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Paper No. 38
Entered: September 4, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNDER ARMOUR, INC.,
Petitioner,

v.

ATHALONZ, LLC,
Patent Owner.

IPR2024-00636 (Patent 10,674,786 B2)
IPR2024-00637 (Patent 11,013,291 B2)
IPR2024-00638 (Patent 11,064,760 B2)
IPR2024-00639 (Patent 11,375,768 B2)
IPR2024-00640 (Patent 11,510,456 B2)

Record of Oral Hearing
Held: June 17, 2025

Before HYUN J. JUNG, CARL M. DeFRANCO, and
MATTHEW S. MEYERS, *Administrative Patent Judges.*

IPR 2024-00636 (Patent 10,674,786 B2)
IPR 2024-00637 (Patent 11,013,291 B2)
IPR 2024-00638 (Patent 11,064,760 B2)
IPR 2024-00639 (Patent 11,375,768 B2)
IPR 2024-00640 (Patent 11,510,456 B2)

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The above-entitled matter came on for hearing on Tuesday, June 17, 2025, commencing at 10:01 a.m. EDT, via video-conference.

P R O C E E D I N G S

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(10:01 a.m.)

JUDGE JUNG: Oral argument for IPRs2024-00636, 37, 38, 39, and 40. In these proceedings, Petitioner Under Armour -- Under Armour, Incorporated, challenges claims of several related patents owned by Athalonz, LLC. Beginning with the petitioner's counsel and followed by Patent Owner's counsel, please state your names for the record.

MR. BUGG: This is Robert Bugg on behalf of Petitioner Under Armour. With me, I have Eric Harmon, Frank Cimino, and Megan Woodworth.

MR. HOUGHTON: And this is Connor Houghton on behalf of the Patent Owner, Athalonz, and with me, I have my colleague, Stephen Bosco.

JUDGE JUNG: Thank you, both. Few reminders for this hearing. If you encounter any technical difficulty, please let us know immediately, even if you have to interrupt. If you're not speaking, please mute yourself. Please identify yourself each time you speak to help make the transcript clear, and please refer to demonstratives, papers, or exhibits by slide or page number. And be aware there is a connection to the public to watch and listen.

And with that, Petitioner and Patent Owner each have 50 minutes -- or, I'm sorry, 75 minutes of total time to present their arguments. Petitioner has a LEAP practitioner, so it may have up to 15 extra minutes.

Each party may reserve time for rebuttal, and I will track argument time and interrupt you when you have only a few minutes remaining.

With that, Mr. Bugg, you may proceed when you're ready.

MR. BUGG: Thank you, Your Honor. Let me share my screen here.

All right. Thank you, Your Honors. As we understand, this morning, we'll be addressing IPRs2024-636, 637, and 638, known as the slope patents. And then I understand that this afternoon we'll be addressing the latter two compression patents. As you noted, we do have a LEAP practitioner, Mr. Harmon, who's going to be conducting the majority of the argument this morning, and I'll be handing that over to him now.

MR. HARMON: All right. Thank you, Your Honors. So again, yes, today, this morning, we'll be covering the slope patents. So starting here with slide 3, three slope patents, they each describe a shoe sole that has a flat heel and a sloped forefoot platform that slopes down from the heel to the toe and from the outside of the toe section to the inside of the toe section. The three slope patents claim the shape in similar but different ways.

In the '786 patent, it's described using slopes. So as described here on slide 3 for claim 1 of the '786 patent, claim 1 requires an apparatus comprising a heel platform section of uniform height from the outer edge to the inner edge that establishes a reference slope, a midfoot section, and a toe section, where the combination of the midfoot section and the toe section forms an angled support platform that has a first slope along an inner edge of the apparatus from the toe section of the heel section, a second slope from

the inner edge to the outer edge of the toe section, and the third slope along the outer edge of the apparatus from the toe section of the heel section, wherein the first, second, and third slopes are each greater than the reference slope and the toe section is a lower than the heel section.

As shown on slide 4, claim 5 of the ’786 patent is similar in scope to claim 1. This claim requires an upper shoe section, a sole section that includes a specific bottom, a heel platform section of uniform height from the outer edge to the inner edge that establishes a reference slope, and a midfoot section and a toe section wherein the combination forms an angled support platform that has a first slope along the inner edge of the apparatus from the toe section to the heel section, a second slope from the inner edge to the outer edge of the toe section, and a third edge -- a third slope along the outer edge of the apparatus from the toe section to the heel section wherein the first, second, and third slopes are each greater than the reference slope.

For the ’291 patent, moving to slide 5, claim 1 requires a shoe comprising an upper section, a midsection, an insole, and an outsole wherein the combination forms an athletic positioning shape, having a first height at an inside edge and an outside edge of the heel section, second height at the outside edge of the toe section, and third height at the inside edge of the toe section wherein the first height is greater than the second height and the second height is greater than the third height, causing slopes to form.

Finally, with respect to the ’760 patent, this patent claims the same slope sole design but using positioning. So for claim 1, this claim requires a pair of shoes wherein each shoe includes an upper shoe portion, a sole wherein the foot platform of the sole provides an athletic positioning of

a big toe area at a lower position than the heel area and at a lower position than an outer small toe area. And from the inner edge to the outer edge, the heel area has substantially no slope, and from the inner edge to the outer edge at the cross-section of the ball of the foot, the bottom of the sole is substantially linear.

Now, moving to the instituted grounds of unpatentability, starting on slide 7, for the ’786 patent, there are five instituted grounds that cover claims 1 through 8 of the ’786 patent. The primary references for all five grounds are the Kim, Dufour, and Rubin references. And grounds 4 and 5 cover the combinations of Dufour and Rubin each with Kim.

As for the ’291 patent on slide 8, there are three instituted grounds covering claims 1 through 5 of the ’291 patent. The primary references again are Kim, Dufour, and Rubin, while grounds 2 and 3 cover the combinations of Dufour and Rubin each with Kim.

Finally, for the ’760 patent, there are -- on slide 9 here, there are six instituted grounds that cover claims 1 through 11. Primary references, again, are Kim, Dufour, and Rubin, while grounds 4 through 6 cover the combinations of the -- these three primary references, each in view of De Obaldia. Now, Patent Owner does not challenge whether De Obaldia discloses the limitations, independent claims 4, 5, 9, and 10, nor its combination with the primary references. So my focus today is going to be just on the primary references.

Moving on slide 10, for the definition of a person of ordinary skill in the art. The definition the Board has adopted is someone with at least a bachelor’s of science or equivalent degree related to industrial or

product design and at least two years' experience designing or developing athletic shoes or someone with at least five years designing or developing athletic shoes.

Now, Mr. Delgatty, Petitioner's expert, he provided testimony as to what a person of ordinary skill in the art would understand the challenged patents and the prior art references to disclose and why all of the challenged claims aren't valid. As Mr. Delgatty described in his declarations, his entire professional career has centered on athletic shoe design. Mr. Delgatty has a degree in industrial design and is currently the department chair of product innovation at the prestigious USC Iovine and Young Academy, where he teaches courses in shoe designs.

Now, as described on slide 10, at the time of the challenge patent's priority date of 2011, Mr. Delgatty had over 15 years of experience as an athletic footwear designer, including spending eight years as Vans' senior director of product design, where he was responsible for overseeing the design of all Vans shoes during his tenure there.

In contrast, Patent Owner's expert, Mr. Markison, who's also the founder and CEO of Athalonz, has degrees in electrical engineering and in law. And by 2011, Mr. Markison had just a single year of experience working in shoe design, and he admits in his declarations that he was not yet a person of ordinary skill in the art. In fact, he was many years away from being a person of ordinary skill in the art, which Athalonz agrees requires at least five years of experience designing or developing athletic shoes.

Going to slide 11. In addition to not being a person of skill in the art at the time of the invention, Mr. Markison is also not objective, and

his opinion should be given little weight for the reasons explained in Petitioner's replies.

Skipping over to slide 13 to start discussing the grounds and the prior art that Petitioner relies on. With respect to Kim for the '786 patent, the only disputed limitation is highlighted in red at the end of claim 1. I won't read it aloud word for word, but this limitation relates to the midfoot and toe sections of the shoe that form the angled support platform and whether the angled support platform has the claimed first, second, and third slopes around its edges. And here, what the dispute boils down to is whether the toe section is lower than the heel section as a result of these three slopes and whether the cleats should be included in measuring those slopes.

Similar for independent claim 5 of the '786 patent, the disputed limitation at the end of the claim is the same, but here, specifically in the context of the claimed athletic positioning sole section. Now, Patent Owner proposes a construction for athletic positioning that requires a heel section higher than the toe section and the outside edge of the toe section higher than the inside edge of the toe section. Now, this construction simply repeats the shape of the sole that's already described elsewhere in the claim, which led the Board to determine, at the institution stage, that construction was unnecessary for this term. But in any event, both parties agree that Athalonz's proposed claim construction does not change the invalidity analysis here.

And the disputed limitations are similar for the '291 patent here on slide 15, shown in red, but here, the disputed athletic positioning shape is defined by the claimed heights, instead of the claimed slopes. And again,

the dispute here is centered on whether the cleats are included in the measurement of those heights, as well as whether Kim positions the toe lower than the heel as a result of those heights.

As for the ’760 patent, the only disputed limitations are the athletic positioning for the left and right shoes and, more specifically, whether Kim’s big toe is at an area -- big toe area is at a lower position than its heel area, including whether the cleats are considered as part of the -- part of the positioning.

So now, let’s discuss what the Kim reference discloses. In Paragraph 12 at the top right-hand side of this slide 17, Kim discloses a pair of golf shoes that allow a golfer to concentrate his or her weight balance on the inner edge of the soles of the feet. Kim explains that this position allows the golfer to perform the swing motion while maintaining his or her stable position.

Kim’s golf shoes include an outproportion -- an outsole. That outsole includes a lower surface that is inclined from its outer edge to its inner edge, so that the outer edge has a thickness larger than that of the inner edge. Importantly, in Paragraph 46, shown in the bottom right hand of this slide, Kim discloses that the inclined lower surface may be formed only at the front portion of the outsole. And except for the outsole 10, including the inclined lower surface 12, the golf shoes disclosed in Kim are substantially the same as conventional golf shoes. In other words, Kim discloses that the heel may be conventional, which, as I’ll go on to explain, means that the heel will be flat with substantially no slope.

Now, starting here on --

JUDGE DEFRANCO: Mr. Harmon, can you go back to the one -- that last slide, please? So I'm just wondering, what is your position as to what the meaning is of athletic positioning shape? Are you saying that it's defined by the claim, as far as all of the slopes go? Or are you saying that it's defined as in Paragraph 12 of the Specification, where it concerns, you know, the weight balance of the actual golfer?

MR. HARMON: Yes. Petitioner is not proposing any particular claim construction as necessary for this term, as the -- as the Board found the remaining limitations do define how the athletic positioning sole is shaped based on either heights or slopes. But in Paragraph 12, Your Honor is correct that the proper weight balance is a measure of understanding the athletic positioning, but it's not required in the form of a -- of a particular claim construction in this case.

JUDGE DEFRANCO: So you're saying athletic positioning shape could be something other than weight -- the proper balance of the weight of the golfer?

MR. HARMON: I think it intrinsically does address that due to the shapes claimed by the -- by the claimed heights or slopes, but no. We do not believe a particular construction is necessary here.

JUDGE DEFRANCO: Okay. And you said that Patent Owner doesn't dispute that?

MR. HARMON: Patent Owner -- Patent Owner has offered a particular construction for this term. We think it's unnecessary as the Board found at institution because it provides no further definition beyond what the

subsequent limitations that the claim require with respect to the heights or slopes or positioning.

JUDGE DEFRANCO: Okay. So does Patent Owner agree that no construction is necessary? Did you say that?

MR. HARMON: Patent Owner does not agree that no construction is necessary. It offers us construction, but Petitioner does believe it's unnecessary, as it's simply repeating the remaining limitations of the independent claims.

JUDGE DEFRANCO: Okay. Thank you. We'll hear more from Patent Owner, I'm sure.

MR. HARMON: So I'll jump back to slide 18 here. Now, Athalonz first argues that Kim's outsole is level from the heel forward and, therefore, fails to disclose the toe section being lower than the heel section. Now, this argument was already correctly rejected by the Board, as shown on the left side of this slide 18. In particular, no person of ordinary skill in the art could reasonably interpret the outsole that's shown in Figure 2 of Kim to support Athalonz's position as it depicts the toe section as being thinner than the heel section. And as Mr. Delgatty, Petitioner's expert, additionally explains, this conclusion is supported by Figure 5B, as shown on the bottom right hand of this slide, which shows the top -- the top of a surface area on the part of the sole that sticks out beyond the upper, which indicates from this perspective that the shoes are tilted forward.

Additionally, Patent Owner's suggestion that Figure 2 is shown on the left-hand side of this slide is either inaccurately drawn or an illogical design because there would be a gap between the bottom of the forefoot and

the ground, or because only a small portion of the heel would be in contact with the ground, is unsupported and incorrect because it assumes that Kim's sole is rigid and would not flex. But Kim, and it's Paragraph 40, which is excerpted in the bottom left of this slide 19, expressly discloses that the outsole 10 of the golf shoe 100 is made of synthetic rubber, which Mr. Markison admitted during his deposition, may be flexible.

Now, whether the Kim reference is properly interpreted in light of this disclosure of a flexible sole, as well as well as its disclosure of a conventional heel section, as I'll go on to discuss, it becomes clear that Patent Owner's diagrams misrepresent Kim as having heel and toe sections that are level at both the inside and outside edges.

Moving to slide 20 here, Athalonz separately argues that Kim fails to disclose the sloping forefoot platform because the claimed slopes heights and positions should be measured with respect to the bottom of the cleats as opposed to the bottom of the outsole. Now, that argument is wrong. It's directly contradicted by not only the intrinsic record, but also the prior art, as well as Athalonz's prior analysis of the claim scope.

So first, as shown here on slide 20, is claim 5 of the '786 patent, which explains how the claimed slopes heights and positions should be measured. Specifically, this sole includes two distinct parts that are -- that are underlined in red near the top of the claim: first, a specific bottom, and second, an athletic positioning sole section that includes an angled support platform. Now, the first, second and third slopes of this claim are specifically found in the athletic positioning sole section, not as part of the specific bottom, which as described in claim 8 at the bottom of this slide, are

the cleats or spikes. Athalonz then fails to address this conclusive evidence anywhere in the record.

Moving here to slide 21. So in addition to the claims, as I just discussed, the challenged patent specifications also describe the sole and the cleats as separate components of the shoe. For example, as described in columns 1 and 9, which are on the left-hand side of the slide, the Specification lists the cleats as separate components that are coupled to rather than part of the sole. Additionally, the sport specific bottom, which is identified with reference number 190 in the middle of the slide, is also shown and described throughout the Specification, not only in the figures but also in the excerpts on the right hand of the slide, as a separate component from the sole 10, which suggests that these components, each of which have their own distinct reference number, are separate and distinct structures in the patents.

In addition to the patents themselves, the prior art also consistently describes the sole and the cleats as separate components of a shoe, which illustrates that there is an industry understanding of these terms. For example, as shown on the left side of this slide 22, Kim explains in Paragraph 30 that the spikes protrude or extend from the outsole and that they are located below the outsole's lower surface. And similarly to the slope patents themselves, Kim uses distinguishing reference numbers for the sole, for example 10, and the spikes 11 and 50.

Additionally, Dufour, as shown in the middle of this slide, similarly explains that the spikes are separate components that are fastened to the sole and also consistently use distinguishing reference numbers to do -

- identify these distinct components. Likewise, Rubin, as shown on the right hand of this slide, discloses cleats that project downwardly from and are located below the bottom of the sole, and again uses distinguishing reference numbers for the sole and cleats.

Going to slide 23. So in line with the industry's understanding of the difference between the sole and the cleats, Mr. Delgatty explained that the -- this particular difference is relevant to the claims because a person of ordinary skill in the art would understand that. What determines if the foot is placed in a -- in an athletic position is the shape and orientation of the sole in relation to the ground, regardless of the cleats. The cleats serve to provide traction as described in the Kim and Dufour disclosures on the previous slide 22. But they do not contribute to athletic positioning. Particular to whether or not a shoe has cleats, the athlete's foot will be positioned with respect to the ground when in use, and the athlete will obtain the same positioning benefits. In fact, Mr. Markison admitted when comparing the placement of the forefoot relative to the ground, when using either Athalonz technology as shown in the Figure 5, the left of the three images, in comparison to the shoes of Rubin and Kim when on soft ground, that each of these creates a similar ground reaction force simply as a result of the angling of the foot's interaction with the ground as caused by the shape of the sole itself, not the cleats.

And finally, as shown here on slide 24, Athalonz's inclusion of the cleats when measuring the claimed slopes, heights or positions in this case is inconsistent with its own litigation positions in the underlying litigation. For example, in its infringement contentions, Athalonz measured

the different heights of the accused Under Armour shoes at the location of the vertical red lines that it drew onto different dissected shoe sections, and it used those measurements to define the claimed slopes. So for Petitioner's accused shoes that do have cleats, like the HOVR Drive 2 shown on the screen on slide 24, Athalonz did not include the height of the cleats when it was measuring the claimed slopes.

Now, Athalonz's suggestion that this is incorrect and that the cleat height is included is directly contradicted by the fact that the cuts were made in between the cleats. For example, the cross-section E-E as shown in the blown-up image on the middle of this slide was clearly cut in between the four cleats of the heel of the HOVR Drive 2, which is shown in the bottom right of this slide. Now, that height at E-E, at the line E-E, defines the claimed first height of the heel in the '291 patent, the position of the heel in the '760 patent, as well as the uniform height for the reference slope of the '786 patent.

I'm going to skip this slide but come back to it. Going on to the conventional flat heel, Athalonz's suggestion that Kim's primary embodiment lacks a heel that's substantially uniform in height or has substantially no slope for the inside of the outside edge is unsupported. In particular, in Paragraphs 46 and 27 that are shown on the left-hand side of this slide, Kim discloses that the inclined plane may be formed only at the front portion of the outsole and that, except for the outsole 10, including the lower surface 12, the golf shoe 100 of the present invention is substantially the same as conventional golf shoes.

1 Now, the Board already considered this issue and did find that
2 Kim teaches a flat heel, as shown in the bottom right of this slide. And the
3 fact that Kim's -- that Kim's disclosure includes a flat heel disproves Patent
4 Owner's argument that Kim's entire foot, including its heel section, would
5 rotate inwards or be on an inclined plane. Now, as I'll discuss on these
6 following slides, a person of ordinary skill in the art would understand that
7 conventional athletic shoes include a substantially flat heel.
8 On the left side of this slide 27 is each of the claim
9 requirements for a substantially flat heel requiring that the heel platform or
10 section or area has a substantially uniform height or substantially no slope.
11 On the right hand of this slide 27 is Patent Owner's interpretation of what
12 these claim limitations mean, showing two things: First, alleged
13 infringement of an accused Under Armour product that has a cupped heel
14 that varies somewhat in height from the inside to the outside edge of the
15 shoe and from the front to the back of the heel. So despite these minor
16 differences in claim language, Athalonz itself does treat all these claim
17 limitations the same, despite the minor deviations in their language.
18 And here, as Mr. Delgatty explains, as shown on the left side of
19 slide 28, conventional design traits for a shoe such as a heel section would
20 have a consistent height throughout. Having that consistent heel height is
21 part of a standard shoe design, both before and after the priority date of the
22 challenged patents. And contrary to Athalonz's suggestion that Mr.
23 Delgatty's supplemental declaration and its contents are procedurally
24 inappropriate, Mr. Delgatty was simply providing an opinion and evidence

in direct response to Mr. Markison and to the arguments Athalonz makes in its Patent Owner Response.

Now, in his supplemental declaration as shown here on slide 29, Mr. Delgatty provided conclusive support for his opinion that conventional shoes have a substantially flat heel. For example, he provided images of cutaways of the shoes, same shoes that he discussed in his initial declaration, as examples of shoes that do have this conventional heel design. Mr. Delgatty also discusses his knowledge of each of the pictures and what they show in his declaration, and he expressly states and describes his knowledge that each shoe is publicly available and sold in the United States prior to the priority date of the challenged sole patents. Notably, Patent Owner does not challenge that each and every one of the shoes Mr. Delgatty cut and described in his declarations do, in fact, show a conventional flat heel from the inside edge to the outside edge and from the front to the back of the heel, as is clear in these images depicted on slide 29, as well as the images, the remaining images included in his supplemental declarations.

Furthermore, despite his declarations that suggest the opposite, Mr. Markison admitted during his deposition that a conventional heel is flat from the inside edge to the outside edge. For example, as shown here on slide 30 with respect to Kim on the left side of this slide, Mr. Markison admitted that if a conventional heel was used on Kim, there would be a portion where it would be flat from the inside edge to the outside edge. Likewise, with respect to the Rubin reference, Mr. Markison admitted that it does appear to have a conventional block heel, where a conventional meant

that it has a consistent height from the inside to the outside of the heel section.

Also during his deposition, Mr. Markison described the conventional sole or insole that's described in the Specification of the challenged patents as being flat or having roughly the same thickness from the inside of the sole to the outside of the sole. For example, discussing in column 20 of the challenged patents, Mr. Markison explained that the insole or conventional insole that's described in the patents would have roughly the same thickness under the -- under the big toe all the way across the little toe. As well in the context of column 35 of the challenged patents, Mr. Markison explained that the conventional sole design meant a conventional sole that would have -- that would be flat from the inside to the outside.

Now, Mr. Markison also opined on his belief that the Athalonz EnVe golf shoe practices all the claims of the sloped sole patents. And as Athalonz made clear in what's been attached as Exhibit 1036, as excerpt on the top right-hand side of this slide 32, which shows cutaways of the EnVe shoes and why Athalonz itself believes that they meet each of the challenged claims. A sample of these cutaways is also shown in Mr. Delgatty's cutaway on the bottom right-hand side of the slide.

Now, this is important moving to slide 33 because Athalonz and Mr. Markison have gone on the record express -- expressly describing the EnVe shoes as having a, quote, "conventional" heel section. For example, on the left side of slide 33 is an Athalonz document that describes the Athalonz EnVe shoe, stating in relevant part that its technology includes a relevant or, excuse me, a conventional heel section. Additionally, on the

right hand of this slide 33 is an excerpt from a Sports Illustrated article that included an interview with Mr. Markison in which Mr. Markison is quoted as stating that the EnVe's heel is conventional, but as you go forward in the shoe, it transitions you to the inside of the foot.

And it's not just the Athalonz EnVe. The same is also true for Athalonz's latest released golf shoe, the Mana Mangrove. For example, in a video Athalonz posted online regarding this shoe, the transcript of which is found at Exhibit 1029 and excerpted on the right-hand side of this slide 34, when Mr. Markison in the video is describing the Mangrove shoes, he states that you can see the platform here in the heel sections. It's flat. So just like a normal heel in any kind of golf shoe, it's flat.

Additionally, another Athalonz document, which was attached as Exhibit 1030 as shown on this slide 35, explains that a conventional pair of shoes has a flat sole. Now, in some of the challenged patents, the prior art, both parties' experts and Athalonz itself all agree that a conventional heel section has a substantially uniform height and substantially no slope.

So I am going to jump back to the slide 25 that I previously skipped over. So even when Athalonz correctly illustrates Kim's conventional flat heel and correctly recognizes that the toe will be lower than the heel on soft ground when depicting Kim in its diagrams, Athalonz argues that Kim's shoe will pivot when on soft ground, which would result in the shoe not having the claimed slopes or heights in the heel. Now, Athalonz cites no disclosure in Kim as support for this pivoting, and Mr. Markison during his deposition recognized that, in order to pivot in this manner, Kim's sole would have to be rigid. However, Kim discloses a

rubber sole that would flex, which is a scenario Mr. Markison admitted during his deposition that he hadn't considered. But Mr. Delgatty, Petitioner's expert did consider that scenario. And as he explains in Paragraphs 27 and 28 of his supplemental declaration, which is shown here on the right side of slide 25, "Person of skill in the art would understand that Kim's design choice to use a synthetic rubber would allow the sole to flex rather than pivot when the cleats in the forefoot depress into a soft ground surface."

Additionally, this is the only proper interpretation in light of Kim's disclosure that its shoe design allows the golfer to maintain a stable position during and after the swing motion, which would not be the case if the golfer's heel was lifted off the ground due to pivot points as Athalonz suggests. Now, in this scenario with the conventional heel remaining flat on the ground with a substantially parallel reference slope, while the toe is lower than the heel as the cleats in the forefoot enter soft ground, Kim meets the claimed slope, heights, and positioning of all of the challenge claims.

So now going to jump back, moving on to ground 2. So just like Kim, Patent Owner argues that Dufour fails to disclose the slope sole design. More specifically, here for the '786 patent on slide 36, the same challenged limitation in red with respect to the first, second, and third slopes that are formed by the angled support platform is at issue. And here, the dispute particularly relates to whether the outside edge of the toe section is lower than the heel platform section. Likewise, for claim 5 of the '786 patent shown here on slide 37, Patent Owner argues that Dufour fails to

disclose the athletic positioning sole section having those same first, second, and third reference slopes.

Now, as for the ’291 patent shown here on slide 38, Patent Owner disputes that Dufour meets the athletic positioning and shape limitation by having the first height greater than the second height and the second height greater than the third height. And these similar limitations are, again, at issue for the ’760 patent shown on slide 39, particularly whether the athletic positioning of a big toe area is at a lower position than the heel area for both the left and right shoes included in this claim. Now, also Athalonz’s disputes for ’760 patent that Dufour discloses a pair of shoes as shown in the preamble.

So let’s talk about Dufour. As shown here on the top of slide 40 in the middle of the screen, Dufour discloses a golf shoe where the sole 45 has a transverse section in which the inside support surface 46 is inclined with respect to the walking surface 47. And that inclines of the surface 46 rises from the right inner edge 48 of said sole to the outer edge 49. This inclined surface can also be seen in Figure 10 at the top right-hand side of this slide 40. Dufour further goes on to describe that the plantar support zone 61, as shown in Figure 11 on the bottom right hand of this slide, remains substantially parallel to the walking surface 62, while the support surface 63, in the front area of the foot, is inclined upwards from the inner edge 64 towards the outer edge 65.

Now, starting here on slide 41, Athalonz argues, similar to Kim, that Dufour’s toe and heel sections are at the same height. However, Dufour’s Figure 11 conclusively discloses the slope, sole patent’s claimed

slopes, heights, and positionings. And as shown on the left side of this slide 41, the Board already considered this issue at the institution stage and concluded the same, in particular, finding that the heel area visually appears to be taller than the toe area.

Mr. Markison, during his deposition also admitted that the height of the toe section in Dufour, shown in the top right hand of this slide 41 at line C, is smaller than the height of the heel section at line A, which should end the inquiry.

Now, Patent Owner tries to support its argument that the outer toe area and the heel are at the same height based on the outer edge 65 in Figure 12 on the left-hand side of this slide 42, is not showing a decreased height from the heel 61. But as Mr. Delgatty explains on the right side of slide 42, a person of ordinary skill in the art would not interpret Figure 12 as Athalonz suggests. Rather, based on the clear disclosures of Figure 11, from the point on the outer edge of the shoe where the surfaces, 61, 63, and 65 intersect and moving forward there to the toe, the outer edge 65 decreases in height in that direction in a similar but less pronounced fashion as the decrease in height shown at the inner edge 64, from the heel 61 to the toe. Now, also, as we've been preparing for today's argument, we did recognize another way that Figures 11 and 12 can be interpreted consistently with each other that also rebuts Patent Owner's position.

