

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON USA, INC.,

Petitioner

v.

NIKE, INC.,

Patent Owner.

IPR2024-00460
Patent 8,266,749 B2

Record of Oral Hearing
Held: May 7, 2025

Before KEN B. BARRETT, MICHAEL J. FITZPATRICK, and
SCOTT A. DANIELS, Administrative Patent Judges.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

ALI S. RAZAI, ESQUIRE
BRANDON G. SMITH, ESQUIRE
Knobbe, Martens, Olson & Bear, LLP
600 Anton Boulevard, Suite 1800
Costa Mesa, California 92626
(714) 830-0440

ON BEHALF OF THE PATENT OWNER:

MICHAEL J. HARRIS, ESQUIRE
Arnold & Porter Kaye Scholer LLP
70 West Madison Street
Suite 4200
Chicago, Illinois 60602
(312) 583-2422

LINDSEY C. STAUBACH, ESQUIRE
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001
(202) 942-5029

The above-entitled matter came on for hearing on Wednesday,
May 7, 2025, commencing at 1:30 p.m., at the U.S. Patent and Trademark
Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

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JUDGE BARRETT: Welcome everyone. We are on the record in
IPR2024-00460 Lululemon USA, Incorporated v. Nike Incorporated.

I am Judge Barrett. I'm here in Alexandria with Counsel. And
appearing by video today are Judges Fitzpatrick and Daniels. I'd like to start
with the parties' appearances. Who do we have for petitioner today?

MR. RAZAI: Good afternoon, Your Honor. My name is Ali Razai
from Morgan Lewis. With me is my partner, Brandon Smith.

JUDGE BARRETT: Welcome.

MR. RAZAI: Thank you, Your Honor.

JUDGE BARRETT: And for patent owner today?

MR. HARRIS: Yeah. Good afternoon, Your Honors. Michael
Harris and Lindsey Staubach from Arnold and Porter for patent owner.

JUDGE BARRETT: Thank you.

MR. HARRIS: Thank you.

JUDGE BARRETT: All right. As you know, we set forth the
procedure for today's hearing in our oral argument order. Just as a quick
reminder, I imagine everybody knows how these work, but bear with me.
Both parties are going to have 60 minutes total to argue their cases.
Petitioner will go first and may reserve rebuttal time. Patent owner will then
have the opportunity to present its response and also may reserve some time
for a brief sur-rebuttal. Petitioner will then present rebuttal arguments, and
patent owner will close us out with sur-rebuttal arguments.

For the -- we do have your demonstrative exhibits. They are pulled
up on our computers. As we go through your presentations today, please

1 identify whatever slide you're on. That will help not only the Judges who
2 are appearing by video, but also for a clean transcript. And that will help us
3 later when we're drafting the decision. If you're going to refer to something
4 that is not in your demonstratives, you're going to pull something from the
5 record, give us a good clean citation --, exhibit number, page, column, line
6 number, something like that. These hearings are open to the public and there
7 is an open line. I don't expect any confidential information to come out
8 today, but if you foresee something like that, just pause, let me know, and
9 we will deal with it as appropriate.

10 Any questions or concerns, Petitioner?

11 MR. RAZAI: No, Your Honor.

12 JUDGE BARRETT: Patent owner?

13 MR. HARRIS: Nope. We're good. Thank you.

14 JUDGE BARRETT: All right. Then with that, let us begin.

15 Petitioner, whenever you are ready. And if you could tell me how
16 much time you'd like to reserve.

17 MR. RAZAI: Your Honor, I'd like to reserve 15 minutes for rebuttal,
18 if possible.

19 JUDGE BARRETT: 15, correct?

20 MR. RAZAI: Yes. Thank you, Your Honor.

21 JUDGE BARRETT: All right.

22 MR. RAZAI: And Your Honor -- Your Honor, I will be arguing the
23 Nishida-based references. And Mr. Smith, for his first PTAB argument, will
24 be arguing the remainder of the grounds today. So there will be a switch at
25 some point.

26 JUDGE BARRETT: That's fine. That's fine.

1 MR. RAZAI: Thank you, Your Honor.

2 This is the 749 patent, as I'm sure many of you are very, very familiar
3 with at this point. The 749 patent teaches a method of manufacturing a shoe
4 upper. And the claim method is relatively simple. It's not -- it's a pretty
5 broad patent. Not a lot of bells and whistles. It's a method -- a method of
6 manufacturing an article of footwear. The method comprising, per step, is
7 simultaneously knitting a textile element with the surrounding textile
8 structure, the knitted textile element having at least one knitted texture that
9 differs from a knitted texture in the surrounding knitted textile structure,
10 meaning that there's at least one texture on the part that's the upper that's
11 different than the waste, the outside material.

12 The next step is -- the next two steps are relatively simple and they're
13 just basic steps in creating shoes, which is, you remove that upper textile
14 element from the surrounding knitted textile structure. And then you
15 incorporate that knitted textile element into the article of footwear. And not
16 surprisingly, the only dispute left really is at that first step, the
17 simultaneously knitting step, but not the entirety of it. Here, there is -- there
18 seems to be no dispute between the parties regarding the knitted textile
19 element having at least one knitted textile structure different from what's in
20 the outside. The only dispute that remains is simultaneously knitted that
21 textile element with the surrounding textile structure. The only other
22 independent Claim 13 -- the only difference between Claims 1 and 13 really
23 are that, Claim 13 talks about knitting multiple uppers on the same piece of
24 material.

25 And the only argument there, again, is this portion about knitting a
26 first textile element simultaneously. So it's the simultaneous limitation that

1 is really the only dispute in the Nishida webbing. But then Nishida
2 absolutely anticipates that particular limitation. Now, we look at the abstract
3 in Nishida, the abstract in Nishida first says to this end --

4 JUDGE BARRETT: If I could remind you, please read off the slide
5 numbers as you go along, please.

6 MR. RAZAI: I'm awful with that. I will try really hard. So going to
7 Slide 6, Your Honor.

8 The abstract is quoted here.

9 MR. RAZAI: Exhibit 1005 abstract, says, "The invention proposes
10 that when the strip of material 1 is manufactured, the patterns 2 of the
11 upper," so that's the textile element, "are produced at the same time." There
12 really is no equivocation un-ambiguity about when it's produced. It's at the
13 same time as the strip of Material 1. And if there's any ambiguity at all
14 about what the strip of Material 1 is and whether it's the surrounding textile
15 structure of that waste material, go to the very end. It says, "The patterns
16 being cut from this strip," meaning the strip of material, "and further work to
17 give shoe uppers." So they're produced at the same time. The upper is cut
18 out, and then it's worked to be incorporated into a shoe.

19 If we go to Page 5, another example says in Figures 1 and 2, 1
20 indicates a material web, that's the entirety of everything. That's the Surface
21 Area is 1.1, which is the surrounding textile structures in purple, as well as
22 the textile element or the upper that's shown in green. During its production
23 -- during its production by a method customary. And the reason why a
24 method is important is there's some arguments later about having to use
25 various different methods on the same sheet, necessarily, which is not in any
26 way even suggested that it's a necessarily -- it's -- that there could be various

1 different methods used by during production, meaning that the material web
2 production, by a method customary to the textile industry, you can do it by
3 various different things, including knitting. It's provided a single or plurality
4 of unwound web parts for the shoe upper. Basically, you use a method to
5 make it at the same time, and you could knit it. You could weave it. You
6 could make it in different ways. But here, the relevant method that we're
7 talking about is they're knitted at the same time.

8 Now, one thing we'll get to in a second as well in some later slides, is
9 we'll get into the fact that Nike doesn't dispute that the entirety could be
10 knitted. And that's expressed in some of their filings, including a footnote in
11 their sur-reply. I believe it from their sur-reply. What the only dispute is,
12 that they're not necessarily knitted at the same time or simultaneously. But
13 that's exactly Nishida says, is that they're done at the same time.

14 Now, what we're really left with is an out of -- an out of context
15 quote that Nike takes from the Brookstein deposition from the District Court
16 action, and states that Brookstein somehow agrees that the Surface Area 1.1,
17 which is the purple surrounding textile structure, and the Unwound Web
18 Portion 2, which is the green part or the textile element of the uppers, are
19 somehow not made during the same knitting process. That's not what
20 Brookstein says. We'll get to the Brookstein quote in a second. But what's
21 important is that Brookstein repeatedly confirmed that they're made at the
22 same time.

23 Looking at the Brookstein declaration here on Page 7 of the slides. I
24 remembered that time.

25 MR. RAZAI: Exhibit 1003 at Paragraph 76, Dr. Brookstein puts in
26 his report, "Each of Nishida's unwound Web Parts 2 is a knitted textile

1 element." That's undisputed. "Nishida's Surface Areas 1.1 are a surrounding
2 textile structure." I don't believe there's a dispute there. "The single textile
3 structure of Nishida's Web Material 1, which is knit during a single process."
4 So all of it is knit during a single process and includes the knitted textile
5 element green, that's the upper, and the surrounding textile structure colored
6 purple into you. That's Dr. Brookstein's opinion.

7 Going on, Dr. Brookstein, again, confirms that here on Slide 8, he
8 testified that the material web is made at the same time, includes Surface
9 Areas, 1.1, the surrounding textile structure, and the knitted textile element.
10 Now, let's go to this famous quote that's been in every filing that they've
11 made. This is a District Court Deposition. This is the portion that Nike
12 repeatedly keeps citing. "Is it your understanding, Dr. Brookstein, that
13 Unwound Web Part number 2 disclosed in Nishida are same -- are
14 simultaneously knit with the base material?" And again, base material is not
15 a word that's anywhere in the reference. No -- not with the base material,
16 no.

17 And so there's some surprise. No? Well, what do you mean by that?
18 What makes you say that? This is the part that no one -- that Nike won't put
19 into the reference. What makes you say that? You can't knit two separate
20 unconnected fabrics at the same time. He was talking about two separate
21 things, having one and having another. Obviously, you don't knit two
22 unconnected things at the same time. He was in no way saying that there is
23 a base material and then something is knit on top of the base material.

24 Going to Slide 10, Brookstein testified that Nishida disclosed a
25 simultaneous knit. Paragraph 76 of Dr. Brookstein's declaration. "Each of
26 Nishida's unweb -- unwound Web Parts 2," that's a mouthful, "is a knitted

1 textile element." This is what he said, "The single textile structure is knit
2 during a single process." Going to Paragraph 106, we already went through
3 76. "As I explained for Claim 2, Nishida thus describes knitting two textile
4 elements simultaneously with knitting a surrounding textile structure,
5 Surface Areas 1.1." That is Dr. Brookstein's opinion.

6 Now, let's go to the depositions from Dr. Brookstein. "Again,
7 confirm, is it knit with -- over an existing material?"

8 "No, not at the same time. You're making a material web. It's done
9 simultaneously."

10 That's Page 11 of the slides.

11 JUDGE FITZPATRICK: Mr. Razai --

12 MR. RAZAI: Yes, Your Honor?

13 JUDGE FITZPATRICK: Can we go back to Slide 8?

14 MR. RAZAI: Absolutely, Your Honor.

15 JUDGE FITZPATRICK: Slide 8.

16 And sorry, Judge Daniels, I maybe have some more questions. But I
17 -- so I understand his direct testimony that you -- that you -- that you've gone
18 through, I understand what you will assert to be his opinion. What is he
19 saying in this Q and A here? I -- and I understand that you're disputing what
20 patent owner is saying.

21 MR. RAZAI: Right.

22 JUDGE FITZPATRICK: But what is his point here with this answer,
23 quote, "not with the base material, no?"

24 MR. RAZAI: So what does it mean -- so this is -- the question and
25 answer starts with, "What does it mean when it says a textile production

1 method within the -- within the material web?" This is reading from
2 Nishida. It's a quote, asking Dr. Brookstein what it means.

