

Petitioner lululemon's Demonstratives For Oral Argument

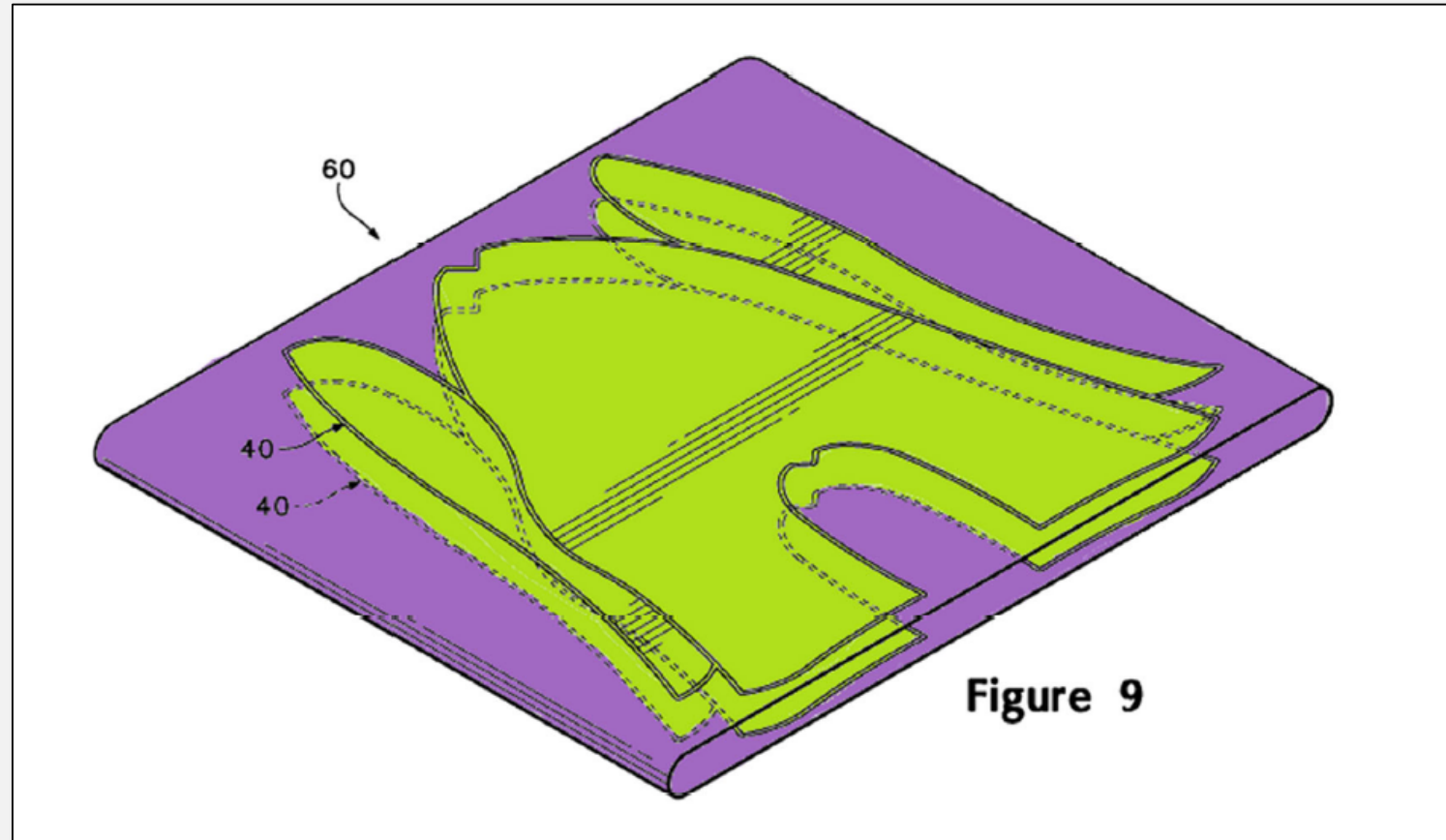
May 7, 2025

lululemon usa inc. v. Nike, Inc.

IPR2024-00460 (Patent 8,266,749)

lululemon Ex. 1028
lululemon v. Nike
IPR2024-00460

The '749 Patent



(Ex. 1001, Fig. 9 (annotated))

Claim 1 Of The '749 Patent

1. A method of manufacturing an article of footwear, the method comprising:
simultaneously knitting a textile element with a surrounding textile structure, the knitted textile element having at least one knitted texture that differs from a knitted texture in the surrounding knitted textile structure;
removing the knitted textile element from the surrounding knitted textile structure;
incorporating the knitted textile element into the article of footwear.

(Ex. 1001, Claim 1)

Claim 13 Of The '749 Patent

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

knitting a first textile element and a second textile element simultaneously with knitting a surrounding textile structure, the first knitted textile element located within a first portion of the knitted textile structure, the second knitted textile element located within a second portion of the knitted textile structure,

varying at least one of the types of stitches or the types of yarns in the knitted textile structure to impart a texture to the first and second knitted textile elements different from a texture of the knitted textile structure extending between the first and second portions;

removing the first and second knitted textile elements from the knitted textile structure;

incorporating at least one of the first and second knitted textile elements into the article of footwear.

(Ex. 1001, Claim 13)

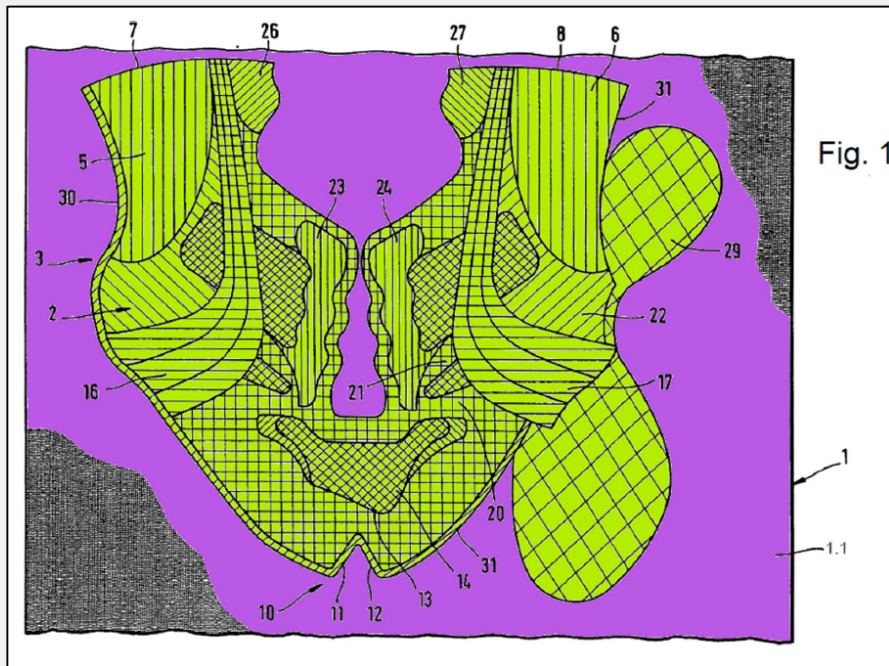
Ground 1

Anticipation by Nishida

**Nishida discloses simultaneously knitting textile elements with a surrounding textile structure
(Claims 1 and 13)**

Nishida Anticipates Claim 1

- ⌚ Nishida describes simultaneously knitting textile elements with a surrounding textile structure



(Ex. 1005, Fig. 1 (annotated))

To this end, the invention proposes that, 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 (1) is produced, using different manufacturing techniques, such as different make-up, different yarn material, different color, different material thickness, single- or multi-layer material, etc., the patterns being cut from this strip and further worked to give shoe uppers.

