- hold on.
8 Claim 5 is for the 749. In Claim 5 --
9 oh. Claim 5. I'm sorry. I'm sorry. I
10 was looking at something else.

11 MR. RAZAI: Let's just focus
12 on the declaration.

13 MS. STAUBACH: Well, I want
14 to make sure the claim language is
15 right.

16 A I'm with you, yes.

17 Q So you're satisfied that
18 what you've written in paragraph 154
19 lines up with Claim 5 from the '749
20 patent?

21 A Yes, I have.

22 Q In paragraph 155, underneath
23 the reproduction of Figure 1 here, you
24 have a sentence that says, "The phrase
25 strip of fabric also indicates that

1 Zuckerman structure of continuous Strip
2 13 is substantially planar because the
3 term strip denotes a long narrow piece,
4 and the term fabric denotes the piece has
5 length and width, but limited thickness,
6 hence forming a flat piece of fabric and
7 a plane."

8 That was a long one. Did I
9 read it right?

10 A You read it right.

11 Q So let's break this down a
12 little bit.

13 Within the phrase "strip of
14 fabric," it looks like you were providing
15 definitions for the term strip and for
16 the term fabric. Do you agree with that?

17 A I agree with that.

18 Q Let's start with strip.

19 You say, "The term strip
20 denotes a long narrow piece."

21 There's no citation here; is
22 that right?

23 A In the declaration, there's
24 no citation.

25 Q Where did you get this

1 definition?

2 A It's a definition a POSA
3 would use if they heard the term strip or
4 fabric.

5 Q But right now, we're just
6 looking at the word strip; right?

7 A Yes.

8 Q So is strip a term of art in
9 apparel or knitting?

10 A It depends on how it's used.

11 Q Well, are you offering it
12 here under a particular usage?

13 A I'm offering it here as it
14 refers to Figure 1.

15 Q So your definition of strip
16 is particular to Zuckerman's knitted
17 Strip 13?

18 A In this case, yes.

19 Q Let's look at fabric.

20 You say, "Fabric denotes the
21 piece as length and width, but limited
22 thickness"; right?

23 A Correct.

24 Q And there's also no citation
25 here. Do you agree with that?

1 A I agree.

2 Q Where did you get this
3 definition?

4 A It's a definition a POSA
5 would understand of what a fabric is.

6 Q What do you mean by limited
7 thickness?

8 A Well, it's a relative term.
9 It would be something that is not thicker
10 than either the length or the width.

11 Q So you couldn't have a
12 fabric that had a thickness the same as a
13 length or a width?

14 A That's a hypothetical. I
15 can't answer that.

16 Q But you're offering a
17 definition of fabric here.

18 So a definition of what
19 constitutes a fabric should fall within
20 that definition; right?

21 A When I teach fabric
22 engineering, I say a fabric is a piece of
23 something that has a length and a width
24 and a relatively thin thickness. But I
25 don't put a number on it.

1 Q But it's conceivable that a
2 fabric could have a thickness that is
3 just as big as its width. Do you agree
4 with that?

5 A You could have a fabric like
6 that, yes.

7 Q So this definition isn't
8 necessarily correct?

9 A It's correct in terms of
10 this patent.

11 Q Which patent?

12 A The Zuckerman patent.

13 Q Let's turn to paragraph 181.

14 A Okay. All right.

15 Q It's page 102.

16 And this is Ground 4:

17 "Zuckerman in view of a POA's general
18 knowledge renders obvious Claims 3, 9
19 through 10, 14, and 19 through 20."

20 You see that?

21 A I see that.

22 Q So in paragraph 181 through
23 paragraph 184, you're addressing Claims 3
24 and 14; is that right?

25 A What were the -- 181 and --

1 Q 181 through 184.

2 A That's inclusive of 184?

3 Q Yes.

4 A Yes. And your question is?

5 Q In those paragraphs, 181
6 through 184, you're addressing Claims 3
7 and 14 in Ground 4?

8 A That is correct.

9 Q So I want to put Zuckerman's
10 Figure 1 side by side with your
11 declaration.

12 A Okay. Let me do that. You
13 want Zuckerman Figure 1? What is it you
14 want me to do now? Repeat that, please.

15 Q Sure. We could just go to
16 the question because you've put them side
17 to side. That's all I was asking for you
18 to do.

19 A Okay.

20 Q As we discussed earlier,
21 Zuckerman discloses knitting Blank 11 in
22 a repeating fashion; is that right?

23 A That's correct.

24 Q And so each Blank 11 would
25 be shaped like Blank 11 that's shown here

1 in Figure 1, give or take?

2 A That would be correct.

3 Q And that means that each
4 Blank 11 would have the triangular apex
5 on the top edge. Do you agree with that?

6 A Can you repeat that?

7 Q Sure.

8 That means that each Blank
9 11 would have that triangular apex at the
10 top edge. Do you agree?

11 A No.

12 Q What's wrong with what I
13 said?

14 A Because that triangular edge
15 extends into the next blank. It would be
16 a right triangle there without edges.

17 Q I'm not sure we're talking
18 about the same thing. I'm talking about
19 the triangular edge that's shown at Part
20 No. 21.

21 A Oh. The triangular, I'm
22 sorry. Yes. That's true. I
23 misinterpreted you.

24 Q Couldn't you have just used
25 a cutting dye to line up the textile

1 element with that triangle?

2 A To do what?

3 Q To cut out Blank 11.

4 A You could use a cutting dye.

5 Q And that triangular portion
6 at the top of Blank 11 would have allowed
7 for aligning the cutting dye to the
8 textile element; right?

9 A No. You'd have to use --
10 you'd have to use an external device to
11 line up the cutting dye.

12 Q So if you had a cutting dye
13 that was shaped like Blank 11 here, you
14 wouldn't know how to line up that
15 triangle at the top on the cutting dye
16 with the triangle on the blank?

17 MR. RAZAI: Objection, form.

18 A I don't follow your
19 question.

20 Q If you had a cutting dye
21 shaped like Blank 11 here, you wouldn't
22 be able to figure out how to line up the
23 shape of the cutting dye with this blank?

24 MR. RAZAI: Objection, form.

25 A I don't know.

1 Q Well, let's look at the
2 shape of Blank 11; right? There's a
3 triangle at the top, and there is a
4 triangular recess at the bottom. Do you
5 agree with that?

6 A I agree.

7 Q So let's just say you had
8 the entire continuous Strip 13 before any
9 blanks are removed, if you just had a
10 cutting dye that had that triangular
11 portion and that triangular recess, you'd
12 be able to line those up in the proper
13 position to remove Blank 11, wouldn't
14 you?

15 MR. RAZAI: Objection, form.

16 A No. You'd have to know what
17 size. You'd have to know what size
18 footwear you're making at that point.
19 There's no dimensions on that. So if you
20 don't have any dimensions, how would you
21 know what size footwear you're making?

22 Q Well, I'm assuming that it's
23 one continuous strip of a certain length
24 from top to bottom and that the dye
25 matches that length, not accounting for

1 different size strips.