3 He said, "That tells me it could be either knitting or weaving within
4 the material web."

5 Basically, that's -- he's just -- he's regurgitating the quote and saying
6 it can be knit or it could be woven as that Material Web 1, which is
7 everything. So then the question says, so are you saying that knitted upper is
8 knitted within an existing material web? So when you're knitting the upper,
9 are you putting it on a web that exists? Kind of trying to test a -- or the --
10 what they thought was the testimony from the District Court. You're --

11 So they're saying, so what you're saying, let me know, Dr.
12 Brookstein, is the textile upper, the knit on top of a material web?

13 And he said, no. It's at the same time you're making a material web.

14 So you're doing it all at the same time. The upper -- and everything
15 else is all knit simultaneously in one knitting process.

16 And then the next question from Nike is, doesn't the phrase within
17 the material web suggest that the material already exists?

18 Dr. Brookstein testifies, no, not to me. It doesn't suggest that there's
19 a web that exists that you knit something else on top of or you somehow
20 create that upper on top of that.

21 JUDGE FITZPATRICK: So then -- so then is his issue that the term
22 -- I know this is you rephrasing. You didn't use the word base material, you
23 said material that is knit on top of it, or something like that. And I think
24 earlier you said, the term base material doesn't appear in Nishida; is that
25 right?

1 MR. RAZAI: That's correct, Your Honor. The term that appears in
2 Nishida, the majority of the time that they're referring to the surface areas is
3 called Surface Areas 1.1. There is one point in Nishida where they call --
4 they call out a material base 4. Not a -- I -- let me check the exact
5 phraseology.

6 JUDGE FITZPATRICK: Well, it may not be super important, but
7 what I want to get at is it your opinion -- I just kind of want to know where,
8 you know -- you know, you're not Brookstein, but you know, what's your
9 position on what he meant by this?

10 Is he disputing -- is it fair to say that your opinion is he wasn't even
11 speaking to the "simultaneously" aspect of the question, he was disputing
12 the premise because there is no base material?

13 MR. RAZAI: There is no base material. So basically, what he was
14 saying -- and the questions that -- and answer that came up, it's in the record,
15 so you can kind of look through the entire question and answer. We were
16 talking about an entire district court litigation with a lot of various different
17 moving parts. This question kind of came up out of the blue, and the
18 question was, can you knit a material base and an element at the same time?
19 And his understanding was, we're talking about two things that aren't
20 connected, two separate things. And he said, no, you don't knit two separate
21 things at the same time. And then they asked, well -- and they didn't really
22 understand what he meant by that. So then the question was, well, why can't
23 you? And his response was exactly what was implicit in his answer, which
24 is, you don't knit two unconnected things at the same time.

25 I don't think anybody here will ever argue that the material -- that the
26 surrounding textile element of Nishida is somehow separate physically from

1 what is the Surface Area 1.1, which is what Dr. Brookstein was referring to
2 based on what he thought he was being asked, can you knit two separate
3 things that are not connected at the same time? And his answer from a Ph.D.
4 person with textile engineering experience is, two unconnected things, you
5 can't -- you can't knit those at the same time. He wasn't talking about what
6 his theory of how the shoe was made. He was answering a question about
7 words that were not necessarily being shown in the context of a reference,
8 just can you knit a base and an element that are unconnected at the same
9 time, was his understanding. He answered no. He was asked why. And he
10 said, because they're not connected. I don't think there's any argument here
11 that these are unconnected. They are absolutely connected. Everyone
12 knows that they're connected. You actually cut one out of the other. It's the
13 only way to remove it.

14 JUDGE FITZPATRICK: I guess -- and I get that. It may -- it makes
15 sense. But also what also would make sense is if he said, I don't understand
16 what you're asking me, these things are -- they're connected.

17 So why does he -- why does he focus on the base material and say --
18 and say no?

19 MR. RAZAI: This is a -- so this is a different question and answer,
20 Your Honor. This is -- this is the question and answer where he now -- this
21 is from the IPR. This is where he does understand it. And here, what he's
22 saying is, no, it didn't preexist. They're done at the same time. So this
23 answer is just basically saying what his -- what his understanding of Nishida
24 is, which is, no, there's no preexisting material that you knit on. Everything
25 is made simultaneously.

26 JUDGE FITZPATRICK: Okay.

1 MR. RAZAI: The part that Nike was clinging onto is the prior -- I
2 believe this -- in -- on Slide 9, this is the one where Nike was pointing to
3 when saying that somehow, Brookstein understands it to be in separate
4 processes. That's not the understanding. This is the only part they're
5 pointing to. The prior slide and the prior testimony was Brookstein being
6 very clear, no, there is no preexisting base material. It's all done at the same
7 time.

8 JUDGE FITZPATRICK: Thank you. I understand.

9 MR. RAZAI: Thank you, Your Honor.

10 JUDGE DANIELS: I have a follow-up question related to --

11 MR. RAZAI: Yes, sir?

12 JUDGE DANIELS: Let me ask if -- are there manufacturing
13 processes in the industry where they -- these two things are done separately?

14 MR. RAZAI: That -- that's a great question, Your Honor. There is
15 both -- so our expert, Dr. Brookstein, said he has no understanding of this
16 ever being done in the fabric or textile industry. The only thing that we've
17 seen in this case was that there was a reference from the 80s that Dr. Pastore
18 put into the record talking about a reinforcement of a ceramic brake used for
19 airplane brakes. So an air -- a brake -- a ceramic brake for an airplane. And
20 talking about reinforcement of a knit structure with other inlaid strands
21 putting -- being put on top, where when you do that, it reinforces this
22 material that's used for ceramic brakes, but it destroys the underlying fabric.
23 It unavoidably destroys it.

24 But the answer that you get from Dr. Brookstein repeatedly, and we'll
25 get to that in a -- in a second, it's -- he says, when you're knitting fabrics,
26 when you're knitting shoes or clothes, it's impossible to knit on top of a knit.

1 You just don't do it. You knit -- and his answer is, you knit with yarns, you
2 don't knit with fabrics.

3 And that's very different than the Leach reference that 2010 --
4 Exhibit 2010 from Nike. That talks about laying reinforced strands into
5 airline ceramic brakes to make them stronger. But understanding with the
6 very last line -- the very last line of that reference, Your Honor, it says that,
7 "While the piercing action unavoidably damages the reinforcing fiber, the
8 powerful knitting machine also permits the incorporation of a fiber mat as a
9 surface layer for the composite." That's a composite brake. That is the only
10 thing that we have in the record. Obviously, if you're trying to put knit
11 needles through an existing structure, you're going to destroy that structure,
12 and all you're doing is creating some inlays to create reinforcement.

13 But when you have the textile manufacturing engineer in Dr.
14 Brookstein testify -- let me see if I -- "Is it your opinion that you can't knit
15 something on something that's already knitted?" This is Nike's question of
16 Dr. Brookstein.

17 "That is correct."

18 "Why not?"

19 "It's mechanically impossible. You knit with yarns, not with fabrics."

20 JUDGE DANIELS: Where's that -- where is that in the binder?

21 What slide?

22 MR. RAZAI: It's -- this is Slide 14, your Honors. It's Exhibit 2004,
23 which is the Brookstein deposition, on Pages 82 and on Pages 84.

24 MR. RAZAI: If you actually were to read that section probably from
25 Pages 81 through 85, it's unambiguous that Dr. Brookstein, who's got a

1 Ph.D. in textile engineering, says, I've never heard of anyone knitting on top
2 of a knit. You just don't do it.

3 JUDGE DANIELS: Is there any dispute in this case -- I was just
4 looking -- we don't -- as far as I can see, we don't have a claim construction
5 issue, at least not in the -- in our institution decision. Is there any dispute
6 that simultaneously does not -- does not mean done in the same process? I
7 think the words you're using, you know, is one knitting process. Is there any
8 dispute that simultaneously is not an equivalent of one knitting process?

9 MR. RAZAI: I don't believe that there is any such dispute that I'm
10 aware of, Your Honor. But the part to me that's unambiguous is that Nishida
11 expressly says that the entire thing is done at the same time. It's done at the
12 same -- I can't -- I can't imagine if there was a claim construction argument,
13 that the words at the same time wouldn't fit within the scope of that
14 construction.

15 JUDGE DANIELS: Thank you.

16 MR. RAZAI: Thank you, Your Honor.

17 So going to Slide 12, now, if Nike doesn't dispute Nishida here, this
18 is from the sur-reply. It's Page 13, footnote 3. This is from Nike, saying that
19 they don't dispute that Nishida discloses that both the Material Web Base 4
20 and Pattern Elements 2 may be knit. The only thing that they're arguing is
21 that they're done in separate knitting processes. But the one thing that we
22 don't see, Your Honor, is that there's not a single thing that they point to in
23 Nishida that in any way unambiguously shows even the possibility of
24 knitting in separate processes, not some inherent argument that it must be
25 done that way. As the petitioner, the burden that we have to show -- that we
26 have to carry by a preponderance of the evidence is that the reference

1 discloses something. If there's 15 additional possibilities and alternatives, it
2 won't make a difference. We still carry our burden. But here we're not even
3 hearing from Nike that there is another possibility of being able to be knit in
4 separate processes. The reason is you don't knit on top of a knit. And that's
5 why what we just went through with Dr. Brookstein follows this slide, is you
6 just don't do it. So even if it were a possibility, it still wouldn't affect our
7 challenge to the patent, because it wouldn't mean that it's the only way to do
8 it.

9 Going to Slide 13, it's important to note that Nike agrees that the
10 entire material web may be knitted. This includes the Surface Area 1.1 and
11 the Unwound Web Portions 2.2. But again, the fact that it'd be knitted in
12 separate processes is just inconsistent with the processes that are used in the
13 space overall, much less completely inconsistent with what's in the
14 specification of Nishida. It doesn't in any way show at all, much less even
15 ambiguously, that it's possible to knit on top of a knit. It's just not there.
16 And again, this is Slide 14 that we were talking about a second ago, about
17 what Dr. Brookstein said about the impossibility of knitting on top of a knit.

18 Going to Slide 15, what we have Nike saying is that Nishida never
19 discloses the Material Web 1 and Pattern Pieces 2 are produced together in
20 the same knitting process. This is from sur-reply, Page 12. And this is the
21 part that I found interesting, is the very next sentence here, which is from the
22 response of Cases 18 to 20. "Instead, Nishida exclusively discloses,
23 exclusively discloses using a variety of processes to form Material Web
24 Base 4 and Pattern Pieces 2," meaning that according to Nike, Nishida says
25 you can't use the same process. You have to use different processes. And
26 what they're using is the abstract.

1 But if we go back to Slide 6, this is the abstract that we're talking
2 about here. And this is really interesting, because when we look at the
3 abstract, to this end, the invention proposes that when the strip of Material 1
4 is manufactured, we went through this, that it's produced at the same time as
5 the strip of Material 1, and then is cut out.

6 But let's look at the middle part. This is the part that Nike keeps
7 clinging onto on this abstract. "Is produced using different manufacturing
8 techniques." Now, if the sentence stopped there, we could say, well, what
9 does that mean? Maybe it does mean that. Maybe it does mean using
10 various different production techniques. But the grammar there doesn't even
11 suggest that. But let's step away from that for a second and look at the next
12 sentence that Nike keeps avoiding. What are these different manufacturing
13 techniques? Such as. These are examples of these techniques. Different
14 makeup, different yarn material, different color, different material thickness,
15 single or multilayer. So what we're really getting at is what Nishida is
16 saying is you don't necessarily have to use these different techniques, but the
17 different techniques that we're talking about are ways to impart different
18 texture, that can be used in a weave, that can be used in a knit. It's not
19 saying mix a knit with a -- with a weave with an embroidery. They're saying
20 that use different techniques like using different yarns. What are different
21 yarns going to do? They're going to impart different texture. What are
22 different colors going to do? They're going to impart different color. Does
23 that mean that you can't knit it? No, not at all. It's just that in the knitting
24 process, you can impart various different properties by using these different
25 things, which can all be done at the same time.