So while both parties experts address Patent Owner's argument regarding Figure 12 as though the cross-sectional line, XII to XII in Figure 11 is drawn across the top of the surface 63 and is therefore at a location past the intersection point of surfaces 61, 63, and 65 as being nearer to the toe. It

may also be the case that Figure 12 is depicting a cross-section that is actually taken exactly at the intersection point of surfaces 61, 63, and 65, at which point the height of the heel and the outer edge are the same.

But it may be the case that the cross-sectional line XII to XII is, in fact, drawn across the bottom of the sole. So for example, if you draw a line straight down from that intersection point of the three surfaces to the bottom of the sole, that is precisely where the cross-sectional line XII is drawn. Now, this is also supported by where the cross-sectional line XII is drawn at the inner edge of the shoe 64 on the opposite end, where the opposite end of that cross-sectional line 12 is drawn to connect with the dashed line, indicating the bottom of the inner edge 64 as compared to the solid line, indicating the top edge of the inner edge 64.

But regardless of whether the cross-section appears to be indicated in Figure 11, that's not the only location at which a person of ordinary skill in the art could measure the height of the toe section to measure the claimed slopes -- claimed slopes or heights. Rather, the toe section includes points that are closer to the front of the shoe than were line XII, XII is shown. For example, at the location of the line C that was shown on the previous slide 41, at which point Mr. Delgatty and Mr. Markison agree that the toe section there has a higher height than the -- has a smaller height than the heel section.

Now, moving to slide 43. Further contrary to Patent Owner's argument regarding Dufour, Dufour's Figures 1 and 9 also disclosed the claimed slopes. Dufour expressly states, as shown in the top right hand of the slide 43, that Figure 9 is a cross-section view across line VI to VI in

Figure 1. Now, Athalonz misinterprets Figure 9's cross-section view, to suggest that it's showing a depth perspective down the length of Dufour from the shoe -- of the shoe all the way to the heel in order to argue that the entire sole, including the heel section, is angled. However, based on dictionary definitions that are shown on this slide, a person of ordinary skill in the art would understand that a cross-sectional view shows only the inside of an object while a perspective view, such as Figure 1, shows depth or distance. So despite Patent Owner's reliance on Figure 9 for an angled heel section, Figure 1, as shown on the left side of this slide 43, does appear to depict flat heel section.

So to move to Athalonz's next argument here on slide 44 regarding Dufour's midfoot section, in its Petitions for '760 and '786 patents, Petitioner identified Dufour's midfoot section and toe section, which together comprised the claimed angled support platform. And the corresponding first, second, and third slopes of that platform were identified with respect to the support surface 56 in Figure 10 that's at the bottom of this slide, as well as the support surface 63 in Figure 11 shown at the top of this slide 44.

Now, Athalonz's argument that Dufour fails to disclose an angled support platform or a midfoot section because it discloses only two sections of the sole and not three is misplaced. Specifically, there's no requirement that the prior art drawings distinctly identify three separate sole sections, and indeed, Athalonz's reliance on Figure 8 of the challenged patents, which is shown in the bottom right hand of this slide proves as much. So for example, just as Dufour's Figure 11 identifies two surfaces,

1 the plantar support zone 61 near the heel and the support surface 63 in the
2 forefoot, so too, does Figure 8 of the challenged patent also include only a
3 heel platform 38 and an angled support platform 36.
4 And so finally, regarding the pair of shoes limitation, the Board
5 previously addressed this issue at institution, as excerpt -- excerpted here on
6 the right-hand side of slide 45. Now, Athalonz has presented no evidence
7 that alters the Board's original conclusion. Instead, in its Response and its
8 Sur-reply, it focuses precisely on what the Board found the claims are not
9 directed to in footnote 1, as a method of playing golf while wearing certain
10 left shoe and a certain right shoe. So in sum, because Dufour discloses the
11 claimed slopes in all of the pair -- in a pair of shoes, ground 2 also
12 invalidates the claims of all three slope sole patents.
13 So finally, moving on to slide 46 for the third ground and the
14 Rubin reference, once again for claim 1 of the '786 patent or disputes that
15 Rubin discloses the claimed angled support platform of the sloped forefoot,
16 and its arguments are largely similar to the Kim reference that we've already
17 covered, including with particular focus, whether the toe is lower than the
18 heel and whether the cleats should be included in measuring the claimed
19 slopes, heights, or positioning. The same applies for claim 5 of the '786
20 patent, which is shown here on slide 47. Same limitations at issue, but in the
21 context of claim 5 with respect to the angled support platform of the athletic
22 positioning sole section
23 And moving to slide 48 for the '291 patent, again, the issues are
24 similar. The only disputed limitations are with respect to the athletic
25 positioning shape and whether the first height is greater than the second

height and the second height is greater than the third height. And again, the issues I'll focus on are whether these heights result in the toe being lower than the heel in Rubin, as well as whether Rubin's cleats should be included in the measurement of the claimed heights.

Finally, moving to slide 49, Rubin for the '760 patent as ground 3. Again, the issues are with respect to the athletic positioning of the -- in particular, whether the big toe area is at a lower position than the heel area of Rubin shoe as with respect to both the left and right shoe. Now, also like Dufour for the '760 patent, Athalonz suggests that Rubin fails to teach or suggest a pair of shoes.

So for some background on the Rubin reference, which is shown here, starting with the top middle of slide 50, Rubin discloses a golf shoe that's designed to aid a golfer in assuming a proper stance and to thereby develop a more consistent swing. So Rubin's golf shoe includes both a conventional upper that's molded with a sole, and that sole has opposed inner and outer sides, and Rubin's shoe also has a conventional heel. As shown in Figures 3 and 4, which are on the right-hand side of slide 50, the outer edge of the sole is thicker than the inside edge of the sole. This causes the golfer's foot to tilt inward on soft ground, which provides the weight distribution when hitting the ball and allows for that better positioning shape.

Moving to slide 51, Patent Owner's argument that Rubin fails to disclose the toe section being lower than the heel section is unsupported. For example, Figure 1 on the left side of this slide 51 clearly depicts that the height of the toe section is lower than that of the heel section, and there's no

evidence, as Patent Owner argues, that this height difference would only be due to a distortion of perspective at the location where the shoe rounds towards the toe -- the toe, as Athalonz suggests.

Indeed, Mr. Markison admitted, with respect to the bottom view of Rubin's shoe that's shown in Figure 3 in the middle of this slide, that Rubin does depict a heel section having a greater height than the outside of the toe section, as shown when the measurement is taken at the position of line B, which would be well before any arguable rounding of the toe begins in that image. And specifically, Mr. Markison testified that by looking at Figure 3, line A in the heel is longer than line B in the toe section.

So next, going to slide 52, Athalonz also suggests that the bottom surface of the sole has to have a flat plane in order to meet the claims of the '786 patent. However, the claimed uniform height that establishes the reference slope, as shown in claims 1 and 5, excerpted in the top right-hand side of this slide 52, that that uniform height that establishes the reference slope should be measured from the outer edge to the inner edge of the heel platform and that it only needs to be parallel or -- I'm so sorry, that it must only be parallel to the bottom surface of the apparatus or sole at the heel section and not at the forefoot section.

For example, this is confirmed by Athalonz's own interpretation of the claims in the underlying litigation. For example, its infringement contentions as excerpted on the bottom right-hand side of this slide 52, where Athalonz was accusing the Curry 4 FloTro shoe of infringement. And when measuring the claimed reference slope and whether it's substantially parallel to the bottom surface, Athalonz itself only relied on

the heel section, which is depicted by the E-E cutout and did not rely on any other portion of the shoe, such as the location in the forefoot, in order to establish this claim limitation.

Going on to the slide 53, even if the claims did have the requirement Athalonz inserts into this claim, they would still be met by the Rubin reference. And this is because just like Kim, Rubin expressly discloses a flexible sole. Rubin's flexible sole would allow the toe section of the sole to extend downwards onto and into the ground while the heel section would remain flat onto the ground.

Now additionally, Rubin's flexible sole, similar to Kim, also contradicts Mr. Markison's assertion that Rubin's heel section would lift off of the ground due to the creation of two pivot points when used on soft ground.

Moving to slide 54, Athalonz's suggestion that some of Rubin's embodiments lack a heel that's substantially flat or of substantially no slope from the inside edge to the outside edge is unsupported. Just like Kim, as I previously covered, Rubin's disclosure of a conventional heel along with the flat heel that is plainly shown in figure 3, confirmed the opposite. This fact also contradicts Patent Owner's argument that the entire shoe in Rubin, all the way from the back of the heel to the front of the toe, would rotate inwards or be on a sloped angled platform.

Similarly, for Rubin on this slide 55, just like Kim, the slopes, heights, and positions should exclude the cleats. For example, Rubin's cleats project from the bottom of the sole 14 and therefore should not be included when measuring the claim's slopes, heights, or positions, for

exactly the same reasons as I previously discussed with respect to the Kim reference.

Now, finally for the Rubin reference, moving to slide 56, with respect to Athalonz's dispute that Rubin discloses a pair of shoes, Athalonz have presented no evidence that alters the Board's conclusion about what the claims require with respect to a pair of shoes. Additionally, Petitioner's expert, Mr. Delgatty, as excerpted here on the right-hand side of slide 56, explained why it would've been obvious to provide both left and right shoes that provide the claimed features and benefits in Rubin.

Moving here to slide 57, with respect to the combinations of the Dufour and Kim references, as well as the combination of the Rubin and Kim references. In both its Petition and its Reply, Petitioner explained why a person of ordinary skill in the art would be able to successfully combine Dufour Rubin's teachings with those in Kim. For example, the -- all three references are in the same field and they disclose similar improvements when wearing the shoes. Both a midsole and an insole, as disclosed in Kim, were common shoe components that provide the wearer with several different benefits. Dufour and Rubin's shoe could be easily modified within the knowledge and skill of a person of ordinary skill to include Kim's midsole and insole while maintaining its same athletic positioning shape. And as was just mentioned, a person of ordinary skill in the art would've been able to make any necessary modifications.

Now Athalonz's arguments to the contrary with respect to obviousness are simply premised on a fundamental misunderstanding of obviousness law. For example, in the Federal Circuit's *In re Snead* decision,

the court there explained that the inventions of different references do not need to be physically combinable in order to render a finding of obviousness, as well as particularly in the *In re Keller* decision, where the court explained that the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference. Rather, the test is what the combined teachings of the references would've suggested to those of ordinary skill in the art, just as Petitioner's expert, Mr. Delgatty, described.

Now in contrast, Athalonz's overly narrow view of the law considers only the physical placement of Kim's embodiments on top of Dufour and Rubin's embodiments, and fails to consider any alternative disclosures in the references or any modifications that a person of ordinary skill in the art would've been able to make.

And finally here, moving to slide 58 with respect to secondary considerations, these secondary considerations do not alter the conclusion that all claims are invalid under all instituted grounds, particularly as Petitioner describes in its Reply briefs, Athalonz fails to both apply the correct legal standards for these secondary considerations, and the supporting facts it offers fail to meet those standards. So I'll go over these in detail. However, I do want to briefly highlight the copying consideration on the bottom of slide 58. In particular here, Athalonz failed to include any technical analysis of Petitioner's products in any of its Responses or any evidence that Petitioner's shoes practice the asserted patents or that they have a similar design as Athalonz's patent -- as Athalonz's products.

So with that, unless there are any further questions, I'll reserve the rest of my time for rebuttal.

JUDGE DEFRANCO: Counsel, I do have one question. With respect to at least the '291 patent, those claims there --

MR. HARMON: Yes.

JUDGE DEFRANCO: -- I see that you have Kim, you rely on Kim for a 103 ground --

MR. HARMON: Yes.

JUDGE DEFRANCO: I'm just wondering, why isn't Kim an anticipatory ground when -- and where does -- how does the obviousness come into it, at least with respect to claim 1, which limitation requires an obviousness analysis as opposed to an anticipation analysis?

MR. HARMON: Yes. I'll shift back to that. So I mean, a moment. We're trying to find it.

JUDGE MEYERS: And, Counsel, could you also address that with respect to the other two patents as well.

MR. HARMON: Okay.

JUDGE DEFRANCO: Does it relate to the heel section? Because I'm wondering if -- I know that the Petition is relying on the testimony of their expert to say that the heel section is conventional and therefore it has a uniform height throughout. So I'm wondering if it has to do with --

MR. HARMON: Yes.

JUDGE DEFRANCO: -- that heel limitation that you actually have -- you say it's undisputed, but I -- I'm not sure it is undisputed.

MR. HARMON: Yes. That's correct. It took us a moment to look through, but it is with respect to the heel limitations, specifically the height limitations of the heel, in each of the three patents, as Petitioner does rely on a conventional heel section which, as Mr. Delgatty has testified, would be understood to be flat with substantially no slope, which would cover those particular limitations of each of the three patents.

JUDGE DEFRANCO: Okay. I'm just wondering why you say that's undisputed as far as the first height on the inside edge and an outside edge -- so meaning the first height is uniform throughout from the inside edge to the outside edge --

MR. HARMON: Yes.

JUDGE DEFRANCO: -- Patent Owner doesn't dispute that. It's just the dispute --

MR. HARMON: Yeah. So Patent Owner disputed in its Patent Owner reply, whether mister -- sorry, excuse me -- whether Mr. Delgatty had sufficiently established what a conventional shoe was. In his supplemental declaration, Mr. Delgatty went on to explain that the images of the shoes he depicted and relied on for a conventional heel did include a flat heel section, once he provided those cutouts. Additionally, we argued that it is undisputed, as due to Mr. Markison's admissions in his deposition where he confirmed that not only the patents themselves, but Athalonz's own products, which contain a flat heel section, are considered conventional portions of the shoe.

JUDGE DEFRANCO: Okay. Got it. Thank you.

MR. HARMON: So with that, I will -- assuming there's no further questions, I will reserve the rest of my time.

JUDGE JUNG: Thank you, Mr. Harmon. You have 35 minutes left.

MR. HARMON: Thank you. And I will pull down my share screen here.

JUDGE JUNG: And Mr. Houghton, you may begin when you're ready.

MR. HOUGHTON: All right, thank you and good morning, Your Honors. My name's Connor Houghton, representing the Patent Owner, Athalonz.

One small housekeeping issue I wanted to raise is an objection to their slide 42 and the new argument that they raised about the cross-sectional view of Dufour. They admitted that it was a new argument that they came up with for oral argument. So we would just ask the Board not consider that. Sort of pretty clear to us under the Trial Practice Guide and the rules for what's allowed that you're not allowed to raise new arguments. I don't think it's a hugely important point. I don't really even understand what the argument they were making was, but I just wanted to raise that for the record.

As sort of an introductory point, I'll start with the Board's last question about anticipation and obviousness. As you noted, they only raise obviousness arguments here for all three of the patents -- for all of the grounds and all the patents, and yet nowhere in any of the Petitions is there an actual indication that they need to modify anything. Really, what we

1 think they're doing is using hindsight to reconstruct these references, picking
2 and choosing different figures, different snippets from the Specification,
3 piecing together prior art that's not there. And we'll show, throughout the
4 presentation, we think the briefing is clear that these patents are not the same
5 thing as this invention. They don't anticipate the claims. They don't render
6 them obvious. It requires a lot of reconstruction hindsight to get to what the
7 claims are saying through these three main prior art references.
8 Just to kind of give you a roadmap of what I'm hoping to cover,
9 I want to start off looking at the prior art because I think one of the big
10 disputes here is what this stuff actually discloses. This isn't a case where
11 you have sort of a clear disclosure in the prior art and there's a dispute about
12 how it applies to the claims. Here we just sort of have a fundamental
13 disagreement about what the prior art actually discloses when you read the
14 entire specification and you look at all the figures. So I want to start off
15 there, get into the claim construction issues, bounce back and forth to their
16 slides in a few places because I think they really illustrate what we think is
17 wrong with their arguments. And then at the end, I want to address the
18 secondary considerations evidence, which we think is pretty powerful and
19 very important for the Board to consider here.
20 But before I get into any of that, you know, I'm here to answer
21 the Board's questions and I think that the best use of time would be to
22 address any issues that are on your mind. So feel free to jump in any time,
23 please, interrupt me, let me know what you want me to go to. So I'll start
24 off with that opportunity. And then if you want me to just get into it, I can.

Okay. So yeah, again, feel free to interrupt, but -- I'm not going to share my screen. I know the Board has the slides. This is what we filed as Exhibit 2023 in each of the three proceedings as our slides, so I'll just reference slide numbers unless you prefer me to put it up.

So one quick point I want to start off with is the expert qualifications. I know during the prehearing conference, the Board mentioned that you didn't really want to hear too much about this, but, you know, they raised it and so I just want to respond. To be clear, the Petitioner did not challenge Mr. Markison's qualifications as an expert. They didn't say he can't testify as an expert here because he is not qualified. You know, it's true that at the time of -- in 2011, he didn't yet have the number of years of experience. But the Federal Circuit case law on this point is super clear: as long as you can go back and provide an objective opinion from the level of skill in the art at the time, you can still be qualified as an expert. And the fact that they didn't even challenge his qualifications, like, they didn't say he can't be an expert, we think sort of resolves that issue.

There's all these claims of bias, which we think we briefed pretty clearly in the Sur-reply why they don't apply, why they're not convincing. The law does not say that you can't be an employee expert or that an employee expert necessarily should be given less weight than others. If you trace back through the cases they cite, going all the way back to the Federal Circuit case in 1985 that they're citing, that's not what it says. It talks about how that's a factor that the Board can -- or that the court, in that case, could consider. And, you know, we're certainly not saying the Board can't consider his employment status, but to say that he's biased and

shouldn't be given any weight, we think really doesn't hold water. Especially with the way the Board typically looks at expert declarations, sort of on a cold record.

As the Board knows we offered to bring Mr. Markison here to provide live testimony so the Board could ask him any questions and sort of weed out any bias that you see. He didn't want to do that, which is fine with us, but we just wanted to offer it for consideration. So we think that the Board should just weigh his testimony, just like it would anyone else's, based on what the actual opinions are and what the support for them is in the record.

And then one last point is just that Mr. Markison has been a patent attorney for 30 years. He makes his living, you know, prosecuting patents before this office. And so to say that he's so biased that he shouldn't be given any credit here, we think really doesn't move the needle. So happy to answer any questions the Board has on that issue but I just wanted to kind of check it off before getting to the merits.

JUDGE DEFRANCO: Mr. Houghton, we're not saying we're not going to give him any weight or any credit. It -- it's just the amount of weight is what's in question right now.

MR. HOUGHTON: Okay. I understand. And we don't disagree with that way of looking at it. We think when you read his opinions and you really look at the entire prior art and what he's saying about it, his opinion should be given a lot of weight because he really is familiar with these issues. He is a true expert in this area. He's been designing shoes and looking at patents in this field for 15 years, he knows

the stuff really well. And so we think his opinion should be entitled to quite a lot of weight.

JUDGE DEFRANCO: Well, that's depending, but you know, Petitioner did have an opportunity to cross-examine him and, you know, whatever your expert said on the cross-examination, that's where the issue of appropriate weight will come in.

MR. HOUGHTON: Okay. Yes. That makes sense.

And I do want to point out in the Sur-reply there were quite a few places we flagged where they were taking his deposition testimony out of context. And some of it's even on his slides. I mean, they say he agreed that certain things show the slopes or the heights, he certainly did not agree to that. He made very clear in his testimony things like, yes, taking Figure 3 in a vacuum without the rest of the Specification, it shows that that line you drew is shorter, but that's not actually what the reference discloses.

JUDGE DEFRANCO: Right. So that's -- that -- this is your opportunity today to get into that. Why those, quote, unquote, "admissions" are not actually admissions.

MR. HOUGHTON: Understood, Your Honor.

So jumping in my slides to slides slide 8 -- or actually, sorry, slide 6. This just has the full language of the '786 patent claim 1, the language from the claims that was in their slides was sort of a summary, and so we just wanted to put up the full claim. We'll come back to it where it matters. If you jump to slide 7, this is a diagram that we have in our briefing and our expert declaration that sort of illustrates the claim elements on diagram that's easy to see and understand. The patents here use similar

1 diagrams to this, and so this is not something we just made up. This is sort
2 of to put everything in the same concept, in the same language as the patent,
3 so you can compare it more easily.
4 For the ’786 patent you can see there’s a reference slope, which
5 has a uniform height from the inner to the outer edge, and it’s parallel to the
6 bottom surface of the apparatus. So essentially, it has a zero slope heel with
7 a reference slope. And the reference slope is parallel to the bottom of the
8 apparatus, and we’ll come back to that when we address claim construction,
9 but the idea is that these are shoes. These claims are on shoes and so the
10 thing you’re looking at is how the shoe actually fits within the claims, with
11 the measurements. And then you can see here, illustrated on slide seven, the
12 first, second, and third slopes that’s formed between the different sections of
13 the shoe.
14 Jumping to claim 5, this is on slide 9, is a similar diagram.
15 You’ll see the difference is that this specifically calls out a specific bottom,
16 something like cleats or an outsole. Otherwise, the elements are essentially
17 the same. Jumping to the ’291 patent, slide 12 illustrates claim 1 of the ’291
18 patent with its elements. This one talks in terms of heights, as we heard. So
19 there’s a first height, which is what establishes the sort of zero slope heel.
20 First height at an inner edge and an outer edge at the heel. There’s a second
21 height at the little toe section, and then there’s a third height at the big toe
22 section. And that forms three slopes similar to the ’786 patent, a first slope,
23 a second slope, and a third slope.
24 And finally, the ’760 patent is the pair of shoes patent. And so
25 this has both a left shoe and a right shoe, which we can come back to when

we're talking about the ground specifically. But slide 15 shows just the left shoe. Both of the shoes have the same characteristics, so there's two shoes, each of which do this athletic positioning. And again, it has the no slope in the heel and it has the toe areas lower than the heel.

JUDGE DEFRANCO: Mr. Houghton, do you agree with Petitioner that we don't need to construe the term athletic positioning, shape, or athletic positioning sole section because the claim itself defines that term?

MR. HOUGHTON: I don't agree. And if you jump up to our slide -- let's see which one it is. Slide 54. We sort of set out the dispute here where they say this needs no construction and we provide a construction. And our construction is that the heel section is higher than the toe section, and the outside edge of the toe section is higher than the inside edge of the toe section. We have quite a lot of support for this in our papers so we've cited those here on slide 54, mostly in the Patent Owner Response. The reason why we think this term is important to construe is that it appears in all three of these slope patents, and it should have the same meaning across all three of the slope patents. It has the same Specification, the same figures, et cetera, but taking their position that it doesn't require a construction reads the term out of the claims completely.

And obviously there's a lot of Federal Circuit case law talking about why you shouldn't read terms out of claims. We think it matters, especially on the '760 patent because, really, their position is all the '760 patent requires is that the heel is higher than the toe. Without the athletic positioning term having some meaning, beyond, you know, just what's in the claims, that patent really is too broad and inconsistent with what

1 anything in the Specification or elsewhere in the patent supports. So we
2 think it really comes into play in the ’760 patent, that it has to have this
3 construction. We noted in the briefing, especially in the Sur-reply paper 23
4 on the 638 proceeding, the Board already sort of agreed with us here.
5 Now you found that it didn’t need construction, but you also
6 found in the Institution Decision on the ’760 patent that the claims describe
7 these features here in our construction. Yet without our construction, the
8 claims actually broader on the ’760 and just really say that the heel has to be
9 higher than the toe.
10 JUDGE DEFRANCO: Okay. But on the other two patents, we
11 don’t need to construe them because it is defined by the claim. That term
12 athletic positioning shape is defined by the claim for the other two patents.
13 MR. HOUGHTON: I think the construction is less important in
14 the overall determination on the other two. I do think we’re not adding
15 anything different on those two patents with this term. Meaning, if the
16 Board didn’t construe it in the ’291 and the ’786 patents, I don’t think it
17 changes the outcome. But it’s the same term and it’s the same spec support,
18 it’s the same figure support, and so we don’t -- we think it makes sense to
19 construe it the same way in all three patents. But it really, it’s the most
20 important in the ’760.
21 JUDGE DEFRANCO: Thank you for that clarification.
22 MR. HOUGHTON: Sure. And if you just look at slide 56
23 briefly, this is some of the support we cited in our briefs about athletic
24 positioning in the construction. Now their expert didn’t offer a construction.
25 He didn’t really even seem to know what the term should mean. He agreed

that it limits the claims some way, but he didn't know how. He talked about weight distribution, but he didn't really have a meaning for how it defined weight distribution or how that would apply. And he didn't put in any evidence in his declaration about, you know, what it is that meets the athletic positioning limitation. So just citing that for a bit of additional support.

JUDGE MEYERS: Counselor?

MR. HOUGHTON: Yes?

JUDGE MEYERS: Does the Specification of the '760 patent limit this athletic positioning to it requiring all three of those elements? Meaning that the big toe is lower than the little toe and both are lower than the heel? Or could -- or does the Spec disclose embodiments where it just requires that the big toe be lower than the heel and the little toe could be at the same level as the heel?

MR. HOUGHTON: Oh, that's a good question, Your Honor. We think the Specification does limit it this way. There is no express definition, I'll agree with that. So there's no athletic positioning means X. There is a place in the Spec where it talks about athletic position, which is different than positioning in the claims here. But every embodiment --

JUDGE MEYERS: Can you direct me to that portion of the Specification or just come back to it later on?

MR. HOUGHTON: It's in one of the first columns, I don't have -- the cite is in our briefing. It's in one of the first columns. It says, "Athletic position EG," and then it talks about weight distribution. It doesn't say athletic positioning, which we think is an important difference.

1 And then in terms of the rest of the spec support, your question
2 was whether there are embodiments that just show the heel being higher than
3 the big toe. We don't think there are any, we think every embodiment is
4 consistent and has this specific athletic positioning shape. And so that's why
5 we think it's important to have the claims be, you know, sort of consistent
6 with the Specification here. Otherwise, you're really just claiming a shoe
7 that has a heel higher than the toe. And even in the Specification, it says,
8 "Just having a heel higher than the toe was in the prior art." So that doesn't
9 really make much sense to us.
10 JUDGE MEYERS: Okay. So that -- it wouldn't be reading
11 embodiments from the Specification into the claim of the '760 patent?
12 MR. HOUGHTON: We don't think it would be, Your Honor.
13 I understand the concern about doing that, but in our view, that's not what
14 we're doing. We're really just reading the claim in light of the Specification
15 in this term -- as this particular term of art in these patents.
16 JUDGE MEYERS: Okay. Thank you, Counselor.
17 MR. HOUGHTON: While we're on claim construction, I'd
18 like to go back to the prior art and sort of just look at it with the view of
19 whether you're supposed to be including, as they say, including the cleats or
20 not. And so slide 18 has an overview of Kim, Kim is one of their three main
21 prior art references. This is Exhibit 1005 in all three proceedings.
22 You can see on slide 18 this cross-sectional view of what Kim's
23 sole and cleats look like. Essentially it has short cleats on the outside edge
24 and long cleats on the inside edge. And what that allows you to do is tip
25 your foot inward to, you know, when you're on soft ground your entire foot

1 will tip inward and it shifts the weight balance inward. There are -- there are
2 references in the prior art that do this. It's -- Mr. Markison refers to it as a
3 wedge, and so essentially you have a wedge shaped sole so that you can tip
4 your foot in when you're swinging a golf club.
5 Kim is one example. Rubin is another example. There are
6 others. This wedge idea is in the prior art. It's not new, but it's also not
7 conventional. This is not how everybody did golf shoes. Golf shoes that
8 had a wedge were doing something different and that -- that's what they
9 were doing. They were using these differing length cleats, or sometimes not
10 differing length cleats, but just a wedge shaped sole to tip the foot in. Slide
11 19 shows the abstract of Kim, it just summarizes exactly what I said, what
12 it's doing. If it's differing length cleats. And then sort of one of the key
13 disputes here seems to be whether the cleats in Kim run through the entire
14 shoe. And so if we look at slide 20, I think it pretty definitively answers the
15 question, they do. Cleats are 11, cleat shape spikes are 50, they're in the
16 heel of Kim. You know, it's pretty clear from figure 1. It talks about it in
17 paragraph 30 and 31 of Kim, this is on slide 21.
18 And then if you look at slide 24, this is what the Board was
19 most focused on at the Institution Decision, was the kind of difference
20 between a hard surface and a soft surface. So slide 24 shows Kim on a hard
21 surface. You can see the longer cleats on the inside edge the shorter cleats
22 on the outside edge. The foot is flat on a hard surface. There are tons of
23 places in Kim that talk about this. If you look at slide 26 we have some
24 examples, these are all in our briefing. There's really no dispute that on a
25 hard surface the foot of Kim is flat, so that when you're walking your foot

isn't angled. And we have a diagram on slide 25 that sort of illustrates what this looks like.