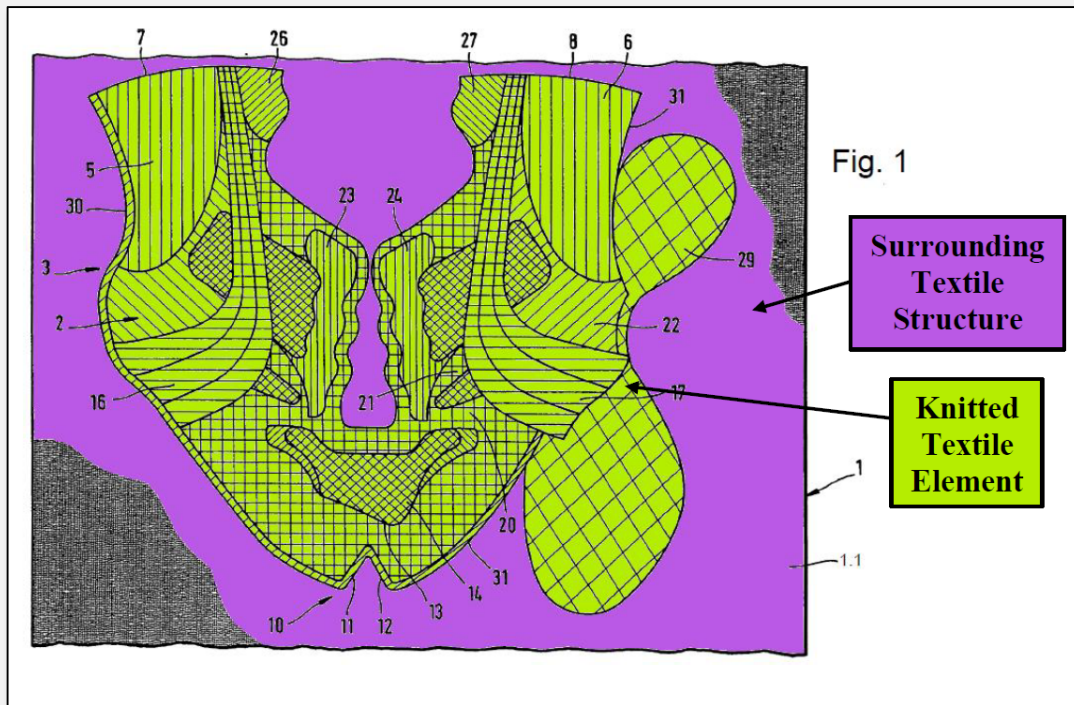
(Ex. 1005, Abstract)

In Figs. 1 and 2, 1 indicates a material web which, during its production by a method customary in the textile industry, e.g., by weaving and/or knitting and/or embroidering, is provided with a single or a plurality of unwound web part(s) 2 for the shoe-upper shape 3, as shown, e.g., from the side in Fig. 3.

(Ex. 1005, 5)

Nishida Anticipates Claim 1

- ⊙ Brookstein confirms a skilled artisan would have understood Nishida as describing simultaneously knitting textile elements and a surrounding textile structure



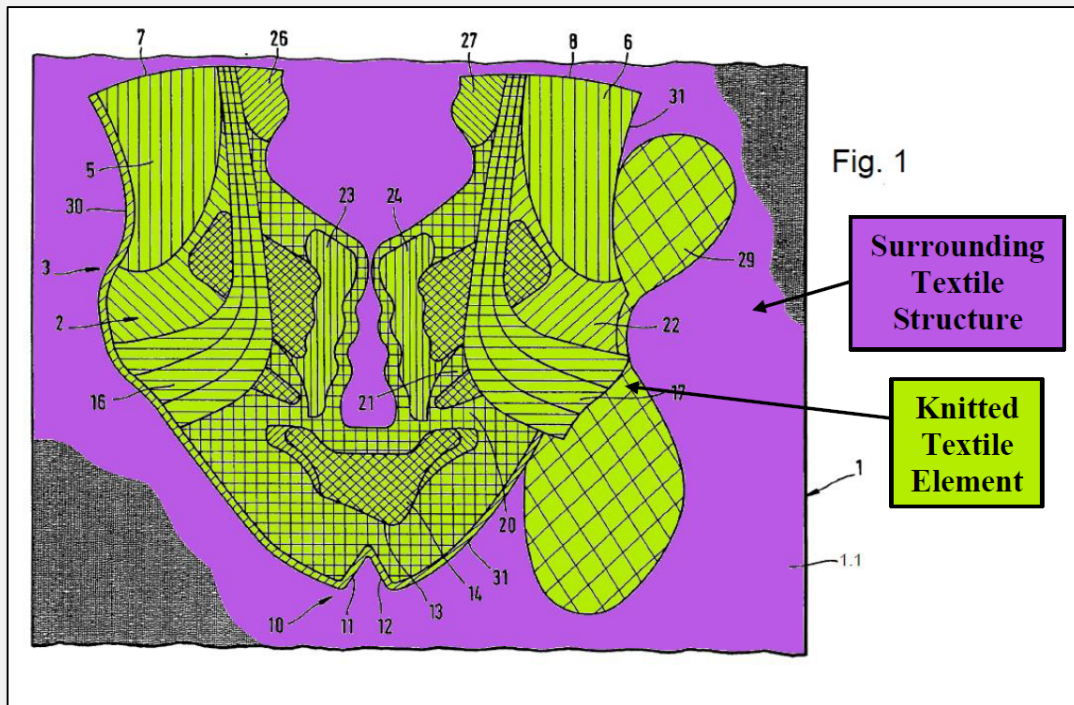
(Ex. 1005, Fig. 1 (annotated))

Each of Nishida's unwound web part(s) 2 is a knitted textile element. Nishida's surface areas 1.1 are a surrounding textile structure. The single textile structure of Nishida's material web 1, which is knit during a single process and includes its knitted textile element (colored green) and surrounding textile structure (colored purple) is shown in Figure 1.

(Ex. 1003, ¶76)

Nishida Anticipates Claim 1

- ③ Brookstein confirms a skilled artisan would have understood Nishida as describing simultaneously knitting textile elements and a surrounding textile structure



(Ex. 1005, Fig. 1 (annotated))

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

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

Q Within an existing material web?

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

Q Doesn't the phrase "within the material web" suggest that the material already exists?

A Not to me.

(Ex. 2004, 99:12-25)

Nike Misrepresents Brookstein's Testimony

- ④ Brookstein never admitted that Nishida does not disclose simultaneous knitting

Brookstein's Testimony

Q. Is it your opinion, Dr. Brookstein, that unwound parts number two disclosed in Nishida are simultaneously knit with the base material?

A. Not with the base material, no.

Q. No?

A. No.

Q. What makes you say that?

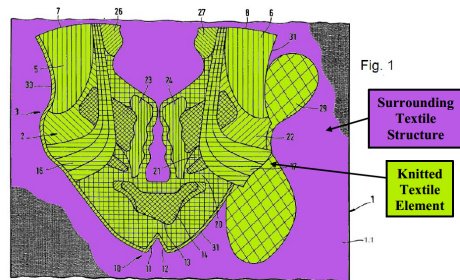
A. You can't knit two separate unconnected fabrics at the same time -- not at the same time. Are we going back to the

(Ex. 2005, 257:13-23)

Brookstein Testified Nishida Discloses Simultaneous Knitting

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.” *Id.*, 5. Material web 1 further includes surface areas 1.1 that are separate from the unwound web part(s) 2, produced during production of material web 1, and described by Nishida as “consist[ing] of a lightweight fabric quality being as simple and inexpensive as possible.” *Id.*, 7-8.

76. Each of Nishida’s unwound web part(s) 2 is a knitted textile element. Nishida’s surface areas 1.1 are a surrounding textile structure. The single textile structure of Nishida’s material web 1, which is knit during a single knitting process and includes its knitted textile element (colored green) and surrounding textile structure (colored purple), is shown in Figure 1 below.



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lululemon Ex. 1003
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76. Each of Nishida’s unwound web part(s) 2 is a knitted textile element. Nishida’s surface areas 1.1 are a surrounding textile structure. The single textile structure of Nishida’s material web 1, which is knit during a single knitting process and includes its knitted textile element (colored green) and surrounding textile structure (colored purple), is shown in Figure 1 below.

(Ex. 1003, ¶176)

According to Nishida, “the individual patterns or partial patterns [of the uppers] can already be produced directly during the production of the material web [1].” *Id.*, 4; *see also id.*, Abstract (“patterns (2) of the uppers are produced, at the same time as the strip of material (1) is produced”). As I explained for claim 2, Nishida thus describes knitting two textile elements (unwound web parts 2) simultaneously with knitting a surrounding textile structure (surface areas 1.1). As is shown in Figure 2

(Ex. 1003, ¶106)

K. Nishida Anticipates Claim 13

104. Claim 13 is similar to claims 1 and 2, and the same disclosures from Nishida that disclosed the limitations of claims 1 and 2 also similarly disclose the limitations of claim 13.