1 As everyone in the art knows and understands, you can use different
2 yarns in the same process. That doesn't change the process. But even if it
3 somehow were different processes, this sentence doesn't suggest in any way
4 that the only way to do it is to make 1 in a different way than 2. You can't
5 knit on top of a weave. You can't knit on top of a knit. You knit with yarns.

6 JUDGE BARRETT: Counsel?

7 MR. RAZAI: Yes, Your Honor?

8 JUDGE BARRETT: And this is for both sides. The judges coming
9 in remotely, they may not be able to see very well the screen on the side.

10 MR. RAZAI: Yes, Your Honor.

11 JUDGE BARRETT: So just as you're making your presentation,
12 continue reading off the numbers, but you're -- you like to gesture, and I
13 appreciate it, but I don't think they can see what you're gesturing there.

14 MR. RAZAI: Got it. Thank you, Your Honor. So we were talking
15 about Exhibit 1005 in the abstract. This is -- we had gone back to Slide 6 on
16 this point. So those are the -- it's -- I don't really think that's a very
17 complicated issue. Nishida talks about producing it at the same time. It
18 talks about producing the material web and taking out that upper -- the other
19 elements are not in dispute in the independent claims.

20 And I'm happy to field questions if there are any at this point, or I can
21 wait until the rebuttal. But at this point, I'll probably move on to the planar
22 argument, if that's okay with the panel.

23 JUDGE BARRETT: I think we're comfortable.

24 MR. RAZAI: Thank you, Your Honor.

25 So the next issue is disclosing a substantially planar configuration,
26 and this doesn't touch on the independent claims, but it has to do with

1 Claims 5 and 15 of the 749 patent. And basically says that when the knitted
2 textile element is removed from the surrounding knitted textile structure, it's
3 in a -- in a substantially planar configuration, basically saying there's no
4 claim construction issue here, and it's not planar, it's substantially planar. It's
5 to distinguish from a three dimensional knit, and it's not three dimensional.

6 If you look at the actual figures, which is what Dr. Brookstein relies
7 on and which the petition is based on, you see that it's a planar configuration
8 when it's within the -- within the material web before you cut it out. Now,
9 we have to remember that we're talking about a material web that is
10 normally made of lightweight gauze-like material. And if you were going to
11 see curling or bunching based on elasticity, you would see it in this figure.
12 The fact that you were to cut out this other material isn't going to somehow
13 transform this particular upper element into a three-dimensional figure.
14 What we have from Dr. Pastore is -- basically, when I look at it, it may or
15 may not impart curvature. This is what Dr. Pastore is talking about. He
16 says, well, depending on how -- what the material is, and you cut it out, it
17 may or may not impart curvature. It may or may not.

18 Now, what we're looking at is a pretty unequivocal and unambiguous
19 figure of an upper with a -- with a completely planar configuration.
20 Obviously, the fact that you have texture on it isn't going to change that, and
21 even Dr. Pastore says some amount of curl wouldn't change that. But here,
22 there can be no argument that this thing comes out in a substantially planar
23 configuration when you cut it out. It's just evident from the figure itself.
24 And when we're talking about a reference that's as old as Nishida. We're not
25 talking about three-dimensional knitting. And that's why it talks about
26 folding the upper into the shoe itself. So this part -- obviously, I don't

1 believe that this argument has any merit or carries any weight, but happy to
2 discuss if there's questions on it.

3 Hearing none, I will turn it over to my partner, Mr. Smith.

4 MR. SMITH: All right. Good afternoon, Your Honors. I will go
5 just directly to the Zuckerman grounds here, and this is where claim
6 construction does come into a little bit. I don't want to spend a lot of time on
7 this issue, just given the time we have today. As we set forth in our briefing,
8 Lululemon contends the plain ordinary meaning of surrounding textile
9 structure is the textile area outside of the knitted textile elements. I don't
10 think there's a dispute that that is where the surrounding textile structure
11 must be. The dispute is just how much there must be, and Nike wants to
12 limit it to -- basically, it has to go completely or mostly around.

13 I recognize the district court disagreed with us on this right before
14 our reply brief, and as a result, I don't want to spend a whole lot of time on it
15 today. I do want to, however, note that, through IPRs and other prosecution,
16 Nike has talked about the goals of this patent family, and one of those goals
17 is manufacturing efficiency. And their construction goes in the opposite
18 direction. What it results in is a patent that these -- the patent -- you have
19 the knit waste that goes mostly or completely around the textile element,
20 whereas they've said in a related IPR, and not on this patent, on different a
21 patent family, the 749 patent family finally solved the well-recognized and
22 long felt need of reducing waste in the manufacture of uppers.

23 It leads to a strange scenario where their argument about Zuckerman
24 is really, Zuckerman doesn't have enough waste in the right spots. And that
25 seems like a very strange reason that the 749 would be patentable over a
26 reference as old as Zuckerman.

1 JUDGE BARRETT: Counsel, I want to go back a moment. When
2 you started, you said the district court had, I take it, disagreed with your
3 position or agreed with your opponent's position, so you weren't going to
4 spend a lot of time on it. What exactly are you saying? Are you acquiescing
5 to Patent Owner's construction?

6 MR. SMITH: No, not at all, Your Honor. We are resting on our
7 briefs beyond what I said here on that. It's been briefed extensively, both
8 here and in the district court, and I don't have a significant amount to add to
9 that right now.

10 JUDGE BARRETT: Well, just understand it may have been briefed
11 considerably in the district court, but that -- I'm not going to be looking at
12 those briefs.

13 MR. SMITH: Correct. Yes. I -- I'm resting on our briefs here in this
14 case.

15 JUDGE BARRETT: Okay. All right. Thank you.

16 MR. SMITH: Thank you, Your Honor.

17 So this is Zuckerman. I'm on Slide 31. We have the textile element
18 here colored in green. There's no dispute that's a textile element. There's no
19 dispute the textile element has multiple textures. There's no dispute this
20 entire strip of material is knit simultaneously. The only dispute on the
21 independent -- not the only dispute, the only dispute on this limitation of the
22 independent claim is whether the purple textile structure constitutes a
23 surrounding textile structure, or really, whether the purple material goes far
24 enough around and is a large enough amount of waste to constitute a
25 surrounding textile structure.

1 Under Lululemon's proposed construction, this limitation we've met.
2 There's no dispute about that. I don't think Nike even argues otherwise. We
3 contend, even under Nike's argument, though, under Nike's construction, it
4 would still be met. And as we can see here, the purple textile structure
5 constitutes the entire textile structure outside of the textile element. The rest
6 is just air.

7 Now, neither party here argues that the surrounding textile structure
8 has to go all the way around. Dr. Pastore -- and I'm on Slide 32 -- said, I
9 don't think the claim requires it to be completely surrounded. Nike in their
10 sur-reply put the construction that the district court adopted of completely or
11 mostly surrounding. So it doesn't have to go all the way around. It just has
12 to go mostly around, under Nike's construction.

13 JUDGE FITZPATRICK: Mr. Smith, on this -- on Slide 31, what's
14 the -- are we looking at the backside? What's the white material? What's the
15 white outside of the purple? Is that just for clarity of the drawing?

16 MR. SMITH: So for clarity of the drawing, the white outside of the
17 purple is actually the start of another textile element. Zuckerman knits a
18 repeating strip of material that basically was textile element, waste material,
19 textile element, waste material.

20 JUDGE FITZPATRICK: Got it. Thank you.

21 JUDGE BARRETT: Counselor, help me with your proposed
22 construction. Textile area outside the knitted textile elements, what else
23 could there be besides air?

24 MR. SMITH: Very good question. There could also be another
25 textile element next to each textile element. Just -- we've got two textile
26 elements right next to each other.

1 JUDGE BARRETT: Okay. I understand.

2 JUDGE FITZPATRICK: Just that -- just to follow-up, that's just
3 kind of what I asked, right? Like, that's what this Figure 1 is showing,
4 another textile element?

5 MR. SMITH: Yes, except that there is surrounding textile structure
6 between the textile elements in -- is that right?

7 JUDGE FITZPATRICK: Okay.

8 MR. SMITH: What I was proposing in response to Judge Barrett
9 was you could have two textile elements literally right next to each other and
10 cut them out with no intervening structure.

11 JUDGE FITZPATRICK: Thank you.

12 MR. SMITH: So under -- neither party's construction, though,
13 requires that the surrounding textile structure be a single continuous
14 structure. Even Dr. Pastore -- and this is in his deposition testimony; it's not
15 on a slide -- testified that there can be gaps, plural, in the surrounding textile
16 structure. It would still be considered surrounding textile structure.

17 And that's at Exhibit 1025, Pages 78 and 79.

18 MR. SMITH: Well, if there's gaps, then Zuckerman can still meet
19 this. It is still a surrounding textile structure because it surrounds the textile
20 elements.

21 I think Dr. Brookstein said this very well in Paragraph 139 of his
22 declaration, and I'm going to quote him here. "The portion of the continuous
23 strip which surrounds the Blank 11 and is not the Blank 11 is a surrounding
24 textile structure to the knitted textile element." That's our point with
25 Zuckerman, is it is a surrounding textile structure. Yes, it's on both sides of
26 Zuckerman, but that's still sufficient under Nike's construction, in our view.

1 Unless there's further questions on that issue, given the time, I'd like
2 to move on to the incorporated argument.

3 JUDGE FITZPATRICK: And this is -- can you repeat that last
4 point? Even if we adopt Patent Owner's construction, how do you get
5 mostly surrounding?

6 MR. SMITH: We get it from Dr. Brookstein, both in his -- well, in
7 his --

8 JUDGE FITZPATRICK: Can -- I'm sorry. Can you explain it in
9 reference to, like, you know, Figure 1 --

10 MR. SMITH: Sure.

11 JUDGE FITZPATRICK: -- on Slide 31?

12 MR. SMITH: Yeah. So in Figure 1 on Slide 31 -- and this is in
13 Paragraph 139 of his declaration -- he says, "The portion of the continuous
14 strip," so talking about the entirety of Zuckerman, "which surrounds the
15 Blank 11," so he's talking about the purple parts, "and is not Blank 11, that
16 constitutes the surrounding textile structure." So he -- he's explaining, this is
17 the surrounding textile structure. Now, Nike and Dr. Pastore have also
18 admitted that in their -- even in their view, this is about -- they say about a
19 quarter each, so about 50 percent, if you add those up. So it would meet the
20 mostly limitation, in our view.

21 JUDGE BARRETT: The portion that you just read from the witness
22 -- you seem to just be basically stating what your demonstrative figure says,
23 purple surrounding the green, but that doesn't really help me understand
24 what surrounding means or even what the expert would think it means.

25 MR. SMITH: So Dr. Brookstein's opinion is that the purple goes
26 sufficiently around to be surrounding textile structure. I apologize. I don't

1 have another quote from him offhand beyond what's cited in our papers, but
2 his opinion is this does go sufficiently around to constitute a surrounding
3 textile structure, even under Nike's position.

4 JUDGE BARRETT: I guess what I'm getting at is that feels very
5 conclusory. That's basically restating what the attorneys want to argue, but
6 is there any flesh on the bone as to why that would be deemed by a person of
7 ordinary skill in the art to the purple surrounding the green?

8 MR. SMITH: Well, even under Nike's construction, purple
9 surrounding the green just means the purple goes mostly or completely
10 around. So if the -- all he's saying is the purple goes mostly or completely
11 around. I -- that's not the exact words he used, but that is his point, and I
12 think that's --

13 JUDGE FITZPATRICK: Even though you don't have his words, you
14 know, right here at hand, did he -- did he take a mathematical position? Did
15 he measure this and say, like, the purple is 51 percent of the perimeter of the
16 green?