Now, when you go to a soft surface, on slide 27, the foot of Kim is rotated inward. The patent itself uses that language about the foot being rotated inward. It doesn't say the toe. It says the foot. We have a diagram on slide 28 showing this. And we think that you can really see this clearly in slide 30. And this is also a diagram that's in our briefing. It's not that the toe of Kim rotates on a soft surface. The entire foot rotates. You can see the heels of Kim on soft surface are rotated, just like the toe is. And the only way that's possible is if the cleats, these inverse length cleats, which are 11 in Kim, are in the heel and the toe. So we think that -- you know, we'll get into it a bit more in the grounds, but we think this figure is pretty definitively showing that these -- this wedge shaped sole runs throughout. Now, there are certainly figures that look a bit different. We acknowledge that, but you have to look at the entire Specification and what it discloses. And so this is, we think, what it's disclosing. Now --

JUDGE DEFRANCO: Counsel, Mr. Houghton, where is the athletic positioning happening? Is it happening in Figure 5A or Figure 5B?

MR. HOUGHTON: Your Honor, in our view, the athletic positioning isn't happening in Kim. This is the prior art that we say doesn't do what we do. At most, what Kim is doing is -- when you're standing on a soft ground, its shoe can dig into the ground and tip your weight inward in Kim. We don't think that meets what the claims require, which requires the shoe to do something on its own. And we can jump to that part of the claim

1 construction issue if it'd be helpful, but we don't think Kim does athletic
2 positioning in the way that claims are require.
3 JUDGE DEFRANCO: Well, it does teach athletic positioning.
4 It may not have athletic positioning shape or an athletic positioning sole
5 section, which is the way the -- those claims read, but there is some sort of
6 athletic positioning, correct, in Kim, Dufour, and Rubin? I mean, they're
7 golf shoes. They're athletic shoes.
8 MR. HOUGHTON: They are athletic shoes, Your Honor.
9 That's right. So what we think is really novel about the claims here and
10 what sets them apart is that they are on a shoe that provides athletic
11 positioning just by virtue of being what it is, when it comes off the
12 manufacturing line. It doesn't require a method of use. And something
13 that's really interesting, actually, on this is, if you turn to their slides and you
14 look at slide 45 -- I'll give you a second to do that. This was the Board's
15 Institution Decision, referring to this pair of shoes issue that's in the '760
16 patent. And there's a footnote from the Board that says, "We note here that
17 the claims are not directed to a method of playing golf while wearing a
18 certain left shoe and a certain right shoe." We agree with that. That's not
19 wrong. These are not method claims. They're claims on a shoe that has
20 certain attributes. And so this sort of gets right into the heart of the claim
21 construction dispute, in our view. Like, the shoe is what does the thing in
22 the claim.
23 Sorry to put that sort of colloquially, but this is not a claim
24 where you can take a shoe and do something to it, and then have it meet the
25 claim sometimes and not other times. It's not a method claim. It's not a use

1 claim. It's not a claim that requires putting certain weight in certain places
2 on a shoe. It's just a shoe that does something. And so when the Board says
3 here, it's not directed to a method of playing golf, that's right. And so you
4 have to look at the shoe and decide whether it meets the claims. And, you
5 know, we've briefed this rather extensively throughout, and we think we're
6 on the right side of this, obviously --
7 JUDGE MEYERS: Counsel --
8 MR. HOUGHTON: -- but --
9 JUDGE MEYERS: If --
10 MR. HOUGHTON: Yes?
11 JUDGE MEYERS: If I can interrupt you for a minute, can we
12 just focus on the shoe that's depicted in Figure 5B, though, Kim?
13 MR. HOUGHTON: Sure.
14 JUDGE MEYERS: You know, I know you refer to these as
15 what-if embodiments, but it's clearly depicted in Kim as the way the shoe
16 works on a soft surface, such as a green. And during the address portion of
17 the swing, you know, it seems to capture the claim language.
18 MR. HOUGHTON: Well, I'm -- so I'm back to our slide, slide
19 30. And again --
20 JUDGE MEYERS: Okay. I'm looking at slide 33 also.
21 MR. HOUGHTON: Okay. Slide 33. So yeah. The what-if
22 embodiment of Kim is a bit different, but just focusing on 5B itself, that's
23 not something we say is the what-if. 5B is what is the primary embodiment
24 of Kim, where the entire foot rotates, as we show on slide 30? And again, if
25 you can take this claim and say, taking a shoe and putting weight on it, and

1 pushing it into certain surfaces and not others, using the shoe in that way,
2 then, you know, sure, Kim, it's position, it's resulting position has the -- has
3 some of the features. It doesn't -- in our view, because of the heel having
4 the cleats, it doesn't meet the claim still, but it does at least create certain
5 slopes with respect to the ground. And this is how they are looking at this
6 with respect to the ground. But we think you need to look at the shoe
7 without reference to the ground, just with reference to the shoe.
8 And so if we turn to the '786 patent, this is on slide 58 of our
9 slides. It's a shoe. Again, we think that's important. It has a reference
10 slope, which is substantially parallel to the bottom surface of the apparatus,
11 the apparatus being the shoe. So you measure the reference slope with
12 reference to the bottom surface of the apparatus, the shoe, not with respect to
13 the ground, and then you determine whether the first, second, and third
14 slopes are greater than the reference slope. And the way you do that is you
15 look at the bottom of the apparatus again. And you say, is there a slope
16 between these relevant portions in the bottom surface of the apparatus? It
17 doesn't make sense to look at the ground and say, well, if you're on soft
18 ground, there's a slope with reference to the ground. You know, then you
19 could take a shoe and hold it up in the air and say, you know, if I hold the
20 toe section up higher than the other section, there's a slope. It's not the
21 slope in the claims. There is a slope.
22 JUDGE MEYERS: I mean, your point is made there about
23 holding in the air, but it is being used as a golf shoe in Figure 5B. You
24 know, I do take your point, but are we supposed to just ignore this -- what's

depicted in Figure 5B? Would one of ordinary skill in the art look at that and just say -- you know, not appreciate what is going on there?

MR. HOUGHTON: No, I don't think we should ignore it, Your Honor. I just think that we should look at it in the way that we've described. And you look at it with reference to the bottom of the shoe so that you can figure out if a shoe falls within the scope of the claims without reference to how you're holding it or how it's being used, or how it's being pressed into the ground. We think this is pretty well shown in our diagrams on the '786 patent. If we look at slide 70, this is a --

JUDGE DEFRANCO: Counsel --

JUDGE MEYERS: This would be -- this would be 5A, correct, that we're looking at, though?

MR. HOUGHTON: That's right. And then 71 is 5B. And again, sure, you can look at the fact that the spikes are digging into the ground, but when you measure with reference to the bottom surface of the apparatus, that doesn't change it, just like it wouldn't change it if this were standing on dirt so that -- you know, if it were standing on hard dirt so that the cleats didn't penetrate the ground, but this inside edge of the shoe were higher, right? You can imagine if you stood on a rock, for example, that's something that happens on a golf course, the inside edge of the shoe would then be higher than the outside edge of the shoe. It shouldn't change whether the shoe falls within the scope of the claims, what the ground surface is.

And we think this is something that they just got wrong, their expert in the reply deposition. You can see some testimony there that we

1 cited in the Sur-reply brief where he's basically saying -- you know, we gave
2 him a hypothetical.
3 What if you're standing on a hill so that your toes are higher
4 than your heel, right?
5 He said, well, I didn't really consider that because I only
6 viewed these claims as applying when you're standing on soft, flat ground.
7 You look at the claims, they're not for standing on soft flat
8 ground. Like, these claims apply to much more than golf shoes. The
9 Specification is full of examples of these being used for basketball shoes,
10 baseball cleats, dress shoes, all kinds of things that are not just golf shoes
11 used on flat, soft ground. And indeed, our infringement contentions, most of
12 the examples they gave you are basketball shoes. They're not golf shoes.
13 JUDGE DEFRANCO: Yes, but, Counsel, that goes to
14 Petitioner's point that that's why you don't take into account the cleats.
15 Because if you're talking about a basketball shoe, they don't have cleats. If
16 you're talking about, you know, any other type of athletic shoe, other than a
17 golf shoe or maybe a baseball cleat, they don't have cleats. So that's why
18 Petitioner is saying it has to be measured based on the sole itself, and the
19 cleats do not include the sole, correct?
20 MR. HOUGHTON: Oh, I understand their point. I don't agree
21 with it.
22 JUDGE DEFRANCO: Why not? Why don't you agree with
23 it? Because this is just talking about a shoe in general. You don't limit the
24 type of shoe in your claims. Just as you don't limit the type of ground that

1 that shoe is on in your claims. You don't say a shoe on a hard ground. You
2 don't draw a distinction, in your claims so why --
3 MR. HOUGHTON: Sure.
4 JUDGE DEFRANCO: -- shouldn't we take Petitioner as saying
5 it excludes the cleats? You just go by the sole because a sole is uniform,
6 whether it's basketball, golf, or whatever, whatever it -- it's irrelevant as to
7 the use.
8 MR. HOUGHTON: Sure. I understand the point, Your Honor.
9 And if we look at the claim, for example, the '786 patent claim 1 that we
10 talked about a little bit, this is on slide 6, you have to measure the reference
11 slope substantially parallel to the bottom surface of the apparatus, not just
12 the sole. So you look at whether there's a reference slope with reference to
13 the bottom slope surface of the apparatus. Now, sometimes that has cleats.
14 Sometimes it doesn't. Sometimes it's an outsole of a basketball shoe.
15 Sometimes it's a golf shoe, like Kim or Rubin. The bottom surface of the
16 apparatus is what touches the ground. It's the cleats. And again, we talked a
17 little bit in our briefing, and we have some diagrams here today that show
18 that taking off the cleats and not considering them leaves you with
19 something that doesn't really make sense in this context of the prior art.
20 You know, as an example, what if you had -- say you ignore the
21 cleats but you have super long cleats in the toe, such that the shoe results in
22 your toe being way higher than your heel, right? In that example, if we
23 ignore the cleats, then sure, maybe the sole could fall within the scope of the
24 claims, but it's not going to do what this patent is about, and it doesn't make
25 any sense because it's doing the opposite. It's not putting the heel higher

than the toe. It's putting the toe higher than the heel. And so that's why we think it's important to look at the shoe as a whole, measure with reference to what is touching the ground, regardless of surface, and look at things that way.

JUDGE MEYERS: Counsel, though, looking at slide 71 that we've been looking at, and then how does Figure 2 of Kim factor into slide 71, the figure in slide 71?

MR. HOUGHTON: Sure. So Figure 2 of Kim is a figure that shows certain aspects of it. And I agree, you know, if you just look at Figure 2 of Kim, it looks like it has a block heel that has no spikes, right? That's not what the rest of the Specification describes, and not every figure has to show all the features that are in the claim. If you just look at Figure 2 and you say, okay, I'm going to say that Kim is actually disclosing a shoe that doesn't have cleats in the heel, right? We obviously disagree with that, but we address it at length. This is the what-if embodiment.

JUDGE MEYERS: Right.

MR. HOUGHTON: If you go to our next slide, 72, this sort of provides you with that what-if embodiment, which, you know, they say figure 2 shows. We disagree, but regardless, if you took the cleats out of the heel and you made the heel thicker than the toe portion, but to be consistent with all of the rest of Kim, talking about how the foot surface is flat to the ground when you're walking, this is what it would look like. And we address this in our briefing. This is the -- what we call the what-if embodiment. It still doesn't meet the claims. It still doesn't have any of the slopes. And again, this is when you measure with reference to the bottom of

the shoe, which we think you have to do in all of these claims. It's still lacking all of these things, even if you take figure 2 for what it is.

JUDGE MEYERS: And that is your figure on slide 79?

MR. HOUGHTON: I'm on slide 72. This is with regard to the '786 patent. 72 is the what-if for the '786 patent.

JUDGE MEYERS: Okay. All right. My apologies.

JUDGE DEFRANCO: Where is the sole on figure 70 -- on slide 72? What is the sole?

MR. HOUGHTON: The sole is the thing that's excluding the cleats, so it would be --

JUDGE DEFRANCO: The white?

MR. HOUGHTON: -- the white. The white.

JUDGE DEFRANCO: Okay.

MR. HOUGHTON: And just sort of --

JUDGE DEFRANCO: Where is -- where is the bottom of the sole?

MR. HOUGHTON: The bottom of the sole is the angled thing that goes sort of from -- you can see it's thinner at the -- at the front part and thicker at the back part, the incline plane.

JUDGE DEFRANCO: So it's the line immediate -- it's the line that's between the white sole and the cleats? That's the bottom of the sole?

MR. HOUGHTON: I think that's right, yes.

JUDGE DEFRANCO: Thank you.

MR. HOUGHTON: And again, just to kind of button up this what-if embodiment of Kim, if we go back to slide 31, this is the language of

1 Paragraph 46. This is where this comes from. And we'll just flag, this is the
2 last paragraph of Kim. It's kind of typical patent language. Like, here's all
3 the stuff we disclosed. By the way you could do it any number of other
4 ways. Here's one example. That's what Paragraph 46 is, that any number of
5 other ways, which are not as it says at the you know, right at the beginning,
6 although the preferred embodiments have been disclosed, aka, all the figures
7 are what the preferred embodiments are. For example, the inclined plane
8 may be formed only at the front portion. And so they're saying that's not
9 what's the preferred embodiment. It's not what we're showing in our
10 figures. It's not what we're describing. This is another way you could do it.
11 And so again, that's sort of how we get to where we are in what these claims
12 are -- what Kim is disclosing.
13 And again, this sort of goes back to the point that we talked
14 about before, right at the beginning. Like, they're doing obviousness
15 without really explaining what they're doing. They're relying on this what-
16 if embodiment, but they're not saying they're making any modifications.
17 They're just sort of relying on the figures which show the preferred
18 embodiments as disclosing something. And then maybe you could modify it
19 some way with this, but we don't really get any of the rigor required to
20 prove obviousness.
21 So turning to Dufour, and I think that really answers the
22 questions of why these claims aren't met for most of the Kim references. So
23 I don't -- I won't belabor that unless the Board has specific questions. We
24 can come back to it. But turning to the Dufour reference, this is Exhibit
25 1006 in all three of the IPRs. So I'm on slide 35 and this is Figure 9. Figure

1 9 shows a wedge-shaped sole. The same one that I've been talking about
2 that runs through the entire shoe. We have a depiction of what that looks
3 like sort of in the same terms that we've been looking at for the patents. On
4 slide 36, this is what a wedge looks like when it runs through the entire shoe.
5 And this is what Figure 9 and the related figures are depicting.
6 Now, Figures 11 to 12 on slide 37 is a different embodiment.
7 There's no dispute about that. Their expert agreed in the deposition.
8 They've agreed in the briefing. Figures 11 and 12 are a different
9 embodiment than Figures 1 through 9 so -- or 1 through 10. So this is not
10 the same thing. This doesn't show the wedge shaped sole all the way
11 throughout. One thing we pointed out pretty extensively in our Response
12 was you can't just combine the embodiments from 1 through 10 and 11
13 through 12. They're pretty different. They don't do any of the analysis
14 required to show why you would modify one set of embodiments with the
15 other. They sort of just mix and match. And they don't really respond to
16 that in their Reply. So we think they've clearly not met their burden to try
17 and do any kind of modification. I think in their Reply, they almost
18 abandoned Figures 1 through 10. Like, they -- they've raised it a few times
19 here, but they don't ever talk about combining it or using those to modify.
20 So I'm going to focus mostly on 11 to 12, which seems to be what they're
21 really saying now renders obvious.
22 Slide 38 shows what Figures 11 through 12 looks like in these
23 terms. This is, it has this declining support surface and it has a plantar
24 support zone 61. The height at the outside edge remains the same
25 throughout. The kind of distinction between the Figure 12 diagram and the

Figure 9 diagram is really important. And one that we think cuts heavily in our favor. These are both showing a cut across the shoe at the same place on the shoe and they're different. If you look at slide 39, Figure 9 doesn't show anything about the heel. Figure 12 does. And so what this is showing is that the height at the outside edge of Figure 12, 65 is the same, just like the height at the outside edge in figure 9, 49 is the same. The difference is the back section of Figure 12, which is the heel is at that consistent height throughout. Whereas in Figure 9, it's not.

If you look at our slide 40, we put these pictures in briefing, too. Their expert agreed with us in his opening declaration that this was the right way to look at Figure 12. And it was only when they realized that what they were saying didn't work anymore, that they tried to change it and say that actually, Figure 12 is wrong. There's some error with it. And it's Figure 11 that we should be looking at. But you can see here on slide 40 in his opening declarations when he is talking about what the height of the heel is, or what the first height is, he puts the same red lines on Figures 11 and 12 and says that's the same height. First height, uniform height, reference slope height. And he agreed in the deposition that he drew the first height on Figure 12 along the back end of the figure, meaning the height at the heel is shown in Figure 12 at the back of the figure.

You know, once you get -- if you agree with us on this understanding, we think it kind of takes care of most of Dufour and we can come back to the specific points they raised. But that's the overview I wanted to address with that.

JUDGE DEFRANCO: Counsel, I understand you're -- what you're saying. But I think in the Institution Decision we made it clear that we were relying -- what we were relying on. We said that there was a uniform cross-section based on what's in Figure 11. So you did have -- you had notice of our position as to Figure 11.

MR. HOUGHTON: Sure. And we understand what the Board said about Figure 11 and what they said about Figure 11. And our view is that the evidence we've put in through Mr. Markison's testimony, through our additional argument, through the depositions should change that conclusion.

JUDGE DEFRANCO: Okay.

MR. HOUGHTON: Because what we think -- I mean, I understand what the Board said is that Figure 11 looks like it shows a heel higher than the toe. And you know, what we did to respond to that was put in pretty extensive argument, evidence, testimony, deposition transcripts that show that when you look at 11 and 12 together, the only right -- the only way to understand them that's consistent is to look at Figure 12 and say, this shows that the height of the heel is the same along the outside edge all the way through. So that's where we land on that.

So Rubin, I won't spend a ton of time on because like we talked about before, it's very similar to Kim. It's another example of a prior art wedge shaped sole. One thing that I want to show you in Rubin, that I think kind of really cuts in our favor here is, if you look at slide 48. Again, the big dispute about Rubin is whether there's cleats in the heel. And I acknowledge Figures 1 and 3 are sort of perspective views that appear to not

have cleats in the heel, right? That's what it looks like if you just look at the picture, but that's not consistent with how Rubin throughout the Specification and in the figures that actually show what happens when you stand on ground. What happens? So if you look at 48, we lined these up so that you can see what happens when you go on soft ground. So Figure 2 in Rubin is on hard ground. Figure 4 is soft ground. You can see this vertical line that runs throughout the shoe is tipped in Figure 4. And you can see that the heel rotates and sinks in.

I mean, it's pretty clear in Figure 4 that the heel, like the toe sinks in. I mean, if you look at the bottom lines, you can see once the cleats go in and then you look at the top lines, you can see the heel drops down by the exact same distance as the cleats go in. And so the reason that happens, if you look at slide 50 is because the heel has cleats that sink in on soft ground, meaning the wedge shaped sole in Rubin runs throughout and the entire foot rotates, which is consistent with how Rubin describes it throughout.

Again, we address, you know, sort of the alternative theory that they raise on slide 51. What if Rubin doesn't have cleats in the heel? And that still isn't going to meet the claims for a variety of reasons that we talk about in the -- in the specific grounds that I can get into. But just showing that, you know, our view of Rubin is 2 and 4 show clearly spikes in the heel. Even if you accept that Rubin has no spikes in the heel, it's still not going to meet these claims.

JUDGE DEFRANCO: I'm sorry. I'm confused, Counsel. Why do you -- why do you think Figures 2 and 4 show cleats in the heel? Because those are frontal views.

MR. HOUGHTON: They're frontal views. But if you look at slide 48, they also show what happens to the heel. And in Figure 2, you're on hard ground and your heel is at one height, right? The back of the shoe. Then if you look at Figure 4, the heel is significantly lower. And the heel isn't going to go lower, just because your toes sink in. If there's no cleats, the heel would stay at the same height. That's not what happens.

JUDGE DEFRANCO: That's not showing. That's not showing the heel section of the shoe. Figure 2 --

MR. HOUGHTON: Well, it show --

JUDGE DEFRANCO: Or showing what happens at the toe section of the shoe. We can't see the heel section of the shoe in Figures 2 and 4.

MR. HOUGHTON: Well, you can see the top of the heel of the shoe and that drops down by the exact amount of the height of the cleats.

JUDGE DEFRANCO: Okay. Okay. I see what you mean. I'm sorry.

MR. HOUGHTON: Sure.

JUDGE DEFRANCO: Thank you for clarifying that. I missed that. Got it.

MR. HOUGHTON: No, I'm glad that we raised it because I think that we made this point in the Preliminary Response, and I think we probably just didn't make it very clearly. And it, you know, it went over my

1 head the first time I looked at it, too, but we think Figures 2 and 4 are, like,
2 they're really important. Those are the figures they're relying on.
3 JUDGE DEFRANCO: I see. I see. Got it. Thank you.
4 MR. HOUGHTON: Thank you.
5 Okay. So that's what I wanted to talk about for these references
6 sort of at a high level without getting into the -- every single specific
7 element. And I hope that helped clarify sort of where we are at on what
8 these references disclose. I'm happy to take more questions, but I've got
9 plenty more I can jump to if that makes sense.
10 Okay. So on this conventional shoe idea, if we jump to the
11 slide 65, we don't think the conventional shoes plays too much into the slope
12 patents. It's a bigger issue in the density patents. So you'll hear about this
13 afternoon from my colleague because there they really are importing things
14 from conventional shoes into the prior art. Here, they're just saying that
15 these shoes in the prior art or I guess they're not saying they anticipate, but
16 they're saying they render the claims obvious. And they sort of point to
17 conventional shoe ideas as things that fill gaps a little bit. But they're not
18 really saying there are gaps.
19 The main dispute we have with the conventional shoes, again,
20 they point to stuff from, you know, Athalonz's marketing material that talks
21 about conventional heels, conventional shoes. There certainly are plenty of
22 shoes out there that have flat heels. These just aren't them. Kim, Rubin,
23 Dufour are not those conventional shoes. And they're not saying you would
24 modify Kim, Dufour or Rubin to change them to make them have features
25 that they don't have. You know, the one exception being Dufour Figure 12

1 does have a flat heel like we talked about. It just has the same height at the
2 outside edge. But we think really other than that, there's not too much the
3 Board needs to decide here on this conventional issue for the slope patents.
4 The one -- our main complaints here were procedural in that,
5 you know, in the opening declaration, their experts showed the outside of a
6 bunch of shoes and said, look, this has features. Here's the outside of the
7 shoe. In slide 66, you can see he agreed what the outside of the shoe looks
8 like really weigh -- has no bearing on what the inside of the shoe does. And
9 so then he came back and he bought a bunch of new shoes on eBay. And he
10 cut them apart to try and do what we did in our infringement contentions and
11 say that they do have these features. We think that's procedurally improper.
12 But it really again, you can see on slide 67, what that looks like. We don't
13 think it moves the needle too much here. It shouldn't change the Board's
14 decision.
15 Given the time and what I've already covered, I do want to
16 jump to the secondary considerations section of our presentation because I
17 think that's a lot of --
18 JUDGE DEFRANCO: Also, before you -- before you leave the
19 references, Dufour Figure 11, you agree that shows a heel section that has a
20 uniform cross-section from inner edge to outer edge?
21 MR. HOUGHTON: Can you repeat that, Your Honor?
22 JUDGE DEFRANCO: Do you agree that Figure 11 of Dufour
23 shows a heel section that has a uniform cross-section from the inner edge to
24 the outer edge?

MR. HOUGHTON: Let me just say it back to make sure I'm saying the same thing. Do I agree that Figure 11 of Dufour shows a heel section that has a uniform height at the inner edge and the outer edge?

JUDGE DEFRANCO: Yes.

MR. HOUGHTON: I do, Your Honor. And that's what Figure 12 shows as well. The heel in Figure 11 to 12 does have a uniform height from the inner edge to the outer edge. The point we're making --

JUDGE DEFRANCO: Well, I'm just asking about Figure 11. I understand there's a dispute over what Figure 12 shows. I'm just looking at Figure 11.

MR. HOUGHTON: Sure. And just to kind of put it in the terms that we've been looking at here, if you go to our slide 95, this is with reference to the '291 patent. This is our view of Dufour. And I guess if you -- when you're talking about uniform height, that's more for the '786 patent. So this would be slide 90, but yes, we agree there's a uniform height in the heel section of Figure 11 and 12 embodiment of Dufour. You can see that on slide 90. The dispute we have here is whether there is a slope from the heel to the outer toe section. And we say there's not, based on Figure 12, and how that interplays with Figure 11.

JUDGE DEFRANCO: Okay. I understand.

MR. HOUGHTON: Okay. So I'll jump to secondary considerations.

This is, I think, a bit of a unique case, in that we have a lot of evidence here, and there's not a whole lot of response. Primarily on the nexus -- so obviously, on slide 123, you need to show nexus between your

1 secondary considerations, evidence, and the claims. You know, that's often
2 where secondary considerations fail, both at the Board and in district court.
3 We don't fail that prong. In fact, it's unrebutted. We have extensive claim
4 charts. Exhibit 2014. The same charts are Exhibit 1036. These show where
5 every single element of the claims are in our products, and we have
6 testimony from Mr. Markison saying that these products are coextensive
7 with the claims. They don't rebut it. They don't have anything saying that's
8 not true. And so we have this presumption of nexus between all of our
9 evidence and the claims here.
10 So establishing that, I then just want to look at a few of the
11 specific things we have. One is on slide 124. This is Exhibit 1028. It's an
12 article from Sports Illustrated that the Petitioner put in the record, and it
13 talks about basically how great Athalonz, is and how their shoes are really
14 amazing for these World Long Drivers. There are quotes here on slide 124
15 from the World Long Drivers, how they were amazed at how these shoes
16 work for them, and how great they are. This is industry praise. It's
17 unexpected results. Really, the only thing they said in their Reply brief was
18 it's hearsay, and we addressed that in the briefing, why that's not true. It's
19 both not hearsay because we're not relying on it for the fact of the matter.
20 They also waived any objections by not objecting at the right time.
21 More evidence --
22 JUDGE MEYERS: What is it talking about, acclaimed feature?
23 MR. HOUGHTON: Well, they're talking about the shoes as a
24 whole, and the shoes as a whole are coextensive with the claims here.
25 That's the point we're making in the nexus. And so we can rely on praise of

1 the shoe as a whole to demonstrative secondary considerations with the
2 nexus of claims. We cited the law on that in our Sur-reply brief.
3 And also, the thing that's unique about the Athalonz shoes is
4 these features. It's not like there's some new rubber in the outsole, or some
5 new material on the upper that changes it.
6 JUDGE MEYERS: Well, that's exactly what I'm looking at on
7 slide 124, in the bottom of this -- the sole, is, you know, is it some unique
8 composition of rubber that could be what is connecting this person with the
9 ground? As opposed to, you know, he's not saying he's deriving, you know,
10 a certain amount of power from the athletic positioning of the shoe. He's
11 just saying that the was amazed at the way the shoes connected him to the
12 ground.
13 MR. HOUGHTON: Well, I think if you look at -- there's some
14 marketing materials in their documents to talk about ground reaction force,
15 and the connection between the athlete and the ground. And the way that
16 Athalonz does that, and what they put in their marketing material, and what
17 these drivers are describing, is how the connection to the ground, with the
18 athletic positioning of the shoe, is the thing that's novel, and what's really
19 driving increased performance. There's a lot more in this article if you read
20 the whole thing. This is just one little quote that go to that.
21 Similarly, on Exhibit 2013, there's more praise for the -- you
22 know, they don't use the word athletic positioning, which is a patent term of
23 art, but they talk about all sorts of things that these shoes do that are the
24 result of the athletic positioning. That's the point of novelty with these
25 shoes. And so that's the industry praise and unexpected results.