1. Preamble

105. The preamble of claim 13 is the same as the preamble of claim 1. It is disclosed by Nishida for the same reasons.

2. Limitation 13[a]: “knitting a first textile element and a second textile element simultaneously with knitting a surrounding textile structure, the first knitted textile element located within a first portion of the knitted textile structure, the second knitted textile element located within a second portion of the knitted textile structure”

106. Nishida discloses limitation 13[a]. Nishida describes knitting “a fabric with several unwound web parts for different shoe uppers.” Ex.1005, 5, Fig. 2. According to Nishida, “the individual patterns or partial patterns [of the uppers] can already be produced directly during the production of the material web [1].” *Id.*, 4; *see also id.*, Abstract (“patterns (2) of the uppers are produced, at the same time as the strip of material (1) is produced”). As I explained for claim 2, Nishida thus describes knitting two textile elements (unwound web parts 2) simultaneously with knitting a surrounding textile structure (surface areas 1.1). As is shown in Figure 2 below, a first knitted textile element is located within a first portion of the knitted

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Brookstein Expressly Confirmed Simultaneous Knitting

Nishida's Disclosure

1. A method of producing a shaped shoe part using a material web having a plurality of patterns in the form of a shoe-upper unwound web part, cutting these unwound web parts from the material web and sewing the shoe uppers together to form an upper part, and attaching the associated sole part to the edge area of the cut-free outer edge of the associated unwound web part, characterized by the following method steps:

- during the production of the material web (1), both the patterns or partial patterns in the form of the shoe upper (3) unwound web part (2), as well as the patterns or partial patterns in the form of a 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;

....

(Ex. 1005, Claim 1)

Brookstein's Testimony

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

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

Q Within an existing material web?

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

(Ex. 2004, 99:12-21)

Nike Concedes Nishida Discloses Knitted Sheets

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disclosure of simultaneously knitting a textile element and surrounding textile structure.”³ Reply at 10. lululemon’s reliance on *Kennametal, Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1381–82 (Fed. Cir. 2015) to support this proposition that “disclosing the patented system as one of many options is still anticipation” is misplaced. *Id.* Unlike in *Kennametal*, where the prior art disclosed several potential material combinations, some of which undoubtedly met the claim limitation at issue, here, Nishida *never* discloses the option that the material web base 4 and pattern pieces 2 are knitted during the same knitting process.

Examination and *adidas* IPR: lululemon’s assertion that “Nike provides no rationale supporting the Examiner’s analysis of Nishida-US” is plainly wrong. Nike’s entire position for this limitation set forth in the Response and in this Sur-Reply provide that rationale. And as Nike argued in the Preliminary Response, the statements the Board made in dicta in the *adidas* IPR should be afforded little weight as they were unnecessary to the decision in that case. Paper 7, 25; *See Kastigar v. U.S.*, 406 U.S. 441, 454–55 (1972). *adidas* did not ask the Board to review a

³ Nike doesn’t dispute Nishida discloses that both the material web base 4 and pattern elements 2 may be knitted. Nike contends, however, that even if that is the case, those two components are formed in *separate* knitting processes, i.e., they are not simultaneously knitted, as recited in the claims.

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³ Nike doesn’t dispute Nishida discloses that both the material web base 4 and pattern elements 2 may be knitted. Nike contends, however, that even if that is the case, those two components are formed in *separate* knitting processes, i.e., they are not simultaneously knitted, as recited in the claims.

(Sur-Reply, 13 n.3)

No Support For Nike's "Pre-Existing Base" Argument

- ⌚ Nishida never describes "material web base 4" as pre-existing
- ⌚ Nike's multi-step knitting theory contradicts Nishida's disclosure

In Figs. 1 and 2, 1 indicates a material web which, **during its production** by a method customary in the textile industry, e.g., by weaving and/or **knitting** and/or embroidering, is provided with a single or a plurality of unwound web part(s) 2

(Ex. 1005, 5)

To this end, the invention proposes that, 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 (1) is produced....

(Ex. 1005, Abstract)

Knitting On A Knit Base Is Not Possible

④ Brookstein explains you cannot knit on existing knit material:

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.

(Ex. 2004, 82:17-24)

1	Q	Could you knit within an
2		existing knitted fabric?
3	A	Not that I know of.

(Ex. 2004, 84:1-3)

Nike's Mix-And-Match Theory Fails

- ⌚ Nishida discloses single-step manufacturing processes:

To this end, the invention proposes that, 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 (1) is produced....

(Ex. 1005, Abstract)

- ⌚ *Kennametal*: Disclosing the patented features as one of multiple options still anticipates the claim.

Kennametal, Inc. v. Ingersoll Cutting Tool Co., 780 F.3d 1376, 1381-82 (Fed. Cir. 2015)

Pastore Agreed Multi-Layer Does Not Mean Multi-Step

- ④ Nishida's disclosure of multi-layer materials does not mean Nishida is limited to multi-step production processes

Pastore's Testimony

19 Q. Could you describe to me what a spacer
20 fabric is?
21 A. A spacer fabric is a fabric that has
22 substantially two planar layers that are separated
1 yet connected to each other, typically through a
2 monofilament, that both joins and separates the two
3 layers that are formed simultaneously.

(Ex. 1025, 240:19-241:3)

Nishida's Abstract Does Not Support Nike's Argument

- ⌚ Contrary to Nike's novel argument, the abstract does not require the strip of material (1) to be produced with a different manufacturing technique than the patterns (2) of the upper.

Nishida's Abstract

To this end, the invention proposes that, 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 (1) is produced, using different manufacturing techniques, such as different make-up, different yarn material, different color, different material thickness, single- or multi-layer material, etc., the patterns being cut from this strip and further worked to give shoe uppers.

(Ex. 1005, Abstract)

- ⌚ **Nike:** *"But [Nishida's abstract] merely says that 'the patterns (2) of the uppers are produced ... using different manufacturing techniques, such as ... single- or multi-layered material.'"*

(Sur-Reply, 11 (elipses original))

Ground 1

Anticipation by Nishida

**Nishida discloses a substantially
planar configuration
(Claims 5 and 15)**

Claims 5 And 15 Of The '749 Patent

5. The method of claim 1, wherein the knitted textile element has a substantially planar configuration upon removal from the surrounding knitted textile structure.

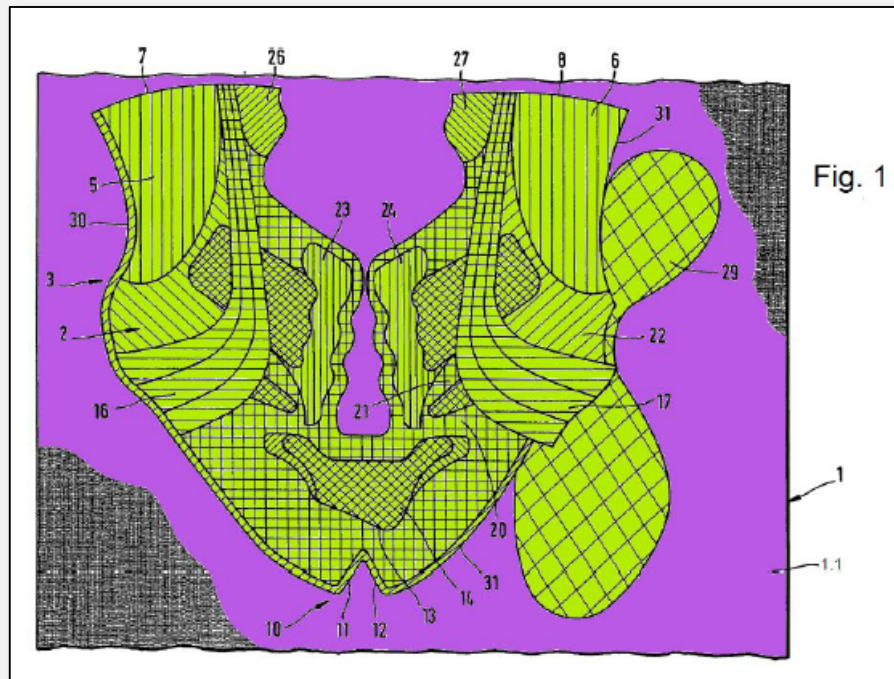
(Ex. 1005, Claim 5)

15. The method of claim 13, wherein the first and second textile knitted elements have substantially planar configurations upon removal from the surrounding knitted textile structure.