17 MR. SMITH: No, neither expert has actually done the math and
18 measured out the edges of Zuckerman.

19 JUDGE FITZPATRICK: So how did he conclude -- or what was his
20 factual basis for saying that the purple that we're seeing here on Figure --
21 you know, Slide 31, taken from Figure 1 of the -- of the prior art, where's he
22 getting mostly? I think that mostly has to be at least 51 percent, you know,
23 more than half.

24 MR. SMITH: Yeah, and he's looking at the figure and says, to him,
25 that looks like it's mostly around.

26 JUDGE FITZPATRICK: Okay. All right. That's all. Thank you.

1 MR. SMITH: Thank you.

2 If there are no other questions, I'll briefly touch on the incorporating
3 argument. So with respect to incorporating, there's no dispute that
4 Zuckerman discloses an article of Footwear and -- in its final form, an article
5 of footwear meaning it has both an upper and a sole. The sole dispute here
6 is whether taking Zuckerman and -- out of its form in a knitted strip and
7 making it into an article of footwear is sufficient. Dr. Brookstein's explained
8 the steps. He's explained how it goes from knit strip to final footwear.
9 That's incorporated.

10 Nike's argument then has ultimately evolved to be, well, you have to
11 incorporate it into a separate sole structure. There is no support for that
12 anywhere in the intrinsic record. Instead, Nike goes to the IPR decision
13 from the New Balance matter, and I don't think that decision helps them
14 either. That decision addressed is a sock, an article of footwear. That's not
15 an issue in our case. Zuckerman's not a sock. Nobody's argued it's a sock.

16 And that decision also held that an article of footwear means sole
17 structure and an upper. Well, again, there's no dispute. The experts agree.
18 Parties seem to agree. Zuckerman has an upper and a sole structure. This --
19 the New Balance decision just does not support any assertion that the
20 incorporating step transforms a claim that already, through the phrase
21 "article of footwear", includes an upper and a sole structure to mean the
22 upper has to be incorporated into a separate sole structure.

23 JUDGE BARRETT: So I may be mischaracterizing it. I thought the
24 issue was more about, what does it mean to incorporate? I understand, I
25 believe, Petitioner's position is, once we cut out this pattern, you fold it up,
26 and it makes a shoe, it has been incorporated into an article of footwear, or

1 whatever the claim language is, whereas I understand Patent Owner to say,
2 no, you need to take whatever you cut out and incorporate that. You
3 incorporate it by adding it to something else, in this case a separate sole
4 structure.

5 MR. SMITH: So I think that was Nike's position originally.
6 However, the problem with that position has been that Zuckerman does take
7 the Blank 11 and incorporate it with the toe-covering portion. And it
8 specifically describes that the article of footwear is not complete until those
9 two pieces have been connected.

10 And that's Exhibit 1008, Page 1, right-hand column, at 31 to 36, and
11 it's talking about Figures 4 and 6.

12 MR. SMITH: So the result was in -- I'm going to get the brief wrong.
13 Either -- I think it started a little bit in the patent owner's response, and then
14 completely in the sur-reply became, incorporating requires the upper to be
15 incorporated into a separate sole structure. So it's gone one step further than
16 incorporated into something else. That something else now has to be a
17 separate sole structure, and there's no support for that. It would be
18 redundant. And in fact, Claim 12 actually introduces the concept of an
19 upper and a separate sole structure and says, put them together and secure
20 them together. So that -- it just -- that construction or that view of what
21 incorporating means doesn't make any sense in view of the dependent
22 claims.

23 The other issue with Nike's argument is it leads to testimony from Dr.
24 Pastore that the unremoved blank still in the knitted strip constitutes a,
25 quote, "incomplete article of footwear". That testimony just makes no sense,
26 but it's the circularity that the board noted in the institution decision, when

1 you say, incorporating means you have to go into something else, and things
2 like that. Each step of the process, as we've explained, is the incorporation.

3 I will move quickly to the knitted outlines. This is no longer
4 independent claims. It's Dependent Claims 3 and 14, and I'm on Slide 38.
5 The anticipation of knitted outlines to quickly level set. Everyone agrees
6 that variance stitches can create a knitted outline. Dr. Pastore testified to
7 this.

8 It's on Slide 39, Exhibit 1025 at 267. He also explained in that bit of
9 testimony that an outline really is just the perimeter of the element you want
10 to incorporate. Well, take that with what Dr. Brookstein then said, and I'm
11 on Slide 40. He said, "Zuckerman's Figure 1 shows varying stitches
12 throughout the continuous strip forming an outline of the knitted element,
13 blank 11, along lines 27 and 29."

14 So if we look on Slide 40, we have Zuckerman's Figure 1
15 unannotated, and then the annotated version. You can see the -- what Dr.
16 Brookstein is pointing to here as the varied stitches. It -- it's pretty apparent
17 his view. Nike criticizes this argument as short, but this is anticipation based
18 on what the expert understands from a figure. It doesn't require a lot of
19 words to explain. I see varied stitches in the figure. Here they are.

20 And Dr. Brookstein explains, here's the outline. I can see it. Nike
21 also says that 29 and 27 in figure 1 are cut lines. Well, yeah. Zuckerman
22 says they're cut lines. That's where you cut. It's an outline. It makes sense
23 that you would cut along those lines where it's telling you to cut the
24 perimeter of the textile element, and those are describing post-processing
25 steps.

1 I'll also briefly touch on the substantially planar configuration issue.
2 Here, Zuckerman describes its material as a continuously knitted strip. Dr.
3 Brookstein testified in his declaration on Slide 42 that when he reads -- when
4 he reads strip of fabric in the context of Zuckerman, it's talking about a
5 substantially planar piece of material. This is a patent from I think the
6 1920s. He's talking about a substantially planar piece of fabric. He
7 understands what it's talking about in the context, and says it's planar in the
8 material. Nike wants to say that's a definition he made up solely based on
9 Zuckerman. But what he actually testified to was, look, I'm reading the text
10 in the context of the reference, looking at the reference as a whole. He didn't
11 make up a definition based on Zuckerman. He said, here's what I understand
12 as a person of ordinary skill in the art when I read Zuckerman. That's what
13 he is supposed to do as an expert.

14 He then explains, "When I take that continuously strip of --
15 continuously knitted strip that I see in Figure 1, it confirms it's a
16 substantially planar piece of material." Dr. Pastore's response to that was, I -
17 - I'm just not sure I can tell. Well, look at the figure. It shows the strip of
18 material that looks planar. Dr. Pastore also takes issue with the text and says
19 there's nothing to support its planar. Well, Dr. Brookstein explained in
20 detail how the folding steps to tell him that I started with a planar step --
21 strip of material, and then took post-processing steps to turn it out of a planar
22 material consistent with what Zuckerman describes as an intended
23 simplification of the shoe manufacturing process.

24 I only have about a minute left, Your Honor, and I don't want to cut
25 into rebuttal time, so ask some questions. I will pause here.

26 JUDGE BARRETT: I think we're fine.

1 MR. SMITH: Thank you, Your Honor.

2 JUDGE BARRETT: As you're setting up, how much time would you
3 like to reserve?

4 MR. HARRIS: I'll reserve 15 minutes. Thank you, Your Honor. I
5 can see the slides are showing up on my monitor. I don't see them on this
6 monitor to the side, but --

7 JUDGE FITZPATRICK: I'm looking at one that says 11.

8 MR. HARRIS: Perfect. Yeah. Thank you. Thank you. Oh, there
9 it's it. Came up on this monitor, too. Okay.

10 All right. I'm ready, Your Honor.

11 JUDGE BARRETT: You may begin whenever you're ready.

12 MR. HARRIS: Thank you. Thank you. So I'm going to -- I'll
13 address the issues in the same order. I'll start with the Nishida grounds,
14 grounds 1, 2, and 6. And then I'll discuss the Zuckerman grounds 2 -- 2, 3 --
15 or 3, 4, and 5. And I'm going to -- I'm going to start at the beginning with
16 the claim language. There was a lot of -- I heard a lot of attorney argument
17 about what Lululemon's attorneys believe their expert testified to, what they
18 wish he had testified to, what he had an opportunity to testify to, and didn't.
19 And so I want to -- I want to clear that up.

20 And I'm going to start with claim construction and Judge Daniels, a
21 question that you asked about the meaning of simultaneously knitting, and
22 this applies to all the Nishida grounds. So Nishida, the Nishida grounds all
23 fail because Nishida does not teach or disclose simultaneously knitting a
24 textile element with the surrounding textile structure.

1 Okay. So what does simultaneously knitting mean? I want to show
2 you -- or I want to direct you to Dr. Brookstein's declaration in support of
3 the petition.

4 This is Exhibit 1003, Paragraph 73. And this is where Dr. Brookstein
5 defines and construes what the simultaneously knitting means in the context
6 of the 749 patent.

7 JUDGE FITZPATRICK: Mr. Harris, can you give me a slide
8 number, too? I have my own copy of that. And my view of your view is not
9 included.

10 MR. HARRIS: Yeah. Yeah. This is not in the slide. This is just in
11 Exhibit 1003.

12 JUDGE FITZPATRICK: I got it, or I don't -- thank you.

13 MR. HARRIS: Yeah. It's Exhibit 1003, Paragraph 73.

14 JUDGE FITZPATRICK: Thank you.

15 MR. HARRIS: And Dr. Brookstein, his opinion was that
16 simultaneously in the context of this claim -- simultaneously, it means that
17 the textile element and the surrounding textile structure are formed during a
18 single knitting process, okay? The construction isn't at the same time, and
19 there was a lot of talk about at the same time. And I'm going to talk about
20 what that reference to at the same time in the abstract of Nishida's really --
21 what it really means in the context of the rest of the evidence. But for
22 Nishida to anticipate the claims of the 749, Nishida needs to disclose -- what
23 Lululemon needs to show that Nishida discloses with sufficient precision in
24 detail that the textile element and the surrounding textile structure are
25 formed during a single knitting process. Nishida does not teach that.
26 Lululemon cannot show that Nishida teaches it. I'm going to show you why.

1 Before we get there, I want to make sure we're on the same page
2 about some of the terminology in Nishida. So I'm now on Nike's
3 demonstrative Slide 36, and this is an annotated Figure 2 from Nishida. It
4 comes from Lululemon's petition. It's Figure 2 in Nishida, and you've seen it
5 before. Lululemon annotated the -- what they believe is the textile element
6 in green. That's part number 2 in the figure, and Nishida refers to that as the
7 part or the pattern piece or the element, part number 2. Okay.

8 Lululemon has highlighted or colored in purple what Lululemon
9 believes is the surrounding textile structure. Now, you -- you'll see in this
10 figure, there's an element 4. That's the purple that's part of the surrounding
11 textile structure. And Nishida refers to that as the base material or the web
12 base material. Item number 4 -- item number 4, the base, I believe I heard
13 Counsel say earlier that Nishida doesn't disclose a base material at all. I'm
14 going to show you where it does disclose the base material, and it's labeled
15 number 4. Now number 1 in this figure, item number 1, is the entirety. It's
16 all of it. It's this entire web material, including the purple and the green, the
17 entirety of the structure.

18 Okay. So we've got element 1, the entirety. We've got element 4, the
19 base, and element 2, the textile element. Nishida does not disclose that the
20 green and the purple are formed during a single knitting process, and we
21 know that because Lululemon's expert admitted it.

22 All right. So I'm going to go to Slide 42. This is Dr. Brookstein's
23 testimony in June of 2024. We put Exhibit 9 -- Exhibit 9 was the Nishida
24 reference, the translation of the Nishida reference.