1 Slide 126 is the copying. So we lay out the facts in our
2 briefing, but basically Mr. Markison and others from Athalonz went to
3 Under Armour in 2013 and gave them a 79-slide presentation that described
4 basically exactly what we've talked about today. The athletic positioning,
5 the way of positioning the foot with the shoe to do what it is the claims
6 cover. If you look at slide 127, it talks specifically about athletic positioning
7 concept. If you look at slide 128, they put in the figures from their patents.
8 They told them that these were things that they'd filed patents on, and they
9 showed them exactly how they were claiming it.
10 And then we have testimony from Mr. Markison about what
11 happened next, which is that he sent them a physical prototype, so they had
12 access to the shoes. They didn't purchase or license. Instead, a few years
13 later, they came out with the infringing shoes. There may --
14 JUDGE MEYERS: Now, do we have anything besides Mr.
15 Markison's testimony here to support these? Do we have the emails setting
16 up the meeting?
17 MR. HOUGHTON: Well, we have the -- we have the
18 presentation, which on its face talks about the -- how it's a presentation to
19 Under Armour. It's got all these sort of attributes of authentication. It's also
20 authenticated by Mr. Markison. His testimony says it is what it is. So it
21 meets, we think, 901 and all the Federal Rules of Evidence. They don't
22 dispute it, also, which is just something that they could have done if they
23 really didn't receive the presentation. I understand we have the burden here,
24 but we think we meet it pretty readily with the testimony we have.

1 Their main complaint was that we don't have something
2 showing a technical analysis of their products. We do. It's on slide 130,
3 131. They put in our complaint in the district court, they put in our
4 infringement contentions in the district court, and they put in our charts from
5 the district court, showing the technical analysis that shows the substantial
6 similarity between their products and ours.
7 If you look at slide 131, you can see Exhibit 1025 on the left is
8 the Under Armour shoes. Exhibit 1036 on the right is the Athalonz shoes. I
9 mean, the picture itself does what we need here. Shows substantial
10 similarity. But if you flip through these claim charts, you can see that all the
11 elements are clearly met by both.
12 And then just one sort of concluding point on the law here.
13 Slide 132, we cited this *Medtronic* case in our Sur-reply. "Evidence of
14 access and substantial similarity is evidence of copying." We have that. We
15 have evidence of access. We have substantial similarity. We've done
16 enough to show copying here, and they don't have anything to rebut it. So
17 you have to weigh this at least somewhat in our favor. I mean, obviously the
18 Board is free to weigh the evidence and weigh the secondary considerations,
19 but we've done what we need to do to meet our burden, to show these things
20 are here, and so this has to factor into the decision.
21 So let me just see. There's a few other points I wanted to circle
22 back on from their slides, if the Board doesn't have any questions right now.
23 One is on their slide 24. They talk about the infringement contentions, and
24 how we didn't include the cleats. This is pure attorney argument in their
25 briefing. They have no evidence to support this. They didn't look at these

1 cutouts. Like, we made these cutouts for the infringement contentions, and
2 we put pictures in. They never inspected them, so they don't know what we
3 were doing. To say we didn't include the heat -- the cleats, I mean, you
4 can't see that from the pictures.
5 Also, the cleats are the same height here. This isn't a thing like
6 in Rubin and Kim, where there's differing height cleats. They just have
7 these consistent cleats throughout, so it doesn't make a difference. And also
8 to say that we measured at the red lines here on the middle picture of their
9 slide 24, that really means nothing. That's just the position along the
10 horizontal place where we measured. It doesn't show anything about the
11 heights.
12 On -- okay. So the pair of shoes, this is something that applies
13 to the '760 patent only. And I just want to address the Board's Institution
14 Decision on this, which was on their slide 45. So again, we flagged why the
15 Board was right here. This is not about a method of playing golf, and we
16 think that's important for many other reasons about how you should construe
17 the claims. But when the Board said, "The claim is directed to a pair of
18 shoes, which would seem to be satisfied by making a left shoe in a right
19 shoe," we respectfully disagree with that just interpretation. We think a pair
20 -- the plain meaning of pair is just something that's meant to be used
21 together. And so the idea of the '760 patent is you have a pair of shoes, and
22 they both have the athletic position. And so sure, a manufacturer could sell
23 one shoe for a left-handed player, and separately sell one shoe for a right-
24 handed player that has the positioning. We don't think that meets the plain
25 meaning of pair. We think the pair requires both shoes to do this.

1 You know, Kim does that. Kim is a pair of shoes, so we're not
2 making this argument for Kim. The Athalonz products do this. The Under
3 Armour products do this. They have both shoes that are sold in a box to be
4 used together with athletic positioning. Dufour and Rubin do not do that.
5 They're specifically designed to only be for one foot in the golfer's stance,
6 and we put in quite a bit of evidence about why it wouldn't be modified to
7 do it on both shoes. It's contrary to the teachings. It's teaching a way in
8 these references is really not what the references are talking about doing.
9 JUDGE DEFRANCO: Counsel, why isn't it just simply an
10 obvious duplication of parts?
11 MR. HOUGHTON: Sure. So I understand how that -- that's an
12 argument that they have made. They talk about it on -- I don't know which
13 slide it is, but they had a slide on this from their expert. We have quite a bit
14 of evidence from Mr. Markison, and argument in our briefing about why it
15 would not be obvious to do this, based on what's in these references
16 themselves. Rubin talks about doing this only on the rearward foot of the
17 golfer. It has a metal plate on the rearward foot to prevent rolling over. It's
18 not something that would happen on the front foot. If you think about the
19 rear foot of a golfer and how it sort of rotates in the swing, if you're -- if
20 you're putting the front foot inward too, that's not going to have the same
21 issue about rolling inward. And so you'd have a weird middle plate on the
22 inside of your foot that would be doing nothing and adding a lot of
23 complication.
24 That's one example that we put in our briefing. There's a lot
25 more. I don't have a slide on it, but I think we go on for a few pages about

why it wouldn't be obvious. And again, this is their burden to prove that it would. They have basically one conclusory paragraph from their expert, and we have pages and pages of evidence about why these references don't teach a pair of shoes.

JUDGE DEFRANCO: Well, Kim teaches a pair of shoes. You're talking --

MR. HOUGHTON: Kim does. Right.

JUDGE DEFRANCO: Your arguments relate to Dufour and Rubin.

MR. HOUGHTON: That's right. And they're not the same arguments, I'll flag, because of this support we have. It's not like we're saying, you would never do something on a pair of shoes that you do on one shoe. That's not what we're saying. We're saying, based on what's actually disclosed in Dufour, in Rubin, there are many reasons why you would not duplicate that rearward golf shoe for the other shoe. And if you did want to do that, they would have talked about it. Instead, they talk about how you do it only on one shoe. So we don't think it's obvious. We think there's a lot of reasons why you wouldn't do that.

I think -- oh, the only one last point I want to make, unless the Board has more questions, is about the flexible sole idea that they raised, mostly for Kim and Rubin. I think the best response to that is all of the things we've talked about today, about how this shoe is supposed to do the thing just by virtue of being a shoe. The flexible sole is only going to change something if you're looking at what happens when you push down on certain aspects of the sole, right? So I mean, if you just are trying to

figure out if a shoe infringes this claim without look -- or renders it obvious, or does whatever, doesn't much matter what the material is because, unless you're physically manipulating it in some way, the flexible material isn't going to make a difference. So that's something we put in our briefing.

We also have other responses to why the flexible sole doesn't make a difference. It's not in the Petition. It's a new argument. Requires the use, and I just wanted to touch on that briefly because it's something they raised.

And then one last point, since it seems like I have the time, is on their slide 51. I just want to raise, we have a few other arguments than what we've talked about today that we briefed, and that we're happy to rest on our briefs on those, particularly the midfoot and toe section for Dufour, things like that, unless the Board has questions about them. But here on slide 51, they're trying to say that the height at the toe is clearly lower than the height at the heel. And we just respectfully submit there's nothing clear about it. Like, if you look at the figure in the top left of slide 51, it's not clear at all that that height is lower. There's no clear slope. There's just a line that's on a diagonal on a piece of paper. It's not clearly showing anything, and they have the burden here. We don't think they met it.

So I'll reserve the rest of my time for rebuttal, unless the Board has more questions.

JUDGE DEFRANCO: Not right now.

JUDGE MEYERS: No. Thank you, Counselor.

MR. HARMON: All right. So in terms of our rebuttal, I've got a number of points here I'd like to address.

1 First, more briefly, going back to the start of that discussion,
2 with respect to the construction of an athletic positioning, again, it's
3 Petitioner's position that, you know, regardless of whether or not Athalonz's
4 proposed construction will be adopted, it doesn't ultimately change the
5 outcome here, even if it was justified to the '760 patent.
6 You know, as we described today and thoroughly in our
7 Petition and our Reply brief, each of the references, the Kim, Dufour, and
8 Rubin references, meet all of the limitations of the claim, and whether
9 Athalonz's proposed construction is adopted wouldn't change that fact.
10 I believe the focus is on, perhaps without that construction, the
11 claims could be read broader, such that only the big toe needed to be below
12 the heel. As we've shown, that -- it wouldn't make a difference, as the little
13 toe in each of our references is disclosed as being below the heel. So that's
14 on that point.
15 So then to move to what was the main focus of the discussion
16 they just had was the understanding of whether or not the cleats should be
17 included in the height. And I believe sort of the phrase that was used is, it's
18 just a shoe, in order to argue that the shoe inherently or always would need
19 to meet the claims.
20 And I just bring back to the Institution Decisions, where the
21 Board found that, similar to infringement, where an infringing device does
22 not always need to infringe in all -- in all possible embodiments, the same
23 applies to validity, or your invalidity, in that it does not need to -- not need
24 to meet the claims in all possible uses. And I think taking it to a -- taking

1 these sloped sole patents and the prior references to a -- to a higher level,
2 that's what really makes sense here.
3 The entire point of these sloped sole patents is, you know, in
4 the golf context, to angle the foot when playing golf, which is on soft
5 ground. These patents and the prior references, when they're discussing
6 hard ground, they're not focused on, you know, a period when you're
7 walking across the pavement from your car to the clubhouse. It's focused on
8 when you're actually playing golf on the course, and that's why it's proper
9 to consider these references and the patents in the soft-ground context. You
10 know, and if --
11 JUDGE DEFRANCO: And, Mr. Harmon, I'm not sure I agree
12 with you because, I mean, in golf context, sometimes you are on hard
13 ground, sometimes you're on soft ground. I think it really -- the whole focus
14 here has to be on where you're doing an athletic position, whether it's on the
15 hard ground of the golf course or the soft grass of the golf course, or even
16 whether it's on a basketball court.
17 I think this claim is all about the athletic positioning. So in
18 there, you know, Kim has a number of instances where it shows athletic
19 positioning. It shows athletic positioning on the hard ground when the cleats
20 aren't in the ground. It shows athletic positioning when the cleats are in the
21 ground, so --
22 MR. HARMON: Yes. I do agree with that. And with that
23 athletic positioning, the issue, again, with respect to the cleats, is -- and I
24 guess more specifically why the cleats aren't relevant, is that the -- you
25 know, as I explained, the real focus is, what is the shape of the sole with

1 respect to the ground? That's what provides the athletic positioning. And
2 again, the cleats, or whatever length they are, they aren't contributing to that.
3 And, you know, I think something I want to highlight, it was in
4 the -- came up in the context of the secondary considerations. You know,
5 counsel admitted that it was the slope of the sole, with respect to the ground,
6 that was creating those, you know, alleged unexpected results or industry
7 praise, and that's really showing what these -- what these patents are about.
8 And just to -- just to clarify, our Petitioner's position is that
9 there's not any confusion. Our position is that the claimed heights or slope
10 sole is being measured with respect to the bottom of the sole. It just so
11 happens that in many of these instances, the bottom of the sole is, you know,
12 laying flat on the ground. So whether it was measured from the ground or
13 the bottom of the sole would not ultimately result in a different
14 measurement.
15 But it is Petitioner's position that the bottom of the sole is the
16 correct place to measure, and this is a point where I'd just like to flip to --
17 well, geez, it's in Patent Owner's slides. I believe it was slide 72, when we
18 were discussing -- or, when there was a discussion around, you know, where
19 the bottom of the sole is.
20 And, you know, I believe what counsel agreed to is that the
21 bottom of the sole was sort of that black line in the forefoot just separating
22 the white section illustrating the sole and the bottom of the cleats -- or, sorry,
23 the top of the cleats and that intersection line. That's precisely what
24 Petitioner has been arguing.

1 You know, I think further on this, in response to, you know,
2 one of Your Honor's questions or statements, it -- not all shoes may have --
3 may have or may not have cleats, which is, you know, a strong indicator as
4 to why these patents in particular are directed to an athletic positioning
5 shape that's defined without respect to any cleats.
6 And I just wanted to sort of expand on that point for a moment
7 with respect to -- or, I guess with reference to Petitioner's slide 20, and then
8 in particular, that claim 5 of the '786 patent. And this is where I think that
9 issue becomes clear, is that this is the one claim where the claim shoe is
10 actually requiring both the athletic positioning, but it -- in a shoe that has a
11 specific bottom. And the structure of this claim makes clear that the angled
12 support platform, and the, you know, particular locations at which the slopes
13 of it are being measured, are only in the athletic positioning sole section and
14 not the specific bottom.
15 You know, further on this issue, you know, counsel raised a
16 point that came up in deposition of Mr. Delgatty, Petitioner's expert, you
17 know, asking him to address the scenario of, what if we're not playing golf
18 on flat ground? What if you're on a -- on a hill? Maybe you're off the side
19 of the green.
20 And I -- what I just want to highlight is, Mr. Delgatty's
21 explanation there is that, you know, these heights -- these heights are not
22 measured with respect to sea level, in terms of, the claims can still be met
23 even if the ground is not -- that is being stood on is not flat. You know,
24 where these heights should be measured is always from the bottom of the

1 sole, so that doesn't change whether the ground that the golfer is standing on
2 is sort of a hilled surface or a flat surface in the fairway.
3 With respect to the discussion on the Dufour reference,
4 specifically on slide 36 of Patent Owner's slides, I just wanted to bring back
5 to this to highlight Petitioner's point, in terms of why this particular diagram
6 is incorrect, specifically with respect to the heel area that's depicted as flat.
7 And I understand that this is, you know, allegedly depicting
8 Figure 9. You know, as I argued today, Figure 9 is described as an
9 embodiment of Figure 1 of Dufour, which, again, going back to Figure 1 of
10 Dufour is clearly showing a flat heel section and not an angled heel section.
11 And additionally, with respect to the different figures of
12 Dufour, and I understood there was an argument about sort of the mixing
13 and matching, which we maintain that the Board, you know, correctly
14 understood at the institution stage, you know, it is position -- Petitioner's
15 position that we've always relied on Figure 11, going back to the Petition.
16 So it's not something where we have, you know, raised arguments on Figure
17 12 and then abandoned them. Our position has always been based on figure
18 11 as well.
19 With respect to the Kim reference, there's also quite a bit of
20 discussion about what the different Figures 1 and 5A and 5B are showing.
21 And, you know, Petitioner does recognize that in Figure 1, Kim is depicted
22 as having cleats in the heel. You know, I just wanted to clarify our position
23 on something counsel mentioned, is that those cleats in the heel would be
24 inverse -- would have an inverse height in relation to the heel, such that in
25 Figure 5B, the entire shoe must be tilting inwards.

I just wanted to clarify, it's Petitioner's position that, you know, Kim discloses that it has a conventional heel. That conventional heel would be flat. There's no evidence to the contrary that's been offered. In that context, in order for, you know, Kim's disclosures to be met about it remaining substantially -- the foot remaining substantially parallel on a hard surface, a flat heel could accomplish that, and it would not have an inverse length spike in that configuration.

Briefly on the Rubin reference, which is not really the focus of the discussion here, you know, I think in particular with respect to this slide, Patent Owner's slide 48, so the argument here seemed to be that, you know, based on what the Figures 2 and 4 are showing, there must not be a flat heel.

Petitioner would point out that this is, you know, plainly ignoring the disclosure of Figure 3 in Rubin, which is showing a block heel with no cleats. And whether or not that's represented here in these Figure 2 or 4, Figure 3 makes that clear, as we've argued that heel is a conventional heel, which would be flat with a uniform reference slope.

And just as I was discussing those -- you know, the conventional heel features, you know, one thing as well to focus on is that Mr. Delgatty, when offering his opinions about the conventional heel, he did not just rely on the pictures of the outsides of the shoes as the basis for his argument that a conventional shoe is a flat heel. Those were merely supporting examples of what he was testifying to through his decade-plus of experience as a leader in industrial design and athletic shoe design, in particular experience.

1 You know, he was able to testify from his knowledge, from the
2 shoes he's worked on and come across throughout his years of experience,
3 that the conventional heel of an athletic shoe will be flat. The pictures he
4 offered were mere examples of those, and as he supplemented in his
5 supplemental declaration with cutaways of those shoes, evidencing that the
6 shoes are, in fact -- or, do, in fact, include flat heels.
7 And this is a general matter with respect to all three of the
8 references. You know, most of Patent Owner's arguments are really just
9 based on the diagrams they created themselves, you know, ignoring the
10 actual disclosures and what the diagrams in the prior art are showing. You
11 know, often, these diagrams that Patent Owner relies on are excluding
12 certain features that are expressly shown in the -- in the prior arts diagrams.
13 You know, and what Petitioner is focused on is what each of
14 these prior art references do disclose, what their Specifications say, how
15 those are interpreted in light of the -- in light of the figures. You know, it's
16 our position, once you read and focus on the actual disclosures and the prior
17 art, the errors in those diagrams the Patent Owner relies on become evident,
18 and the actual disclosures of the prior art are what invalidate each claim.
19 Now, also with respect to Kim and Rubin in the context of, the
20 entire sole of the -- of the foot from the heel to the toe must be angled and
21 must be tilting in, based on the side-by-side comparisons that Patent Owner
22 relies on, or the superimposed images, again, is plainly contradicted by the
23 conventional flat heel that each of these patents teach, which would prevent
24 the heel of the shoe from rotating inwards, as Patent Owner argues, even if
25 the forefoot of the shoe is tilting inwards.

1 You know, additionally, even if the Board were actually to
2 determine, with respect to Kim in particular, that what Figures 5A and 5B
3 are showing is that the entire shoe tilts in, this doesn't really get around
4 Petitioner's point about Kim's disclosure. You know, I believe it's
5 Paragraph -- I believe it's Paragraph 46 of Kim is saying that the sloped
6 incline may be just in the forefoot of Kim's shoe, which is the part of the
7 disclosure Petitioner relies on.
8 So even if Figure 5A and 5B, when superimposed, are showing
9 that the entire shoe may be tilting in, it's really as simple as, that may be
10 depicting one of the potential embodiments in which it's not just the forefoot
11 of the shoe being tilted in. Now --
12 JUDGE DEFRANCO: Counsel, I tend to agree with you. I
13 think that's a -- that's a critical point with respect to Kim, that they do make
14 that acknowledgement. And I think that that's going to be a -- that's a
15 problem for Patent Owner right now.
16 MR. HARMON: I think I'd like to -- two more points I'd like
17 to address. You know, with respect to slide 24, Petitioner slides, now this
18 was the -- you know, and we're relying on Athalonz's -- you know, their
19 statements, and their positions, and their infringement contentions in the
20 underlying litigation.
21 You know, we've argued pretty clearly and I think is, you
22 know, plainly evident based on the images shown on slide 24, that the height
23 of the cleats is not included -- was not being included in the measurements.
24 You know, something I just want to highlight is that, you know,
25 in response to that evidence -- you know, Patent Owner only -- Patent

1 Owner's only argument on that point is that Petitioner lacks evidence.
2 Petitioner does not have these actual, physical -- you know, we don't have
3 these cut up shoes in our hands, so we can't know. Patent Owner does not
4 actually claim that it did include the heights of the cleats when it was
5 measuring Under Armour shoes for these infringement contentions. If it had
6 included the heights of the cleats, that would be a pretty easy and clear
7 argument to make and it has not made that argument.
8 And lastly, with respect to the secondary considerations and
9 particularly the nexus that was discussed in the comparison with Under
10 Armour's and Athalonz shoes, Patent Owner made its argument on
11 secondary considerations without that evidence. Petitioner put in that
12 evidence of -- using the comparisons of shoes and, you know, it's being
13 relied on now by Patent Owner as part of its secondary considerations, but I
14 would just highlight that that was not part of its original argument. It was
15 not a basis for its argument with respect to copying.
16 And I think that's all the points I'd like to make on rebuttal.
17 Thank you for -- thank you for the time.
18 JUDGE JUNG: And, Mr. Houghton, you have about 12
19 minutes left.
20 MR. HOUGHTON: Thank you, Your Honor.
21 Just as a kind of intro point, none of the shoes in the prior art
22 here show what's in the claims without the cleats and the reason is that it's
23 new. It's not something people were doing. The cleats in these shoes, in the
24 prior art, make the heel flat on hard ground. They can -- when used on soft

1 ground, the heel can dig in and do certain things. That's not what our claims
2 cover and that's the reason why the claims were allowed over all this stuff.
3 JUDGE DEFRANCO: Why don't they cover it? I mean, it
4 says athletic positioning. So you take athletic positioning to mean regardless
5 of whether it's on hard ground or soft ground. You can have an athletic
6 position on either type of ground.
7 MR. HOUGHTON: I agree, Your Honor, that the surface
8 shouldn't matter. And that's the point that we're trying to make with our
9 construction argument here is that you should be able to look at the shoe and
10 know, one way or the other, whether it falls within the scope of the claims.
11 And so the only way you can do that is if you take all of the parts of the shoe
12 into account and the claims support it, they talk about measuring the
13 reference slope with reference to the bottom of the apparatus. They talk
14 about, in the '291 patent, the heights are made up of the midsole, the outsole,
15 and the insole, and the '760 patent is similar. The only way these claims
16 make sense is if you include all the parts of the shoe together to figure out
17 whether they do the positioning that's required.
18 Jumping to Kim, which I think it seems like Your Honor is the
19 most concerned about here, we heard for the first time today that they agree
20 that Figure 1 shows cleats in the heel. That's the first time they've
21 acknowledged it. They now have a brand new argument that they just made
22 that somehow the cleats and the heel of Kim are different. I just want to
23 show you Figure 1 of Kim again, which is on our slide 20, they're not
24 different. They're the exact same cleats in the heel as they are in the
25 forefoot. They're the same reference number. They look the same. If Kim

had different kinds of cleats in the heel than in the forefoot, then they would've said that in Kim, but they didn't. And all the figures are consistent with that.

It seems like this what-if embodiment in Figure 46 is what Your Honor is, sort of, the most on their side about. And I understand your -- the position on this. Our view is that the what-if embodiment of Kim is not what Kim discloses. It would require a significant rework of Kim to have this inclined plane only in the front.

It's not something that they put in evidence about how you would do it, what you would need to modify, how it would change Kim. Our view is the entire purpose of Kim is to do what we described and tilt the entire foot inward. And if you're going to change it so that now somehow just the toes are going to tilt inward on certain ground surfaces and it's going to provide some different kind of positioning, that's the kind of obviousness analysis that requires some analysis and they didn't do that.

Regardless, we talk about why the what-if embodiment of Kim still doesn't meet the claims. We have a whole section in our Response brief. We have a whole section in the Sur-reply brief. We have extensive evidence and testimony from Mr. Markison about the what-if embodiment. That is the Paragraph 46 embodiment without the cleats in the heel. So we just encourage you to look back at that again and see, you know, what the issues with it are

Sort of supporting that, when they say these side by side images don't show what we say they do, we think they pretty clearly do. We think they show the entire foot tipping in and it's supported by extensive,

1 extensive citations to the Specification. We're not just taking a figure and
2 saying, oh, it looks kind of like this. We're looking at the abstract,
3 Paragraph 14, Paragraph 15, Paragraph 33. You know, the cites are
4 extensive in our briefing about why the way we're looking at Kim is correct
5 in the primary embodiments. They don't really cite anything that goes
6 against that. They just say, well, Kim says you could have the incline plane
7 in the front, right, and that's the extent of it. It's a throwaway paragraph at
8 the end of Kim. It's not what it's actually disclosing.
9 JUDGE DEFRANCO: Well, I disagree. It -- it's not a
10 throwaway paragraph. It's actually talking about an alternative embodiment
11 in Kim. It's talking about where the heel section would not have the incline
12 portion.
13 MR. HOUGHTON: Okay.
14 JUDGE DEFRANCO: So I think you have -- I -- and, you
15 know, I'll go back and look at your briefs and see how you deal with that
16 type of embodiment, you know, as far as this, what you call, what-if
17 embodiment.
18 MR. HOUGHTON: Thank you, Your Honor. We'd appreciate
19 that. And I just want to point out even agreeing, you know, even if this is a
20 thing that Kim really discloses, it's -- it distinguishes it from the preferred
21 embodiments. So it's making clear, in Paragraph 46, what we showed
22 before in all these figures and all the disclosure, that's different from what
23 we're talking about here where the incline plane is formed only at the front
24 portion.

1 So the figures in Kim are not showing the incline plane only at
2 the front portion. That's a modification. It's -- what they say, various
3 modifications, additions, and substitutions are possible. And this is one of
4 those modifications that you could make to Kim. But I -- again, I'd
5 encourage you to look at --
6 JUDGE DEFRANCO: The argument -- but the argument,
7 Counsel, could be made that Figures 5A and 5B are focusing on the front
8 part of the shoe. But I'm not -- I'm not sure they're showing anything about
9 the rear part of the shoe.
10 MR. HOUGHTON: I understand, Your Honor. If you look at
11 slide 30, we think that answers the question about the heels rotating. You
12 know, whether they're focused on the front part or not, they show the heels
13 rotating. They didn't have to do that. If -- and that's consistent with all the
14 rest of Kim where it talks about how the foot is parallel to the ground, right?
15 It's not saying the toes are parallel to the ground. It's saying the foot and the
16 spikes are parallel to the ground.
17 Turning to the idea of the cleats being included in the height or
18 not, again, we just think that looking at the claims themselves answers the
19 question here and is consistent with all the Specification and all the other
20 evidence that we have. You have to include the cleats because you have to
21 include all the parts of the shoe to figure out if it's going to do what the
22 claims require.
23 You can't have -- like they said, it doesn't need to always
24 infringe. It also can't be that the same exact shoe, if you hold it up in the air
25 in some particular direction, or if you dig it into the ground in some

1 particular direction, is suddenly going to infringe. And then you could sell
2 the same shoe and not infringe if somebody never uses it that way. That's
3 exactly what a method claim covers and these are not method claims. And
4 so it just can't be that the same shoe can infringe if you put it a certain way
5 into the ground or if you hold it up in the air a certain way, and not infringe
6 if you don't do that. If the shoe is just sitting there in a box, does it infringe
7 or not? You need to be able to know that. And the way you know that is by
8 taking the view of the claims that we have.
9 Finally, the idea that the entire point of these shoes are playing
10 golf on soft ground, I mean, we just strongly, strongly disagree with that.
11 Like, most of what we accuse of infringement here is basketball shoes. So
12 those are not used on soft ground. These are claims that apply to all
13 different types of shoes and they have this athletic positioning that is done
14 by the shoe itself that applies to all different sorts of ground surfaces, all
15 different sorts of shoes. If not, like their expert said that these claims are
16 meant to apply to golf shoes used on soft ground, that's hindsight. That's
17 exactly what the prior art is doing. That's not what our claims are doing.
18 JUDGE DEFRANCO: But your claims -- but your claims do
19 cover shoes on soft ground. They cover shoes on hard ground. They cover
20 shoes on intermediate ground between hard and soft.
21 MR. HOUGHTON: That's right, Your Honor. Our view is our
22 claims cover the shoe, no matter what you do with it. You could put it in a
23 box, you could hold it up in the air, you could dig it into the ground, the
24 same exact analysis should apply to that shoe no matter how you're using it,
25 where you're using it, what you're using it for.