2 MR. RAZAI: Is there a
3 question there?

4 MS. STAUBACH: There will
5 be.

6 Q If you just have the strip
7 that's shown in Figure 1, Strip 13,
8 regardless of the length, but you have a
9 dye that matches that length from top to
10 bottom and the dye has the triangle and
11 the triangular recess, would you be able
12 to line that dye up --

13 MR. RAZAI: Objection.

14 Q -- to cut out Blank 11?

15 MR. RAZAI: Objection, form.

16 A Figure 1 isn't just one
17 blank. It's one full blank and parts of
18 two other blanks. So how do you know
19 what the other blanks are?

20 Q Wouldn't each blank have the
21 same triangle and triangular recess?

22 A Not necessarily.

23 Q Didn't you just testify that
24 Zuckerman creates a strip with repeating
25 blanks?

1 A I didn't say they were the
2 same size.

3 Q Can't you see the start of a
4 Blank 11 on the right and left of
5 Figure 1?

6 A I can see them.

7 Q Don't they appear to be the
8 same length from top to bottom?

9 A Bottom part. But the top
10 part, you don't know where it ends. You
11 also don't know how wide it is.

12 Q So is it your opinion that
13 the triangle at the top of Blank 11 shown
14 in Figure 1 and the recess, the
15 triangular recess at the bottom would not
16 assist someone with aligning a cutting
17 dye to remove Blank 11?

18 MR. RAZAI: Objection, form.

19 A What is your definition of
20 assist?

21 Q Help, aid.

22 A Might aid, but it might not
23 be enough.

24 Q And why would it not be
25 enough?

1 A Because you don't know what
2 all the other dimensions are.

3 Q Let me ask you this.

4 Looking at Figure 1, if you
5 had a cutting dye shaped and sized to
6 Blank 11 shown in Figure 1 and the
7 cutting dye had that triangle at the top
8 and triangular recess at the bottom,
9 there would be no other way to orient
10 that cutting dye to remove Blank 11 in
11 this fashion; is that right?

12 MR. RAZAI: Objection, form.

13 A I don't know if there'd be
14 another way.

15 Q So even if an outline was
16 knitted in Zuckerman's strip at lines 29
17 and 27, Blank 11 would still have to be
18 cut out; right?

19 MR. RAZAI: You can answer.

20 A Cut out for what?

21 Q Cut out from Strip 13.

22 A For what?

23 Q For making a textile element
24 for a slipper.

25 A For making a textile, yes.

1 Q So you point to Spencer,
2 Exhibit 1009, on page 103 which is a part
3 of paragraph 182. Do you see that?

4 A Yes.

5 (The above-referred-to
6 document was marked as Brookstein
7 Exhibit 7 for identification, as of
8 this date.)

9 Q You recognize this document?

10 A I do.

11 Q Is it the Spencer textbook
12 or excerpts of the Spencer textbook?

13 A It's definitely excerpts. I
14 don't know if it's the entire textbook.

15 Q But it is the Spencer book,
16 and it's Exhibit 1009 in the IPR
17 proceeding?

18 A It is.

19 Q So I want to have your
20 declaration side by side with Spencer
21 this time.

22 A I have it.

23 Q And looking at the second
24 sentence on page 103 of your declaration,
25 you say, "Spencer describes outlines in

1 multiple chapters and highlights uses and
2 benefits of outlines which would be
3 generally known to a POSA."

4 Did I read that right?

5 A You read my declaration
6 right, correct.

7 Q I want to start by going to
8 page 30 of Spencer.

9 A Yes. Let me just do
10 something here. Okay. Page 30 of
11 Spencer.

12 Q So we're looking at the
13 first paragraph which says, "It is also
14 possible to produce length sequences,
15 such as scarves with fringed ends,
16 articles produced on double needle bar
17 raschels based on the tubular knitting
18 principle, and scalloped shaping of knit
19 designs by cutting around the outline
20 after finishing."

21 Did I read that right?

22 A Yes, you did.

23 Q How does this support your
24 opinion that Spencer discloses knitting
25 an outline of a textile element?

1 A I didn't hear that last part
2 of your question.

3 Q How does this support your
4 opinion that Spencer discloses knitting
5 an outline of a textile element?

6 A That particular sentence
7 does not.

8 Q Why did you list it in your
9 declaration?

10 A Well, let me read it again.
11 Well, because it's implicit. It says by
12 cutting around the outline after it
13 finishes.

14 Q But it never says that the
15 outlined is knitted?

16 A It says it's knitted on a
17 knitting machine. So, yes, it's
18 knitting.

19 Q That sentence says it's
20 knitting on a knitting machine in the
21 outline?

22 A Yes, produced on double
23 needle bar raschels.

24 Q Let's re-read the sentence.
25 "It is also possible to

1 produce length sequences, such as scarves
2 with fringed ends, articles produced on
3 double needle bar raschels based on the
4 tubular knitting principle, and scalloped
5 shaping of knit designs by cutting around
6 the outline after finishing."

7 What part of that says that
8 the outline is knitted?

9 A The whole paragraph refers
10 to knitting. So then that means the
11 outline refers to knitting.

12 Q So it's your opinion just
13 that the whole paragraph refers to
14 knitting, and therefore, any mention of
15 outline must be knitted?

16 A In this case, yes.

17 Q Let's go to page 90.

18 A Of?

19 Q Spencer.

20 I want to look at the
21 second-to-last paragraph here, the
22 sentence beginning, "Cutting out
23 techniques vary widely from marked lays
24 whose outlines are followed by
25 hand-guided cutting knives to press

1 cutter blades shaped to the outline of
2 the garment part."

3 In this sentence, is marked
4 lay and hand-guided cutting knives what
5 you and I were discussing earlier about
6 an alternative to cutting out textile
7 elements?

8 A It's an alternative to using
9 a dye.

10 Q But a marked lay or a cutter
11 blade are things that are laid on top of
12 a fabric; right?

13 A A cutter blade is not laid
14 on top of a fabric.

15 Q Well, it's initially set on
16 top of a fabric and then forced through;
17 right?

18 A My understanding, yes.

19 Q But neither of those are
20 knitted outlines?

21 A No. They're marked.
22 They're marked.

23 Q So this doesn't support your
24 opinion?

25 A Which opinion are you

1 talking about?

2 Q It would have been obvious
3 to knit an outline; is that right?

4 A When I say it would be
5 obvious, I'm referring one way to do it.
6 It'd be obvious to do it one way.

7 Q What does that mean?

8 A Well, if you have a bunch of
9 opportunities to do something, it would
10 be obvious -- it might be obvious to use
11 one to accomplish something.

12 Q So in pointing to Spencer,
13 are you just saying POSITAs knew about
14 outlines, generally?

15 A No.

16 Q What are you saying?

17 A I'm saying that's one way to
18 do it.

19 Q What's one way to do what?

20 A To follow an outline and
21 cut.

22 Q Yes.

23 But what's one way?

24 A To what Spencer's saying, to
25 have knitted stitches that would form an

1 outline, then put a marker on it and then
2 follow that and cut it.

3 Q So Spencer is essentially
4 establishing that a POSITA would have
5 known to use a marked lay or a press
6 cutter blade to cut out a textile
7 element?

8 A Is there a question there?

9 Q Yes.

10 A The question is?

11 Q Spencer is essentially
12 establishing that a POSITA would have
13 known to use a marked blade or a press
14 cutter blade to cut out a textile
15 element; right?