25 MR. HARRIS: We put it in front of Dr. Brookstein, and we said,
26 hey, this is the Nishida reference.

1 And he said, yes, it is. It's an English translation of the reference. In
2 fact, he said, you know what? I've looked at it. It's a certified English
3 translation. He knew exactly what he was looking at.

4 We asked him -- again, this is on Slide 42. We asked him:

5 Question: "Is it your opinion, Dr. Brookstein, that unwound parts
6 number 2 disclosed in this Nishida are simultaneously knit with the base
7 material?"

8 Answer: "Not with the base material. No."

9 We asked him again: "No?"

10 He confirmed: "No."

11 Now what have we heard today? We've heard from Lululemon's
12 counsel that, oh, well what he really meant was something else. He was
13 talking about something else. He wasn't talking about Nishida. We handed
14 him Nishida. He was -- he had it in his hands. We were asking him about
15 Nishida. We were asking him about unwound part number 2, and the base
16 material, and he answered, those are not simultaneously knit. That was in
17 June of 2024.

18 We filed our patent owner response in October. Lululemon filed its
19 reply in January of this year. Lululemon had all kinds of time for Dr.
20 Brookstein to provide an additional declaration. Had all kinds of time for
21 Dr. Brookstein to tell us what he really meant, if this isn't what he meant.
22 But nothing more from Dr. Brookstein. Instead, just attorney argument that,
23 oh, well, he really meant something else. Okay. So I'm not -- I'm going to
24 go to Slide 36.

25 JUDGE BARRETT: Just to make sure I understand base material. Is
26 that specific phrase in the reference?

1 MR. HARRIS: Yeah. The -- I will show you on Slide 38, Nike Slide
2 38. This is an excerpt of Nishida. Nishida refers to the Material Web Base
3 4. So that's the 4 that we see in Figure 2 on slide -- Nike Slide 36, that's
4 colored in purple. That's the base 4.

5 JUDGE BARRETT: Well, I understand that. And I'm being very
6 precise. Base material, that's the phrase you used. I believe that was the
7 phrase that was used in the deposition. Is that particular phrase used
8 somewhere in the reference?

9 MR. HARRIS: Understood. Yeah. Thank you for clarifying that.
10 I'm sorry. I didn't understand the question initially. No. The phrase is
11 Material Web Base 4.

12 Okay. So if --

13 JUDGE FITZPATRICK: I have a related question.

14 MR. HARRIS: Yeah.

15 JUDGE FITZPATRICK: Mr. Smith, and I got lost with my slides.
16 Is it -- is it the question and the answer, is that Slide 42?

17 MR. HARRIS: Slide 42, yes, Judge Fitzpatrick.

18 JUDGE FITZPATRICK: Thank you. So in the question, although,
19 you know, the stenographer wrote out the number 2, you said -- I noticed
20 that the question included two quote "parts" for the part number 2, right?
21 But the base material wasn't provided. And the question -- the question
22 could have been more specific definitely. It could have asked -- it could
23 have said, for example, is it your opinion, Dr. Brookstein, that unwound
24 parts number 2 disclosed in Nishida are simultaneously knit with the base
25 material 4? And they didn't say that.

1 My question is, in this deposition transcript, before we get to this
2 page of the transcript, did -- is there a discussion and an acknowledgement
3 of what base material is?

4 MR. HARRIS: No, Your Honor. This started with this line of
5 questioning, putting the Nishida reference in front of him. There is only one
6 base material in Nishida, and it's number 4. That is the only reference to a
7 base in Nishida is the reference to number 4. Agreed, the question, you
8 know, could have used the number 4. It's not in there, though, but there is
9 no other base in Nishida other than 4.

10 JUDGE FITZPATRICK: Thank you.

11 MR. HARRIS: Okay. So if the base is not simultaneously knit with
12 the parts in green, well, then how is this Web Material 1, the entire structure,
13 how is it formed? What does Nishida teach or tell us?

14 I'm going to move to -- I actually want to look at Nishida, which is
15 Exhibit 1005 and Figure 1 of Nishida in Exhibit 1005.

16 Now, this is Nishida with the color, the annotations that Lululemon
17 put on. The annotations have been removed. And I wanted to point this out
18 to you, because if you look at Figure 1, you can see the base material.
19 Nishida shows us the -- this preexisting base. And you can see it in the
20 corners of Figure 1. It's this common knit or weave, a very basic,
21 inexpensive fabric. That's the base material.

22 And what is does Nishida tell us? Okay. So now I'm on to Slide 38.
23 And I see Slide 38. Nishida tells us that there's this material, Web Base 4. It
24 can be a common woven or knitted fabric. And then Nishida goes on to say
25 that the web material, that's the entire thing, both the green and the purple in
26 the annotations, the entire thing could be produced by weaving and/or

1 knitting, and/or embroidery onto that base material. And how do we know
2 that?

3 Well, let's look at the claims. The claims have an issue then. Now
4 I'm on to Slide 39.

5 JUDGE BARRETT: Before we move on, I may have missed it. You
6 were talking about weaving and such onto the base material. Were you
7 reading from a quote from the reference?

8 MR. HARRIS: I am looking at Slide 38, Nishida Exhibit 105 (sic) at
9 Page 5 where it reads -- or where it says that in the figures, 1, that 1 is the
10 entirety of the -- of the structure, both the green and the purple, 1 indicates
11 "A material web, which during its production, by a method customary in the
12 textile industry, e.g., weaving and/or knitting, and/or embroidery, is
13 provided with a single or a plurality of Unwound Parts 2."

14 So what Nishida is saying there is, you create the material web.
15 That's Element number 1. That's the entirety of it. You create that by
16 weaving, knitting, or embroidery. And how do you do it? You do it on the
17 base -- the base that Nishida already disclosed. That's 4. Now onto Slide 30
18 --

19 JUDGE FITZPATRICK: I can tell you, this -- Mr. -- I'm reading this
20 and it -- I get the opposite. I get the -- I gather the opposite from it. And I'm
21 going to -- it says, "In Figures 1 and 2, 1 indicates a material web, which
22 during its production," and then describes some production methods. But
23 "During its production, is provided with a single or a plurality of Unwound
24 Web Parts 2." I'm not saying it's a slam dunk in the other direction. I'm just
25 saying that strikes me as the opposite of what you were just saying.

1 MR. HARRIS: Well, I -- well, thank you, Your Honor. What we
2 believe Nishida is saying and what Dr. Pastore believes and testified to
3 Nishida is saying there, and consistent with Dr. Brookstein's testimony that
4 the base is not simultaneously knit, what that means, what that language
5 means is that the web -- the Web Material 1 is produced by forming the
6 elements on the base or in the base. And that's what the claims of Nishida
7 also say. So if we look at Slide -- Nike Slide 39 --

8 JUDGE FITZPATRICK: I'm sorry to interrupt you again.

9 MR. HARRIS: Yeah.

10 JUDGE FITZPATRICK: I just don't want the record to be unclear.
11 And I just want to draw your attention to these that are boxed, you know,
12 these excerpts from Exhibit -- from Nishida on Slide 38. In the bottom one,
13 the part that I was reading, I was talking about, it says 1. It says -- it gives
14 the numeral 1. And then -- and the one above, it talks -- it starts with the
15 Material Web Base 4. So what's the distinction there? I thought earlier, it
16 was saying 1 is both 2 plus 4.

17 MR. HARRIS: Yeah. 1 is 2 and 4.

18 JUDGE FITZPATRICK: All right.

19 MR. HARRIS: And you create -- you don't have a 1 until you have
20 the 2s printed or braided or weaved or woven into the 4. That's what creates
21 the 1. You create the 1 by printing, knitting, weaving, embroidering the 2
22 into the 4, onto or into the 4. And that's the next language I was going to
23 point you to, Your Honor.

24 JUDGE FITZPATRICK: Thank you.

25 MR. HARRIS: And in the claims of Nishida, this is on Slide 39,
26 Exhibit 1005 at Page 9, we read this claim language in the context of the rest

1 of the evidence that we just talked about, including Dr. Brookstein's
2 testimony, Nishida's teaching that the Material Web 1, that's everything. It's
3 that green, blue, all of it together, that material web is produced by a print
4 process on the web, meaning it's printed on that preexisting base, and/or by a
5 textile production method within the web, meaning it's knitted or woven into
6 the base.

7 Okay. So that brings us to the abstract. Lululemon focuses a lot of
8 its time and attention on the abstract, because the abstract uses that language
9 at the same time. What is the abstract saying? I have it reproduced on Slide
10 39. The abstract does not say the Base 4 and the pattern elements or Parts 2
11 are knitted at the same time, or produced in a single -- or during a single
12 knitting process. No. It says the web of Material 1, the whole thing, and the
13 Parts 2 are -- can be created at the same time.

14 So what does that mean? That means this entire structure is created
15 just as the claims say, by printing, knitting, weaving, embroidering the parts
16 onto Base 4. That's consistent with Dr. Brookstein's testimony. It's
17 consistent with Dr. Pastore's testimony.

18 JUDGE BARRETT: So I -- I'm glad you mentioned the witnesses.
19 Did your expert -- you talked a lot today about the interpretation of the
20 reference, and specifically taking on Petitioner's contentions. Did your
21 expert opine about that? Because I -- my impression was we only have one
22 declaration from your witness, and that was really talking about what
23 Petitioner argues is an alternative process, but I don't think really hit head on
24 Petitioner's contentions.

1 MR. HARRIS: I -- so Dr. Pastore provided his opinion on what
2 Nishida discloses. And then -- and that -- that's Exhibit 2003, Paragraphs 41
3 to 43.

4 MR. HARRIS: And then Lululemon in response, said, oh, well --
5 and I was going to get to this. So I'm glad you asked, Your Honor. Thank
6 you. In response, Lululemon said, well, that doesn't make any sense,
7 because you can't knit on a preexisting knit.

8 And Dr. Pastore did respond to that, and said, well, sure, you can.
9 And in fact, I wrote an article about it before Nishida, years before Nishida,
10 and that is on Nike Slide 44, where he said that a person that's still in the art
11 would know how to knit over an existing fabric. And he cited to an article, a
12 publication that he co-authored in 1989. This is in the record at Exhibit
13 2003, Paragraph 43.

14 And then -- and then today, we heard Lululemon's counsel say, oh,
15 well, yeah, a lot of attorney argument on why he didn't think that that would
16 work.

17 But there's nothing from Dr. Brookstein in response to Dr. Pastore's
18 position that, hey, I wrote an article explaining how you could do this. Now,
19 there's additional evidence in the record that supports and shows that at the
20 time of Nishida, skilled artisans knew how to knit on and over and into an
21 existing fabric.

22 In fact, it came up in the original prosecution of the 749 patent.
23 When the examiner initially rejected these claims based on the Nishida and
24 Nike explained that, no, what Nishida actually discloses is a pre-existing
25 base that's knitted or woven or embroidered onto. And there was a

1 discussion of additional prior art at that time that taught knitting on a -- on
2 an existing fabric. And I'll give you one example.

3 It's at Exhibit 2001, Page 31. And that's the Duhl reference, Patent
4 number 4144727.

5 MR. HARRIS: So there is -- there is plenty of evidence, unrebutted
6 by Dr. Brookstein, that, yes, a skilled artisan would have known how to knit
7 onto or into an existing fabric at the time of Nishida.

8 JUDGE BARRETT: I apologize. My question may not have been
9 really clear. What you just explained might say that, well, that it's possible
10 to do what you contend Nishida teaches. And Petitioner's position is well,
11 even if it does teach you one thing on top of another, that doesn't hurt us,
12 because we still say it teaches doing these two parts simultaneously. So my
13 question really was more you talked a lot today about what a number one is,
14 what a number two is, what a number four is, how all they fit together, and
15 why that's not simultaneous.