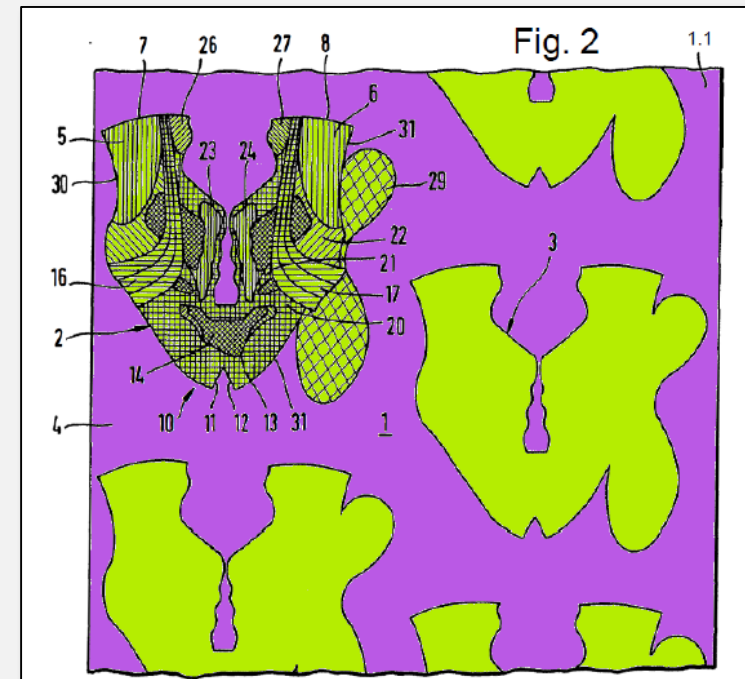
(Ex. 1005, Claim 15)

Nishida Discloses Substantially Planar Textile Elements

- ④ **Brookstein:** "As is shown in Figures 1-2 below, Nishida's knitted textile element (colored green) has a substantially planar configuration within the surrounding textile structure (colored purple)." (Ex. 1003, ¶93)



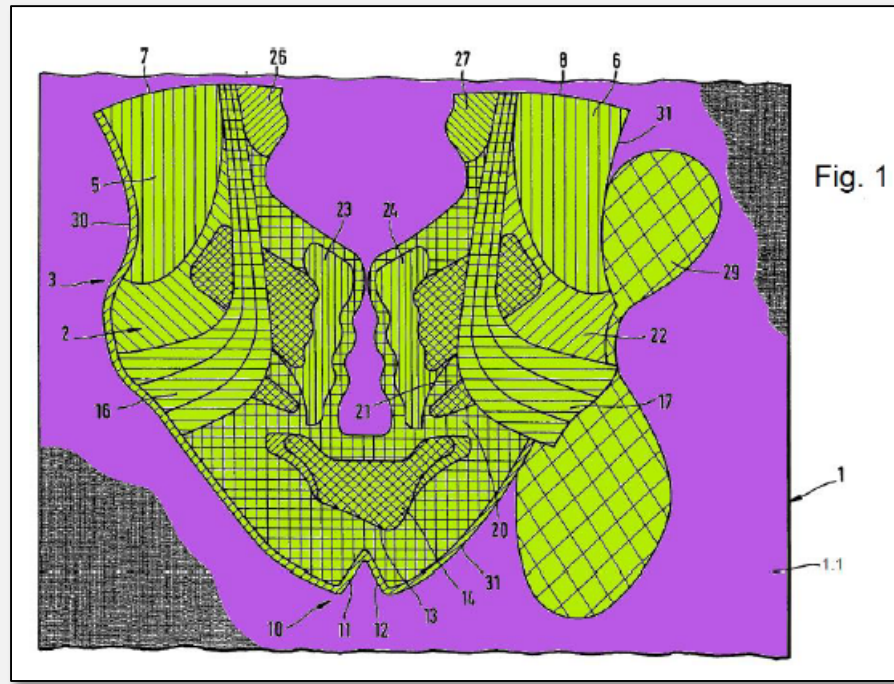
(Ex. 1005, Fig. 1 (annotated))



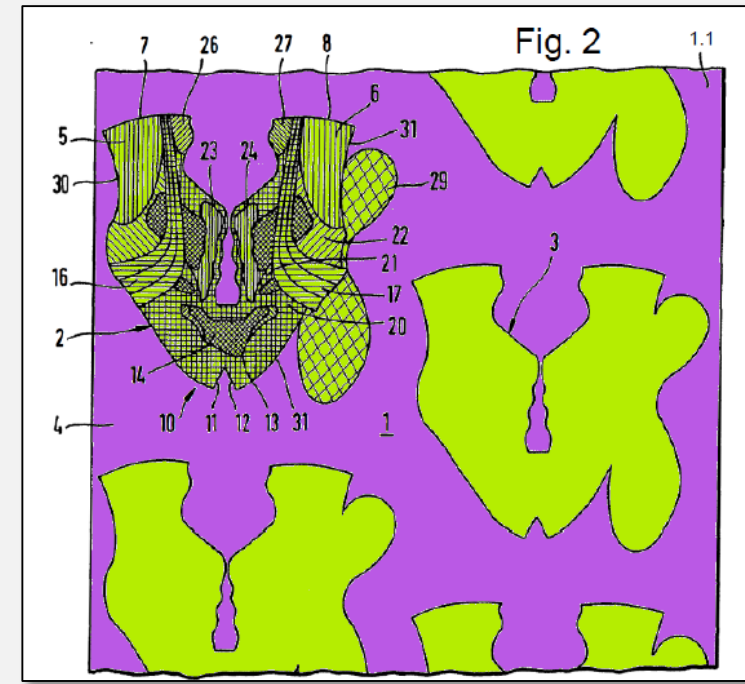
(Ex. 1005, Fig. 2 (annotated))

Nishida's Textile Elements Are Substantially Planar When Removed

- Ⓢ **Brookstein:** "[W]hen I look at the picture [Figs. 1 and 2], that tells me it's planar."
(Ex. 2004, 102:22-24)
- Ⓢ Nishida's folding process transforms its planar element into a non-planar element.
(Ex. 1003, ¶93; Ex. 2004, 102:5-19)



(Ex. 1005, Fig. 1 (annotated))



(Ex. 1005, Fig. 2 (annotated))

Even Pastore Cannot Credibly Refute Nishida's Substantially Planar Textile Element

Pastore's Testimony

Q. In that example, is it your opinion that when the pattern element is removed from the base, it may impart a curl or three-dimensional structure to the removed pattern element?

THE WITNESS: Yes. By the same logic.

We don't know how that knitted pattern element is attached to the web base. And depending on the details, it may or may not impart curvature and cause a three-dimensional structure when it is removed from the base.

(Ex. 1026, 43:11-44:1 (objection omitted))

Ground 3

Anticipation by Zuckerman

Claim Construction

Construction Of “Surrounding Textile Structure”

- ⌚ *Plain and Ordinary Meaning*: the textile area outside of the knitted textile element(s)
- ⌚ Both parties agree that the limitation refers to this textile.

Nike Seeks To Improperly Narrow “Surrounding Textile Structure”

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lululemon argues that the “portion of continuous strip 13 [purple] that surrounds blank 11 [green]” is “a surrounding textile structure to the knitted textile element.” Petition at 58. The Board’s inclination in its Institution Decision that it’s “difficult [] to characterize the noted purple portions as ‘surrounding’ the noted green portion” is astute. Institution Decision at 26. This is because Zuckerman’s blank 11 is knitted with two separate textile structures adjacent the blank—one on each side. Ex. 2003 at ¶¶53–54. And even if the two separate structures could be considered a single structure (they can’t), they abut only two sides of the blank, and less than half of its periphery, and therefore cannot be characterized as “surrounding” the textile element. *See id.*; Ex. 2004 at 33:18–34:13.

Dr. Brookstein testified in deposition that Zuckerman’s strip 13 would still surround blank 11 even if it only had abutting material from which it was removed on one side of blank 11. *Id.* at 35:7–36:2. In other words, if blank 11 were only removed from the purple portion shown on the right-hand side of annotated Figure 2. *Id.* In lululemon’s apparent interpretation, a textile element having *any edge* which is adjacent to an abutting material would meet this limitation. *See, e.g., id.* at 20:15–21:20. But as Dr. Pastore explains, a POSITA would not have understood Zuckerman’s strip 13 to abut enough of blank 11 to be a textile structure “surrounding” the blank. Ex. 2003 at ¶55.

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each side. Ex. 2003 at ¶¶53–54. And even if the two separate structures could be considered a single structure (they can’t), they abut only two sides of the blank, and less than half of its periphery, and therefore cannot be characterized as “surrounding” the textile element. *See id.*; Ex. 2004 at 33:18–34:13.

(POR, 26)

55. I understand that Dr. Brookstein testified in deposition that Zuckerman’s strip 13 would still surround blank 11 even if it only had abutting material from which it was removed on one side of blank 11. Ex. 2004 at 35:7–36:2. In other words, if blank 11 were only removed from the purple portion shown on the right-hand side of annotated Figure 2. *Id.* In my opinion, a POSITA would not have considered this to be “surrounding textile structure.” Instead, a POSITA would have understood that a “surrounding textile structure” extends around most or all of the periphery of the textile element.

(Ex. 2003, ¶55)

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my opinion, a POSITA would not have understood these two separate structures, designated by purple in the figure above, to be a textile structure “surrounding” the blank. Thus, Zuckerman does not disclose this limitation.