JUDGE DEFRANCO: Well, wait a minute. It has to be being used for an athletic positioning. Those -- your claims are limited to an athletic positioning.

MR. HOUGHTON: Our claims put the foot in an athletic position and they -- you know, generally they're covering athletic shoes. We don't agree that the claims have to be doing an athletic positioning. You don't have to really be doing anything with the shoe for it to be covered by these claims.

JUDGE DEFRANCO: Well, walking is an athletic endeavor.

MR. HOUGHTON: Sure, it is. But again, these are not method claims. And so --

JUDGE DEFRANCO: I understand.

MR. HOUGHTON: -- just circling back, our point is the shoe does what it does, regardless of what it's being used for or whether it's being used at all.

JUDGE DEFRANCO: Right. So it covers any number of scenarios. Right.

MR. HOUGHTON: It does. And no matter what scenario, then you need to look and see whether the shoe falls within the scope is our view.

JUDGE DEFRANCO: Well, the prior art doesn't have to cover every scenario. The prior art just needs to cover one of those scenarios.

MR. HOUGHTON: That's right. The shoe in the prior art needs to do the thing in the claim, right? I mean, I think we agree. Our view is you can't just say that a shoe, when it's pressed into the ground in a

1 certain way, meets the claim because that's not what the claim covers. The
2 claim covers the shoe, regardless of how it's being used. And I think
3 importing the idea that when you use a shoe on soft ground and you do
4 something with it, then it meets the claims, that's inconsistent with the idea
5 that this is a system apparatus claim.
6 I think I've used just about all my time, so unless the Board has
7 more questions --
8 JUDGE DEFRANCO: No. Thank you.
9 JUDGE MEYERS: No. Thank you very much.
10 Thank you, both.
11 JUDGE JUNG: Thank you, Mr. Houghton.
12 Thank you, Mr. Harmon.
13 I have 12:30 right now on my clock. We'll take a one-hour
14 break for lunch. Please stay connected. Just mute your microphones and
15 cover your camera lens so that we can start right back up at 1:30.
16 (A recess was taken.)
17 JUDGE JUNG: All right. This is Judge Jung again, let me just
18 make sure that everybody's back.
19 So, Mr. Bugg or Mr. Harmon, can you verify that you're back
20 for Petitioner?
21 MR. BUGG: Yes, this is Robert Bugg on behalf of Petitioner.
22 JUDGE JUNG: And same for Mr. Houghton, are you back for
23 Patent Owner?
24 MR. HOUGHTON: I'm back. Yes. And also, my colleague,
25 Mr. Bosco is here, and he'll be doing this second presentation.

JUDGE JUNG: Okay. Thank you.

All right. Mr. Bugg, you may proceed when you're ready.

MR. BUGG: Great. Thank you, Your Honor. Let me share my screen here.

All right. Thank you, Your Honors. So as you know this afternoon, we'll be changing gears. We'll be talking about IPR2024-639 and 640. These are what we refer to as the compression patents, I believe patent articles in the density patents.

Turning to slide 3, each the '768 and '456 compression patents claim an athletic shoe that includes a heel platform with a substantially uniform height heel and a forefoot that's more compressible near the inner edge than near the outer edge. More specifically, claim 1 of the '768 patent claims an athletic shoe, comprising an upper section and a sole section, where the sole section includes a heel platform that's both constructed of a first material, and that has a substantially uniform height around a perimeter, and a forefoot platform constructed of a second material having a gradient compression factor that compresses near -- more near an outer edge than an inner edge, and that is thicker at a position proximal to the heel platform than at a toe portion. The gradient compression factor is shown on the right of slide 3, in Figures 93, 112 and 113 -- 115. Sorry.

And as you can see in the bottom two figures, in Figures 112 and 115, the forefoot gets increasingly more compressible where the more compressible material, 140, is shown under the inner half of the foot. '456 patent, claim 1 is similar, but here, the heel platform has a substantially uniform height from the inner edge to the outer edge of the heel platform, as

1 opposed to around its perimeter. And there's no limitation for forefoot
2 platform being thicker at a position proximal to the heel platform than at a
3 toe portion.
4 '456 has two independent claims. The second independent
5 claim is claim 10. That's even broader, eliminating the gradient
6 compression factor. And instead only requiring the forefoot platform to be
7 more compressible, proximal to its inner edge than its outer edge. Turning
8 to the grounds of -- the instituted grounds of patentability. For the '768
9 patent, the IPR was instituted on all grounds for claims 1 through 5, and 8.
10 Based on the Umezawa, Norton, and Won references, with some additional
11 grounds based -- that include the Gallas reference and the Talarico reference.
12 Similar references were applied in the '456 patent. Again, the Umezawa,
13 Won, Norton and Talarico references are our issue, and we'll go through and
14 address each of these grounds and each of these references in turn.
15 JUDGE JUNG: Okay. Mr. Bugg?
16 MR. BUGG: Yep.
17 JUDGE JUNG: You would agree that for Petitioner to prevail,
18 we don't have to address every ground in the final decision, correct?
19 MR. BUGG: Absolutely, Your Honor. So for example,
20 grounds 2 and ground 6, as shown on figure 5, those are fallback positions
21 for what the Gallas reference represents as far as what the heel structure
22 looks like. So yes, you're right, Your Honors. You don't actually have to
23 reach every ground for each of these.
24 JUDGE JUNG: Okay. So for the rest of your presentation, I
25 would like you to concentrate on the Umezawa grounds in both cases. And

1 then the Won combined with Talarico for both cases. And then if you have
2 anything else you want to talk about for the other grounds, you feel free.
3 But those are the two grounds I'm kind of interested in.
4 MR. BUGG: Okay. So -- just to repeat, Umezawa, and the
5 Won and Talarico combination. Is that correct?
6 JUDGE JUNG: That's correct.
7 MR. BUGG: Okay. So let's do just that. So as you know,
8 Your Honor, my colleague discussed the person of skill in the art, and the
9 experts this morning.
10 JUDGE JUNG: Did you -- did you have anything else you
11 wanted to say that's unique to these two proceedings for the -- for that
12 argument?
13 MR. BUGG: No, Your Honor. It's the same experts and it's
14 the same issues at stake here.
15 JUDGE JUNG: Okay.
16 MR. BUGG: But I do want to address and this is relevant for
17 both of those grounds. And then this is the claim construction issue for first
18 material, second material, if you -- if it's okay to start with that, and then we
19 can go into the grounds, Your Honor?
20 JUDGE JUNG: Yes.
21 MR. BUGG: Okay. So this is an issue that came up really in
22 Patent Owner's Preliminary Response. And it's something that we have to
23 address here because it's an issue that does apply to all the grounds. So
24 Under Armour believed that the parties had agreed that the first material in
25 the heel section, and the second material in the forefoot, could be the same

1 or different materials based on Athalonz infringement contentions in the
2 underlining litigation. Athalonz first proposed that the first material must be
3 a different material or a different combination of materials in the second
4 material, in its Patent Owner Preliminary Response.
5 And then the Board adopted a more narrow proposal, somewhat
6 in line with what the Patent Owner suggested in the Institution Decision,
7 noting that the first and second materials are, quote, "different in some
8 manner," but then noted that the parties are free to explore this issue further
9 at trial. So first thing we'd just like to address is that the Petitioner
10 absolutely has a right to address this construction. This isn't something that
11 we knew or, you know, saw coming. This is -- we thought everyone was in
12 agreement. Again, in the underlying litigation at the time the Petitions were
13 filed, there had been no claim construction briefing. There had been no
14 claim construction proposals, nothing. And really, we were going off of
15 their infringement contentions, right. So we learned this in the Patent Owner
16 Preliminary Response. And then our Replies was really the first time
17 Petitioner had any chance to address the proposed claim construction, and to
18 provide evidence in support of why we think our proposal is correct.
19 But also to address Patent Owner's proposal as far as where
20 those limitations could be found in the prior. As the Board noted in the
21 prehearing conference, the *Axonics* case provides that a Board cannot adopt
22 a new claim construction without giving the petitioner an opportunity to
23 respond, exactly the case here. And further, the *Apple v. Andrea* case
24 suggests that a petitioner may introduce new evidence after the petition
25 stage, if the evidence is a legitimate reply to evidence introduced by the

1 patent owner. As we'll go through, we believe Athalonz proposed
2 constructions contradict both the intrinsic record and Athalonz own
3 statements, and should be rejected.
4 JUDGE JUNG: So Mr. Bugg?
5 MR. BUGG: Sure.
6 JUDGE JUNG: By arguing first and second materials, are you
7 -- do you want the panel to revert back to an interpretation where the first
8 and second materials are the same?
9 MR. BUGG: Yes. So we believe that the proper construction
10 is that they can be the same material and have the same compressibility.
11 They could be the same in all -- in all respects. And what I'll establish and
12 discuss over the next few slides, is we certainly believe that Patent Owner's
13 proposal that they can -- they must be a different material or different
14 combinations of material, is absolutely not supported to the extent that the
15 Board's decision that they're different in some manner. We still don't
16 believe that's correct, but it's certainly more acceptable or more in line with
17 the intrinsic record than what Patent Owner has proposed.
18 JUDGE JUNG: Okay. Thank you.
19 MR. BUGG: So let's take a look at the intrinsic record first,
20 and take a look at why we believe what we believe as far as the materials.
21 So claim 1 of the '768 patent recites that a heel platform is constructed of a
22 first material and a forefoot platform constructed of a second material, but
23 provides no limitation as to what the materials are except for saying that they
24 are first and second materials. Claim 6 shown on the left of slide 11, which
25 depends on claim 1, expressly states that the first and second materials can

be constructed of the same one or more materials. So this claim dictates that they can be the same, right. They can't be limited to being different. Claim 6 states they can be the same one material. And when Mr. Patent -- sorry. When Mr. Markison was asked this exact question, as shown on the right on slide 11. We'll skip to the bottom.

Question: "So yes or no: Do you agree that the material in the heel can be the same as the material in the forefoot claimed in -- described in claim 1?"

Mr. Markison's answer: "The material composing the first material of the claim and the second material of the claim could be of the same material."

Second question: "So that's a yes?"

Answer: "Yes."

Furthermore, Patent Owner now tries to suggest that even if they're the same material, there must be some other type of difference between them in the -- in their Sur-reply suggesting that maybe the compressibility is different. That's also contradicted by now claim 7, which is shown on the left of slide 7 -- slide 11, which requires that the first compression factor, which is the compression factor of the heel, is the same or -- sorry, is equal to the gradient compression factor of the second material on the forefoot. So therefore the claims expressly state the first and second materials can both be the same material and can have the same compressibility.

The Specification also supports Petitioner's construction, nor does the Specification state that the first and second materials must be

1 different. Rather, the Specification indicates the materials described as first
2 and second may be the same. For example, with respect to Figure 43 on the
3 upper left of slide 12. The Specification describes that the first compressible
4 material may be more compressible and out of the second compressible
5 material. This indicates that it also may not be more compressible. Figure
6 93, which Athalonz suggests is directed to the very claims at issue here. It
7 describes that both the heel and forefoot may be comprised of, quote, "one
8 material." During his deposition, Mr. Markison also agreed that the
9 challenged patents disclose a heel platform and a forefoot platform
10 constructed of the same material as shown on the right in the excerpt on
11 slide 12.
12 Petitioner's constructions also consistent with the
13 Specification's use of first and second in other contexts, such as the first and
14 second dimensions that are described in the challenged patents, and first and
15 second angles. As you can see on the left of slide 13, in column 10 of the
16 challenged patents, it describes that the first dimension has a magnitude that
17 is greater than or equal to a magnitude of a second dimension. Similarly, in
18 column 22 on the left of slide 13, it describes, as shown, the outer edge of
19 the sport specific bottom, 190, angles in at a first angle in the inner edge of
20 the bottom, angles in at a second angle. Further down, it may be desirable to
21 have the first angle larger than the second to provide more stability, more
22 lateral stability, but both angles may be equal. On the right of slide 13, are
23 excerpts from another patent where Mr. Markison is both the inventor and
24 the prosecuting attorney.

1 This patent further supports Petitioner's proposal, where first
2 and second materials are described as being the same or different in the
3 Specification, in the claims. For example, in column 23 of Exhibit 1024, it
4 describes the outer layer includes a first material composition and the inner
5 layer includes a second material composition, and that in an embodiment,
6 the first and second material compositions are the same. Similar -- similarly
7 in the claims, they confirm the same, based on claim differentiation here,
8 where independent claim 11 establishes that the two materials are different,
9 which requires that claim 10, from which claim 11 depends, be broader and
10 include that the first and second materials could be the same.
11 JUDGE DEFRANCO: Counsel?
12 MR. BUGG: Yes.
13 JUDGE DEFRANCO: Is Mr. Markison being offered as a legal
14 expert, a technical expert or both?
15 MR. BUGG: I believe in this case he's being offered as a
16 technical expert.
17 JUDGE DEFRANCO: Okay. I'm just wondering if his
18 opinions on claim construction are being offered, you know, as a legal
19 expert or if they're being offered as legal opinions since he's a -- an
20 attorney, as well as a prosecuting attorney.
21 MR. BUGG: I understand. And you're kind of where you're
22 going with this, Your Honor. And the reason we -- we're relying on this is
23 Patent Owner suggested that there was no, you know, the way this was
24 argued, was that using the terms first and second was common patent law, a
25 way of indicating that they must mean something different, and that this is

1 common parlance or common practice in patent law. So that inventors or
2 prosecuting attorneys would always assume that if they use the term first and
3 second are used, that's implying that they're -- they mean something
4 different. And the reason we're bringing in Mr. Markison's other patent
5 here, and his experience as an attorney, is just to contradict that presumption.
6 JUDGE DEFRANCO: Okay. Thank you for the clarification.
7 MR. BUGG: So moving on to Athalonz infringement
8 allegations. He's also confirmed Petitioner's understanding of the claim
9 scope. These have been in our briefs, and we've talked about these at length
10 before, but as you can see on the left of slide 14, Athalonz accuses the Under
11 Armour charged Curry shoe of infringing these patents, the compressibility
12 patents, as shown in the cutaway on the left of slide 14. Both the heel and
13 the forefoot, and actually the entire sole of the shoe is -- made of one single
14 material. It's that white material you're seeing there. On the right of slide
15 14 is an excerpt from Exhibit 1026. This confirms this is an Under Armour
16 Technical drawing produced by Under Armour -- sorry, a redacted version
17 of that produced in the underlying litigation, that shows that same shoe on
18 the left. And it's -- shows that the same IMEVA material, that blue
19 crosshatching, is used throughout the shoe, for the entire sole. Notably,
20 Patent Owner cited to this exact document -- sorry. The document from
21 which we redacted some of the evidence from over 60 times, as evidence of
22 infringement, and which Mr. Markison confirmed shows a single material
23 midsole and outsole during his deposition.
24 So finally, Athalonz cites a number of cases, and I believe the
25 Board even cited to one or two of them in its Institution Decision regarding

first and second elements or components. But these cases really don't apply here with the way the claims are written, and are easily distinguishable. So here are the claims where they cite an attribute of a component, like the type of a material, and the modifier delineates multiple instances of that attribute, which could be the same or different, unlike Athalonz cases where first and second enumerate and differentiate multiple members of a group. So for each of the cases that are cited, like in free motion, it -- it's suggesting that a first and second pivot point must be a different pivot point. You can't have one pivot point meet the limitation to be first -- sorry, both first and second pivot points. Similarly, in *Gillette*, first, second, and third razor blades were determined they should be different blades.

3M innovate -- *innovative* -- *3M* suggests that first and second sidewall surfaces are different surfaces. And finally in *Springs Window*, it's first and second opposed ends are different ends. So as a corollary, this is like -- the claims here are like claiming a wall that's a first color and a wall that's a second color and determining that both walls could be blue. This is not the same as claiming a first wall and a second wall and determining that both walls can be the same wall. That's what these cases are suggesting against. So since the intrinsic record and Mr. Markison and Athalonz's statements testimony and prior claim analysis, all confirmed Petitioner's proposal, we believe that the first and second materials can be the same material.

Turning now to construction of the term, gradient compression factor. This became an issue after the Petition was filed and raised by the Petitioner recently. So Patent Owner -- sorry. Raised by Patent Owner

1 recently. Patent Owner agrees an argument that Petitioners propose
2 construction for this term for gradient compression factor provides another
3 argument for validity, a separate argument for validity. We believe it does
4 not.
5 As was made clear, Petitioner's proposal for construing this
6 term was directed to whether the material in the forefoot needs to become,
7 what we put in quotes, "increasingly more compressible" as you move
8 across the forefoot, not just more compressible near the inner edge than the
9 outer edge as the Patent Owner suggests. This is demonstrated in the
10 excerpt of the Petition on the right-hand side of slide 16.
11 Note the quotes around, quote, "increasingly less compressible,
12 used to," in Petitioner's claim construction proposal, making a -- that --
13 that's the point of what we're trying to construe here. "Petitioner's proposed
14 construction for gradient compression factor does not change the position at
15 which the claim compressibility should be measured as defined by the
16 claims." As you can see on the on the left in Exhibit -- sorry, the '768
17 patent, claim 1, it suggests that the second material compresses to a first
18 level near and outer edge of the sole section, and a second material
19 compresses to a second level near an inner edge of the sole section.
20 So the proposed construction requires the forefoot platform get
21 increasingly less compressible as you move from the inside to the outside of
22 the forefoot between those measurement points. Notably in the claims, it's
23 the -- it's the same second material of the forefoot that has both of these --
24 that has both the gradient compression factor. And that is defined as
25 compressing more near the inner edge than the outer edge. Notably, patents

1 -- Athalonz patents never suggest that gradient compression must extend
2 across the entire width of the forefoot. For example, in Figure 112, shown
3 on the left bottom of figure -- slide 16, that doesn't provide gradient
4 compression from edge to edge. We mentioned this in earlier slides. That
5 shows that easily compressible material only goes maybe two thirds of the
6 way across the forefoot, clearly not reaching the pinky toe and not extending
7 from edge to edge of the forefoot.
8 This is the same for other figures in the patent, for example, 35
9 through 37 with -- which Athalonz suggests discloses gradient compression
10 during the prosecution of the '768 patent, and they similarly don't show
11 compression gradient compression across the entire forefoot.
12 So in conclusion, we believe the Board should reject Patent
13 Owner's suggestion that there are proposed construction -- or sorry, our
14 proposed construction for gradient compression factor somehow should
15 extend the area across, which the variably compressive area, the forefoot,
16 must extend, and it shouldn't extend beyond the claimed measurement
17 points that are, quote, "near the edges of the forefoot" but be measured
18 between those two measurement points.
19 So let's turn now to the grounds, and we'll start with the
20 Umezawa reference, which was one of the two that we'll be spending some
21 time on today. As you can see, for '768, claim 1, Patent Owner argues that
22 Umezawa fails to disclose the three limitations shown in red on slide 17.
23 The party's dispute here really centers on whether the varied compression in
24 Umezawa in the forefoot extends far enough across the width of the sole.
25 This is the issue we're kind of just teeing up in the last slide, in addition to

whether the heel has a uniform height and whether the forefoot platform is thicker proximal to the heel than at the toe. Those are those three limitations.

'456, ground 4 is similarly based only on Umezawa. Here, claim 1, there's no limitation regarding forefoot platform thickness, but is otherwise similar in scope. And we'll discuss that in unison with the '768 claims. And finally, similar arguments exist for the '456 patent, claim 10. But again, claim 10 eliminates the need for gradient compression. So turning to what the prior reference Umezawa actually discloses. So it's directed to shoes suitable for a number of athletic activities. On slide 20, it describes shoes suitable for golf, tennis, squash, mentions other activities, but it discloses a midsole. This is kind of the novel feature, a midsole that has a low elastic part 20 and a high elastic part 22 in the forefoot. This is shown in Figures 2, which is kind of in the middle of slide 20, as well as Figure 3 on the upper right-hand side of slide 20.

Umezawa explains that the elastic modulus of the low elastic part 20 is lower than that of the high elastic part 22, such that when a compression -- when a compression load is applied to midsole, the low elastic part 20 is more easily deformed than the high elastic part 22. Umezawa also teaches that since the thickness of low elastic part 20 and high elastic part 22 gradually changes along the incline surface 24, the compression deformation changes continuously from the inside to the outside of the shoe. So Patent Owner argues that Umezawa fails to teach a forefoot platform that's more compressible and near the edges of the

1 forefoot or the claimed gradient compression factor because the more
2 compressive low elastic area does not extend far enough across the forefoot.
3 But the Board has already properly rejected Athalonz's
4 argument regarding this ground. As shown in the excerpt on the left, this is
5 on slide 21, this is from the Institution Decision. By describing that wearing
6 the shoes causes midsole 10 to compress with larger compression
7 deformation on the inside of midsole 10, Umezawa makes clear that the
8 player's foot must be on top of the compression deformation to cause such
9 deformation and thus must necessarily be, quote, "near an inner edge and
10 near an outer edge of the sole section under an interpretation based on where
11 a foot sits in a shoe, which is the agreed on construction for edge of where
12 the measurement should be taken, which is near the edge of the shoe where
13 edge is where the foot sits." We already discussed the proper construction
14 of gradient compression earlier, and it was confirmed by the Board here.
15 Umezawa -- you analyzed Umezawa, and found that it disclosed this
16 limitation and that it disclosed gradient compression factor, as well as the
17 compressibility difference on the inside and outside edge of the forefoot, or
18 near the inside edge and outside edge of the forefoot. And as the Board
19 recognized, the claims only require that the forefoot platform have more
20 compression near the inner and outer edges.
21 Umezawa plainly discloses this design. As shown in Figure 2
22 in the middle of slide 21, this is annotated by Patent Owner. "The big and
23 small toes fall partially or predominantly on low elastic part 20 on all three
24 cross-sections: 3 to 3, 4 to 4, and 5 to 5." These are highlighted in red.
25 Again, this is -- this is Patent Owner's proposal. This is where they are

1 suggesting the wearer of Umezawa, his or her bones of their feet would sit.
2 And clearly, each one of those sits predominantly or partially on that low
3 elastic part. Therefore, the claim limitations clearly met. This conclusion is
4 also confirmed in the superimposed annotated images from the Patent
5 Owner Response, shown on the right of slide 21. This is that modified
6 Figure 3 you see on slide 21 on the right. And again, the big and small toes,
7 as well as all the toes, fall squarely on that low elastic part 20.
8 And to the extent there's any kind of claim construction issue
9 with near, I know this is one of the things that in the -- in the Institution
10 Decisions, the Board asked if there had to be a proposal for what the term
11 near meant. Mr. Delgatty, our expert -- Petitioner's expert, suggested that
12 even if we took Patent Owner at his suggestion that a 3-millimeter
13 difference, and that 3-millimeter difference is what's shown on slide 20 on
14 the bottom of Figure 4, they suggest that that WB amount of 3 millimeters
15 doesn't meet the requirement to be near the edge of the forefoot. Beside the
16 fact that, that's wrong, for the reasons we laid out in our Petition, or sorry, in
17 our -- in our Replies, a person of skill in the art would assume and would
18 understand that 3 millimeters actually meets that claim requirement for
19 being near the edge anyway, even if we took them at their word, especially
20 in light of the fact that the entire width of the forefoot, and Umezawa has
21 described as being 100 millimeters wide, as described in Paragraph 78 of
22 Umezawa, and this is described by Mr. Delgatty in his Exhibit 1022 in
23 Paragraph 15.
24 So Mr. Markison also agrees that Umezawa's midsole actually
25 compresses more on the inside than the outside. This confirms the

1 placement of the wearer's foot on that low elastic part 20 on the images we
2 were just looking at. As shown on slide 22, Paragraph 38 explains that
3 compression of the midsole results in an incline of the wearer's foot upward
4 -- excuse me, upward from the inside to the outside of the shoe. As shown
5 in the excerpts on the right, Mr. Markison agreed that Paragraph 38 and
6 claim 1 of Umezawa expressly described more compression on the inside.
7 So next, Patent Owner incorrectly argues that Umezawa fails to
8 disclose a substantially uniform height heel platform. A person with skill in
9 the art would understand that Umezawa's disclosure of known golf shoes,
10 having a known or typical outsole as described in Paragraph 32, along with
11 an insole having consistent thickness heel section, would result in a heel
12 platform having a substantially uniform height from the inner -- the inside
13 edge to the outside edge, and around a perimeter of the heel platform.
14 Umezawa expressly states that T, capital T, is a thickness of the midsole 10,
15 except for sidewall 18. This is described in Paragraph 52 in the middle of
16 slide 23. Goes on to say, "The midsole 10 has a base 16 and a sidewall 18,
17 which is located on the outer edge of the base." And this base includes the
18 heel platform as shown in Figures 2 through 4. Nor does Umezawa always
19 suggest that the midsole has any thickness other than that consistent T height
20 or that it changes thickness in any way.
21 So like the slope patents that were discussed this morning by
22 Mr. Harmon, Petitioner relies here on the design of what we're calling
23 conventional shoes, what kind of, you know, conventional shoes have a
24 specific type of design. And we discussed that why -- our expert has
25 explained why a conventional shoe has a substantially flat heel. We're not

1 going to go through the slides again. Here they are in this presentation for
2 the record, but they are similar to what we discussed this morning. And for
3 time's sake, we won't go through conventional heel design again, unless any
4 of you have any questions, Your Honors? Okay.
5 JUDGE JUNG: Mr. Bugg, just to make sure I'm clear, do you
6 need to -- you need to rely on conventional heel design or the heel platform
7 having a substantial uniform height? It seems like Umezawa gets you pretty
8 much all the way there.
9 MR. BUGG: It gets --
10 JUDGE JUNG: It doesn't seem like you need --
11 MR. BUGG: Well, so I don't disagree with you.
12 JUDGE JUNG: -- you're missing?
13 MR. BUGG: So I don't disagree with you. And the reason we
14 put it in as we do is because there's not, and this is Patent Owner makes this
15 argument where there is no cutaway of a heel platform in Umezawa, right?
16 It's not like they cut the shoe like we saw in the infringement contentions or
17 in the way Mr. Delgatty did in his expert declaration, you know, showing
18 from the inside to the outside edge across the entire heel platform, or from
19 the front to the back.
20 Especially in Figure 1, there's debate on what Figure 1 should
21 be used for. So the fact that Umezawa describes that the rest of the shoe is
22 conventional, supports what the figures show. And that's really why we're
23 relying on it. It's more of a person who's skilled in the art, looking at
24 Umezawa having the knowledge of what a conventional shoe design is,
25 would get there, right? And that's why it's an obviousness ground, and

that's why we cite conventional shoe design. But we don't disagree with you. Umezawa -- you know, a person skilled in the art, looking at Umezawa, what -- could properly determine that there's a flat heel.