16 A Right makes it a question.
17 Okay. That's one way, yes.

18 Q Let's go to page 106 in
19 Spencer, lining this up with your
20 declaration.

21 A Okay. Let me do that. What
22 page are we going -- 106?

23 Q So in Spencer, page 106, in
24 your declaration, we're still on page
25 103.

1 A Okay. I got them marked
2 next to each other.

3 Q So nearing the bottom of the
4 first paragraph in your declaration, you
5 have this cite to page 106.

6 And you say, "Production of
7 a firm starting welt" in your
8 declaration.

9 A Oh. I see it. Give me a
10 minute here. What paragraph in my
11 deposition -- declaration?

12 Q Paragraph 182 on page 103.

13 A Yes.

14 Q And you have a parenthetical
15 here where you cite page 106 of Spencer.

16 And you say, "Production of
17 a firm starting welt where --

18 A Hold on. Let me find it. I
19 see it there. Okay. 106, yes.

20 Q I'll read that again.

21 "Production of a firm
22 starting welt where 'a welt is an
23 attractive and secure edge of a knitted
24 article that helps to prevent laddering
25 or unroving of a structure.'"

1 A Correct.

2 Q But isn't a welt an edge of
3 a knitted element?

4 A It could be.

5 Q And isn't a welt a way that
6 you would start knitting, such that the
7 edge of a knitted element doesn't
8 unravel?

9 A It's one way.

10 Q What's the other way that a
11 welt is used?

12 A A welt or to keep from
13 unraveling? I guess I misinterpreted
14 your question, or I didn't understand
15 your question.

16 Q I guess I'm trying to
17 understand how a welt, which is a way to
18 start a knit on an edge, supports your
19 opinion that it would have been obvious
20 to knit an outline within a surrounding
21 textile structure.

22 MR. RAZAI: Objection, form,
23 foundation.

24 A So your question is?

25 Q How does a welt, which is a

1 way to start a knit on an edge, support
2 your opinion that it would have been
3 obvious to knit an outline within a
4 surrounding textile structure?

5 MR. RAZAI: Objection, form,
6 foundation.

7 A Because that's the way a
8 POSA would do it.

9 Q That's the way a POSA would
10 do what?

11 A To keep a knitting structure
12 from unraveling or unroving from the
13 edges.

14 Q But page 106 of Spencer
15 never talks about a welt being a knitted
16 outline within a surrounding textile
17 structure; right?

18 A No. But I thought you asked
19 me about a POSA would know this.

20 Q Well, I'm asking you a new
21 question now.

22 A Okay.

23 Q Page 106 of Spencer never
24 talks about a welt being a knitted
25 outline within a surrounding textile

1 structure; right?

2 A That is correct.

3 Q Let's go to paragraph 190.

4 A Of?

5 Q Of your declaration.

6 MR. RAZAI: Are we done with
7 Spencer?

8 MS. STAUBACH: For now.

9 A We're done with Spencer for
10 now?

11 Q For now.

12 A Let me do a little
13 housekeeping here.

14 Q Take your time.

15 A What would you like me to
16 open up now?

17 Q Your declaration, page 107,
18 paragraph 190.

19 A Okay. I got it.

20 Q If you wouldn't mind having
21 the Doughty reference close by.

22 A I do.

23 THE WITNESS: Before you ask
24 a question, I'm going to need a
25 nature break in about five minutes.

1 MS. STAUBACH: Now is a good
2 time to take one since we're just
3 getting started.

4 We can go off the record.

5 THE VIDEOGRAPHER: Off the
6 record at 10:29, ending Media Unit
7 No. 2.

8 (A short recess was taken.)

9 THE VIDEOGRAPHER: On the
10 record at 10:35, marking the
11 beginning of Media Unit No. 3.

12 Q Let's turn back to paragraph
13 190 of your declaration. This is the
14 start of your opinions about Ground 5,
15 "Zuckerman in view of Doughty renders
16 obvious Claim 12."

17 Do you see that?

18 A I do.

19 Q So Doughty discloses a sock
20 that can be attached to a sole structure.
21 Do you agree with that?

22 A Well, he says a slipper
23 sock, yes.

24 Q Is there some distinction
25 I'm missing between sock and slipper

1 sock?

2 A No. I'm repeating what he
3 says or she says.

4 Q But Doughty's sock is
5 releasably attached to a sole structure?

6 A The way I understand it,
7 yes.

8 Q Do you know how Doughty's
9 sock is attached to its sole structure?

10 A The patent says it's
11 stitched to the sole structure.

12 Q I'm looking at Doughty. I'm
13 looking at Column 3, line 73.

14 A What line?

15 Q Line 73. We'll start there.
16 And then it goes into the top of the next
17 column a little bit.

18 A So what line did you say?

19 Q 73.

20 A Okay. Again, as earlier,
21 I'm just going to mark so I know where to
22 find it. So 73 to where?

23 Q Just the top of Column 4,
24 line 1.

25 A The word seaming?

1 Q Yes.

2 A Okay. I got it.

3 Q This says, "It is preferred
4 to attach together, the separable parts
5 of the improved article of footwear by
6 any conventional method of stitching,
7 sewing or seaming."

8 Do you see that?

9 A I do.

10 Q So Doughty's sole is
11 attached by, for example, stitching,
12 sewing or seaming the sole to its sock;
13 right?

14 A That's how the patent reads,
15 yes.

16 Q I want to turn in your
17 declaration to paragraph 193 but the
18 portion of paragraph 193 on page 110.
19 Actually, let's look at paragraph 194.

20 A Okay.

21 Q The second sentence
22 says, "The incorporation of such a sole
23 structure would permit easy washing of
24 and reduced wear on a knit upper like
25 Zuckerman's."

1 Do you see that?

2 A I do.

3 Q So how would attaching
4 Doughty's sole structure to Zuckerman's
5 slipper permit easy washing of
6 Zuckerman's slipper?

7 A Well, in Column 4, you did
8 not read the whole disclosure.

9 Q Column 4 of what?

10 A Of Doughty. And I'll read
11 it into the record.

12 "In this connection, it is
13 possible to employ for the stitching,
14 sewing or seaming operation either an
15 ordinary yarn or a thread or special
16 thread soluble in water or chemical
17 solvent."

18 And that tells me that you
19 could dissolve the stitching. And then
20 you'd be able to take it apart from the
21 sole.

22 Q I have a couple of follow-up
23 questions for that.

24 The first one is, is that
25 cited in your declaration?

1 A I don't think so. I don't
2 know. Implicitly, yes. It says
3 incorporation of a sole structure will
4 permit easy washing, yes.

5 Q But I'm asking about that
6 particular portion of Doughty that you
7 just read.

8 A That is not in my
9 declaration. But the results of it is in
10 my declaration.

11 Q So because the stitching,
12 sewing or seaming yarn or thread could be
13 dissolved in a chemical agent, adding
14 Doughty's sole to Zuckerman's slipper
15 would facilitate easier washing of
16 Zuckerman's slipper?

17 MR. RAZAI: Objection, form,
18 foundation.

19 A Of Doughty's slipper sock,
20 yes. That's the way I read it, a POSA
21 would read it.

22 Q Wouldn't it be easier to
23 wash Zuckerman's slipper if there was no
24 sole that had to be removed?

25 A I can't answer what would be

1 easier. I'm just saying what I read.