16 Did your expert have any testimony along those lines?

17 MR. HARRIS: Oh, yeah, absolutely. Thank you. And that's the
18 testimony I cited initially at Paragraph 41 to 43 in his declaration at Exhibit
19 2003. He explained there that what has Nishida actually discloses is what
20 I've described today, a base that is not simultaneously knit with the -- what
21 Lululemon is calling the textile structure, but instead, a preexisting fabric,
22 preexisting textile fabric or fabric that is printed onto or knitted into, just like
23 the claims and disclosure of Nishida discussed.

24 Okay. So I will now move on to the substantially planar
25 configuration. This is in Dependent Claims 5 and 15. Nishida does not
26 disclose anything about what that element or that part in green, Part number

1 2, there is no disclosure on the configuration of that element upon removal
2 from the purple in Phase 4. No disclosure. It's not shown in any figures.
3 There's no written description. There's simply no disclosure in Nishida on
4 what -- whether that element is planar or non-planar upon removal.

5 Dr. Brookstein points to the figures and he says, oh, well, those
6 figures look planar. But we asked him about it in his deposition. I'm now
7 on Slide -- Nike Slide 49.

8 And we asked him, "So these two figures from Nishida, they don't
9 show you what the unwound Web Part 2 -- that's the part in green, they don't
10 show you what they look like upon removal from the material web; isn't that
11 right?"

12 His answer, "That would be correct. This is an anticipation.
13 Lululemon needs to show that Nishida describes the claimed invention with
14 sufficient precision and detail to establish that it existed in the prior art."
15 That's the Wasica Finance case, 853 F.3d 1272. Pinpoint 1284, 10th Circuit
16 2017. There is no disclosure in Nishida on what the green part, whether it's
17 planar, not planar, anything in between, upon removal. Okay.

18 JUDGE FITZPATRICK: What about prior to removal? What's your
19 position prior to removal?

20 MR. HARRIS: I -- so our expert was asked about it.

21 And they showed you his testimony. He says, you know, these are
22 two-dimensional drawings. Prior to removal, I don't know what it shows. I
23 mean, it could be flat. Maybe it's planar. Maybe it's not. I don't know. But
24 what we do know is the claim is directed to upon -- as to removal, upon
25 removal, and there is no disclosure. You don't see it anywhere in Nishida.
26 No images, no written disclosure.

1 JUDGE FITZPATRICK: Well, the reason that I'm asking prior to
2 removal is because I think it's relevant, even though that's not where the
3 claim ultimately goes, because if it's -- if it is planar before removal, and the
4 sheet tells you to remove the purple structure, it -- so that you can get your
5 uppers. And in doing so, Nishida doesn't say, oh, and contort or change the
6 shape of these green structures that you're cutting out in the process. Then I
7 -- then there is a disclosure, indirect. If you start from planar and the only
8 instruction -- the only step is to remove the purple and by implication, you
9 have now isolated planar green structures.

10 MR. HARRIS: Yeah. Dr. Pastore addressed that. And he said, well,
11 it depends on how it's knitted. If it could be knitted in a way that you have
12 tension, and then once it's removed, it's -- it springs or curls into a non -- a
13 non-planar shape, a substantially non-planar shape.

14 So Dr. Pastore did address that and said, well, no, you can't -- you
15 can't make that conclusion that it's -- that it's absolutely necessary that it
16 would be planar if the drawings show it as planar upon removal.

17 JUDGE FITZPATRICK: I don't see it as an inherency thing, which I
18 think you are suggesting with that "necessarily."

19 MR. HARRIS: Right.

20 JUDGE FITZPATRICK: Let me turn -- wait for another. I think that
21 this argument is in conflict with your other arguments. And that is that you
22 are -- that you're going to sow or knit these uppers, the structure that will
23 ultimately become the upper, onto a web that preexists.

24 How are you going to do that if that web is not planar?

25 MR. HARRIS: It is not that it's -- so Dr. Pastore's testimony is, when
26 you knit or weave or produce the part in the existing base, which may have

1 been planar, when you do that, according to Dr. Pastore, it could change the
2 structure so that when it's removed, it pops into a different shape, so it's no
3 longer planar upon removal.

4 JUDGE BARRETT: Didn't the witness use the word may or
5 something similar? So it wasn't absolute. It's like it could be different.

6 MR. HARRIS: Yes. And agreed. That was his testimony. And
7 that's our position. And we think that's the point, that Nishida just doesn't
8 teach it. It's not there. The disclosure is not there.

9 Okay. I'll quickly move on to Zuckerman. I think this one can be
10 quick. There is a claim construction dispute. I'm on slide -- jumped back to
11 Nike Slide 17 to show the competing claim constructions for surrounding
12 textile structure. This applies to all of Zuckerman grounds, three, four, and
13 five. And really -- the dispute really is around the terms surrounding. And
14 the parties as our -- as Lululemon's Counsel suggested, the parties really did
15 brief this and argued that since that the District Court -- the District Court
16 adopted Nike's construction, rejected Lululemon's construction.
17 Lululemon's construction is that any amount of waste material anywhere
18 outside of the textile structure is surrounding. There's no support in the 749
19 patent for that. And I'm now going to jump to Slide 19. Move to Slide 19 --

20 JUDGE FITZPATRICK: Mr. Harris, the concern I'm having with
21 Nike's construction, is this term, or "mostly surrounding." I mean, to me, it
22 just introduces ambiguity into the -- into the whole construction.

23 Is that, I know it's been briefed, but can you just give us a quick
24 summary of why we should introduce a term like that into the claim
25 construction?

1 MR. HARRIS: Sure. The -- and this was argued at the District
2 Court, and the reason it was included there was because our understanding
3 and the District Court's understanding of the ordinary and customary
4 meaning of the term, surrounding, is something that is, mostly surrounding -
5 - oh, I'm sorry, completely surrounding or mostly. It doesn't have to be 100
6 percent, but it's going to be most of it.

7 That's the ordinary and customary word -- meaning of surrounding.
8 That's what the District Court Judge found. I think it's consistent with
9 dictionary definitions that were before the District Court regarding the
10 ordinary and customary meaning of that term. So it doesn't have to be 100
11 percent, but it's going to be -- you know, if not completely, it's going to be
12 mostly.

13 JUDGE BARRETT: In the district Court, was -- your proposed
14 construction, did it include the word mostly?

15 MR. HARRIS: We did,. Because it was consistent with what we
16 understood the ordinary meaning to be, and other courts have construed the
17 term surrounding -- in other context, you know, not in the context of the 749,
18 but other courts have construed the ordinary and customary meaning of
19 surrounding. And that's consistent with the constructions that have been
20 adopted in those other cases.

21 JUDGE BARRETT: Okay. I just ask because I don't think I'm
22 seeing "mostly" in the District Court's decision here.

23 MR. HARRIS: It was -- so the Court said that they adopted our
24 construction and that was our construction in District Court.

25 JUDGE BARRETT: And do we have that in the record?

26 MR. HARRIS: I can look.

1 JUDGE BARRETT: Well, if it is, it is, and we'll find it.

2 MR. HARRIS: I -- we -- I -- I'm pretty sure we cited it in our sur-
3 reply. We might have -- I'll find out.

4 JUDGE BARRETT: Okay. Thank you.

5 MR. HARRIS: But in this case, whether it's completely or mostly, or
6 mostly and completely -- whether it's mostly, it doesn't matter because
7 Zuckerman is not even close.

8 I'm now going to jump to Nike Slide 54. And we saw this image
9 earlier. This is Zuckerman Figure 1 that Lululemon has annotated the
10 colors, the green being what they contend is the textile element, and the
11 purple being what they contend the -- to be the surrounding textile structure.
12 Now, Dr. Pastore, Nike's expert said, well, this isn't a surrounding textile
13 structure for a lot of reasons. It's not mostly or completely surrounding.
14 And it's also two different textile structures, one on either side of the element
15 green, neither of which is surrounding, neither of which is completely
16 surrounding, neither of which comes close to mostly surrounding.

17 Okay. And I got that cite for you, Judge Barrett, sur-reply at Page 4 -
18 - Nike's sur-reply at Page 4, citing Exhibit 1027.

19 MR. HARRIS: You'll find Nike's construction that was adopted at
20 the District Court mostly or completely surrounded.

21 Okay. So that is Zuckerman. All of the Zuckerman grounds fail
22 because Zuckerman does not disclose or teach a surrounding textile structure
23 at all, and certainly not one that's mostly. So with that, there are -- we do
24 have some additional arguments on dependent claims for Zuckerman. But
25 they all they all fall within the proper construction the District Court

1 adopted. So with that, I will rest on the brief, unless there are any additional
2 questions.

3 JUDGE BARRETT: Hold one second. I may want to go back to the
4 Nishida ground. You probably discussed this all today, but something I was
5 a little unsure of, I believe patent owner cites it, and then your expert cites it.
6 Pages 4 to 5 of Nishida has the support for Nishida disclosing this two-step
7 process. I don't know if you have a slide on that, but the two-step process
8 just wasn't jumping out on me. And so when I see basically one -- a single
9 sentence and it says, here's -- see these two pages of the reference, I'm left
10 wanting. And if you could somehow explain to me how Pages 4 to 5
11 disclose the process, the two-step process.

12 MR. HARRIS: Sure. Yeah. It's 4 to 5 -- I think it's Pages 4 to 5 and,
13 Your Honor, Page 9, where we have the claims that describe the process. So
14 Pages 4 to 5 and 9 of Nishida. And I have 4 and 5 on Page 38 -- I'm sorry,
15 Slide 38, Nike Slide 38, and Page 9 is on Nike Slide 39. So this disclosure
16 in Nishida, Nike's position is this needs to be considered in the context of
17 what both experts have said, which is that the base is not simultaneously
18 done.

19 Dr. Brookstein admitted it in deposition. Dr. Pastore testified to that
20 in his declaration. In that context, what Nishida is teaching is that you have
21 a base four. And this is the first excerpt on Page 38. You have a base four.
22 It can be a common, woven, or knitted fabric. Probably going to want it to
23 be a -- an inexpensive fabric layer. And Nishida refers to it as a gauze. It
24 can be a gauze. So an inexpensive fabric that's going to get cut and thrown.

25 JUDGE BARRETT: Now are you editorializing now?

26 MR. HARRIS: No. That --

1 JUDGE BARRETT: This is --

2 MR. HARRIS: -- that's in --

3 JUDGE BARRETT: -- this is what Nishida said?

4 MR. HARRIS: Nishida refers to it as a gauze. It can be a gauze.

5 JUDGE BARRETT: It -- well, that -- that's kind of my point is
6 Nishida seems to talk about a lot of different things, not even just knitted,
7 but other things.

8 MR. HARRIS: Agreed.

9 JUDGE BARRETT: And -- so it, not to play advocate for the
10 petitioner, but it -- is it -- tell me why you're not just cherry-picking -- or
11 your expert's cherry-picking certain alternatives to put together into
12 something to say, see, this is how --

13 MR. HARRIS: Sure.

14 JUDGE BARRETT: -- one disclosure.

15 MR. HARRIS: Yeah. And agreed with you that Nishida discloses a
16 lot of things that aren't clear. And it is a translation of a foreign reference
17 and it's not clear. And just to frame this, it's Lululemon's burden, and I'm
18 going to -- I'm going to go back to a Wasica Finance case. It's long been
19 understood by the Federal Circuit that ambiguous references do not, as a
20 matter of law, anticipate a claim.

21 Okay. So to answer your question directly, the experts agree. They
22 both testified that the base is not simultaneously knit with the parts labeled
23 two. So we know that that base is preexisting. It is not knit. It is single
24 knitting process with the elements labeled two, because it's not
25 simultaneously knit. So you have this preexisting base four. That's what the

1 first excerpt on Slide 38 says. You have the material, base four, and it can
2 be a common, woven, or knitted fabric.