JUDGE JUNG: Yeah. It seems like, you know, Figure 4 shows a transverse cross-section. And then Figure 1 shows a partial cross-section, longitudinally. And granted, figure 4 is near the forefront of the shoe, but it seems like it's a --

MR. BUGG: So --

JUDGE JUNG: -- small assumption that it's flat all the way across.

MR. BUGG: So we agree with you 100 percent, and thank you for raising it. So in Figure 4, you're right, that is part -- that is a cross-section taken near the front of the shoe, closer to the toe area. But Umezawa makes it clear that, that midsole is flat. It has the same thickness throughout, right?

So really what the issue is, is -- and this is raised by Patent Owner, that's the midsole, and it doesn't show you conclusively what the insole and the outsole are doing, right? So the fact that -- and our argument is, a person skilled in the art would know that a conventional midsole -- sorry, conventional insole and a conventional outsole used with a flat midsole as shown in Figure 4, that gets you there, right? That's flat. And we think Figure 1 supports that analysis, but it doesn't show all three of those elements, midsole, insole, and outsole as a -- as a cutaway cross-section, but I don't disagree with Your Honor.

JUDGE JUNG: Okay. Thank you.

MR. BUGG: So I will skip ahead over the conventional heel design, unless there's any other questions on that. No? Okay.

JUDGE JUNG: Actually, yeah.

MR. BUGG: Okay?

JUDGE JUNG: Can you just run through the evidence you have for the conventional shoe having a flat heel platform? I think at least one of the Patent Owner's argument is that you have insufficient evidence that the conventional shoe as described in your references would have had a flat heel platform?

MR. BUGG: Sure. So what Mr. Delgatty provided in his initial declaration, a portion of which is shown on slide 25, it's that his understanding that conventional shoe design traits include a heel platform that's substantially uniform around its perimeter or from the inside edge to the outside edge. And that having this design is standard both before and after the priority date of the '768 patent or '768 and '456 patents. And then in his supplemental declaration, he provided additional evidence in response to some arguments made by Patent Owner in their Reply. Sorry, their Response. And what we -- what was included in his -- in the supplemental declaration are these -- a few cutaways?

There's more than this in his declaration. These are a select few and these are all shoes that were addressed in his initial declaration. And what Mr. Delgatty explained is in his declaration was, I'm aware of all these shoes and these shoes are just samples of shoes that I know that have conventional design. And he included pictures of them. Never did he say,

1 I'm looking at the pictures of these shoes and based on the outward
2 appearance, I can tell that they have a flat heel.
3 He didn't say that. He said, I know for a fact, I know these
4 shoes, I've worn them, I've owned them. I knew they were on sale, and I
5 know their design. And I know what a conventional shoe means to someone
6 of ordinary skill in the art. These are all shoes that were on sale prior to the
7 priority date. He knew that as well, and suggested that he knew that these
8 were just sample shoes that he used to back up his opinion of what
9 conventional would mean, right?
10 So in his response, he also now provided cutaways of these
11 shoes that were initially referenced. So on slide 26, this shows a cutaway of
12 one of the Vans shoes that he himself designed. This is on the top left is
13 Exhibit 1022, Page 4 on the top right. That's a cutaway of an Air Force 1.
14 So notably, the Air Force 1 was cited in his initial declaration, and the
15 design patent that covers the outsole of the Air Force 1, Patent Owner
16 suggested that because only the outsole, or maybe the midsole and the
17 outsole was shown, you couldn't be sure that an Air Force 1 actually had a
18 flat heel.
19 You -- there's no question now. Well, if you look at the heel
20 and on the -- on slide 26, that's clearly a flat heel. All of these have clearly
21 flat heels. In fact, Patent Owner doesn't even suggest that they don't have
22 flat heels. So this is the evidence that he's provided both in his initial
23 declaration as from his opinion and based on prior art -- shoes he knew of,
24 and some that many of which he designed himself, as well as some typical
25 kind of classic shoes, like an Air Force 1. On the bottom left, that's a Nike

1 running shoe from the '70's, and on the bottom right, that's the FootJoy
2 style 51409.
3 And again, Patent Owner hasn't suggested that any of these
4 shoes do not have a flat heel. And despite his declaration suggesting the
5 opposite, Mr. Markison admitted during his deposition that conventional
6 heels are flat from the inside to the outside edge. My colleague discussed
7 this somewhat this morning. So with respect to Kim and Rubin, Mr.
8 Markison did admit that both of these show a, quote, "flat conventional
9 heel."
10 And then during his deposition, Mr. Markison also described
11 that a conventional sole or conventional insole described now in the
12 Specification -- so the intrinsic record in the -- in the Specification of the
13 challenged patents, those also are described as being flat or as having
14 roughly the same thickness from the inside of the sole to the outside of the
15 sole.
16 And then really one of the most telling things is Athalonz's
17 description and Mr. Markison's descriptions of its own shoes, which they
18 say practice the claims of the patents at issue this morning, the slope sole
19 patents. And here, what Athalonz documents show and what Mr. Markison
20 said during his deposition -- sorry, during an interview, was that each of
21 these shoes -- so here it's the Athalonz EnVe on slide 30, and then also the
22 Athalonz's Mana Mangrove on slide 31. Mister -- Mr. Markison and
23 Athalonz describes each one of these shoes as having a conventional flat
24 heel.

1 So in conclusion, we think it's pretty clear that until the
2 litigation -- or sorry, until the IPRs, anytime that they talked about their
3 design technology, they described their invention as being the sloping sole
4 of the forefoot and that the rest of the shoe -- in fact, the heel section, was
5 just a conventional heel. I mean, that's all over the record and in his
6 deposition and in all the documents that predate the IPR hearings.
7 So next, Patent Owner argues that Umezawa fails to teach
8 another limitation in the claim. And this is the forefoot platform having an
9 outer edge that's thicker proximal to the heel than at the toe. This is also
10 wrong. This limitation describes a shoe that includes a sole that is thicker at
11 a position proximal to the front edge of the heel platform than a toe -- sorry,
12 toe portion. This is a design that's common in almost all shoes and it's been
13 a conventional design feature much like the heel section we just talked about
14 as Mr. Delgatty explains at length in his declaration and during his
15 deposition.
16 A person of skill in the art would understand that Umezawa's
17 disclosure that the material and structure for the outsole 12 are equal to those
18 of known outsoles. Would teach or suggest a person of skill in the art, that
19 the sole is thicker at a position proximal to the front edge of the heel
20 platform than at a toe portion? Now, to address something that you -- Your
21 Honor raised with respect to the flat heel, we also don't believe that we have
22 to rely on -- Petitioner has to rely on a conventional shoe because Figure 1
23 really gets you there, right? So what Figure 1 shows is that there's a
24 forefoot thickness proximal to the heel that's shown on the slide 33, which is

1 thicker than the toe portion, right? There's clearly a drop in heel length, heel
2 size on the right side is higher than the toe side.
3 Patent Owner argues that there's some -- you can't be certain
4 on whether or not the toe area is lower than the heel area because you can't
5 see -- there's no cutaway, right? You can't see really where the insole, the
6 midsole, and the outsole is. And I'm sure they'll bring that up today. But
7 again, we believe Figure 1 being viewed from a person of skill in the art
8 would get you there. That this clearly shows a conventional foot -- sorry,
9 conventional shoe design with a heel is taller than the toe. But to the extent
10 that we do need to rely on Mr. Delgatty and his opinion on what a
11 conventional shoe design is, we'll discuss that in the forthcoming slides.
12 So on the left of slide 34 is the limitation at issue. And again,
13 this is whether the thickness of the forefoot is thicker proximal to the heel
14 versus the toe. And that's shown on the right in Exhibit 1025. This is their -
15 - again, their infringement contentions Patent Owner's infringement
16 contentions showing a heel to toe drop that first thickness on the outside
17 edge at the front of the heel of 19.3 millimeters. And then the second
18 thickness of 7.9 millimeters at the toe. Again, it's just a thickness difference
19 between the heel at the front and the toe section.
20 So as Mr. Delgatty explains, conventional shoe design traits
21 also include a forefoot platform where at the outer edge the thickness is
22 greater than the thickness at the toe portion. This limitation describes a shoe
23 that includes a sole that's thicker at a position proximal to the front edge of
24 the heel. This sole design is common in almost all shoes and has been a
25 conventional design feature in athletic shoes long before the patent's priority

1 date, as it places the foot in a more natural position and is more comfortable
2 for running, walking, and sports-related activities. And then he notes in
3 Paragraph 63 of his initial declaration, "In fact, over the course of my career,
4 the vast majority, if not all of the shoes I designed or oversaw the design of
5 had both of these features."
6 And then again, in the supplemental declaration, Mr. Delgatty
7 provided supplemental evidence showing why in these sample shoes this is -
8 - this is the -- this is the case. So on slide 36 for each of the shoes, the
9 thickness of the toe is shown in green. And as you can refer to that in
10 comparison to the thickness of the heel portion at the -- at the front edge of
11 the heel, that's shown in red. Clearly in each one of these comparisons, a
12 person of skill in the art can tell that the heel section is thicker than the toe
13 section.
14 In fact, the only one of these shoes that Patent Owner suggests
15 doesn't have this design trait is the bottom right. That's the FootJoy shoe
16 again. But as you can see, the green arrow and the red arrow in comparison,
17 it's clear that the thickness of the forefoot proximal to the heel is thicker
18 than it is at the toe. And again, just like the heel platform limitation, there's
19 evidence that Athalonz has already described this limitation as being
20 conventional. It uses the word conventional. So again, in Exhibit 1027, it
21 suggests that its Athalonz's EnVe shoe has an athletic positioning forefoot
22 section that has a, quote, "conventional" heel section to toe section slope on
23 the lateral side. That's the limitation. We're measuring the heel, the front
24 edge of the heel to the toe section and whether it's higher or thicker. And

1 Athalonz's own documents describe that as being a conventional design
2 trait.
3 And this is confirmed on the right. This is a cutaway that Mr.
4 Delgatty provided that confirms that the Athalonz shoe, the Athalonz EnVe
5 does in fact have this heel to toe drop. As Mr. Delgatty explains, this feature
6 is also present in applicant admitted prior art. This is -- this is shown in the
7 challenged patents in column 2 in the background section of the challenged
8 patents. They explicitly disclose that in some designs of prior art baseball
9 spikes, the heel portion of the shoe may be higher than the toe portion of the
10 shoe from a side perspective.
11 Again, same limitation. A person of skill in the art would
12 understand that a shoe having a higher heel portion than toe portion would
13 include a sole that's thicker at a position proximal to the front edge of the
14 heel platform than at a toe portion. On the right of slide 38 when Mr.
15 Markison was asked about this limitation or about the background section of
16 his patents, he admitted as much. So he noted that -- he admitted prior art
17 heel to toe drop incorporates the claim limitation at issue here suggesting the
18 only distinction is that the claim requires the measurements to be taken at the
19 outer edge of the shoe versus anywhere in the shoe. So admitted prior art
20 also discloses this limitation.
21 And the only reference Mr. Markison cites to in his declaration
22 suggesting that this is not a conventional design trait is what's shown on
23 slide 39. And this discloses a shoe that has a higher toe section than heel
24 section, and it describes it as being novel, right, not conventional, right? So

this isn't showing what a conventional shoe design has. This is what's showing is different -- a different novel, non-conventional shoe design.

And then when asked about at deposition again, they talk about this patent.

"The patent explains that the principle object of this invention is to provide a novel and improved means for golf; is that right?"

And Mr. Markison said, "Yes. That's what that says."

So because Umezawa discloses the uniform height, heel platform, the claimed variable compression forefoot, which includes the gradient compression factor and a thicker forefoot proximal to the heel, we believe Umezawa invalidates all the challenge claims on both IPRs.

So before I move on, any questions I can address in Umezawa before we move on to the -- to the Won discussion?

JUDGE JUNG: No. No. Thank you.

MR. BUGG: Thank you. So I -- because we did this in a specific order, if Your Honor doesn't mind, I'm going to discuss the Won reference kind of first by itself and then discuss the combination with Talarico if that's all right.

JUDGE JUNG: That's fine.

MR. BUGG: So turning to the Won reference, we can kind of skip this ground, but really, what the dispute is for what Won discloses for both this ground and the -- and the ground where it's combined with Talarico is whether -- sorry. Here we go. Also, for the Won reference by itself, we only serve this against '456 patent claim 10. So I do want to just address it because we don't actually combine it with Talarico for this

ground, if that's all right, Your Honor? And then I'll discuss it in another ground with respect to the combination, if that makes sense?

JUDGE JUNG: That's fine.

MR. BUGG: Okay. Thank you. So sorry to reiterate, '456 patent claim 10 requires no gradient compression, right? It only requires it to be more compressible, the forefoot to be more compressible, proximal to the inner edge than the outer edge. And that's when we rely on Won alone. And we think this is -- clearly discloses this design, right? So Figure 5 in the middle shows the primary embodiment of which we rely on Won. And that's described on the bottom right of slide 53 in column 4.

And what that's showing is that the inside and outside portions of the forefoot are made of different materials that variable -- that vary, sorry, in compressibility, where the inside material is softer, and this allows it to compress more, causing the sole to tilt inward when a golfer wears the shoe.

So Patent Owner suggests that Won fails to disclose a uniform hike heel platform. This is something the Board has already addressed. So on the left here, this is an excerpt from the Institution Decision of the 640 IPR. The Board states, "as Under Armour correctly notes, that one skilled in the art would've understood that the heel platform depicted in many of Won's figures is the same as that found in a, quote, 'conventional' golf shoe. Indeed, Juan expressly discloses that its Figures 6 and 7 illustrate the sole of a conventional golf shoe. And the conventional heel platform shown in -- shown in Won's Figures 6 and 7 appear to be no different than the heel platform shown in Won's Figures 2 and 5, which concern only changes to

1 the intermediate metatarsal and toe portions of the shoe, but not the heel
2 portion."
3 "Thus reading one as a whole, one skilled in the art would
4 clearly recognize that while the angle and elasticity of the metatarsal and toe
5 portions of the shoe are modified to promote balance and stability during the
6 swing, the heel portion is flat, and of uniform thickness as is the standard
7 with conventional golf shoes." Nothing has changed since the Board made
8 that determination, and we believe that it should continue with that analysis.
9 Nothing is -- nothing is changing this.
10 Athalonz's suggestion somehow that Won fails to disclose a
11 heel -- a heel portion that's flat from the rear edge to the -- to the front edge
12 of the heel platform as well is directly contradicted by what's shown in
13 Figures 2, 6, and 7 in slide 54 which shows that exact design.
14 So Patent Owner suggests that Won also fails to disclose the
15 claimed forefoot platform. And he -- they make a few arguments as to why.
16 The first is that Won's forefoot materials have, quote, "no appreciable
17 thickness," and therefore it's not a forefoot platform. And then three -- at
18 bullet point 3 as shown at slide 55, that Won doesn't actually teach
19 compressibility. All of those arguments are wrong.
20 So contrary to Patent Owner's argument, Won discloses a
21 forefoot platform that includes dual compression in either the sole or the
22 midsole of the shoe. This is shown in the excerpt to columns 3 and 4 on the
23 left of slide 56. Mr. Markison acknowledged that can be either Won's sole
24 or midsole that's constructed of the softer forefoot material, and that a
25 suggestion that the softer material is only provided in an outsole and that that

1 out -- outsole has no appreciable thickness -- excuse me, has no support in
2 Won.
3 So Won clearly discloses the forefoot platform and clearly
4 shows compression more near the inner edge than the outer edge when it
5 describes, both in the claim and in the Specification, that the foot is tilted
6 inward when worn by a golfer. So this is explained by Mr. Delgatty --
7 JUDGE JUNG: Mr. Bugg, just to clarify, if we modify Won
8 with Talarico, a lot of the concerns of the Patent Owner -- do they go away?
9 MR. BUGG: Yes, Your Honor. I believe that's true. So
10 what's interesting about Won and Talarico, they both describe different
11 elements of the sole of the shoe. So like, for example, Won disclose --
12 discloses both a midsole and an outsole having the features. Talarico
13 describes that it could be the insole, the midsole, or the outsole that is being
14 modified or is non-conventional or is novel.
15 So yes, Your Honor, a lot of the issues with whether there's an
16 appreciable thickness outsole in the combination with Talarico, a lot of these
17 concerns do go away. So let me -- what I can do is transition to that -- to
18 that discussion if you'd like.
19 JUDGE JUNG: I was just making sure that there's not
20 something I missed.
21 MR. BUGG: No, Your Honor. Yeah, that -- that's correct. A
22 lot of the arguments that Patent Owner makes regarding what Won teaches,
23 and where the materials are, and whether it's compressible, whether those
24 are not made with respect to the Talarico ground.

1 So let's talk about ground 5 for the '768 patent and ground 3 for
2 the '456 patent. And this is the Won plus Talarico ground. I may have to go
3 back and discuss some of the elements if we kind of skip over them in this
4 section of the slide. So we'll walk through it here and then see if we have to
5 go back to anything.
6 But for these grounds, what Patent Owner is challenging is,
7 again, the heel platform, which is the -- what we just talked about in the first
8 ground for '456, and whether it's substantially uniform in height. The
9 forefoot platform and whether it's constructed of a second material that's
10 different than the heel platform material. And the third element, which is
11 whether there's a -- sorry, a forefoot thickness that's greater proximal to the
12 heel than in the toe. Similar issues with ground 3 for the '456 patent. And
13 the only issue for '456 patent, claim 10 is substantial height heel, which we
14 just addressed in ground 1.
15 So let's talk about the Talarico reference. What Talarico '911
16 discloses is a midsole for a shoe comprising materials with different
17 compressibility arranged across the width of the forefoot. It discloses
18 multiple embodiments in which a dual density forefoot can be provided. For
19 example, in the top of slide 67, it shows a side-by-side comparison of the
20 two materials. And then below that in the middle and in Figures 9 and 13, it
21 describes embodiments where there's a 45-degree split which allows a more
22 and even and gradual alteration of the weightbearing forces as they're
23 delivered and directed across the forefoot. Excuse me.
24 But in both embodiments, Won explains that the material
25 employed on the lateral half of the forefoot is denser than the material used

on the medial half of the forefoot. Talarico also explains that the midsole has a consistent thickness throughout it. And also that the rear foot portion is of consistent thickness across the width thereof. That's shown in the last two lines of claim 1 on the bottom of slide 67. Importantly, that's acknowledging that the rear heel portion of the shoe is flat from the inside edge to the outside edge.

So if the Board does construe that the first and second materials must be different as we discussed earlier, this combination renders this design obvious. Talarico discloses that the heel section is constructed of a single material. That's 23, as shown on slide 68, and the forefoot platform -- forefoot section is a combination of materials. It's material 23 and also that softer material 22 that's showed as the shaded material in Figures 9 and 13. And as discussed earlier, Won also discloses that the heel portion is different from the forefoot portion.

JUDGE JUNG: Mr. Bugg?

MR. BUGG: Yep.

JUDGE JUNG: So this combination seems to land right in the middle of both our constructions for first material and second material, right? There's some aspect of Talarico where the first and second materials are the same. They both have material 23 and then there's an aspect that's different because they have different compressibilities. Would you agree with those statements?

MR. BUGG: I do. I -- so I do agree with that, and I think I'd take it -- take it one step further. I -- but I do agree that the heel material is a material, and the forefoot section is made of a combination of materials. So

1 the way I would -- I would say it is, even if Patent Owner's proposed
2 construction, which I don't believe is correct, was adopted, I even think
3 Talarico meets that because, here, the forefoot, a single material -- sorry,
4 dual materials combination, and the -- and the heel is a single material. But
5 absolutely, does it -- does it meet that kind of middle ground interpretation
6 that you're suggesting, that it's different in some manner. It certainly meets
7 that.
8 So on this combination, we believe it would have been obvious
9 for a person of skill in the art to replace the forefoot platform of Won with
10 some portion of that forefoot platform, including either the outsole or the
11 midsole, as Won discloses, with Talarico's variable compression sole
12 element. Again, Talarico describes -- I think I might have called it a midsole
13 in the last -- in the last slide. Importantly, Talarico describes it as a sole
14 element, and it does so intentionally. It describes it as -- you know, typically
15 is -- the invention is typically used in a midsole, but it does, throughout the
16 patent, say, "sole element." And it does that for a reason. And it describes a
17 midsole or describes the invention being used as part of an ensemble with an
18 outsole and an insole. And that suggests that the invention can be used in
19 any one of those areas of the shoe: insole, midsole, outsole, right?
20 So a person of skill in the art would also recognize that the
21 entire midsole of Won could be replaced with a Talarico '911 midsole made
22 of differing compression EBA, even if you're going to sub it in, right, one
23 for one, and that would have that differing material in the heel and the
24 forefoot as Your Honor just indicated. And the Board agrees, as shown on
25 the right of slide 69. The Board previously found that the proposed

1 combination of Won and Talarico would result in materials different in some
2 manner for the forefoot and the heel, as shown, for example, in Figure 5 of
3 Won. And this is citing the Institution Decision for the 639 IPR.
4 So the only other ground I'd like to discuss with respect to --
5 sorry, the only other limitation is whether or not the Won and Talarico
6 discloses that last limitation, the thickness of the forefoot platform. And
7 here we discuss it with respect to ground 4. So here again, I'm sorry I'm
8 jumping around, but to try to save Your Honor's time, we try to address
9 some of the issues once and not repeat them for each of the grounds. So this
10 applies for the Won and Talarico combination as well. And what we're
11 talking about now is whether Won, here it's described with combination
12 with Norton, but whether Won plus Talarico would disclose that final
13 limitation. And again, that's the heel -- forefoot platform thickness right
14 next to the heel, proximate to the heel versus the toe.
15 So here on slide 63 is where we discuss what Won discloses
16 with regard to the midsole -- sorry, the forefoot platform and the thickness or
17 height differential. Contrary to Patent Owner's suggestion in its briefing,
18 Mr. Delgatty's annotations of Figure 6. This is shown on the top left of 63.
19 They're not misleading. A person of skill in the art can plainly see that the
20 forefoot is thicker at a position proximal to the heel than at the toe.
21 Athalonz also never addresses that Won expressly talks about this in column
22 1. This is on the bottom left of slide 63, where it explains that the bottom
23 surface of the heel portion and the bottom surface 12 of the toe portion are
24 almost in parallel where the bottom surface 12 of the toe portion is formed to
25 be a little bit lower than the bottom surface of the heel portion.

As shown in figure 6, which is also on slide 63, it is known that the upper surface of an intermediate metatarsal portion 10, which is shown in the toe section, of the toe portion of the sole is formed to be lower than that of the heel portion. This confirms that the thickness of the forefoot platform proximal to the heel is greater than that at the toe portion. If Figure 6 wasn't enough, the Specification itself also suggests this.

Furthermore, a person of skill in the art would know that this is a conventional heel design and Umezawa expressly states that aside from some of the novel features of it, it's a conventional shoe, includes a conventional heel, which also supports a person of skill in the art's understanding of what Figure 6 would teach, and that it would include this design limitation.

So that really concludes the discussion of the Won and Talarico ground. So, Your Honor, is there any questions specifically on that ground?

JUDGE JUNG: No. Thank you, Mr. Bugg, for modifying your presentation. For the remainder of the grounds, you may either talk about it briefly or just rest on your papers --

MR. BUGG: I think --

JUDGE JUNG: -- your notes. Oh, go ahead.

MR. BUGG: I was going to say I -- unless Your Honor has any questions about the other grounds, we're happy to rest on our papers. We believe that we've made pretty conclusive arguments as to why the invalidity has been clearly shown.

If there is any other issues, let me just go to the end. I know secondary considerations were in issue. This was raised this morning and

here, less of the secondary considerations are really at issue because they -- Athalonz does not have shoes that practice these claims. So there is really even less of an argument for secondary considerations, and unless Your Honors have any other questions, I'm happy to retain the rest of my time for rebuttal.

JUDGE JUNG: Oh, just one verification on secondary considerations. You did not dispute nexus, only because the evidence for the secondary considerations was insufficient. Is that correct?

MR. BUGG: That's correct, Your Honor. Yes. We believe that's right. And I think that's what we established in our -- in our brief.

JUDGE JUNG: Okay. Thank you. Mr. Bugg. You have 31 minutes left for your rebuttal.

MR. BUGG: Thank you, Your Honor.

MR. BOSCO: Good afternoon, Your Honor. Stephen Bosco here, co-counsel representing Patent Owner Athalonz, and I'll be handling the presentation for what we call the density patents. As counsel for Petitioner noted, we have a disagreement even as to what to call these patents, but we call them the density patents, they call them the compression patents. But we can agree they are the same patents.

So I -- Your Honors, I do want to jump into some of the issues that were raised in Petitioner's presentation pretty quickly. I had a roadmap, but I think I should change it slightly. And I think I'm going to start with claim construction and go to slide 13 of our presentation because, as Petitioner's counsel acknowledged, the construction of first material and second material -- excuse me, is something that affects all the grounds.

1 They said that expressly. So I'm going now to slide 14 and what we have on
2 our slide 14 is the totality of what Petitioner put in their Petition for the
3 construction of first material and second material. And this was buried in a
4 footnote. So that's all they had.
5 And just stepping back a little, I mean, right off the bat that's
6 problematic. The -- as Your Honors know, the Trial Practice Guide and
7 relevant regulations say they need to put forth all their evidence for claim
8 construction in the Petition. And there's a whole slew of case law cited in
9 our briefing, and I have some slides on it, too, that talks about the
10 importance of the Petition -- the Petitioner making their full argument in the
11 Petition including claim construction, but this is all we got. And there are a
12 couple of things notable about this. And this is going to dovetail with that
13 discussion of *Axonics* and the question of what arguments were waived.
14 You -- if you look at the highlighted language of that footnote, they say,
15 "While claim 1 recites that the heel platform is constructed of a first material
16 and the forefoot platform of a second material, Athalonz contends that they
17 can be the same material."
18 So right off the bat, they're disparaging the construction in
19 which they can be the same. And in our view, they're acknowledging that
20 there's this other construction, that they can be different. And the Board
21 seems to read it the same way in the Institution Decision. So in the
22 Institution Decision, the Board recognized and now on slide 15, we have
23 some of that, recognized an apparent agreement as to what was the real
24 correct construction. And that's really significant. So that's significant to
25 the whole analysis of whether these arguments that Petitioner is trying to

1 make in their Reply for the first time and all the new evidence they're
2 bringing in, the new unpatentability theories, the new motivations to
3 combine. All of it that we're seeing the first time in Reply, whether that's
4 permissible and it comes down to notice.
5 And the reality is, I think as the Board recognized, they were on
6 notice. And on slide 15, I didn't highlight it, but you see the little snippet
7 from the Institution Decision. And at the bottom there, it says, "Petitioner
8 does not dispute that convention." And that's the convention, that first and
9 second are conventionally used to claim different things. So the Board
10 recognized that they were aware of it, they didn't really dispute that the two
11 materials have to be different, but they made a strategic decision for
12 whatever reason at the time that they were just going to go with the
13 construction that they can be the same. And that was their choice. But our
14 position is that they have to live with the consequences of that choice.
15 And I'm moving ahead to slide 17, this is just exemplary. We
16 have a lot of citations in our Patent Owner Response and in our Sur-reply of
17 all the authority saying that new evidence in reply is improper. The Trial
18 Practice Guide emphasizes that all the intrinsic and extrinsic evidence for
19 claim construction has to be in the Petition. And also on slide 18,
20 emphasizes that Petitioner may not submit new evidence or argument in
21 reply that it could have presented earlier.
22 Well, clearly they could have presented all of this intrinsic
23 evidence that they're relying on in support of their new claim construction or
24 in support of their claim construction. They could have put that in the
25 Petition, they chose not to. They could have put in the grounds that they put

in their Reply for why they alleged that the prior art meets the claim limitations under Patent Owner's construction, but they didn't.