2 Q But your motivation for
3 making this combination is that it would
4 be easier to wash Zuckerman's slipper
5 with Doughty's sole attached. How can
6 that be?

7 A Where do I say that?

8 Q Paragraph 194.

9 A I say easy washing and
10 reduced wear on the knit upper. I don't
11 say the whole item.

12 Q Well, how would attaching
13 Doughty's sole to Zuckerman's slipper
14 make washing any portion of Zuckerman's
15 slipper easier?

16 A Because you won't have the
17 sole.

18 Q Are you proposing that the
19 combination of Zuckerman and Doughty
20 would require removing Zuckerman's own
21 sole?

22 A For washing possibly, yes.

23 Q How would you remove
24 Zuckerman's sole? It's a one-piece
25 slipper.

1 A Repeat the question.

2 Q Sure.

3 Are you proposing that the
4 combination of Zuckerman and Doughty
5 would require removing Zuckerman's own
6 sole?

7 A Where do I say that?

8 Q You don't. I'm asking you.

9 A No. I say exactly what I
10 have in paragraph 194: "The
11 incorporation of such a sole structure
12 would permit easy washing and reduced
13 wear on a knit like Zuckerman's."

14 And that's based on Column 4
15 which I don't cite. So if the sole
16 structure wears out, then you can go
17 ahead and wash it.

18 Q What is Doughty's sole
19 structure made of?

20 A I don't recall.

21 Q Would it be like rubber?

22 A I have to look at Doughty to
23 see.

24 Q Let's look at Column 4, line
25 44.

1 A Yes.

2 Q Through 47.

3 A I see that. So what's your
4 question?

5 Q This says, "The foot bottom
6 or sole section may be made of felt,
7 woven fabric, moulded material, such as
8 rubber or plastic, or any appropriate
9 combinations of such materials."

10 Do you see that?

11 A I see that.

12 Q So let's say Doughty's sole
13 is made of rubber or plastic and we sewed
14 that to Zuckerman's slipper, would we
15 wash Zuckerman's slipper with the sole
16 still attached?

17 A I don't know what we do.
18 But it says we could remove it.

19 Q You're proposing that it
20 would be easy to wash because you could
21 remove the sole by dissolving the
22 stitches?

23 A Easier.

24 Q Easier than what?

25 A Than washing it with the

1 sole.

2 Q Let's turn to paragraph 64.
3 I'll give you a page number here in a
4 second.

5 A You're talking about the
6 dec; right?

7 Q Yes. That is page 40.

8 A Okay. Nishida. All right.

9 Q This is Ground 1, "Nishida
10 anticipates Claims 1 through 8 and 12
11 through 18"; is that right?

12 A That is right.

13 Q And your opinions for this
14 ground span the paragraphs of 64 through
15 119 on page 72; is that right?

16 A On page 72, right.

17 Q And all of your opinions for
18 Ground 1 are in these paragraphs 64
19 through 119?

20 A Yes.

21 Q Is it your opinion that
22 Nishida discloses every limitation of
23 Independent Claims 1 and 13 of the '749
24 patent?

25 A 1 and 13?

1 Q Yes.

2 A Yes.

3 Q And that includes what you
4 call Limitation 1A which is -- I'm
5 looking at paragraph 72 of your
6 declaration now.

7 A Okay. Give me a minute.
8 Yes.

9 Q So Limitation 1A is
10 "simultaneously knitting a textile
11 element with a surrounding textile
12 structure, the knitted textile element
13 having at least one knitted texture that
14 differs from a knitted texture in the
15 surrounding knitted textile structure."

16 Do you see that?

17 A I do.

18 Q What does it mean to
19 simultaneously knit the textile element
20 and the surrounding textile structure?

21 A It means to knit at the same
22 time.

23 Q In the same knitting
24 process?

25 A What do you define as a

1 knitting process?

2 Q Well, let's look at
3 paragraph 73 in your declaration.

4 A Okay.

5 Q The last sentence here
6 says, "In this use of simultaneously,
7 simultaneously indicates forming one or
8 more textile elements in a surrounding
9 textile structure as part of a single
10 textile structure during a single
11 knitting process."

12 You see that?

13 A Yes, I do.

14 Q So what did you mean by
15 single knitting process here?

16 A A single knitting machine
17 doing the knitting.

18 Q So let's say a rectangular
19 sheet of homogenous knitted fabric was
20 knitted first; okay?

21 A Yeah.

22 Q So you just have a rectangle
23 of homogenous fabric that was knitted.
24 Are you with me?

25 A When you say homogenous, you

1 mean what?

2 Q It's all the same yarn, same
3 stitch configuration.

4 A Okay.

5 Q And then you took that
6 rectangular sheet, and you knitted
7 pattern elements on top of that.

8 Would that meet this
9 limitation?

10 MR. RAZAI: Objection, form;
11 objection, improper hypothetical,
12 outside the scope of the declaration.

13 Q You can answer.

14 A A POSA would know you can't
15 knit something on something that's
16 already knitted.

17 Q It's your opinion that you
18 can't knit something on something that's
19 already knitted?

20 A That is correct.

21 Q And why is that?

22 A It's mechanically
23 impossible. You knit with yarns, not
24 with fabrics.

25 Q So Claim Limitation 1A also

1 requires that different textures have to
2 be knitted during the same knitting
3 process. Do you agree with that?

4 A Yes, I do.

5 Q So you said it's impossible
6 to knit over top of an existing knitted
7 article; is that right?

8 A That's right.

9 Q Is it impossible to weave
10 over top of a knitted article?

11 MR. RAZAI: Objection, form,
12 foundation, outside the scope of his
13 declaration.

14 A Would they be connected or
15 not?

16 Q Could you weave within an
17 existing knitted article?

18 A Not that I know of.

19 Q And why is that?

20 A Because they're two entirely
21 different processes. In one case, the
22 yarns are going orthogonal; in the other
23 cases, they're being interlooped. You
24 can't take an interlooped fabric and then
25 put orthogonal yarns in it.

1 Q Could you knit within an
2 existing knitted fabric?

3 A Not that I know of.

4 Q Let's look at paragraph 65
5 of your declaration.

6 A Okay, yes.

7 Q You say in the second
8 sentence, "Nishida refers to its knitted
9 material sheet as Material Web 1."

10 A Wait. Let me read this
11 again. What paragraph is this?

12 Q Paragraph 65, the second
13 sentence.

14 A Okay. Hold on. So that's
15 page 40?

16 Q Page 40.

17 A Okay. I thought you said
18 41. Go ahead.

19 Q I just want to look at the
20 second sentence in paragraph 65 which
21 says, "Nishida refers to its knitted
22 material sheet as Material Web 1."