3 Then Nishida goes on, Page 5, this is also on Slide 38, to say in the
4 figures, element number one, that's the entirety of the structure, element
5 number one indicates a material web, which, during its production by
6 method customary in the textile industry, e.g., by weaving and/or knitting
7 and/or embroidery, is provided with a single or a plurality of Unwound Web
8 Parts 2 for the shoe upper three. So if base four is not knit simultaneously, it
9 is preexisting. Like the experts have said, the way that this is formed -- what
10 this is saying is that the parts two are weaved, knitted, or embroidered onto
11 that base -- onto or into that base.

12 And that is exactly what the claim says. Now, I'm onto Page 9 of
13 Nishida, which is on Nike Slide 39. The claim says -- and you have it
14 highlighted here. But the claim explains how this web one is produced.
15 And it says that the patterns are partial patterns in the form of the shoe,
16 unwound part two, are produced by a print process on the material web
17 and/or by a textile production method within the material web, meaning you
18 have this preexisting base. You're printing on it or you are knitting or
19 weeding into that preexisting base.

20 JUDGE BARRETT: Now, you just editorialized there, right?
21 Because it is talking about a print process and then you --

22 MR. HARRIS: Yeah, I was --

23 JUDGE BARRETT: -- suggested that could be knitting?

24 MR. HARRIS: Well, so -- there -- there's a print process and/or a
25 textile production method. The textile production method could be knitting.

26 JUDGE BARRETT: Could be. Okay.

1 MR. HARRIS: But the key is that it's knitting within the web. It's
2 not saying that it's creating the web. So to read this language very carefully,
3 you're printing on the web or a textile production method within the web,
4 which is entirely consistent with what Brookstein and -- Dr. Brookstein and
5 Pastore had both said. The base is already existing. It's not knit at the same
6 time. You're printing on that base or you are performing a textile production
7 method within that base. Thank you.

8 JUDGE BARRETT: Thank you.

9 MR. RAZAI: I always say I'll try to be brief, but I don't think I've
10 ever succeeded. So I -- I'll do my best. We had a lot of discussion about
11 attorney argument and what Counsel said and going through various
12 different portions. And when I was up here, I read the reference. That's
13 what I was relying on. I was relying on the actual reference of Nishida.
14 Nike, in his briefing and his argument today, is patching together various
15 different pieces of reference to make it say something that it actually doesn't
16 say. It doesn't say that there's any pre-existing base. It doesn't say that
17 anything isn't on top of the base. The word pre-existing never appears. And
18 admittedly, Counsel was talking about a reference that is a German
19 translation. And the only word that they use to say that there might be some
20 preexisting nature to this is the word base in what's called Material Web
21 Base four.

22 Can you see my slides, Your Honors? I -- I'm trying to see if I can
23 pop them up there. There we go. See -- you know, we talked.

24 JUDGE DANIELS: Yes.

25 MR. RAZAI: Great.

26 JUDGE DANIELS: I can see them.

1 MR. RAZAI: So we're -- this is -- this is the deposition transcript
2 part that Nike keeps saying the experts agree. Let me make it clear for the
3 record. The experts don't agree that they're made through different knitting
4 processes. The reference is clear that Material Web 1 includes everything.
5 And the way that it's characterized in the reference in Nishida is Material
6 Web 1 includes Surface Areas 1.1 that are made of a low quality, thinner
7 material, and an Unwound Web Portion 2, which is the textile upper or the
8 element. That's then cut out. There's reference to a Material Web Base 4 on
9 Page 5. There's a single reference there, and it doesn't say what it's about.

10 Now, let's talk about the actual deposition itself because that was
11 something that kind of struck me as we were going through Nike's argument.
12 Now, yes, you're right. Dr. Brookstein absolutely recognized that it's a
13 certified copy. But let's look at this testimony. There is nothing preceding
14 it. This is the introduction of the exhibit. Here's Exhibit 9. It's not talking
15 about, let's go to a particular page. It's not saying, let's go to a particular
16 figure.

17 And Judge Fitzpatrick actually noted this as well, talking about the
18 various different referencing rules. Here's the reference. Do you recognize
19 this reference? This is all happening quickly. There's no pauses. Here's the
20 reference. It's your opinion that Unwound Part number 2 disclosed in
21 Nishida are simultaneously knit with the base material. Again, Unwound
22 Part number 2. We're not talking about a particular reference. We're not
23 talking about any figure that's in front of him, just being asked cold in the
24 context of a District Court deposition that has to do with the infringement of
25 three patents, at least eight different products at issue, various different

1 pieces of prior art and saying, here's a reference. Let's go through it. Let's
2 talk about the -- part number 2.

3 Now, remember that the declaration that was put forth by Dr.
4 Brookstein months before this or during the right around the same time, I'm
5 not even sure what the timing was, that declaration we're talking about
6 Unwound Portions 2.2, the Material Web 1, which is everything, and the
7 Surface Area 1.1. There's only one reference to Material Web Base 4. And
8 here, when you get in front of the witness and saying, is it knit at the same
9 time?

10 And he says, no, because you can't knit two connected pieces.

11 He wasn't referring to a figure. He wasn't pointing to Nishida and
12 saying, this is -- I disagree.

13 It's absolutely contrary to everything he said in this case and
14 everything in his depositions. And they had a chance to depose him
15 afterwards and they did, and they asked him again. So it's knit at different
16 times. No, it's knit at the same time. When they're talking about Nishida,
17 it's knit at the same time. This is Material Web Base 4.

18 JUDGE DANIELS: Counsel, well, I -- I've been actually looking at
19 this testimony for a couple of minutes and I'm glad you're talking about it. I
20 agree that it is sort of strangely out of touch with anything before or that
21 followed it and that it was not used directly with a figure. But he -- he's
22 pretty clear that he says no, but then I don't quite understand why he's
23 talking about two separate unconnected fabrics, when Nishida as patent
24 owners, Counsel points out, really does, you know -- you know, is Nishida
25 supposed to have one? So I'm a little confused as to what his answer is,

1 even though it does -- it does kind of make sense if they were two separate
2 unconnected fabrics. Is this just a mistake?

3 MR. RAZAI: I think it's the misunderstanding of -- I think that the
4 parties were just -- looks to me like they're talking past each other. Because
5 if we're talking about Material Web Base 4 and the textile upwards or the
6 Unwound Part 2, there is no question that they're connected. That -- that's
7 the entire argument here. And so the understanding here isn't talking about
8 some type of Material Web 1 that consists of two connected pieces. There's
9 a misunderstanding or a talking past each other that could have been
10 clarified in the next question, that should have been clarified in the next
11 question, and actually was clarified during the context of the IPR
12 depositions, during which he unequivocally in every single context says, no,
13 they're not knit at different times in different processes. They're knit at the
14 same time.

15 JUDGE DANIELS: Got it.

16 JUDGE FITZPATRICK: Let me follow-up. It was -- I'm glad you
17 asked that, Judge Daniels, because I didn't necessarily get it out correctly
18 earlier. I was wondering if you had a plausible explanation for why
19 Brookstein's mind went to a separate material when it was being asked about
20 Nishida. It's his view that to -- you know, that the Unwound Web Part 2 is
21 woven or knitted in the same process as the web or whatever you want to
22 call it, whether it's 1 or 4. If that's his view, as it is the client's view, why
23 does he -- do you have a plausible explanation for why he injected into this -
24 - into this question and answer the idea of a separate unconnected pattern?

25 MR. RAZAI: Your Honor, I honestly wouldn't even pretend to try to
26 get into the mind of Dr. Brookstein, but what I can --

1 JUDGE FITZPATRICK: I'm not asking you --

2 MR. RAZAI: Yeah.

3 JUDGE FITZPATRICK: -- to tell me what he thinks. But can you
4 make -- can you come up with a plausible reason for why he would bring up
5 an unconnected fabric if he thinks -- I mean, it's connected as it's -- as it's
6 knitted from the start?

7 MR. RAZAI: Well, I think that the understanding that he had at that
8 point was that the questioning attorney is asking about two different
9 materials. And obviously when he's asked, why do you answer that?

10 He expressly says, well, we're talking about two different materials.

11 Because they have to be two different because they're not connected.

12 So his understanding somehow went to something that -- the questioning
13 attorney was talking about two different things, not one thing that's

14 connected to another thing that basically makes the entire Material Web 1.

15 But to get it -- to look at this, it's very clear that Dr. Brookstein didn't

16 understand the questioning attorney to be talking about the concept that's

17 being presented by Nike, which is this after-the-fact shoehorning of some

18 kind of a material web base that's then connected to another structure that's

19 on top.

20 Here, we're talking about two unconnected structures that aren't knit

21 at the same time because they're un-connected. And, you know, to be honest

22 with you, I'm struggling with this concept of why would you knit a Material

23 Web Base 1 and then knit a fully formed upper on top of it just to cut it back

24 out? It -- it's nonsensical to me to even do that, but we haven't even gotten

25 to that aspect. But one of the things that we were talking about during the

26 last part of the session --

1 JUDGE FITZPATRICK: Let me interrupt you there for a second.
2 I'm sorry. That struck me immediately when I read the briefs. But also --
3 what also struck me is I don't think there's any evidence that speaks to that
4 point. At that point, I mean, I think that's an intuitive point, but what -- is
5 there evidence in the record to support that?

6 MR. RAZAI: But I guess all we can really do, Your Honor, is to try
7 to figure out how you can cobble this reference into -- it's saying that you
8 have some kind of a preexisting base that you knit on top of. So all of this
9 going in, there is nothing in this reference. Nothing that talks about knitting
10 in two separate knitting processes. We have unequivocally a statement by
11 Nike that we don't dispute that both the knitted textile element and the
12 surrounding textile structure are knitted. It's unequivocal. Then you have an
13 unequivocal statement from the reference, which should end the entire
14 conversation. That Material Web 1, which is everything, whether you look
15 at the Surface Area 1.1, which is the inexpensive area and Unwound Web
16 Portion 2, whether it's the sole structure, whether it's anything else, there's an
17 unequivocal statement that is made at the same time. And the fact that it's
18 made at the same time is simultaneous.

19 All these claim construction arguments are of no weight having -- to
20 have to deal with a claim construction issue coming up in front of the
21 podium at the last minute. That's an argument that's not even there. But
22 even if it were, the fact that it says simultaneous and Nishida then says, you
23 make everything at the same time. When he means everything, that includes
24 literally everything, right? Because there is no argument -- and it's in the
25 record. You can go back to the record and check. Nike has agreed that
26 Material Web 1 is everything. There is no dispute about that.

1 So now when you have everything made at the same time, and that
2 includes the Unwound Web Portion 2, which is a textile upper, and then you
3 have the outside area, whether it's Surface Area 1.1 or Material Base 4, it's
4 everything. It's made at the same time, and there is no dispute that the other
5 elements are met.

6 I feel like -- I was talking to somebody earlier about walking into this
7 argument. It's really difficult to come in and try to argue against the
8 recasting of a reference. The reference says what it says. It says it's made at
9 the same time. And now for me to sit there and try to figure out, well, could
10 that mean not at the same time? It's a difficult in-depth for me to read the
11 reference because -- and it's characterized as attorney argument, but I'm just
12 reading a reference, Your Honor, and I'm repeating the words verbatim, not
13 as Judge Barrett was saying, not editorializing, not splicing pieces together
14 to come to a conclusion. There is nothing in here about a preexisting base.
15 And even the part that Counsel was reading about the -- on the web or within
16 the web -- let me see if I can find that slide on -- I apologize. I was trying to
17 find a slide that was -- oh, here we go.