And then if you look at slide 19, there's extensive Federal Circuit -- precedential Federal Circuit case law. And as the Federal Circuit points out, I mean, this comes from a statute. The statute says that the evidence that supports the ground for challenge has to be identified with particularity in the petition.

So -- and now I'm going to jump ahead to *Axonics* because I think, you know, this gets right to that issue. I'm on slide 30 now. So *Axonics* represents the outer limit of what the Federal Circuit has permitted in a reply brief. In *Axonics* there are a couple facts that we think clearly distinguish what the Federal Circuit allowed a petitioner to do there, and what should be the outcome that should -- you should arrive at here. And there are a couple of things.

So first of all, *Axonics* was applying the Administrative Procedures Act and it was wrestling with this tension between clear case law, precedential case law and statute, that says that all the arguments have to be in the petition with the Administrative Procedure Act, which looks at well, we do have to have considered whether parties have had notice and an opportunity to respond. That -- we're not on all fours with that right from the beginning because we saw from that footnote, Petitioner did have notice. They knew about this other construction. They knew it was a possibility. They just chose not to address it.

Another consideration that was key in *Axonics* and is a differentiating factor here is in *Axonics* the Federal circuit talks a lot about

1 the fact that the patent owner introduced this construction for the first time in
2 their patent owner response and didn't introduce it in their preliminary
3 response. That's not what we have here. So here, Patent Owner proffered
4 the same construction in the Preliminary Response as they did in the Patent
5 Owner Response. So I think that takes it outside of *Axonics* right off the bat.
6 And there were some policy reasons that the Federal Circuit focused on the
7 consistency between the preliminary response and the patent owner response
8 or subsequent filings. And those had to do with what the Federal Circuit
9 called sandbagging. And I mean, we all know what that is, it's when you
10 hold back on your good arguments and keep them in the back pocket and
11 then you bring them out later. And that's exactly what Petitioner did here.
12 So they -- Petitioner was aware of this construction they had or
13 should have had arguments for unpatentability under that construction, and
14 they just chose not to do it in the Petition. That's the exact kind of
15 sandbagging that the Federal Circuit was worried about in *Axonics*. Of
16 course, that in *Axonics*, they were talking about it from concern that a patent
17 owner might withhold their best construction and not put it in the
18 preliminary response, but the policy concerns the same. And we see the
19 effect of it here.
20 I mean, so now, as a consequence of what Petitioner did, Patent
21 Owner had to deal with whole new substantive unpatentability theories in
22 their Reply. They didn't have the opportunity to submit expert evidence to
23 rebut the new supplemental declaration that Mr. Delgatty put in Reply that
24 we think was improper. And so we had a lower word count, we had a lot of
25 constraints, time constraints. That's not the way it's supposed to work. So

it's supposed to be that they put their unpatentability theories in the Petition and then we get the opportunity to respond in the patent owner response. And that's not what they did and that was highly prejudicial. And in our view *Axonics* is in a different -- a whole different set of facts, a whole different universe. I'll pause there for a sec because --

JUDGE JUNG: Okay.

MR. BOSCO: -- I know this is something the Board was interested in and I wanted to see if there are any questions on that.

JUDGE JUNG: Yes. Mr. Bosco, so are you saying *Axonics* does not apply here because the new construction was in the Decision to Institute?

MR. BOSCO: The -- we're saying it does not apply because the new construction was in the patent owner put it -- put it forward in the preliminary response. That's a distinguishing factor. And because there's clear evidence from the footnote, I referenced in the Petition that Petitioner understood that was a possible construction. So they were on notice. They had notice. They had opportunity to respond. So all the policy concerns that underlie the Administrative Procedure Act, those sort of go out the window because they already had notice.

JUDGE JUNG: Okay. So in our Decision to Institute, we disagreed with the Petitioner about its construction for first and second material. So doesn't that -- doesn't that change your analysis a little bit? It's because of what the Board did after the Petitioner decided to offer an interpretation.

1 MR. BOSCO: Well, the -- it's a -- Your Honor, it's a great
2 question. And it's an interesting issue because the Board, of course, did
3 institute. However, what -- it appeared that the Board understood Petitioner
4 to be making an argument that they didn't make, in that the Board seemed to
5 understand that Petitioner was making an argument under the construction
6 where the materials can be different, but that turns out to be untrue. And we
7 know that because Petitioner has told us that.
8 So we -- Patent Owner filed a motion to strike, as the Board is
9 aware, or, sorry, raised the -- emailed the Board raising -- requesting
10 authority to file a motion to strike. And the Board addressed that issue by
11 asking Patent Owner to identify the portions of the Reply brief and the
12 declaration that were -- we allege were improper. And then gave Petitioner
13 opportunity to say, file something that says, here's where in our Petition we
14 actually made those arguments. And they didn't, they -- I mean, they filed
15 it, but they didn't make any argument that those arguments were in the
16 Petition. Instead, they for every argument -- we have a slide on it, I'll have
17 to try and find it here. But they instead said that they -- only arguments are
18 on patentability in the Petition were under their own construction. And
19 that's on slide 29.
20 JUDGE JUNG: Okay. Let me just ask, if the Board adopts a
21 new construction, you would agree that the Board has to give the Petitioner
22 an opportunity to respond to that new construction, correct, under *Axonics*?
23 MR. BOSCO: Yes, Your Honor. With a heavy emphasis on
24 the word new. So in our view, this isn't a new construction. This is a

1 construction that was contemplated in a petition. So it's been part of the
2 proceeding from the beginning, but it's --
3 JUDGE JUNG: Okay. I think I understand your position.
4 Now, turning to the notice issue, since we explained what we think first and
5 second material means, don't you agree that the Patent Owner did have a
6 opportunity to respond in its Patent Owner Response?
7 MR. BOSCO: Yes, Your Honor. To a degree, I still think we
8 were prejudiced in that, we never really -- we never got Petitioner's position
9 on it. And so we never had their expert opinion, for example, on that issue.
10 On -- and it -- and this turns out to be really critical, including for some of
11 the grounds that I know you're interested in, Your Honor, and that we'll talk
12 about it later. I'm sorry.
13 JUDGE JUNG: Oh. I'm sorry. I'm sorry. You froze for a
14 moment there. Can you repeat the -- your last two seconds?
15 MR. BOSCO: Yes. Sorry. So I was speaking about the fact
16 that we never got to see at the Petition stage or at the Patent Owner
17 Response stage Petitioner's expert opinions in support of their motivations
18 to combine and other aspects of unpatentability grounds under the -- under
19 patent owner construction. So we never got to see that until the reply stage.
20 And I -- that actually turns out to be quite significant including
21 for grounds like the ones you're particularly interested, both Umezawa and
22 Won and Talarico. And it's also as you saw and I'm going to get into this,
23 we saw that in their supplemental declaration that was served with the -- and
24 filed with the Reply brief, their expert put in a whole lot of new evidence.
25 So the evidence, I mean, he put in new theories and new evidence as to the

nature of conventional shoes and all of that. Again, none of that was -- we were able to respond to at the Patent Owner Response stage.

JUDGE JUNG: I see. Okay. Oh, one more thing I just wanted to bring up. Mr. Bugg during his presentation, seemed to disagree with our interpretation of first and second material. So if we, you know, revert back to what the Petitioner originally proposed in the -- in its Petition, doesn't a lot of your arguments go away?

MR. BOSCO: Yeah. The -- some of them, Your Honor, but we still have arguments on all of the on all of the grounds. And I'd happy -- be happy to go through that. Now I -- I'd also, Your Honor would like to take up if it makes sense for you, some of the evidence that they did cite, you know, evidence that we think shouldn't be considered. But again, even if it's considered, we don't think it should change the board's view on the proper construction.

JUDGE JUNG: Okay. Yes. Please proceed.

JUDGE DEFRANCO: Mr. Bosco, I have one question. Isn't it true that it -- there -- in the Institution Decision, we invited the parties to explore this issue of claim instruction?

MR. BOSCO: Yes. Yes, Your Honor. For sure I will --

JUDGE DEFRANCO: Are we supposed to now renege on that invitation as far as Petitioner is concerned?

MR. BOSCO: Well, no, I think -- I think, Your Honor, we interpreted that as an invitation to further explore it, but still within the confines of what was in the Petition, the theories in the Petition. So you'll notice we --

JUDGE DEFRANCO: But we came in with a construction. We adopted your construction. Why shouldn't the Petitioner have a chance to respond to our construction that put everybody on notice? You agree you were on notice per our Institution Decision, correct, of that construction?

MR. BOSCO: We -- yes, Your Honor. So we were --

JUDGE DEFRANCO: Okay.

MR. BOSCO: -- certainly on notice both of the fact that the Board had a -- had instituted under that construction and that Petitioner in the -- in the Petition had a different construction.

JUDGE DEFRANCO: Okay. And then Petitioner came in, and they're not changing their grounds, right?

MR. BOSCO: Well, we -- I mean, Your Honor, we think they substantively are. For -- I mean, they're relying on --

JUDGE DEFRANCO: They're not changing the references that they relied on in the Petition, right?

MR. BOSCO: They're not changing the references. They're changing the way they rely on them, including portions of the references --

JUDGE DEFRANCO: In response to our construction?

MR. BOSCO: Yes.

JUDGE DEFRANCO: Okay.

MR. BOSCO: Well, in response --

JUDGE DEFRANCO: So now --

MR. BOSCO: -- to our construction --

JUDGE DEFRANCO: So now they came in -- they came in with their version of how they are going to apply our construction to the

1 same references that they relied on in the Petition. And now you got a
2 chance to respond in your sur-reply, am I correct?
3 MR. BOSCO: Yes. Again, this --
4 JUDGE DEFRANCO: And now you get a chance to respond in
5 the hearing as well, correct?
6 MR. BOSCO: Correct.
7 JUDGE DEFRANCO: Okay. So I think that's where we need
8 to go is, let's hear your response to whatever their evidence is that they
9 relied on in the reply or to the extent there was any changes.
10 MR. BOSCO: Absolutely, Your Honor.
11 JUDGE DEFRANCO: Okay.
12 MR. BOSCO: So -- and that -- that's in fact where I was going.
13 So on slide 20 of our presentation, this is where we get into some of the
14 arguments that Petitioner made with intrinsic -- alleged intrinsic evidence for
15 their construction, so for their view that the materials can be the same.
16 So they make a claim differentiation argument. The reality is
17 that claim differentiation doesn't in the way that they say it does here. So
18 the fact that claim 6 states that the first and second materials are constructed
19 of the same one or more materials, that doesn't address the issue of
20 compressibility or other aspects of the materials that can be different. And
21 to the -- it seemed like there was a little confusion as to whether Patent
22 Owner's position was different from the construction that was used in the
23 Institution Decision. Our position is that the construction used in the
24 Institution Decision is the correct one.

1 So then looking at slide 21 of our presentation, so this is part of
2 the Specification that Petitioner cited, and what we'll see here, and as well as
3 with pretty much all the other Specification cites, is that it is really not on
4 point. So there are a couple issues that what they're citing is not clearly the
5 claimed invention at all. And then the language is not really -- it doesn't
6 speak to the issue, and that all it says is that a first compressible material
7 may be more compressible than that of a second compressible material. And
8 they're putting a lot of emphasis on the maybe more, but this doesn't speak
9 to whether the materials are different in other respects.
10 And that's the bottom line with everything they cite in the
11 Specification, and I'm going on to slide 22. What's really notable is they
12 can't find a single part of the Spec that says the materials are the same. So
13 instead they look at things that say, well, for example, like, on slide 22
14 where they highlight, "The integrated sole in insole 12 is comprised of one
15 or more materials." And they say, oh, well, that means it could be just one
16 material or it could be more materials. The bottom line is, this isn't saying
17 anything about the actual claimed embodiment. And there's nowhere in the
18 Spec that says, the two -- a forefoot first material of the forefoot with a
19 compression gradient factor can be the same as the material of the heel.
20 And then turning to some of the other evidence they cite in their
21 slides, and I'm going to go to their slides for a little bit and in particular
22 slides -- slide 13 of Petitioner's presentation. So they talk about the use of
23 first and second in other contexts in the Spec of the challenged patents. And
24 then they bring up this other patent from Mr. Markison, and I'll address that.
25 But it -- what they're doing here on slide 13 is actually making our point. So

1 the patentee, when he wanted to say that two things could be the same, he
2 said it. And that's what's cited here. So they refer to, well, there's a place
3 where it says, the first dimension and the second dimension can be the same.
4 And there's another place where it says these two angles can be the same.
5 So when the patentee understood things to be the same, he
6 expressly said it. And that's what the Specification says. They don't have
7 that for the first and second materials here. And the same applies to this
8 other patent. Now, this -- we don't think this other Markison patent really
9 should be in this proceeding. It's totally irrelevant. It's different
10 technology, different assignee. But to the extent it's considered at all, it
11 makes the same point. So when the patent -- patentee wanted to say that two
12 things could be the same, he did so. And he didn't do that here.
13 I want to go back and sticking with their slides for a little bit.
14 So I'm going to slide 11. There were a lot of statements made about things
15 that Mr. Markison said in his deposition. Now, we tried in our sur-reply to
16 get into all the different -- it was difficult. There were a lot of places where
17 his testimony was mischaracterized and within the confines of the word
18 limit. We tried to lay that all out, and I would encourage the Board to really
19 look at closely at all of their citations to his deposition testimony.
20 But if you look at what -- what's cited here on slide -- their
21 slide 11, he specifically, in the part they don't underline, emphasizes that the
22 first material has a compression factor and the second material has a gradient
23 compression factor. So they're different. The whole line of questioning was
24 with that understanding. So he's not testifying that the materials can be the
25 same, and his testimony is completely consistent with our construction.

1 Now, then I'm going to go to slide -- again, Petitioner slide 14.
2 So the next argument they have, and we didn't object to this argument on the
3 grounds that it was outside the scope because this is the type of argument
4 they made in their Petition. So to kind of circle back a little bit to the
5 question about that. When they made an argument in the Petition in support
6 of the claim construction, we fully recognize they're allowed to expand on
7 that argument. So they -- the only evidence they had put in the Petition in
8 support of their claim construction was about infringement positions. So
9 they expanded on that here. So we don't didn't argue that it should be
10 excluded.
11 But getting to the alleged merits of this, what their position is,
12 is that, well, they picked one accused shoe out of dozens of accused shoes in
13 the district court litigation. And they said, well, those two shoes have the
14 same materials in the -- in the heel and the forefoot. So you're being
15 inconsistent or that actually shows that you agree with our construction.
16 Now, what they didn't mention is Athalonz is being completely consistent in
17 that Patent Owner is advocating for the same construction in district court as
18 they are in this proceeding. 100 percent the same. No daylight between
19 them.
20 So even if they were right about this one shoe having the same
21 materials, then the outcome would be, you know, we don't prevail on
22 infringement in that one because we're taking the same position in both -- in
23 both proceedings, but they haven't even made a threshold showing that the
24 materials are actually the same. So the only evidence they had was this
25 Exhibit 1026, which is on the right of their slide 14. They didn't have any

1 witness testimony from anyone knowledgeable saying what this is,
2 describing anything about it. You know, they presumably have full access
3 to Under Armour employees who could have said, hey, yeah, actually, these
4 materials are the same, but they didn't have that.
5 So they left all that out. And then not only that, I'm going to --
6 I'm going to shift back now to slide 23 of Patent Owner presentation. They
7 left a lot more out, too. So if you look at slide 23, you can see what was
8 offered as Exhibit 1026 in this proceeding, and then the reality of what
9 Exhibit 1026 is. And they -- what it shows is they took a lot out of this
10 document. So they took a lot of material out, and I don't know what they
11 took out. So I'm not under the protective order in the district court
12 litigation. I've never seen the underlying document. All I know about it is
13 what we -- has been put in our papers and our Motion to Exclude on this.
14 But that's a lot. That looks like a lot of substantial material, and I've never
15 seen redactions done like this before.
16 And I'm not trying to argue the Motion to Exclude, but
17 Petitioner affirmatively relied on this document, not only in their Reply, but
18 just now in their -- in their -- in their presentation. So I think the Board
19 needs to recognize that this document is not an accurate representation or
20 authentic copy of any document that was used in the district court. This
21 document has been materially altered, and it's unfortunate that during Mr.
22 Markison's deposition. And again, this is Petitioner relied heavily on Mr.
23 Markison's deposition testimony about this document. They didn't show
24 Mr. Markison the reality here. They didn't show him a document that was
25 covered in black because it was redacted. They showed him this other

1 document that looked like it was authentic, but it actually it had a lot of
2 important stuff whited out.
3 So if you go to slide -- and they never told them that it had been
4 -- it had been altered either. If you go to slide 24 of Patent Owner
5 presentation. So you -- you've heard about the Petitioner relying on his
6 deposition testimony -- of Mr. Markison's testimony about this document.
7 So first of all, he never testified to what they said he did. He never said that
8 the materials were the same in this shoe. Of course, he knows nothing about
9 this shoe. This is an Under Armour shoe, an Under Armour document. He's
10 never seen it before. It's all confidential under the PO. He wasn't allowed
11 to see it.
12 And so they showed him that redacted document. And if you
13 look at his testimony and I'm sorry, that, you know, some of these quotes
14 aren't bigger here, but he -- they showed it to him, and he said, "I can't read
15 this." He said it about four times. "I can't read this document." And then,
16 you know, he says, if you look at the excerpt on the bottom left, "I mean, if
17 you're telling me that's the midsole, I mean, I can't disagree, but I can't read
18 it either." And Petitioners were lying on this testimony and they just told the
19 Board just now that Mr. Markison testified that those materials are the same.
20 That's simply not accurate.
21 The absolute outer limit of what he tested to -- testified to is at
22 the bottom right where he said, well, it keeps rotating on me, and I'm
23 paraphrasing. It appears that each of these cross-sections have hash marks.
24 That's all he said. So he didn't say anything about the materials being the
25 same, and he had no ability to testify as to whether they were the same

because he had no idea. He'd never seen a document before. He's not privy to Under Armour's confidential material. So we think that whole argument should go out the window. It should be entitled to no weight. And I'll pause there for any questions on that.

JUDGE JUNG: I have no questions.

MR. BOSCO: So I'm not going to -- I think we've already addressed the *Axonics* issue sufficiently, Your Honors, but I'm just going to go to slide 26 briefly because I think this summarizes our petition -- our position on this issue pretty succinctly. And our view is, look, the Petition was lacking on patentability grounds under a construction that Petitioner was aware of. It was highly prejudicial. And what they're doing now is effectively amending the Petition in Reply, but I'm going to move on now.

And I'd like to, if it makes sense, get into the issue of conventional shoes and Mr. Delgatty's opinions on that because that's another issue that in our view affects us every ground or essentially every ground. And I think Petitioner said the same thing in their presentation, and we heard it, too. I mean, we -- when Your Honors asked questions about Umezawa, Petitioner kept coming back to, well, it says conventional, or it says, known insole, and so Mr. Delgatty says a known insole is this. And even, I think, Petitioner had an invitation to rely solely on Umezawa, and they weren't willing to do it. They acknowledged that they need these conventional shoe opinions for their unpatentability grounds to hold together.

So I'm on slide 34. And this just summarizes pretty much what I just said. But I think what's key here is over and over again, Petitioner is

1 relying on these opinions to supply limitations that are missing from the art.
2 They're not just relying on them to -- for what a person of ordinary skill
3 would think about the art. They're relying on them to supply limitations that
4 aren't in the art. And there are major, major issues with his opinions.
5 They're incoherent. We saw some of the incoherence during Petitioner's
6 presentation on display, and I'm going to get into that. They're contradicted
7 by his deposition testimony, and they lack any true scientific basis.
8 So Mr. Delgatty submitted two declarations as the Board is
9 aware. He submitted his opening declaration. Which one would've thought
10 would've had all of the opinions that he would rely on in support of the
11 grounds that were in the Petition. That declaration had no measurements. It
12 had no pictures of the inside of shoes. It had no other evidence of the
13 interior structure of the shoes, and like we say here, it was totally lacking in
14 scientific rigor. Now, Petitioner, I'll get to this right now. Petitioner said,
15 well, he knew about some of the shoes, but all we have is -- first of all, he
16 didn't know about a lot of them. He knew about some of them. And all we
17 have is his say so about the characteristics of these shoes. We have his say
18 so, and we have a bunch of pictures of the outside of shoes and those are
19 totally unreliable.
20 And I'm going to slide 37. Now, there -- as the Board's aware,
21 there are two core limitations. Well, really three, but two that I'm going to
22 focus on right now that Petitioner relies on these conventional shoe opinions
23 for. So in the '768 patent, there's a limitation about the heel having a
24 uniform height around the perimeter. And then there's another limitation
25 about the forefoot platform being thicker at a position proximal to the heel,

1 not at the heel, so, and it's the forefoot platform. It's not the heel, but being
2 thicker at a position proximal to the heel, at the outside edge, than at a
3 position near the toe. And then there's a limitation in the '456 patent
4 relating to the heel that relates to the height between the inner and outer
5 edge.
6 So for -- on slide 37, this is one of the shoes that Petitioner and
7 Mr. Delgatty relied on over and over again as a conventional golf shoe. And
8 all we had in the opening declaration as to the characteristics of this shoe
9 was this picture. That's all we had. And we had Mr. Delgatty's conclusory
10 generic statement that, well, this limitation is in every shoe, or almost every
11 shoe. And now I'm talking about the limitation requiring a differing
12 thickness in the forefoot platform proximal to the heel versus the toe.
13 And if you look at this shoe, I mean, there's no difference
14 between the area proximal to the toe and proximal to the heel. And again,
15 it's important to emphasize the claim limitation is about the forefoot. It's
16 not about the heel, so it's not -- having the heel thicker doesn't get you there.
17 You have to show that the forefoot near the heel is thicker than at the toe.
18 And this -- it's just not there.
19 And you don't have to take my word for it. If you -- on slide
20 38, Mr. Delgatty, in his deposition, when he was presented with that exact
21 picture of that exact shoe, the 1970 FootJoy style 51409, he agreed. He
22 looked at that image and he said, yes, the thicknesses are similar. They look
23 relatively similar.
24 And that's all the evidence he had in his -- in his opening
25 declaration. Now he says it -- this is Petitioner's burden. I mean, they -- this

is their burden to prove that this feature was conventional. And Mr. Delgatty says it's in almost every shoe, but the very -- one of the very shoes he relies on over and over again, it's not there. It's just -- I think it's clearly not there. And if it were there, why didn't he measure it? Why didn't he -- it would have been presumably trivial to do. He could have just taken a measurement and been done with it. But he didn't do that for any shoe, this shoe or any other.

And so then going to slide 39, we have Mr. Delgatty again undermining his own opinions with his deposition testimony. He testified in his deposition that the exterior has no bearing on the interior structure of a shoe. No bearing. But that's all he put in his declaration. His original declaration was positioned -- pictures of exteriors. And, as we saw and we'll get to, Petitioner and Mr. Delgatty relied, and continued to rely, on shoe exteriors, even though Mr. Delgatty testified quite clearly that has no bearing on what the actual shoe would look like.

And on slide 40, just highlighting, again, these are the -- this is the level of rigor that we saw in Mr. Delgatty's declaration, was pictures of shoes. He claims they're all the -- all conventional. They all have these features. We have absolutely no way of telling if that's true or not.

If you look -- and I'm on slide 40 again, if you look at that Vans shoe on the left, you look at that outsole. It's all over the place. But Mr. Delgatty already testified you can't look at that outsole or sidewall and say anything about what the inside looks like. But that -- that's the level of evidence he had.

1 And so then I'm going to move to slide 41. You know,
2 Petitioner and mister -- Mr. Delgatty realized they had a problem with this.
3 And so in their supplemental declaration, they put in new evidence with all
4 these cutouts. Now this is clearly improper. I already cited the language in
5 the Trial Practice Guide that says a petitioner -- a reply is not an appropriate
6 place for evidence that could have been in the -- in the petition.
7 And clearly this could have been in the Petition. He knew
8 about these shoes. He's opining on the interior characteristics of these
9 shoes. He just didn't put that evidence in. It's not a matter of -- well, of
10 replying to Patent Owner. I mean, this is part of his affirmative opinion as to
11 allegedly these things being conventional. So it could have been in there,
12 but he didn't put it in.
13 But even what he did put in is insufficient. So we got the --
14 these pictures, there are no measurements, again. So even with the
15 opportunity after being criticized on that very issue, they still didn't put any
16 measurements in.
17 Now, I'll say it again, I mean, if it's true that it was
18 conventional to have a forefoot platform thicker near the heel than at the toe,
19 it seems like he could have measured it and just told us. I mean, if he cut
20 these shoes apart, he could have taken some measurements, put it in his
21 supplemental declaration. But he didn't do it. So it's entirely reasonable to
22 infer that the measurements don't actually back up the story.
23 And then I want to shift with respect to this issue to Petitioner's
24 brief again. And I'm going to find the right slide here. So Petitioner had
25 some pictures of what they -- from Mr. Delgatty's declaration. Bear with

1 me, Your Honor. Just take a second. So it's on slide 36. So slide 36 of
2 Petitioner's presentation. They say this came from Exhibit 1022, which is
3 Mr. Delgatty's supplemental declaration. Well, it's sort of true, sort of
4 inaccurate, in that none of these arrows were in Mr. Delgatty's declaration.
5 So I mean, this is now their third bite at the apple. They had an
6 original declaration that just showed pictures of the outside of shoes. Then
7 they come back -- after being criticized for not having measurements and not
8 having any scientific rigor, they come back with cutouts that still don't have
9 any measurements, and don't even have these lines, which of course are not
10 probative of anything and not something that an expert would -- should rely
11 on. But then Petitioner realizes they still have an issue, so now, before the
12 Board for the first time at this hearing, they put these arrows in that they
13 purport to show differences in thickness between these different cutouts, and
14 this obviously isn't the kind of thing that can be relied on to prove -- to meet
15 Petitioner's burden of proving that something was in the prior art or that it
16 was conventional.
17 There are a host of issues here. Among them, the -- we have no
18 information on the camera angles, on the distance between these different
19 cutouts. And you can just see visually they're obviously at different
20 distances. So some are closer. Some are farther. You can't tell from
21 somebody using their mouse cursor and drawing a line on PowerPoint what
22 the actual dimensions are. And this clearly isn't the kind of evidence that
23 should be relied on to prove on unpatentability.
24 And then you don't have all the right angles either. What's
25 interesting is, if you look, for example, in the bottom left, where it -- as I

1 understand it, they're trying to -- they're trying to make the point that the
2 forefoot platform is thicker proximal to the heel than at the toe, but they're
3 measuring the heel. So if you look at the red arrow in the bottom left, that's
4 the heel. That's not what the claim limitation is. It's about the forefoot
5 platform. And they do the same thing on the -- with the black shoe above.
6 They measure the heel, not the forefoot platform that's proximal to the heel.
7 So this is just -- you know, this isn't evidence. This is late
8 attorney argument and a bunch of lines that they drew on pictures that aren't
9 probative of anything. But I think what it does underscore is how
10 insufficient the evidence they did put forth really is, that they couldn't even
11 rely on what Mr. Delgatty did in his second try, they had to go and put
12 another gloss on it. So I'll pause there for any questions about the
13 conventional shoe analysis.
14 JUDGE JUNG: Okay. Mr. Bosco, if we agree with you that
15 the pictures in the declarations are problematic, there still seems to be
16 indications in the asserted references about what the conventional shoe had.
17 Granted, like, some of them are just outside -- outward appearances, they
18 don't really tell you about the inside. But it does seem like the thicknesses
19 that was a known feature, known in the art, a flat heel platform that was also
20 -- it also seems like it's a feature that's known in the art. And those features
21 are not the limitations that got you this patent, right? These are not the -- it's
22 not -- it's not the -- it wasn't the limitations that distinguished over the --
23 over the prior art. Isn't that correct?
24 MR. BOSCO: Well, I mean, just to address the prosecution
25 history, I mean, I don't think the -- patentee conceded anything with respect