23 A Right.

24 Q So I want to also put
25 Nishida beside this.

1 A Okay. Let me do that.

2 Q Let's look at Nishida

3 Figure 2.

4 A Okay.

5 Q Now, what is Nishida's
6 Material Web 1 in Figure 2?

7 A It is the knitted fabric
8 around the various multiple knitted
9 textile elements.

10 Q So Element 1, Material Web 1
11 is just the areas in between Pattern
12 Elements 2?

13 A The textile pattern
14 elements.

15 Q Material Web 1 wouldn't be
16 the entire fabric shown in Figure 2?

17 A I'd have to go back and look
18 at what the definition is. Okay. Re-ask
19 the question.

20 Q Sure.

21 What is Material Web 1 in
22 Figure 2?

23 A "Material Web 1 -- I'm
24 reading from my declaration -- is
25 constructed to include different parts,

1 including one part, which is incorporated
2 into a shoe, which is known as the
3 Unwound Parts 2, and another part which
4 is not incorporated into the shoe as
5 Surface Areas 1.1."

6 Q So Material Web 1 includes
7 Unwound Web Parts 2 and Surface Areas
8 1.1?

9 A That's the way I read it.

10 Q So is Material Web 1 the
11 entirety of what's shown in Figure 2?

12 A Yes.

13 Q Including Web Base 4.

14 MR. RAZAI: Objection, form,
15 foundation.

16 Q Is that right?

17 MR. RAZAI: Objection, form,
18 foundation.

19 A Including -- you have to
20 repeat that last part.

21 Q Sure. I'll back up a little
22 bit.

23 You just testified that
24 Material Web 1 is the entirety of what's
25 shown in Figure 2.

1 A Yes.

2 Q And that includes Part No. 4
3 which is Material Web Base 4.

4 MR. RAZAI: Objection, form,
5 foundation.

6 A I seem to recall 4 just says
7 material web.

8 Q Let's look at page 5 of
9 Nishida.

10 A Yes.

11 Q The second paragraph under
12 the figure descriptions.

13 A Tell me what page of
14 Exhibit 1005 you're on.

15 Q Page 5.

16 A Okay., yes.

17 Q I'm looking at the second
18 paragraph under the figure descriptions.

19 So it begins --

20 A Yes.

21 Q -- "The Material Web Base 4
22 may be a common woven or knitted fabric,
23 e.g., consisting of warp and weft."

24 Did I read that right?

25 A You did.

1 Q So I'll ask my question
2 again with respect to Figure 2.

3 Material Web 1 includes the
4 entirety of what's shown in Figure 2,
5 including Material Web Base 4. Do you
6 agree with that?

7 A Let me get the picture
8 again. I would like you to read that
9 again where I'm looking at the picture as
10 you're reading it. So could you read it
11 again?

12 Q Sure thing. Let me know
13 when you're there.

14 A I'm at the pictures.

15 Q Are you at Figure 2?

16 A Yes, I am.

17 Q "Material Web 1 includes the
18 entirety of what's shown in Figure 2,
19 including Material Web Base 4."

20 Do you agree with that?

21 A Yes.

22 Q I just want to look at a few
23 of Nishida's disclosures. Let's turn
24 back to page 5.

25 A Okay.

1 Q I want to look at that first
2 paragraph under the figure descriptions.

3 A Yes.

4 Q Which says, "In Figures 1
5 and 2, 1 indicates a material web, which
6 during its production by a method
7 customary in the textile industry, e.g.,
8 by weaving and/or knitting and/or
9 embroidery, is provided with a single or
10 a plurality of Unwound Web Parts 2 for
11 the Shoe-Upper Shape 3 as shown."

12 A I do.

13 Q So this says that Material
14 Web 1 can be formed by, for example,
15 weaving or knitting or embroidery; right?

16 A That's what it says.

17 Q And I want to look back
18 again at that paragraph directly
19 underneath that says, "Material Web Base
20 4 may be a common woven or knitted
21 fabric."

22 Do you see that?

23 A I do.

24 Q So, so far, we have Material
25 Web Base 4 can be woven or knitted;

1 right?

2 A That's what it says.

3 Q And Material Web 1 can be
4 made, for example, by weaving, knitting
5 or embroidery; right?

6 A That's what it says.

7 Q Sorry for making you jump
8 around.

9 But can we look back at
10 Figure 2?

11 A Sure.

12 Q Are Surface Areas 1.1 a part
13 of Material Web Base 4?

14 A Ask me that again.

15 Q Are Surface Areas 1.1 a part
16 of Material Web Base 4?

17 A Yes.

18 Q Let's look at paragraph 65
19 of your declaration again.

20 A Okay, yes.

21 Q And I want to look at the
22 part that's on page 41.

23 A Okay. So still paragraph 65
24 of 41?

25 Q Correct. I'm going to start

1 about halfway down here.

2 You have a sentence that
3 begins, "On the other hand, Surface Areas
4 1.1 are described by Nishida as offcut
5 resulting from the cutting and are, thus,
6 discarded after Unwound Web Parts 2 are
7 cut out."

8 Do you see that?

9 A I do.

10 Q So Surface Areas are the
11 part of Material Web Base 4 that don't
12 include Unwound Web Parts 2; right?

13 A That's correct.

14 Q And then I want to look at
15 your next sentence here.

16 It says, "Nishida states
17 that Surface Areas 1.1 consists of a
18 lightweight fabric quality being as
19 simple and inexpensive as possible and
20 can be produced in the manner of a gauze
21 or with a low to very low number of warps
22 and/or wefts and/or, e.g., thin-threaded
23 or the like."

24 Do you see that?

25 A I see that.

1 Q So Nishida says that Surface
2 Areas 1.1 can be like gauze; right?

3 A Correct.

4 Q And gauze is kind of
5 stringy; right?

6 MR. RAZAI: Objection, form.

7 A You're using a relative
8 term. Stringier than what?

9 Q Well, Nishida says with a
10 low to very low number of warps and/or
11 wefts; right?

12 A Compared to the textile
13 element?

14 Q Compared to unwound.

15 A Okay.

16 Q Yes, compared to Unwound Web
17 Parts 2.

18 A Okay.

19 Q When I think of gauze, I
20 think of something I would see at the
21 pharmacy; right? It's got criss-crossed
22 threads, and it looks kind of stringy,
23 like it would fall apart.

24 A Well, that's what you see.

25 Q What do you think gauze

1 means?

2 A Well, there are all
3 different grades of gauze. But, yeah,
4 basically, that's what I see.

5 Q And at the very bottom of
6 page 41, the last sentence, you
7 begin, "Surface Areas 1.1 merely hold
8 together -- turning to the next page --
9 the patterns or areas of such patterns
10 unwound Web Parts 2 in the material web
11 after its completion."

12 Do you see that?

13 A I do.

14 Q Doesn't that suggest that
15 Material Web Base 4 was woven or knitted
16 with very low warps or wefts or like
17 gauze in a first process?

18 MR. RAZAI: Objection to
19 form.

20 A The entire -- the entire 4
21 or just the part that's offcut?

22 Q The entire 4.

23 A No.

24 Q Why not?

25 A Because they later go on to

1 say what the yarns are in the uncut --
2 excuse me -- in the unwound part.

3 Q How does that suggest to you
4 that Material Web Base 4 wasn't knitted
5 like gauze across the entire Base 4 in a
6 first process?

7 MR. RAZAI: Objection, form,
8 incomplete hypothetical.

9 A A POSA would know that you
10 don't make a shoe out of gauze-like
11 material.

12 Q But you could put patterned
13 elements like Unwound Web Parts 2 on top
14 of or within a gauze-like material;
15 right?