55. I understand that Dr. Brookstein testified in deposition that Zuckerman’s strip 13 would still surround blank 11 even if it only had abutting material from which it was removed on one side of blank 11. Ex. 2004 at 35:7–36:2.

In other words, if blank 11 were only removed from the purple portion shown on the right-hand side of annotated Figure 2. *Id.* In my opinion, a POSITA would not have considered this to be “surrounding textile structure.” Instead, a POSITA would have understood that a “surrounding textile structure” extends around most or all of the periphery of the textile element.

56. For at least these reasons, it is my opinion that Zuckerman fails to disclose this limitation.

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

57. In my opinion, 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 similar limitation in claim 13. Zuckerman’s blank 11 (“knitted textile element”) is not incorporated into an article of footwear—it is an “article of footwear,” as that term is properly construed. *See supra* § VIII.

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The '749 Patent Does Not Require A Specific Amount Of Textile

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Outsole 22 is secured to a lower surface of midsole 21 and may be formed from carbon black rubber compound to provide a durable, wear-resistant surface for engaging the ground. Outsole 22 may also incorporate a textured lower surface to enhance the friction characteristics of footwear 10. In addition, footwear 10 may include an insole (not depicted), which is a relatively thin, cushioning member located within upper 30 and adjacent to a plantar surface of the foot for enhancing the comfort of footwear 10.

Sole structure 20 is described above as having the elements of a conventional sole structure for athletic footwear. Other footwear styles, including, dress shoes and boots, for example, may have other types of conventional sole structures specifically tailored for use with the respective types of footwear. In addition to a conventional configuration, however, sole structure 20 may also exhibit a unique, non-conventional structure. Accordingly, the particular configuration of sole structure 20 may vary significantly within the scope of the present invention to include a wide range of configurations, whether conventional or non-conventional.

Upper 30 is depicted in FIGS. 2-7 as having a lateral region 31, an opposite medial region 32, an instep region 33, a lower region 34, and a heel region 35. Lateral region 31 extends through a longitudinal length of footwear 10 and is generally configured to contact and cover a lateral side of the foot. Medial region 32 has a similar configuration that generally corresponds with a medial side of the foot. Instep region 33 is positioned between lateral region 31 and medial region 32, and instep region 33 extends over an instep area of the foot. Lower region 34 forms a bottom surface of upper 30 and also extends through the longitudinal length of footwear 10. Heel region 35 forms a rear portion of upper 30 and is generally configured to contact and cover a heel area of the foot. In addition, lateral region 31, medial region 32, instep region 33, and heel region 35 cooperatively define an ankle opening 36 for providing the foot with access to the void within upper 30.

Upper 30 is at least partially formed from textile element 40, which forms regions 31-35, and may also include laces or other elements associated with a conventional upper for footwear. Textile element 40 is a single material element that is formed to exhibit a unitary (i.e., one-piece) construction, and textile element 40 is formed or otherwise shaped to extend around the foot. As depicted in FIGS. 2-7, textile element 40 forms both an exterior surface and an interior surface of upper 30. Textile element 40 may be formed as a part of a larger textile element. Textile element 40 is then removed from the larger textile element and various edges of textile element 40 are secured together to form the shape of upper 30. A plurality of seams 51-54 are formed, therefore, when joining the edges of the textile element. Seam 51 extends along the longitudinal length of lower region 34 and is centrally-located with respect to lateral region 31 and medial region 32. Seam 52 is also centrally-located and extends upward along heel region 35. A seam 53 is positioned in a rear portion of upper 30 and joins a portion of lower region 34 with both of lateral region 31 and medial region 32. In addition, a seam 54 is positioned in a rear area of upper 30 and joins a portion of lower region 34 with heel region 35.

Textile element 40 exhibits the general shape depicted in FIG. 8 prior to the formation of seams 51-54. Following formation of seams 51-54, however, textile element 40 exhibits the shape of upper 30 depicted in FIGS. 2-7. Seams 51-54 are formed by securing various edges of textile element 40 together. More specifically, (1) seam 51 is formed by securing an edge 41a with an edge 41b; (2) seam 52 is formed by securing an edge 42a with an edge 42b; (3) a first portion of seam 53 is formed by securing an edge 43a with an edge 43b;

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(4) a second portion of seam 53 is formed by securing an edge 43c with an edge 43d; (5) a first portion of seam 54 is formed by securing an edge 44a with an edge 44b; and (6) a second portion of seam 54 is formed by securing an edge 44c with an edge 44d. Referring to FIG. 8, the positions of regions 31-35 and ankle opening 36 are identified to provide a frame of reference relating to the various portions of textile element 40.

In order to join edges 41a and 41b to form seam 51, textile element 40 is folded or otherwise overlapped such that edge 41a is placed adjacent to edge 41b. Stitching, an adhesive, or heat bonding, for example, is then utilized to secure edge 41a and edge 41b. Textile element 40, as depicted in FIG. 8, has a generally planar configuration. Upon the formation of seam 51, however, one portion of textile element 40 overlaps the other portion of textile element 40. The volume between the overlapping portions effectively forms a portion of the void within upper 30 for receiving the foot.

The folding or overlapping of textile element 40 to form seam 51 places edge 42a adjacent to edge 42b, which facilitates the formation of seam 52. With reference to FIG. 8, an edge 45 forms a generally u-shaped area in textile element 40. Upon the joining of edges 42a and 42b to form seam 52, the u-shaped area becomes an aperture in textile element 40 and effectively forms ankle opening 36. Each of edges 43a-43d and edges 44a-44d are formed from a generally v-shaped area of textile element 40. Accordingly, seams 53 and 54 may be formed by closing the v-shaped areas and securing the various edges together.

Following the formation of each of seams 51-54, the manufacturing of upper 30 is essentially complete. Various finishing steps may be performed, such as reinforcing ankle opening 36. For example, Upper 30 (i.e., textile element 40) is then secured to sole structure 20, with an adhesive, for example. The insole is then placed into the void within upper 30 and adjacent to lower region 34. In some embodiments, various reinforcing members may be added to the exterior or interior surface of upper 20 in order to limit the degree of stretch in upper 20 or provide enhanced wear-resistance. In addition, a lacing system may be added to provide adjustability.

Textile element 40 is a single-material element with a unitary construction, as discussed above. As defined for purposes of the present invention, unitary construction is intended to express a configuration wherein portions of a textile element are not joined together by seams or other connections, as depicted with textile element 40 in FIG. 8. Although the various edges 41a-44d are joined together to form seams 51-54, the various portions of textile element 40 are formed in an unitary element without seams, as discussed below.

Textile element 40 is primarily formed from one or more yarns that are mechanically-manipulated through either an interweaving, intertwining and twisting, or interlooping process, for example. As discussed in the Background of the Invention section above, interweaving is the intersection of two yarns that cross and interweave at right angles to each other. The yarns utilized in interweaving are conventionally referred to as warp and weft. Intertwining and twisting encompasses procedures such as braiding and knotting where yarns intertwine with each other to form a textile. Interlooping involves the formation of a plurality of columns of inter-meshed loops, with knitting being the most common method of interlooping. Textile element 40 may, therefore, be formed from one of these processes for manufacturing a textile.

A variety of mechanical processes have been developed to manufacture a textile. In general, the mechanical processes may be classified as either warp knitting or weft knitting. With

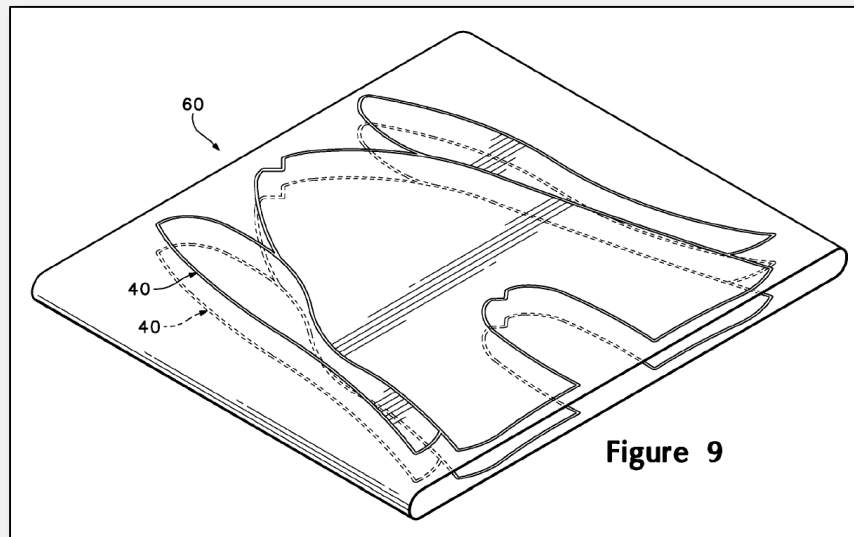
30. Textile element 40 may be formed as a part of a larger textile element. Textile element 40 is then removed from the larger textile element and various edges of textile element 40 are secured together to form the shape of upper 30. A plurality

(Ex. 1001, 5:45-48)

lululemon Ex. 1001
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The '749 Patent Never Limits "Surrounding" To Most Of Periphery

- ③ The specification never uses the terms "surround" or "surrounding."
- ③ The only figure showing a textile element as part of a larger structure is Figure 9, which is described as illustrating "[a]n example of a textile structure 60 that may be formed with a wide-tube circular knitting machine." (Ex. 1001, 7:38–40)



(Ex. 1001, Fig. 9)

Q. So in your opinion, if the edge went all the way down in Figure 9 as described in the deposition, that would still be mostly surrounded, correct?