18 So we're talking about the embroidery part, right? Which is a bit --
19 an alternative embodiment where you can then embroider on top of
20 something that exists. It says, "To this end" -- this is the bottom part, Slide
21 39 from Nike slides. "To this end." It's the top one. Talking about during
22 the production of Material Web 1. So Material Web 1 is the thing that's all
23 knit at the same time. We can all agree to that. We can all agree that
24 Material Web 1 includes the upper. It includes the waste material. It
25 includes everything. It's the thing that's done. And here it is talking about --
26 and then when it comes to the sole portion, it could be put on with

1 embroidery afterwards, if you're weaving or doing something else, or it can
2 be made within the material web.

3 So when it comes to the sole, the sole can be part of the material web
4 and done at the same time, or if you want, you already made the Material
5 Web 1 and then you can do some other things to the sole. That's where the
6 words within is different than all. Printed on the material web or done
7 within the material web when it's being produced. When? At the same time.
8 We're taking pieces. The unwound -- the Material Web Base 4 disclosure
9 appears once on Page 5. It doesn't say that it's preexisting. It doesn't say
10 anything is knit on. It just says Material Web Base 4. And there's no
11 explanation that it provides. And all the -- putting it closer to one other
12 portion or further away isn't all of a sudden going to somehow negate the
13 fact that Nishida says that Material Web 1, which there is no dispute,
14 includes everything is made at the same time.

15 There's no dispute that both -- that all the elements can be knitted. So
16 now we have every limitation fulfilled. It's just really difficult for me to try
17 to figure out what argument I'm pushing against when the reference is clear.
18 And Dr. Brookstein never testified there was a preexisting base. With that,
19 I'd like to talk through just a couple minutes about claim construction on
20 Zuckerman. I know it's a topic that has been kind of discussed but not
21 discussed. I argued that at the District Court. I disagreed with what the
22 District Court said. And the reason why I disagreed with how the District
23 Court came out on that particular term is because the District Court
24 construed the term, surrounding, in a way where it felt surrounding meant
25 this. But the relevant term to construe is surrounding textile structure.

1 When you have a knitted textile element and you have surrounding
2 textile structure, surrounding textile structure is just the structure that's
3 surrounding. That's just around that creates space between. And the reason
4 why we have Nike saying mostly is their patent would be worth much less if
5 it comes out and it has to be completely surrounding. I don't think that they
6 would have taken this position if Zuckerman wasn't there. This position is
7 manufactured for this proceeding. The words, surrounding textile structure,
8 doesn't even appear in the patent. The figures that they point to are point --
9 are talking about various other things. Even Figure 1 isn't called the
10 surrounding textile structure.

11 The word surrounding by itself may or may not mean completely
12 encompassing. One of the questions that I always have is, if you live in
13 Chicago, are there surrounding cities? There absolutely. Are they mostly
14 surrounding Chicago? No. Because Lake Michigan is mostly surrounding
15 Chicago. Doesn't stop them from having surrounding cities, but that's not
16 the term. The term is --

17 JUDGE DANIELS: Also --

18 MR. RAZAI: Yes, Your Honor?

19 JUDGE DANIELS: It is -- it is -- I appreciate this argument because
20 I've been in your shoes making a similar one. I -- isn't -- the word
21 surrounding and just to make an analogy, is similar to permanent. If
22 someone says permanent, how permanent is it? Can you ever break it? Can
23 it never come off? Can you know, how permanent is it? And similarly,
24 right, here we have if, you know, how much does surrounding mean? Is it
25 361 degrees? Is it 51 degrees, you know? But these are difficult terms to

1 decide. And I guess I'm looking in the context as to -- for some -- for some
2 clarity.

3 MR. RAZAI: Yeah. And I think that the important issue, Your
4 Honor, is that this term doesn't appear in the patent. So it's not really a term
5 that is defined by the patent or somehow even used by the patent. It was an
6 after-the-fact term that was put into continuations like the 749 patent. But
7 what you do have with the 749 patent is a method of reducing the amount of
8 waste that's present by making a lightweight material that doesn't have the
9 same textures as the textile element.

10 And if that's where you're trying to go, why would this feature that
11 saves this patent be the fact that you're increasing waste? That's not what
12 was intended by surrounding textile structure. What was intended by
13 surrounding textile structure is you have textile elements that are then
14 separated from other textile elements with some waste material, and you cut
15 it out. And the reason why you really have that is because of the way that
16 shoes are normally manufactured is through work knitting processes that
17 can't knit to shape. And so you are going to cut something out, but you want
18 to reduce how much you cut out.

19 So you're going to have waste, and they just use the word
20 surrounding textile structure not to mean somehow you're going to
21 completely encompass the textile. If you look at Zuckerman, there's no need
22 to encompass it. You have a strip coming out where the length of the textile
23 element fits the strip, but you're cutting -- but everything that abuts textile is
24 surrounding waste. There's no other element next to it. It's surrounding
25 waste any time that you abut it. So anytime there's textile next to it -- it's
26 100 percent waste. It's just that the tops don't have it. Like Chicago, would

1 you say Chicago doesn't have surrounding cities? That wouldn't make sense.
2 I think I went over my time, but I'm happy to discuss further because this is
3 a fun topic for me.

4 JUDGE BARRETT: I want --

5 JUDGE DANIELS: Thank you. I think that was good. You --
6 you've given me some reason to think about that term. Thanks.

7 MR. RAZAI: Thank you, Your Honor.

8 JUDGE BARRETT: Before you step away, I do want to make some
9 clarification. I -- let's see. I may be wrong. I thought I heard you say,
10 surrounding wasn't in the patent. And my understanding is -- that word is
11 my take of your argument is the claim phrase "surrounding textile" is not.

12 MR. RAZAI: Surrounding textile -- exactly.

13 JUDGE BARRETT: Okay. You're not saying --

14 MR. RAZAI: -- surrounding textile structure is not in it, correct,
15 Your Honor.

16 JUDGE BARRETT: Yeah. You're not taking the position that the
17 word is not there at all, just not in that content?

18 MR. RAZAI: Correct. Which the surrounding textile structure is a
19 term of art where the word surrounding is an adjective that meets something
20 different by itself. When you attach it to others prices.

21 JUDGE BARRETT: Thank you.

22 MR. RAZAI: Thank you, Your Honor.

23 MR. HARRIS: Thank you, Your Honors. I'll start -- I'll start with
24 the Zuckerman surrounding claim construction argument. Council made the
25 same, well, what about Chicago? It maybe has some surrounding cities and
26 Lake Michigan -- you made that same argument to the District Court Judge.

1 And the District Court Judge says, what are you talking about?
2 We're talking about patent here. We're not talking about Chicago. And in
3 the context of this patent, all of the intrinsic evidence is surrounding is
4 completely or mostly surrounding, consistent with the plain and ordinary
5 meaning of the term surrounding, not what Lululemon is proposing, which is
6 any material at all, even to a sliver of the material outside of the textile
7 element would be surrounding.

8 And it's significant that Counsel says, look, this term isn't used. The
9 surrounding textile structure, the term that he used, it's not in the -- in the
10 spec. Yeah, surrounding is in there, and surroundings should be given its
11 ordinary and customary meaning, just like the District Court Judge did here,
12 and just like the other District Courts have done with that term, surrounding.

13 There was also this argument about, oh, well the purpose or the goal
14 of the patent is to reduce waste. The patent explains how it does that. So
15 this is in the background of the invention section. Historically,
16 conventionally, the way shoes were made was piecing together lots of
17 different components: rubbers, textiles, synthetics. You would have to
18 source all those different components from different suppliers. They would
19 all show up at a factory. You would cut those different components, piece
20 them all together.

21 That's what the invention was trying to get away from. And the way
22 the invention did that was by knitting a textile structure that had all the
23 different characteristics and qualities that you would want in your upper in
24 the portion that gets cut out and incorporated into the chute. So did we -- did
25 the invention -- this particular patent, did it completely eliminate waste? No.
26 But the inventors didn't say that they were trying to completely eliminate

1 waste. They said they were trying to reduce waste. And that's what they
2 did, by eliminating uppers with 20, 30, 40 different parts.

3 Now, I want to go to Dr. Brookstein's testimony. This is on
4 Lululemon Slide 9.

5 Judge Fitzpatrick, you asked some questions like, what does this
6 mean? What if -- he had it in the sheet in front of him. Dr. Brookstein -- Dr.
7 Brookstein is the one that in his declaration gave the construction of
8 simultaneously knitting. He knows what simultaneously knit meant. He
9 proposed a definition. And it means, as we saw earlier, forming the textile
10 element and the surrounding structure in a single knitting process.

11 So when he was asked this question, is part number two
12 simultaneously knit with the base material, he said, no, not with the base.
13 He knew exactly what he was talking about. He knew -- what he said was
14 that the base material was not knit in a single knitting production process, a
15 single knitting process with part number two. And he explained why.

16 Now, I know Counsel has tried to come up with some explanations
17 on what it meant, but he said, you can't knit two separate, unconnected
18 fabrics. That's exactly right, because the base is preexisting. They're not
19 knit simultaneously. That's what he was saying. They're not simultaneously
20 knit. He was asked the question. His understanding of simultaneously knit
21 is in his declaration. It's knit during the same process, a single process. And
22 he said, why aren't they? It's because the base is preexisting. They are not
23 knit during a single knitting process.

24 He knew exactly what he was talking about. And now the only way
25 for Lululemon to prove anticipation is to disregard their own expert's
26 testimony. That's not the standard. I mentioned -- I'll mention it one more

1 time, the Wasica Finance case that I referenced earlier. The reference, has,
2 cannot be ambiguous. As a matter of law, that is not an anticipating
3 reference. And now Lululemon is asking you, oh, never mind -- never mind
4 what our experts said. He was confused or he didn't understand. But this
5 reference is so clear. That's not the standard.

6 JUDGE DANIELS: Counsel, didn't he come back in his -- he came
7 back in his testimony in these cases in front of the Board and explained it
8 that they -- that they were not separate? So I'm asking you know, where are
9 we supposed to put our weight?

10 MR. HARRIS: Yeah. Well, I don't -- I don't think he ever testified
11 that the base is simultaneously knit with part number two. Instead, what he
12 said was that element number one can be produced or made at the same time
13 as part number two. But that's a different question. That's a different issue.
14 He never said -- he never said base four is simultaneously knit, meaning
15 knit, formed in a single knitting process with element two.

16 And what Nishida actually discloses is forming part number two
17 through printing, knitting, weaving, embroidery onto that base or into that
18 base. And what he said is, this full element, number one, can be made at the
19 same time as each of the individual parts, too, which makes sense and is
20 consistent with his testimony that the base is preexisting. He has never once
21 testified that the base is simultaneously knit with part number two. And he
22 has had lots of opportunities to do it. He didn't do it. This is not the
23 standard for anticipation.

24 That's all I have, Your Honors. Thank you for your time. We
25 appreciate it.

26 JUDGE BARRETT: Thank you.

1 JUDGE DANIELS: Thank you.

2 JUDGE BARRETT: Okay. This case is submitted and we are
3 adjourned.

4 (Whereupon, the proceedings at 3:30 p.m. were concluded.)

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PETITIONER:

Ali S. Razai
Joseph Jennings
Benjamin J. Everton
Jacob L. Peterson
Brandon G. Smith
MORGAN, LEWIS & BOCKIUS LLP
Ali.razai@morganlewis.com
Ben.everton@morganlewis.com
Jacob.peterson@morganlewis.com
Brandon.g.smith@morganlewis.com
2jfy@knobbe.com

PATENT OWNER:

Christopher J. Renk
Michael J. Harris
Aaron P. Bowling
Lindsey C. Staubach
ARNOLD & PORTER KAYE SCHOLER LLP
chris.renk@arnoldporter.com
michael.harris@arnoldporter.com
aaron.bowling@arnoldporter.com
lindsey.staubach@arnoldporter.com