16 A I already testified that you
17 can't -- when something's knitted, you
18 can't knit something again on top of it.

19 Q So let's say you had a
20 rectangular piece of woven fabric.

21 A Right.

22 Q Like Material Web Base 4.

23 A Yeah.

24 Q With low warps or wefts like
25 gauze, you couldn't take that and weave

1 on top of it?

2 A There's nowhere in Nishida
3 where -- nothing in Nishida limits it to
4 having a separate fabric.

5 Q What do you mean by that?

6 A It means you can't have two
7 different fabrics. You have just one
8 fabric. You can have different parts to
9 the fabric, but it's one fabric.

10 Q But can't those different
11 parts be formed in different processes?

12 A You can't combine knitting
13 and weaving. There's no way to do that.
14 You either knit something or you weave
15 something.

16 Q So what does Nishida mean on
17 page 5 when it says "Material Web 1 --

18 A Hold on. Let me get to
19 page 5. Go ahead.

20 Q What does it mean on page 5
21 of Nishida when it says "Material Web 1,
22 during its production by a method
23 customary in the textile industry --

24 A You're reading too quickly.
25 What paragraph are you talking about on

1 page 5?

2 Q The first paragraph under
3 the figure descriptions.

4 A Okay.

5 Q What does it mean when it
6 says "Material Web 1 during its
7 production by a method customary in the
8 textile industry, e.g., by weaving and/or
9 knitting and/or embroidering, is provided
10 with a single or plurality of Unwound Web
11 Parts 2"?

12 A It means you've chosen one
13 of those processes.

14 Q What does and/or mean to
15 you?

16 A Common things. It means you
17 could either do this or this or this.

18 Q Wouldn't it say weaving or
19 knitting or embroidery if that was the
20 case?

21 A Not the way I read it.

22 Q So are you reading out
23 and/or?

24 A The way I read this, it's
25 either you weave something, you knit

1 something, or you embroider something.

2 Q Do you have any or are you
3 aware of any evidence in the record that
4 says that you can't knit on top of a
5 knitted fabric?

6 A I know from 49 years of
7 experience of teaching textile
8 engineering, you can't do it.

9 Q But there's nothing in the
10 record, as far as you know, that says
11 that?

12 A I can't tell you that I've
13 looked at every paper ever published.
14 But I've never seen anything remotely
15 like that.

16 Q Let's look at --
17 THE WITNESS: We're coming
18 up at -- before you ask the
19 question --

20 MS. STAUBACH: I'd like to
21 get through this one more question.

22 THE WITNESS: Okay. That's
23 fine.

24 MS. STAUBACH: Well, maybe
25 two.

1 THE WITNESS: Okay. Two.

2 But not three.

3 Q Page 9 --

4 A Okay.

5 Q -- Claim 1 of Nishida, the
6 first bullet under Claim 1, do you see
7 that?

8 A I do.

9 Q That doesn't count as one of
10 my questions.

11 "During the production of
12 the Material Web 1, both the patterns or
13 partial patterns in the form of the
14 Shoe-Upper 3, Unwound Web Part 2, as well
15 as the patterns or partial patterns in
16 the form of a Sole Part 29, are produced
17 by a print process on the material web
18 and/or by a textile production method
19 within the material web."

20 Do you see that?

21 A I do.

22 Q So what does it mean that
23 Unwound Web Part 2 can be produced by a
24 print process on the Material Web 1?

25 A It means you could print

1 something on Material 1, yes.

2 Q So you could print Unwound
3 Web Parts 2 on an existing web base?

4 A Yeah. But Nishida doesn't
5 limit it to that. That's just one
6 example.

7 Q But it's a possibility that
8 there's a pre-existing Web Base 4 upon
9 which Unwound Web Parts 2 are printed?

10 A You could do it that way,
11 yes.

12 Q And what does it mean when
13 it says "a textile production method
14 within the material web"?

15 A That tells me it could be
16 either knitting or weaving within the
17 material web.

18 Q Within an existing material
19 web?

20 A No. At the same time,
21 you're making a material web.

22 Q Doesn't the phrase "within
23 the material web" suggests that the
24 material already exists?

25 A Not to me.

1 MS. STAUBACH: You could
2 take a break.

3 THE VIDEOGRAPHER: Off the
4 record at 11:33, marking the end of
5 Media Unit No. 3.

6 (A short recess was taken.)

7 THE VIDEOGRAPHER: On the
8 record at 11:21, beginning Media Unit
9 No. 4.

10 Q Let's look at paragraph 93
11 in your declaration.

12 A Okay. As always, can you
13 help me with the page number?

14 Q Page 58. Actually, let's
15 look at paragraph 92 which is on page 58.

16 A I got it.

17 Q So this is regarding Claim 5
18 which recites, "Wherein the knitted
19 textile element has a substantially
20 planar configuration upon removal from
21 the surrounding knitted textile
22 structure."

23 You see that?

24 A I do.

25 Q I want to walk through

1 paragraph 93.

2 A Okay.

3 Q So you point to Nishida's
4 Figures 1 and 2.

5 A On the next page; right?

6 Q Yes.

7 And you say, "As is shown in
8 Figures 1 through 2 below, Nishida's
9 knitted textile element color green has a
10 substantially planar configuration within
11 the surrounding textile structure color
12 purple."

13 A Yes.

14 Q Does Nishida ever show what
15 Unwound Web Parts 2 look like when
16 they're removed from Material Web Base 4?

17 A I'd have to look at the
18 figures in Nishida. Not in the five
19 figures, no.

20 Q So these two figures don't
21 show you what Unwound Web Part 2 looks
22 like upon removal from the material web;
23 right?

24 A That would be correct.

25 Q Under these figures --

1 A Excuse me. In Figure 3,
2 which is the shoe, you could argue that
3 that's showing what it looks like. But
4 that includes the whole shoe.

5 Q Under these figures, you
6 have a sentence that begins, "Moreover,
7 Nishida provides that Material Web 1
8 includes Individual Part 29 that is
9 folded out of the Unwound Web Part 2 and
10 to the plane of the shoe sole."

11 You see that?

12 A Yes.

13 Q How does that tell you that
14 Unwound Web Part 2 is substantially
15 planar when it's removed from the
16 material web?

17 A Because it's subsequently
18 folded. So you fold something that's
19 already planar.

20 Q You can't fold something
21 that's not planar?

22 A You could. But when I look
23 at the picture, that tells me it's
24 planar.

25 Q But we already talked about

1 Figures 1 and 2.

2 A Correct.

3 Q So now I just want to talk
4 about this sentence in Nishida which
5 you've quoted, "folded out of the Unwound
6 Web Part 2 and to the plane of the shoe
7 sole."

8 And as you just testified,
9 you could fold something that's planar or
10 non-planar; right?

11 A Something, yes, something.

12 Q Could you fold a textile
13 element that's planar or non-planar?

14 A Any textile element or this
15 textile element?

16 Q Let's go with this textile
17 element.

18 Assuming this textile
19 element was either planar or non-planar,
20 could you fold the textile element in
21 every either case?

22 A I'm not assuming it's
23 non-planar. I'm assuming it's planar. I
24 see it as planar.

25 Q I'm asking if it weren't,

1 could you fold it?