MR. HARRIS: Objection, form, and scope.

THE WITNESS: Within this context, yes.

(Ex. 1025, 75:11-16)

Nike's Construction Conflicts With The '749 Patent's Goals

⌚ Nike previously argued:

- “[The] conventional method of making uppers was inefficient, and Nike addressed those inefficiencies in the '749 patent and its family.” (Ex. 1020, 1)
- “[T]he claimed methods increase sourcing and manufacturing efficiency.” (POR, 5)
- “The claimed methods increase efficiency.” (Ex. 2003, ¶25)
- The '749 patent's family “finally solved the well-recognized and long-felt need of reducing waste in the manufacture[] of uppers.”
adidas AG v. Nike, Inc., IPR2013-00067, Paper 66 at 10 (Nov. 16, 2017)

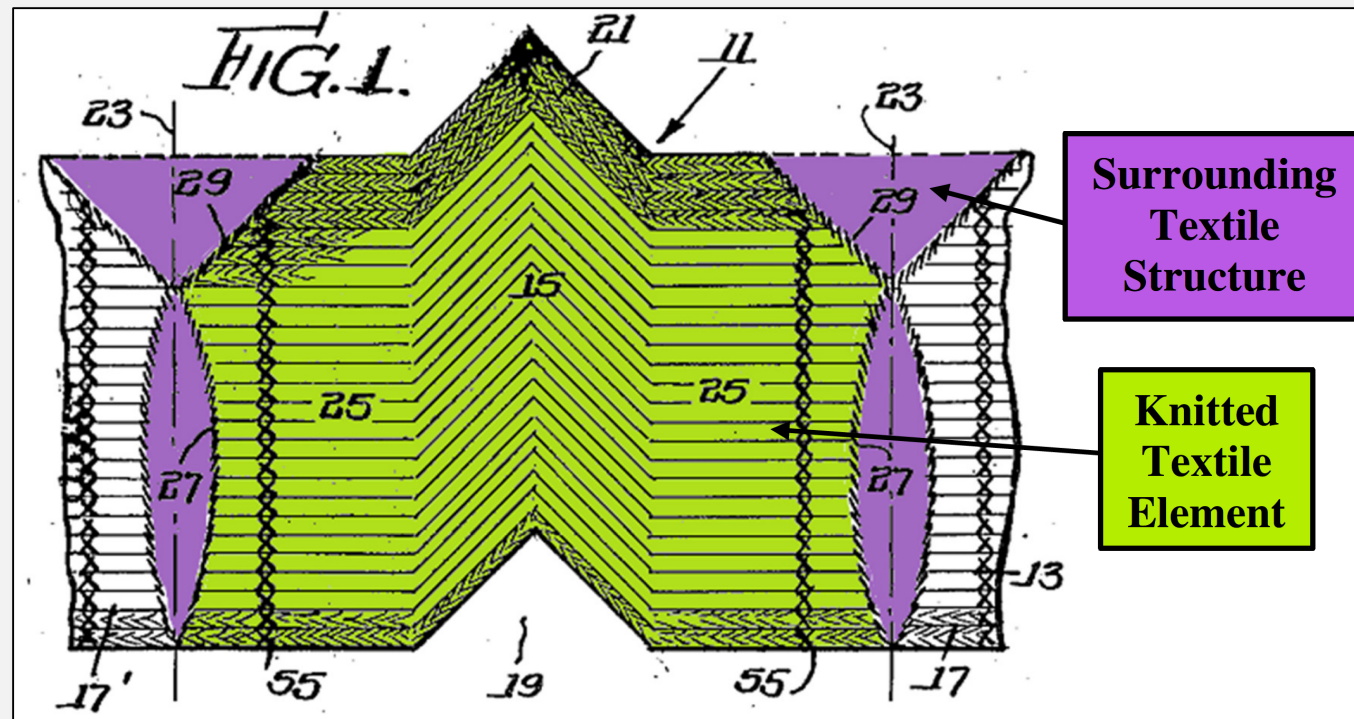
Ground 3

Anticipation by Zuckerman

Zuckerman discloses simultaneously knitting textile elements and a surrounding textile structure (Claims 1 and 13)

Zuckerman Discloses A Surrounding Textile Structure

- ⌚ Zuckerman's surrounding textile structure constitutes the entire textile area outside of the knitted textile elements:



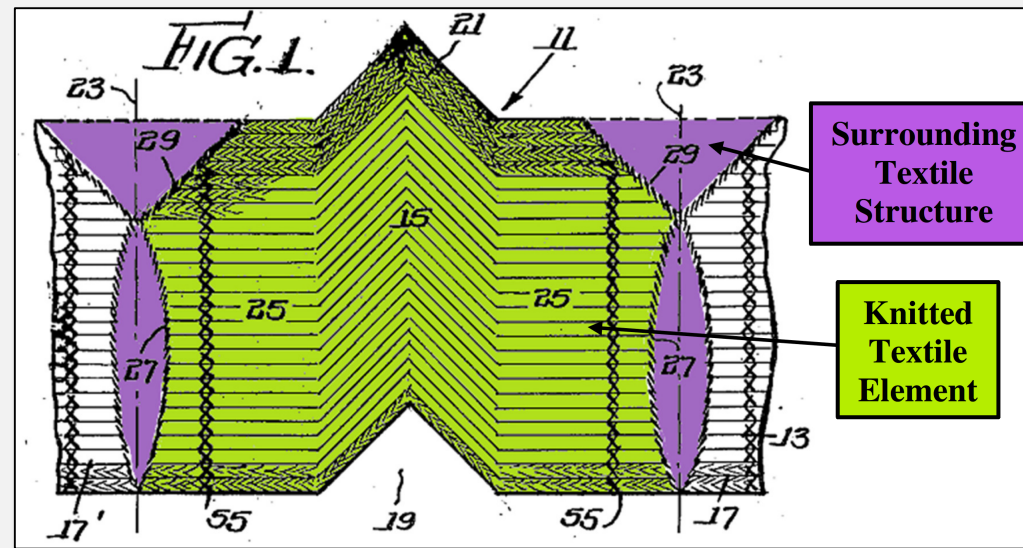
(Ex. 1008, Fig. 1 (annotated))

Completely Surrounded, Single, And Continuous Are Not Required

- ⌚ Pastore confirms that completely surrounded is not required, testifying that “I don’t think the claim requires completely surrounded.” (Ex.1025, 74:9-75:16)
- ⌚ **Nike’s Construction:** completely or mostly surrounding the textile element
(Sur-Reply, 3)

Nike States Zuckerman's Textile Element Is About 50% Surrounded

- ⌚ Nike admits that "Zuckerman's textile structures ... ***each about only about 25% of the periphery*** of Zuckerman's blank (which lululemon identifies as the 'textile element')." (Sur-Reply, 3-4 (emphasis added))



(Ex. 1008, Fig. 1 (annotated))

Ground 3

Anticipation by Zuckerman

**Zuckerman discloses incorporating its knitted textile element into the article of footwear
(Claims 1 and 13)**

The Incorporating Limitation Of The Independent Claims

1. A method of manufacturing an article of footwear, the method comprising:
simultaneously knitting a textile element with a surrounding textile structure, the knitted textile element having at least one knitted texture that differs from a knitted texture in the surrounding knitted textile structure;
removing the knitted textile element from the surrounding knitted textile structure;
incorporating the knitted textile element into the article of footwear.

(Ex. 1001, Claim 1)

13. A method of manufacturing an article of footwear, the method comprising:
knitting a first textile element and a second textile element simultaneously with knitting a surrounding textile structure, the first knitted textile element located within a first portion of the knitted textile structure, the second knitted textile element located within a second portion of the knitted textile structure,
varying at least one of the types of stitches or the types of yarns in the knitted textile structure to impart a texture to the first and second knitted textile elements different from a texture of the knitted textile structure extending between the first and second portions;
removing the first and second knitted textile elements from the knitted textile structure;
incorporating at least one of the first and second knitted textile elements into the article of footwear.