2 A If it weren't planar, you
3 could fold it.

4 Q Do you cite any other
5 disclosures in Nishida, other than
6 Figures 1, 2, 4, 5 and that sentence from
7 page 6 that we just read?

8 A Are you asking me all about
9 Nishida then?

10 Q I'm asking you in paragraphs
11 92 and 93 of your declaration --

12 A Okay.

13 Q -- corresponding to your
14 opinion that Nishida anticipates Claim 5,
15 do you cite any other disclosures in
16 Nishida, other than Figures 1, 2, 4 and 5
17 and the sentence we just read from
18 page 6?

19 A In paragraphs -- in those
20 two paragraphs?

21 Q Correct.

22 A No.

23 MS. STAUBACH: I don't have
24 any more questions.

25 MR. RAZAI: I have a few

1 follow-up questions.

2 EXAMINATION BY

3 MR. RAZAI:

4 Q Dr. Brookstein, what textile
5 experience do you have?

6 A I started undergraduate
7 school as a textile engineer in 1967. So
8 you could say that I have 57 years
9 working in textiles.

10 Q That includes educational
11 background and work specious?

12 A It includes both, both
13 undergraduate and graduate educational
14 background and 14 years of industrial
15 experience.

16 Q And based on your experience
17 in the field, do you have an
18 understanding of the term surrounding
19 textile structure as it relates to that
20 field, textiles?

21 A I do.

22 Q What is that understanding?

23 A It's whenever you have
24 something that is adjacent to something
25 else, you'd say it surrounds it. It's

1 surrounding it.

2 Q Does it have to go all the
3 way around to be a surrounding textile
4 structure?

5 A No, not in my opinion.

6 Q Can we go to Zuckerman real
7 quick which is on page 80 of your
8 declaration?

9 A Yes.

10 Q On page 80 --

11 A Let me -- page 80 or
12 paragraph 80?

13 Q Page 80.

14 A Page 80. Okay. Excuse me.
15 MS. STAUBACH: Page 80 at
16 what?

17 MR. RAZAI: His declaration.

18 A Page 80 of my declaration,
19 okay.

20 Q So on page 80, you see
21 Figure 1 of Zuckerman; correct?

22 A I do.

23 Q And there's green portions
24 and purple portions; correct?

25 A Correct.

1 Q Can you identify the color
2 that isn't the surrounding textile
3 structure?

4 A Purple.

5 Q Does that have to go all the
6 way around the textile element for it to
7 be a surrounding textile structure?

8 A No.

9 Q How do you know that that's
10 a surrounding textile structure?

11 A Because it's adjacent to
12 green. So I say it's a surrounding
13 textile structure.

14 Q So the textile element is
15 shown by Figure 11; correct?

16 A The textile element is shown
17 by Figure 11, correct.

18 Q And that the part that's
19 used in the footwear?

20 A Yes.

21 Q And what happens to the
22 surrounding textile structure?

23 A It's cut away and thrown
24 out.

25 Q But it doesn't have to go

1 all the way around?

2 MS. STAUBACH: Objection,
3 form.

4 A Not at all.

5 Q Looking at Figure 1 of
6 Zuckerman, do you see an outline around
7 the Textile Element 11?

8 MS. STAUBACH: Objection,
9 form.

10 A Yes, I do.

11 Q And I think that if we were
12 to flip to page 89 of your declaration --

13 A Yes.

14 Q -- there's some red
15 annotation of Figure 1; correct?

16 A Correct.

17 Q And what is that red
18 annotation indicating?

19 A It's where the whole Item 11
20 is cut out and made into the shoe.

21 Q And would that correspond
22 also to the outline?

23 MS. STAUBACH: Objection,
24 leading.

25 A Yes.

1 Q Is there annotation in
2 Figure 1 showing the outline of Textile
3 Element 11?

4 MS. STAUBACH: Objection,
5 leading.

6 A I thought you just asked me
7 that.

8 Q I did. I'm asking you
9 again.

10 A Okay.

11 Q Let me ask you a question.

12 A Yeah.

13 Q Is there an outline in
14 Figure 1 of Zuckerman?

15 A Yes.

16 Q Do you use an annotation to
17 indicate that?

18 A Yes. It says -- there's a
19 sentence in there that says I do.

20 Q How is it annotated? How do
21 you show that?

22 A It says, "Such an outline of
23 the knitted textile element color red is
24 illustrated below."

25 Q And the red is yours, your

1 annotation?

2 A Yeah, yes.

3 Q You're saying that line is
4 shown in the red?

5 A Yes.

6 Q Earlier, you testified that
7 Zuckerman doesn't specifically call it an
8 outline; correct?

9 MS. STAUBACH: Objection,
10 form.

11 A I don't recall how I
12 testified before.

13 Q Do you need text that calls
14 it an outline for you to recognize the
15 annotation red as an outline?

16 A No.

17 Q Now, the purpose of the
18 textile element is to be removed;
19 correct?

20 MS. STAUBACH: Objection,
21 form.

22 A That's one of the purposes
23 and then made into a shoe.

24 Q Can you tell me different
25 ways to remove the textile element from

1 that strip?

2 A Well, as the patent says,
3 you can cut it, you can laser cut it, you
4 can dye cut it. Those are three ways I
5 know of.

6 Q Are there other ways that
7 you can cut it?

8 A Not that I know of.

9 Q Is there a more basic way of
10 cutting it?

11 MS. STAUBACH: Objection,
12 form.

13 A I don't know. Like I said,
14 you can use any of those three methods.

15 Q Can you use scissors?

16 A You could use scissors.
17 Well, scissors is similar to cutting,
18 off-cutting.

19 Q Okay.

20 So is scissors one way you
21 could remove that?

22 A Yeah.

23 Q Would you need an outline to
24 be able to use scissors?

25 MS. STAUBACH: Objection,

1 form.

2 A No. You would follow where
3 the stitches change.

4 Q Which is the outline that
5 you're talking about in red?

6 A That's the one that I'm
7 talking about.

8 Q So would the triangular
9 Figure 21, the fact that there's
10 Triangular Figure 21, would that be
11 enough for someone manipulating the
12 fabric to be able to cut it using
13 scissors?

14 A Yes.

15 Q Sorry. Let's go back.

16 Earlier, we were talking
17 about that triangle in 21. You see that
18 sort of triangular part that juts out of
19 the fabric?

20 A I do.

21 Q Now, if there were no
22 outline and all that you had was just
23 that triangular figure, would that be
24 enough for someone cutting to be able to
25 know where to cut this fabric out of the

1 strip?

2 A I believe so.

3 Q So you don't need an
4 outline; the person would just know what
5 to do just based solely on that triangle?

6 A Based solely on the fact
7 that there's stitching there at the
8 triangle, following the stitching.

9 Q I don't think that you're
10 understanding what I'm saying.

11 So let's say that there's a
12 strip of fabric that has all of these
13 blanks on it.

14 A Yes.

15 Q And you are trying to remove
16 the Textile Element 11 from the
17 surrounding textile structure.

18 A Yes.

19 Q And in a prior figure, we
20 had that in purple; right?

21 A Yes.

22 Q So if you were trying to cut
23 it, and there were no outline, and all
24 you had was that Triangular Figure 21,
25 would that be enough for someone to cut

1 it out?

2 A I understand now. Yes. It
3 would definitely be enough.

4 Q It would be enough?

5 A Yes.

6 Q And how would you do it?

7 A You would follow the
8 triangle, and you cut it out.

9 Q You would cut what out? The
10 entire fabric or just the triangle?

11 A No. You'd cut the entire
12 fabric. And 21 includes the entire
13 fabric.

14 Q I'm not talking about 21.
15 You see that there's a part
16 that looks like a triangle at the very
17 top of Figure 1?

18 A I see that.

19 Q This; right?

20 A Yup. I see that.

21 Q And if all you had was this,
22 and there were no outlines, there was
23 nothing that differentiated the fabric
24 from each other --

25 A Correct.

1 Q -- and it was all just one
2 without any outline --

3 A Correct.

4 Q -- would this triangle be
5 enough for you to be able to know where
6 to cut all the way around?

7 A All the way around?

8 Q Yes.

9 A No, no. I see what you're
10 saying. No.

11 Q Let's go to page 5 of
12 Nishida, if we can for a second.

13 A Page 5 of Nishida, yes.

14 Q Right below the figures, it
15 says, "In Figures 1 and 2, 1 indicates a
16 material web"?

17 A Yes.

18 Q Can you read that portion
19 real quick, please?

20 A "In Figures 1 and 2, 1
21 indicates a material web, which during
22 its production by a method customary in
23 the textile industry, for example, by
24 weaving and/or knitting and/or
25 embroidery, is provided with a single or

1 a plurality of unwound web part -- and in
2 parens, S2 -- for the Shoe-Upper 3 as
3 shown, for example, from the side in
4 Figure 3."

5 Q So is it possible to weave a
6 material base and then embroider
7 something on top of it?

8 A Yes.

9 Q Is it possible to weave a
10 base and then knit something on top of
11 it?

12 A Impossible.

13 Q Is it possible to knit a
14 base and knit something on top of it?

15 MS. STAUBACH: Objection,
16 form.

17 A It's impossible.

18 Q So here, what you're saying
19 is that it would be possible to knit
20 something and then embroider something on
21 top of it?

22 MS. STAUBACH: Objection,
23 leading.

24 A It would be possible.

25 MS. STAUBACH: If you guys

1 could slow down the pace a hair so I
2 can get my objections in.

3 THE WITNESS: Okay. I'm
4 sorry.

5 MS. STAUBACH: Thank you.

6 Q Let's go to the '749 patent.

7 A Okay.

8 Q Let's go to Column 1, lines
9 25 through 26.

10 A Yes. I got it.

11 Q Can you read that for me?

12 A Yes.

13 "Conventional articles of
14 athletic footwear include two primary
15 elements, an upper and a sole structure.
16 The upper provides a covering for the
17 foot that securely receives --

18 Q You're going well beyond 26
19 now.

20 A I thought you said 30.

21 Q No. Can you again read that
22 sentence?

23 A Yes.

24 Q On lines 25 to 26?

25 A I thought you said 30.

1 Q Can you please read
2 Column 1, lines 25 to 26?

3 A I can.

4 "Conventional articles of
5 athletic footwear include two primary
6 elements, an upper and a sole structure."

7 Q What type of footwear is
8 that sentence talking about?

9 A Athletic footwear.

10 Q Do you consider that
11 statement to be referring to athletic
12 footwear specifically, that sentence?

13 A That sentence, yes.

14 Q Do you think that that
15 sentence somehow describes footwear
16 generally?

17 A No.

18 MR. RAZAI: No further
19 questions.

20 MS. STAUBACH: Couple of
21 more questions.

22 FURTHER EXAMINATION BY

23 MS. STAUBACH:

24 Q Let's go to paragraph 152.

25 A Of my declaration?

1 Q Of your declaration.

2 A As always, page number,
3 please.

4 Q 89.

5 A Okay. Yes, ma'am.

6 Q So you just testified on
7 re-direct from Mr. Razai that you see a
8 knitted outline in Figure 1. Do you
9 remember that?

10 A I do.

11 Q What tells you there's a
12 knitted outline?

13 A The picture.

14 Q That's it?

15 A I have to go back and look
16 at the description of Zuckerman.

17 Q Please do.

18 A Okay. I may need a few
19 minutes.

20 MR. RAZAI: Didn't we
21 already go through this?

22 A I think I can answer without
23 reading the whole thing. It's coming
24 back to me now.

25 Q Okay.

1 A Okay. So Figure 1 comprises
2 a herring bone portion in 15, which is
3 thicker and more robust, because it's the
4 sole than the sidepieces 25. And then
5 you have the material web, which is the
6 triangle and the part that I called
7 earlier, the curved part.

8 So there's a demarcation
9 between -- and structure between the
10 light material, the lighter material that
11 you're going to cut away and the rib
12 portion which is 25. At that interface,
13 there's an outline there.

14 Q Can you draw that interface
15 on Figure 1 on page 89 of your
16 declaration?

17 A I can. What do you want me
18 to draw it on?

19 Q I've got a blue pen here.

20 A So you want me to draw it on
21 my exhibit?

22 Q Yes, please.

23 A So if I draw on just one
24 side and say it's the same on the other
25 side or do you want it on both sides?

1 Q Whatever you prefer.

2 A I'll just do one side. I'm
3 going to put an arrow that says it's also
4 on that side; okay? You see it?

5 Q So are you saying that the
6 portions that are removed, which you've
7 colored in purple in other annotated
8 figures, have a different stitch
9 structure than what's in Blank 11?

10 A Yes.

11 Q And how do you know that?

12 A It's described in Zuckerman.

13 Q Tell me where.

14 A Okay. Now I have to go back
15 and look. Can I write on my exhibits?
16 When I say write, put marks so I know
17 what I'm talking about?

18 Q You can write anything you
19 want on there.

20 A Okay. I might be able to
21 find it quicker this way. Unfortunately,
22 my eyes are slower than word search.

23 Q Take your time.

24 A As I sit here, I know I've
25 read it. But I cannot find it. I'd need

1 more time to really study it and do a
2 word search. So I don't know what to
3 tell you. It's hard to do when you're
4 just reading.

5 MS. STAUBACH: No more
6 questions.

7 MR. RAZAI: Off the record.

8 THE VIDEOGRAPHER: Off the
9 record at 11:52. This concludes
10 today's testimony given by Dr. David
11 S. Brookstein as stipulated by all
12 parties. The total number of media
13 units used was four and will be
14 retained by Veritext Legal Solutions.
15 Off the record at 11:53.

16 (Time noted: 11:53 a.m.)
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I N D E X

E X A M I N A T I O N

EXAMINATION FURTHER EXAMINATION

Ms. Staubach 6 118

Mr. Razai 105

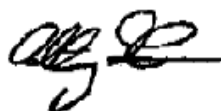
E X H I B I T S

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C E R T I F I C A T I O N

I, ANTHONY GIARRO, a Shorthand Reporter and a Notary Public, do hereby certify that the foregoing witness, DR. DAVID BROOKSTEIN, was duly sworn on the date indicated, and that the foregoing, to the best of my ability, is a true and accurate transcription of my stenographic notes.

I further certify that I am not employed by nor related to any party to this action.



ANTHONY GIARRO

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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