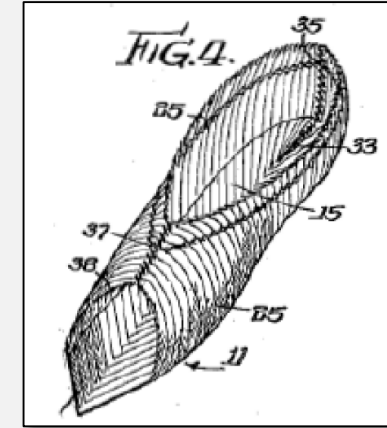
(Ex. 1001, Claim 13)

Nike Seeks To Improperly Narrow The Incorporating Limitation

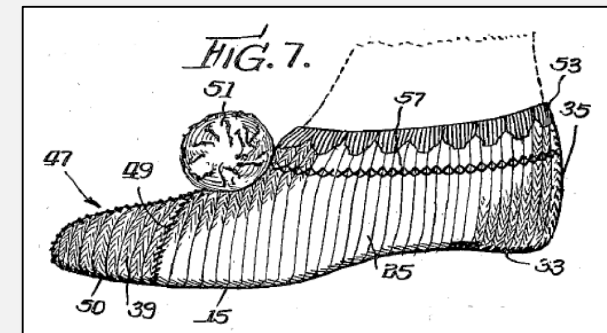
- ⌚ Nike argues claims 1 and 13 require incorporation into a separate sole structure. (POR, 27-28, 3; Sur-Reply 18)
 - ⌚ But Nike's reliance on the Board's decision in the *New Balance* IPR is misplaced:
 - Addressed whether a sock is an article of footwear.
 - Held an article of footwear includes sole structure and upper.
 - Did not exclude a slipper.
- (Ex. 2006, 13–14; Ex. 2007, 11)

Nike's Separate-Sole Argument Is Circular

- ⌚ Nike argues that Zuckerman's blank becomes a "completed article of footwear" when assembled into the configuration shown in Figure 4. (Sur-Reply, 19)
- ⌚ But each step in the assembly process constructs or alters the article, and the final product is an article of footwear.
- ⌚ Zuckerman's blank is incorporated into an article of footwear at least by combining it with a toe covering portion.



(Ex. 1008, Fig. 4)



(Ex. 1008, Fig. 7)

Ground 3

Anticipation by Zuckerman

**Zuckerman discloses knitting an outline of the
knitted textile element
(Claims 3 and 14)**

Pastore Acknowledges Varying Stitches Can Create An Outline

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1 '749 patent, I'd like to ask you a question about
2 claim 3.
3 Now, what are some of the different ways
4 you could knit an outline?
5 A. Well, the outline would be the perimeter
6 of the element that you want to incorporate. So by
7 defining the proper number of needles running in
8 each direction, the courses per inch, the wale
9 per inch, what yarns the needles are carrying, this
10 is how you would generate an outline.
11 Q. And is one way you could generate an
12 outline actually using stitches to form the outline?
13 A. Sure. You could incorporate a visible
14 outline if you wanted to.
15 Q. Okay. And you say "a visible outline."
16 What's an invisible outline?
17 A. Well, the outline of the shoe -- of the
18 textile element would be the perimeter of the
19 textile element that you want to use, whether it's
20 visible or not.
21 Q. Okay. But doesn't -- claim 3 requires
22 knitting an outline of the knitted textile element,

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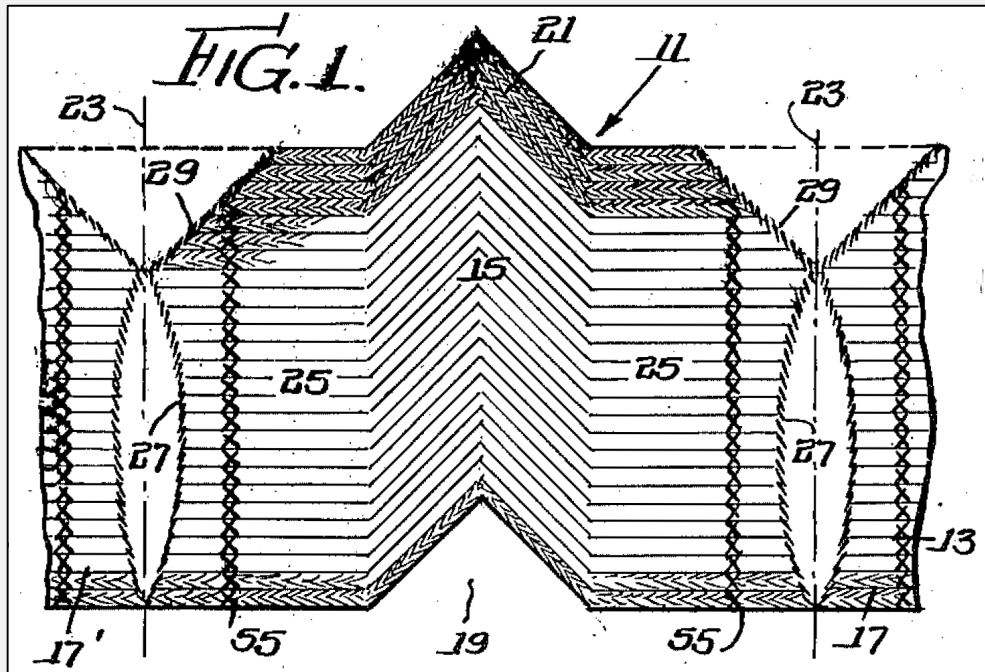
Now, what are some of the different ways
you could knit an outline?

A. Well, the outline would be the perimeter
of the element that you want to incorporate. So by
defining the proper number of needles running in
each direction, the courses per inch, the wale
per inch, what yarns the needles are carrying, this
is how you would generate an outline.

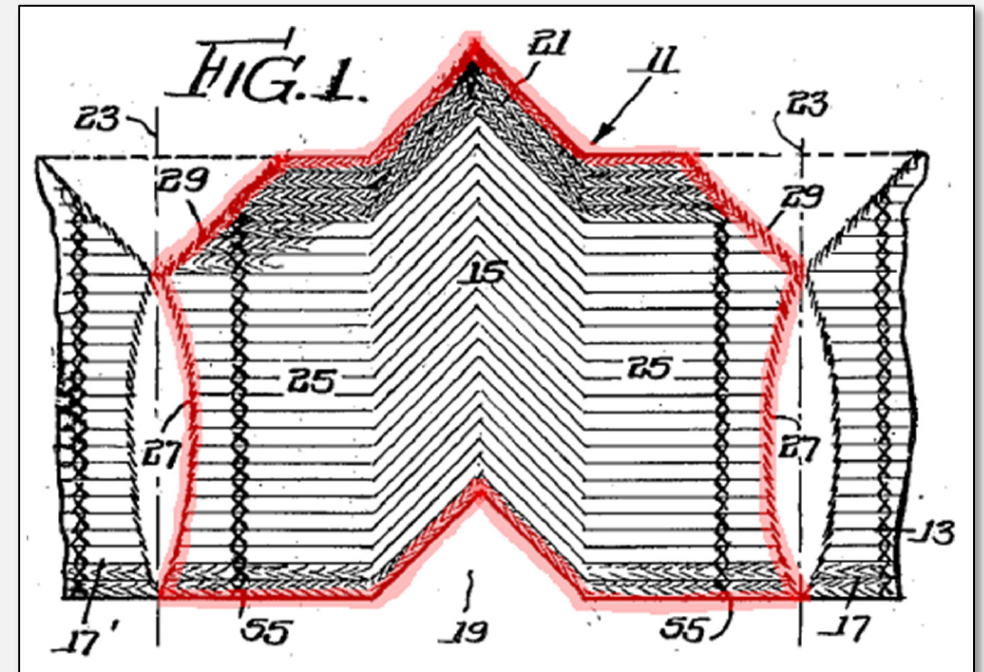
(Ex. 1025, 267:3-10)

Zuckerman Discloses Knitting A Textile Element Outline

- ④ **Brookstein:** Zuckerman's Figure 1 "shows varying stitches throughout continuous strip 13, forming an outline [red below] of the knitted textile element (blank 11) along lines 27 and 29." (Ex. 1003, ¶153)



(Ex. 1008, Fig. 1)



(Ex. 1008, Fig. 1 (annotated))

Ground 3

Anticipation by Zuckerman

**Zuckerman's discloses a substantially planar
configuration
(Claims 5 and 15)**

“Strip Of Fabric” Indicates A Substantially Planar Structure

- ⌚ Brookstein testified regarding the meaning of “strip” in Zuckerman to a skilled artisan:

Id., Fig. 1. The phrase “strip of fabric” also indicates that Zuckerman’s structure of continuous strip 13 is substantially planar because the term “strip” denotes a long, narrow piece and the term “fabric” denotes the piece has length and width but limited thickness, hence forming a flat piece of fabric and a plane.

(Ex. 1003, ¶155)

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

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

A Yes.

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

A It depends on how it's used.

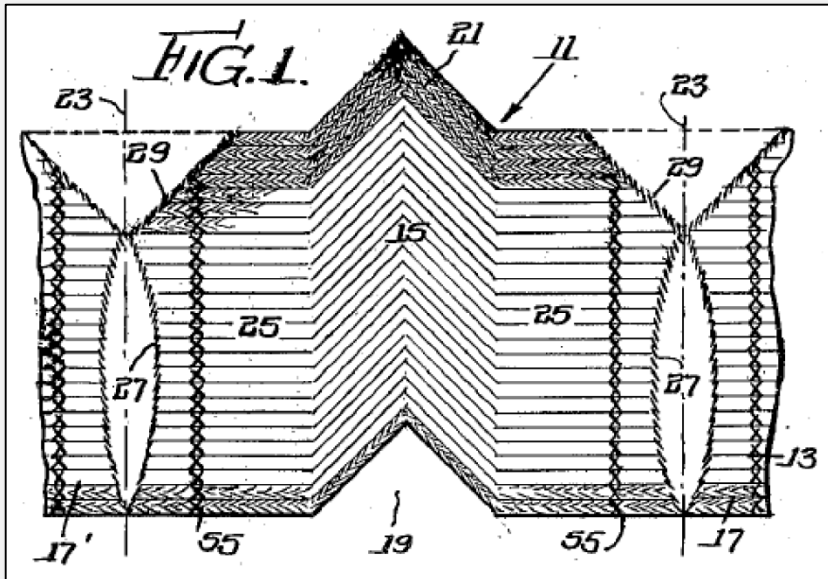
Q Well, are you offering it here under a particular usage?

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

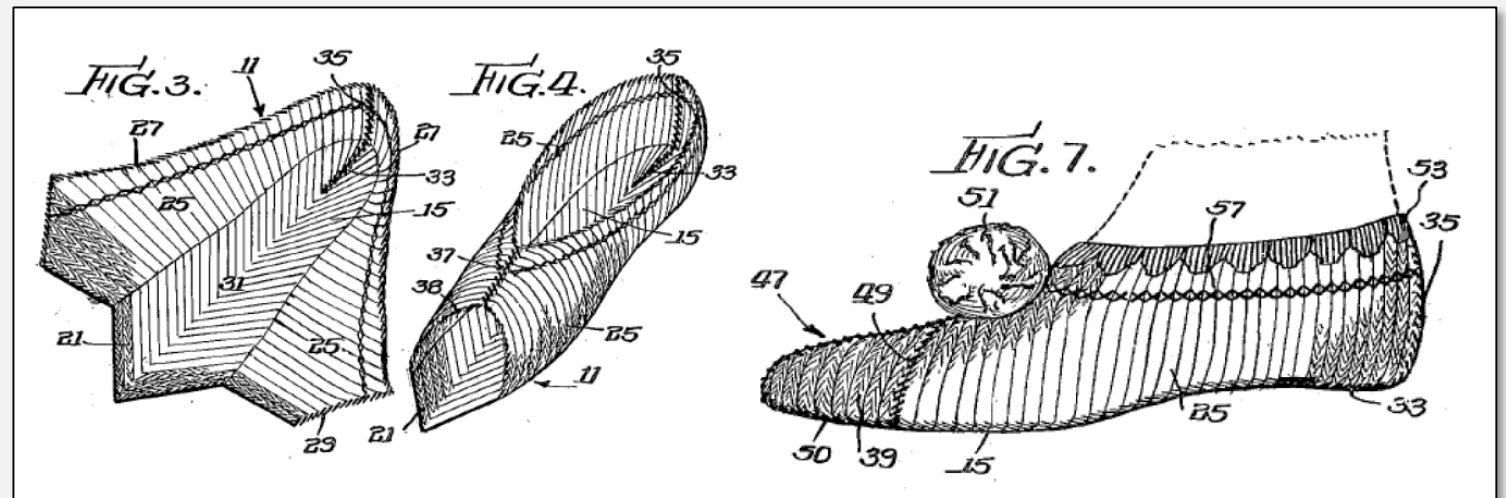
(Ex. 2004, 50:2-14)

Substantially Planar Transforms Into Non-Planar Configuration

- ⊙ Zuckerman's blank 11 begins substantially planar and transforms into a non-planar configuration by folding and stitching:



(Ex. 1008, Fig. 1)



(Ex. 1008, Figs. 3-4, 7)

Nike's Cannot Refute Zuckerman's Planar Disclosure

- ⌚ Nike's argument relies solely the following assertion by Pastore:
 - "[I]n my opinion, it is unclear from Figure 1 that knitted strip 13 is substantially planar." (Ex. 2003, ¶69)

- ⌚ But Zuckerman discloses a "continuously knitted fabric strip."
(Ex.1008, 1(R):11–14)

Ground 4

Obviousness In View of Zuckerman and the Knowledge of a POSA

“Knitting An Outline” Would Have Been Obvious

- ⌚ The Petition shows that knitted outlines were known and had recognized benefits:
 - Improved efficiency and minimize errors during manufacturing
 - Enhancing structural integrity

Efficiency and Error Minimization During Manufacturing

Spencer Describes Knit Outlines

It is also possible to produce length sequences such as scarves with fringed ends, articles produced on double needle bar raschels based on the tubular knitting principle, and scalloped shaping of net designs **by cutting around the outline after finishing**.

(Ex. 1009, 30)

Cutting-out techniques vary widely, from **marked lays whose outlines are followed** by hand-guided knives to presser cutter blades shaped to the outline of the garment part, and cutting blades guided by a computerised programme.

(Ex. 1009, 90)

Brookstein Explains Manufacturing Efficiencies

A POSA would have been motivated to add this guide because it would have been known to **help with improving efficiency** (for example reducing time spent measuring or marking by creating a precise edge identifier relatively early in the manufacturing process), **minimizing errors** (for example increasing the likelihood that desired boundaries are followed or simplifying quality control by facilitating identification of deviations and de[f]ects)....

(Ex. 1003, ¶183)

Knitted Outlines Enhance Structural Integrity

Spencer Describes Welts as Knit Outlines

A *welt* is an attractive and secure edge of a knitted article that helps prevent laddering or unroving of a structure. It is formed either during the knitting sequence (usually at the start, and parallel to the courses), or as a later seaming operation during making-up.

(Ex. 1009, 106)

Brookstein Explains Welts Could Enhance Zuckerman's Structure Integrity

Second, a POSA would have understood that varying the stitches to provide an outline would be useful for increasing structural integrity around the knitted textile element's edges. A POSA would have been motivated to provide the outline because a POSA would have understood that the edges of Zuckerman's knitted textile element could be prone to laddering or unroving (i.e., unravelling) during processing and that the outline would help to keep those areas from laddering or unroving.

(Ex. 1003, ¶183)

“Knitting An Outline” Would Have Been Obvious

- ⌚ The Petition shows that a skilled artisan would have been motivated to knit an outline.
 - Nike identifies a cutting die as an alternative approach.
 - But the advantages of one approach does not preclude consideration of another, particularly where a skilled artisan would have considered both options.
See In re Fulton, 391 F.3d 1195, 1200 (Fed. Cir. 2004)

Ground 5

Obviousness In View of Zuckerman and Doughty

Nike Disregards Two Motivations To Combine

- ⌚ Nike does not address two motivations for the combination:
 - providing “added protection” for Zuckerman’s textile element for use “in more varied environments”
 - “permit[ting] changing of the sole structure” to “extend[] the knit upper’s life”

The Challenged Motivations To Combine Support Obviousness

- ⌚ Using a separate sole structure—like Doughty’s—with Zuckerman’s textile element would allow the textile element to be detached and washed separately. (Ex. 1003, ¶193)
- ⌚ That Zuckerman’s textile element already includes a sole structure does not negate the additional benefits of incorporating a separate sole structure. (Ex. 1003, ¶¶193-194)
 - The advantages of one approach do not preclude consideration of another, particularly where a skilled artisan would have considered both.
See In re Fulton, 391 F.3d 1195, 1200 (Fed. Cir. 2004)