1 to those limitations in prosecution. And -- but to get to that issue, and I
2 think it's an important one you raise, Your Honor, I'll go to slide 42 really
3 quick. And then I think I'll go to Won and slide 93 after that. But I'm on
4 slide 42 right now.
5 So a couple issues. So I don't think that the prior art, Your
6 Honor meet -- is sufficient to meet Petitioner's burden of proving that these
7 elements are there. So there are a lot of generic references to known insoles,
8 to -- I'm not sure if the word conventional is used verbatim, but similar
9 language. But the art doesn't say what the features are. It doesn't say that
10 any of these things were conventional. That the leap that's being made from
11 a generic reference to a conventional insole to the limitations of the -- of the
12 claims, all comes through Mr. Delgatty. And we think that's just pure
13 hindsight. And I think we saw that again, we saw that in Petitioner's
14 presentation. Even when you asked a question, can't you just rely on
15 Umezawa, they weren't really willing to do that. They had to keep coming
16 back to Mr. Delgatty or backup references.
17 And I think that's another point that I want to raise, and I'll
18 raise it with respect to Umezawa and Won as well. You know, they know
19 that what's in the reference isn't enough because they have not just one but
20 often, two, three, four backup references for these limitations that are
21 supposedly conventional. I mean, one would think if it were -- if everybody
22 did this, why is it so hard for them to prove it? They have to -- you know,
23 they'll go, for example, with Umezawa, they -- they'll say, well, it was
24 known. Well, even if it wasn't known, applicant's admitted prior art, which
25 is improper, and that's something -- there's precedential case law we cited in

1 our Sur-reply. Applicant's admitted prior art can't be part of any
2 unpatentability ground, and the Federal Circuit has been clear on that. But
3 then they say, well, if it's not -- if it's not there, then it's in Gallas. And so
4 they know they have an issue there. And I think that very fact speaks to the
5 fact that the references aren't enough and that these limitations weren't
6 conventional.
7 But then if you look at slide 42 -- and I'm kind of surprised,
8 honestly. So this is from Mr. Delgatty's declaration, but Petitioner put the
9 same image in their slides. And I'm surprised they did. I mean, here they
10 are -- they're openly relying on the exterior of the shoe for the forefoot
11 thickness. We just went through the fact that their own expert says, you
12 can't do that. It tells you nothing. And here they are drawing a line to that
13 curvy part up at the top that's the exterior. That -- that's -- and you can even
14 see from this very diagram that the insole is at a different level.
15 And then since I'm on this with Umezawa, I'll try and circle
16 back to it, but I don't want to forget, when Petitioner was talking about
17 Umezawa and talking about the heel limitation, and in response to one of
18 your questions, Your Honor, they -- there was a discussion about Figure 4.
19 You had -- you asked him about Figure 4, which everyone acknowledged
20 showed the forefoot platform. And they said, well, yes, that's the forefoot
21 platform, but we -- Umezawa tells you that it's consistently thick
22 throughout. So we can extrapolate from that that the heel is also of uniform
23 height.
24 But at the same time, they're arguing that the forefoot platform
25 is -- has different thicknesses. So they're saying there's a limitation '768

1 patent. They're saying it's thicker near the heel than at the toe. But they
2 just said that it was uniformly thick. And they do it over and over again. So
3 we see that in Umezawa, we see that to some degree in some of the other
4 combinations as well. So I think at this point, Your Honor, if it makes
5 sense, I'll move on to Umezawa and try and get into some of the meat there,
6 and then get into Won as well.
7 JUDGE DEFRANCO: Counsel, does your expert testify as to
8 slide 42? The figure shown in slide 42?
9 MR. BOSCO: He does. He does. We have it. Some of the
10 citations are there in Paragraph 204 in the '768 proceeding. Exhibit 2008 of
11 the '768 proceeding. But he -- there are other citations as well.
12 JUDGE DEFRANCO: Okay. Because I don't disagree with
13 you that what's shown in that slide 42, it seems like they're pointing to the
14 outside of the shoe. And that kind of portion along the edge, that could just
15 be a rubber layer going along the edge, you know, upward along -- to --
16 along the upper of the shoe as opposed to indicating the sole itself.
17 MR. BOSCO: Absolutely. And again, that's the exact type of
18 thing that Mr. Delgatty testified about as a feature of shoes, and is why you
19 can't rely on it to teach the interior. And just to circle back, Your Honor,
20 Mr. Markison has extensive testimony on this figure and on the general issue
21 of not relying on exteriors for the properties of the interior.
22 JUDGE DEFRANCO: Okay. I think I see you've got a cite
23 there. Is Exhibit 2008 his declaration?
24 MR. BOSCO: Yes.
25 JUDGE DEFRANCO: Okay. Great.

MR. BOSCO: Yes.

JUDGE DEFRANCO: Thank you.

MR. BOSCO: There's more than that paragraph, but that's part of it.

JUDGE DEFRANCO: Yes. I usually read the surrounding testimony from anything that's cited anyway, so -- okay. Thank you.

MR. BOSCO: Yes, Your Honor. So I'm now on slide 44. So these are a number of the things that are missing from Umezawa. And I would just note that the outset, this -- these arguments are all essentially independent of the claim construction issue about the first material and second material. These are all reasons why Umezawa doesn't teach what's claimed, regardless of what happens there. And I want to jump to gradient compression factor. Well, I'll step back a little. I'll start on slide 46. We heard a lot from Petitioner about Umezawa, you know, having allegedly a gradient -- a compression gradient and an interior part that deformed. And it does have a part that compresses in a gradient fashion, but it's only that yellow part in the middle. So if we look at Figure 3 of Umezawa, what we have is -- the low elastic part 20 is completely surrounded by high elastic part 26. So it's completely -- and this goes through every embodiment of Umezawa. And if you -- slide 47 just has some of the description from the specification.

And I want to jump immediately to slide 52 because Mr. Markison put in a lot of testimony on this and it's something the Petitioner totally ignored. And they literally ignored it in every filing, every expert declaration. They ignored the fact that Umezawa talks about this inner high

1 elastic part 26 and talks about how important it is to the invention. So
2 there's a sort of undercurrent of argument that Petitioner's making, that,
3 well, you don't have to count this part because the foot is mostly going to be
4 on the inside part. And now they even in their presentation acknowledge
5 that it's not all on the inside part. So some of it indisputably is on the
6 outside part, the high elastic part, the less compressible part.
7 But Umezawa talks about how this is a critical part of the
8 invention. So it says, even if the body weight of a golf player is applied to
9 the bottom part 6, the inner high elastic part 26 is not deformed so much.
10 And as a result, a large amount of force is transferred from the foot to the
11 ground through this inner high elastic part 26. That's the part that's not
12 compressible. So that's a key part of the invention. So then if you go up to
13 slide 50, we just have a little graphic that shows what the compressibility
14 profile is in Umezawa, and this is totally different from the claimed
15 invention.
16 And this goes directly to the issue of the construction of
17 gradient compression factor, and this is why Petitioner is backing away from
18 their own construction. So I thought it was interesting that they put gradient
19 compression factor in their claim construction section because there's no
20 dispute about it. There -- there's only Petitioner's construction. Patent
21 Owner didn't dispute their construction. The only dispute is between
22 Petitioner in the Petition disputing with Petitioner in their Reply because
23 they realize they have an issue with gradient compression factor.
24 So just going back to this schematic, this graphic here on slide
25 50, if we go -- starting from the inside to the outside of Umezawa, we have a

very substantial period of low compressibility. That's the inner high elastic part 26. And I always found that confusing, but the high elastic is the less compressible. So we have that inner part, then it jumps up. So suddenly, we -- we're more compressible. Dramatically more compressible. That's the opposite of what a gradient compression factor is. Then it goes down. And then on the far right, we have another plateau at the outer edge for a substantial area, where it's not compressible. So not only does it not decrease from the inner edge, the outer edge, there's a period of dramatic increase, and then you end up in the same place you started. So that's completely incompatible with the only construction of gradient compression factor that's before the Board. And I'm on slide 54 now.

So the -- in the Petition, Petitioner said, "A PHOSITA would understand that a forefoot platform constructed of a second material having a gradient compression factor, would become increasingly less compressible from the inner edge to the outer edge of the forefoot platform." Notice, they didn't say anything about measuring points. They didn't say, you know, you measure it here, and you measure it there. You -- they said, "Increasingly less compressible from the inner edge to the outer edge." And then I would urge you to go back to slide 50 and take a look at that. That's not a gradient compression factor under that construction. Not even remotely close. And Petitioner understands they have a problem with that, and that's why we saw in their Reply that they started backing off from that position. They started talking about measurement points, and it was a little -- frankly, it's hard to understand what their construction is now, but the reality is what they put in the Petition was clear.

1 The compressibility has to go down when you go from the
2 inside to the outside, and Umezawa plainly doesn't show that. Now, what
3 they're trying to do, and I'll go back to slide 50 for the visual, they're trying
4 to blur the distinction between the distinct limitation for a gradient
5 compression factor and a different limitation, which was more at issue in the
6 POPR, about a compressibility near the outer edge and near the inner edge.
7 And just so it's clear, we don't think that limitation is met either, for the
8 same reason. Like, if you look at slide 50 and you see those two plateaus,
9 the inside and the outside, we don't think that meets the near limitation
10 either. But you don't have to reach that because it's clearly not a gradient
11 compression factor under Petitioner's construction and the only construction
12 that's before the parties, before the Board right now. So I'll pause for a
13 moment for any questions about that issue.
14 JUDGE JUNG: So just to be clear, your slide 50 graphic, does
15 that take into account the agreed upon interpretation of inner edge and outer
16 edge being in --
17 MR. BOSCO: It --
18 JUDGE JUNG: -- was referenced to where the foot sits in the
19 forefoot platform?
20 MR. BOSCO: Yes, Your Honor. It does. And that -- and
21 that's because -- well, first of all, Petitioner admitted that the -- part of the
22 foot is on those plateaus. They admitted in their briefing and they admitted
23 it just now. But putting that aside, if you look at slide 53, we have a
24 schematic of that. And of course, this is annotated, but it's clear that a --
25 part of the foot is going to be on that inner part. And then beyond that, you

1 don't even have to look at the figures because the reference tells you that. I
2 mean, it tells you in the figures, but it also tells you expressly in the -- in the
3 language. And that -- I'd go back to slide 52. So slide 52 is saying that the
4 weight is going from the golfer down into inner high elastic part 26. The
5 foot has to be there. How else can the -- can the weight go down there?
6 And it talks about how it doesn't -- it doesn't deform as much.
7 So it -- the only reason it would deform is if the foot is there, right? So that -
8 - our view then is -- and I think it -- the reference tells us, the foot is there.
9 If the foot weren't there, then you wouldn't get all these benefits that
10 Umezawa talks about. Umezawa talks about -- like I said before, about how
11 -- a large amount of force being transferred and this inner high elastic part
12 26 contributes to generation of great head speed. The foot has to be there.
13 It's key to what Umezawa's talking about. And that's consistent with what
14 we have on slide 53, and that's consistent with -- I mean, it's supported by
15 all of Mr. Markison's opinions as well.
16 And I just quickly go to slide 57, just to circle off on this. So
17 slide 57 is interesting for a couple reasons. So first of all, we have Figure
18 93, which -- from -- this is from the -- from the patent, from the '768 and
19 '456 patents, not from Umezawa. That shows a gradient compression factor
20 going to the edge, consistent with the construction that Petitioner proffered.
21 And this whole graphic here, that figure and the language to the right, that
22 comes right out of the Petition. So this is what Petitioner put when they
23 were arguing for the construction of gradient compression factor when they
24 were saying it should be increasingly less compressible from the inside to
25 the outside. That's what Petitioner said. And they cited Figure 93. They

actually cite it in their presentation just now, again, as an example of a gradient compression factor. And that's really different from Umezawa. You know, we don't have that inner area or -- and outer area that's less compressible. It's fundamentally different.

JUDGE JUNG: Okay. Mr. Bosco, can you go back to slide 53?

MR. BOSCO: Yes.

JUDGE JUNG: Okay. I want to ask you some questions. Oh. You agree that the toes in the middle, they would compress the low elastic part 20 to some degree?

MR. BOSCO: Yes.

JUDGE JUNG: Okay. So are those toes near an inner and outer edge?

MR. BOSCO: The toes in the middle, I don't think there's any real reasonable reading of -- or understanding of near that would put them near the inner and outer edge.

JUDGE JUNG: Like, for example, the toe right next to the big toe, that's -- wouldn't you consider that to be near?

MR. BOSCO: The one right next to the big toe? No, Your Honor. I would not. And I would note, you know, there's -- Umezawa -- there was a reference to 3 millimeters being the distance, you know, the width of the inner high elastic part. That's a -- that's a floor in Umezawa. If you look at slide 51, they say it's preferably more than that, and preferably 10, less than 25. But -- so it's clear. I mean, they -- it's a substantial part of the forefoot platform. So you know, looking at slide 53, I think especially,

1 you know, if you look at the context of the whole invention, it -- it's
2 inconsistent with the claim language, I think, to have an area of high
3 compressibility that's so substantial near the inner edge. I think that's very
4 different from what's claimed.
5 But again, Your Honor, that -- you know, we don't think that
6 limitation's met, but that's a separate issue from the gradient compression
7 factor. And it's -- again, Petitioner, and you see it in their Reply, they try to
8 avoid that whole gradient compression factor issue. They try to avoid the
9 fact that their own construction shows -- doesn't read on the art. So they are
10 -- basically, put their head in the sand and say, well, let's talk about the near
11 because we think we have a better argument there. Well, they can't do that.
12 And we don't think they have a good argument on near, but we think they
13 lose on gradient compression factor, and that's dispositive of this whole
14 ground.
15 So I understand I've been going for about an hour. If it -- if all
16 right, I'd like to switch to Won for a bit. So Your Honors, I'm on slide 80.
17 And just jumping to the Won -- the Won grounds. And I understand, Your
18 Honor, you're particularly interested in Won and Talarico. I think there's
19 some issues with Won that kind of cut across all the grounds that are going
20 to be relevant to that combination. But there's a lot that in our view is
21 missing from Won.
22 And just to step back a little bit, if you look at slide 82 -- so
23 Won is really directed to -- it's a -- it's an odd reference, and it's certainly
24 odd the way Petitioner's relying on it. Mostly, it's directed to the angle of
25 the heel and the forefoot, right? It's -- that -- that's what's the notional

1 patentable advance, and virtually all of the Specification is talking about
2 that. And that's not really something Petitioner's relying on. There's -- here
3 and there for the -- for the heel platform they talk about some of that. But
4 that and looking at slide 83, all the figures, it's all about these relative tilts
5 between the heel and the forefoot.
6 But then we get to -- and looking at slide 84, there's this outlier
7 paragraph in Won that -- it seems totally disconnected from the rest of the
8 reference, and that's what all -- Petitioner's whole theory hinges on, is this
9 one paragraph and this one figure in Figure 5. There's no discussion in Won
10 about how this fits in with anything else that's described in the reference.
11 It's just -- it just hangs out there, and there's a lot of strange stuff about it.
12 So I'm moving to slide 86. It -- it's talking about Figure 5.
13 And I mean, you can read it yourself. I won't read the whole paragraph, but
14 what it talks about is how there's a -- there can be an inside surface and an
15 outside surface and they have spikes on them and one is soft and one is hard.
16 And then you can see from Figure 5, it's talking about the outside surface of
17 the shoe. And of course, it has to be because that's where the spikes are, and
18 the whole thing is about where the spikes go. So it has to be talking about
19 that exterior surface. And then we have the highlighted language there. It
20 says, you know, "When a golfer puts" his – "both feet together to take a
21 stance for swing, the spikes fitted on the part of the soft surface are pressed
22 down because they are fixed on soft surface, but spikes formed on the hard
23 surface remain in the same position, so the sole is tilted toward the soft
24 surface."

1 So as Mr. Markison reads this, and as we're reading it, to the
2 extent, this can really be understood as to what's happening here, it's talking
3 about spikes going into the ground and that changing the alteration of the
4 shoe. And so you get your tilt to the inside because the spikes sink into the
5 ground. That -- that's what it says. It doesn't talk about compression. It
6 doesn't -- it doesn't talk about any of that. It just says, "The spikes go into
7 the ground."
8 So we think that kind of -- this becomes a problem for all of
9 their Won grounds. So for a couple of reasons. So first of all, the claim
10 limitation at issue requires that the forefoot platform be constructed of a first
11 material that has a compression gradient factor. I'm talking about claim 1 of
12 the '768 patent and claim 1 of the '456 patent. So there's nothing in here
13 that says that, I think, can reasonably read as saying that whatever this
14 outside surface is, that whole forefoot is constructed of that material. And it
15 doesn't seem to teach that anything in any meaningful way than anything
16 other than the exterior surface is constructed of whatever these unstated hard
17 and soft materials are. So we think that's a problem that cuts across all the
18 Won grounds.
19 And then there's this issue of the spikes being pressed down.
20 So if you look at Petitioner's Sur-reply, they acknowledge that if Mr.
21 Markison is correct and that what's happening here is the spikes are going
22 into the ground and that's how the tilt is generated, then this reference
23 doesn't work. They say that. They say it's -- it wouldn't -- it would have no
24 utility. It doesn't make sense. So if that's true, then their obviousness
25 combinations don't work either. And we cited case law on that, you know,

1 person of ordinary skill is not motivated to make something that -- that's
2 inoperative. And at this point, the only argument that they have that it
3 doesn't -- that Won doesn't work in the way the plain language says, is that,
4 well, when it says the spikes go down, that didn't really mean down. Well,
5 that's just rewriting the reference.
6 So now they're saying they don't like the fact that it says the
7 spikes are fitted on the soft surface and are pressed down. They don't know
8 what to do with that. So now they say, well, it actually means the opposite
9 of what it says. And that's actually -- that's inconsistent with Won's own
10 teachings relating to the word down. And if you look at slide 87, so Won
11 uses the word downward and it uses the word upward. And no surprise,
12 when it's talking about down, it's talking about -- or downward, it's talking
13 about going down towards the ground. So if you look at this citation on
14 slide 87, it -- with reference to Figure 4, it says, "The heel portion is tilted
15 downward," and no surprise, Figure 4 shows the heel going down to the
16 ground. And then likewise, upward is the opposite.
17 So we don't think there's really any basis for rewriting Won to
18 say that down means up, and that's what all of their Won grounds rely on.
19 And that we think is clear from their Replies that if you don't agree that
20 down means up in Won, then their grounds fail. And just circling back on
21 surface. So if we look at slide 88, surface has a -- has a clear meaning. It
22 means the exterior or upper boundary of an object or body. There's no
23 indication in Won that surface means anything other than that plain
24 meaning. And, you know, Petitioner, on slide 63 of their slides, referenced a
25 bunch of other language from Won that uses the word surface and all of it

1 shows that they -- Won used surface in the ordinary meaning. That it means
2 the exterior.
3 So you know, we don't think that Petitioner has a good
4 argument, that surface means something other than what a person would --
5 the ordinary dictionary definition. And Won teaches, in fact, that surface
6 means what you would think it means. So that's a big problem for all their
7 Won -based grounds because now they're trying to say that the forefoot
8 platform is constructed of a surface. Well, that doesn't make sense. And
9 then they're trying to combine Won with other references that teach very
10 different things without any coherent explanation of how this sort of
11 idiosyncratic embodiment in Juan, with spikes on an exterior surface, is
12 going to be integrated with the sole element that's taught in, say, Talarico
13 '911.
14 So, Your Honor, I'll pause there for a second on Won because I
15 said a lot there, and I know you were interested in it.
16 JUDGE JUNG: I have no questions.
17 MR. BOSCO: Thank you, Your Honor.
18 So I'm going to move to slide 91, and this sort of underscores a
19 couple of things. So slide 91, this is an excerpt from Petitioner's
20 supplemental declaration from Mr. Delgatty. And this is an example of the
21 kind of new unpatentability theory that Patent Owner had to deal with as a
22 result of Petitioner coming up with new theories based off of new
23 constructions.
24 And what they say here, and putting aside the procedural
25 aspects of it, just looking at the merits of this, their new theory, and this is

1 the theory that underlies the Won -Talarico ’911 combination, and it -- and it
2 underlies, you know, we haven’t talked about Norton at all, but I’ll talk a
3 little bit about that. It underlies that combination as well. Is it -- essentially,
4 is it -- well, everything is obvious. Everything with shoes is obvious. You
5 can take an insole, an outsole, you can mix and match.
6 Doesn’t matter if Won was only talking about the surface. A
7 person of ordinary skill would understand. You can take an insole from
8 Talarico ’911 and put it on the surface or anywhere you want. That -- that’s
9 in essence what is here in Paragraph -- on slide 91. And that’s just not
10 obviousness law. I mean, that -- they -- they’re still an obligation to provide
11 a motivation to combine. You can’t just say that, well, everything could be
12 slapped together. And that’s essentially what they do here.
13 And if you look at slide 92, now, this is obviously, you know,
14 this is just a demonstrative. We’re not arguing that this is what their
15 combination amounts to, but the point we’re trying to make here is that it’s
16 not so simple. And these athletic shoes that are purportedly conventional are
17 -- have a lot of differences. And there’s a big difference between a golf shoe
18 like Won, conventional golf shoe that looks like an Oxford, looks like an
19 Oxford dress shoe with spikes, and an athletic shoe, which is what Talarico
20 ’911 is talking about by the way. Talarico ’911 is talking about a shoe that -
21 - or not even a shoe, but a -- an insole component that you would use for
22 running, soccer, things where you have repetitive impacts. It -- that’s what
23 Talarico ’911 is talking about.
24 There’s no indication, there’s nothing from Mr. Delgatty that
25 would indicate that a person of ordinary skill would look at something like

1 that, which is also what Norton is directed to, and say, yeah, let me put that
2 in my Oxford golf shoe with spikes. Which on its -- by its own terms, says
3 that it generates tilt by spikes sinking into the ground. Their expert never
4 grapples with how that would actually work. We understand Petitioner has
5 got, you know, they cite the bodily incorporation case law and that's not the
6 point we're making. We're not saying, you know, you have to show that
7 you could bodily incorporate it, but you do have to show a motivation to do
8 it. And you do have to show a reasonable expectation of success. And they
9 just haven't done that. What they've offered instead are the kind of
10 conclusory arguments that we see on slide 91.
11 And I just want to -- let's see. I know I don't have too much
12 time left. Want to look -- go briefly to slide 93. And this goes back to this --
13 the conventional shoe issue coming full circle. You know, we can see here
14 that -- and, Your Honor, this goes back to a question you asked a long time
15 ago about why a petitioner can't just rely on the prior art to supply some of
16 these limitations that are purportedly conventional.
17 So we look at something like Figure 6 in Won, you know, this
18 is a rough schematic. We -- this isn't something that was intended to be
19 measured. They don't even show the top of the shoe. There's no substantial
20 evidence here as to the thickness of anything here. We don't think you can
21 look at this and say, well, that heel platform has a particular dimension or a
22 particular uniform height. There's just not enough there. And you certainly
23 can't rely on it to show that the forefoot has a greater thickness proximal to
24 the heel than at the toe because, once again, it's just like that 1970 golf shoe
25 the Petitioner talked about. It's got the same issue. There's no difference.

At least visually, there's no difference. And they have no measurements. They have no evidence to rebut that.

Your Honor, on slide 94, we have just a few notes on a number of the backup theories. And these include the Won and Talarico '911. A few just global points I want to make there. So I think both the parties gave a little bit of short shrift to Talarico '911. That's in part because Talarico '911 was cited in both patents' prosecution. It was applied. The claims were found patentable over it. So I think, you know, right there that's a reference that the patent office has already seen and rejected.

In addition, Talarico '911 doesn't clearly disclose either of what I call the dimensional limitations. It doesn't clearly disclose heel -- the heel platform. It certainly doesn't disclose the forefoot platform thicker proximal to the heel. And once again, we have Petitioner recognizing that and relying on these backup combinations. So they know that even that combination doesn't have those features.

With that, the last thing I'll say barring any questions is, you know, with secondary considerations, you know, the evidence is not the same. We don't contend that there's a -- an Athalonz product that practices, but there is secondary considerations evidence. That copying evidence is still there, that the figures that show the compression gradient factor, those were given to Under Armour as part of that early presentation. It was all before them. And then they -- for the first time after that, they came out with a reference that had those patented features. So with that, Your Honors, I think I'll reserve whatever remaining time I have for sur-rebuttal.

JUDGE JUNG: You have 17 minutes left, Mr. Bosco.

MR. BOSCO: Thank you, Your Honor.

JUDGE JUNG: Mr. Bugg?

MR. BUGG: Thank you, Your Honor. I'll try to address -- each of these issues in turn. A lot was said, but we'll try to get through it. I understand I have about a half hour. I may not use all of that, but we'll start here.

So first thing that was discussed was the material -- the construction of first material, second material. Athalonz's suggestion that Petitioner was somehow on notice or knew of the correct or proper construction and somehow chose not to address it. It -- it's just false. They haven't come forward with anything showing any evidence aside for some way that they're trying to read a footnote suggesting that we are disparaging their interpretation of this. It's just -- it's just not true. What is true is that there was no claim construction in the underlying litigation. Looking at their claim -- looking at their infringement contentions, this is what we were able to glean from their infringement read.

So that -- that's why it was in a footnote. We didn't think this was an issue. We weren't trying to sandbag or anything that Patent Owner suggests. To your point, multiple points that Your Honors made, this wasn't as if we were -- we were saving our best argument for later on. We've now established that each of the references have a first material that's different than a second material under any construction, certainly under the Board's construction.

And as noted, we think we fit squarely within the *Axonics* case where if an institution decision or the Board establishes a different claim

1 construction, which it clearly did, there's no debate about that, the petitioner
2 has an opportunity to address it. And that's what the issue is here. But the
3 implication or the -- whether -- or sorry, the fact that Patent Owner is trying
4 to suggest that we somehow knew of the correct interpretation and chose not
5 to address it is just false. There -- there's no evidence of that and them
6 trying to suggest otherwise is incorrect.
7 Next, I'll address Patent Owner's suggestion on claim
8 differentiations. It's on slide 20 of Petitioner's slides, if you'd like to go to
9 that. Our argument for claim construction is not a claim differentiation
10 argument. Just look at what claim 6 actually says. It says, without a doubt,
11 the materials can be the same. That's not claim differentiation. Just look at
12 claim 6 and then Patent Owner's argument on slide 20 also that suggests the
13 second material must be different due to compressibility. Look to claim 7.
14 Claim 7 suggests the compression of both materials can also be the same.
15 Next, I'd like to talk about Exhibit 1026. This is the redacted
16 technical drawing. The -- their -- Patent Owner's suggestion that this is
17 somehow unreliable because it's an altered document, it -- it's just untrue.
18 Even the new image that they provided on, for example, slide 23 because
19 they redacted in black doesn't change what's actually shown in the
20 document. What this -- the only reason that this document is cited is for the
21 materials that are shown in the -- in the forefoot and the heel. That's the part
22 we left unredacted. This is a confidential document as opposing counsel
23 acknowledged. There's a protective order in place so we redacted
24 confidential information. What we didn't redact was the only thing that
25 mattered, which is what the forefoot and the heel were made out of. And

1 despite what Patent Owner's counsel suggested, Mr. Delgatty certainly said,
2 yes, it looks like the entire sole is made of that same blue hatched material.
3 So I'll just -- I -- on slides 21 of 22 of Patent Owner's
4 presentation, they're suggesting that there's nowhere in the Spec that
5 suggests that the first material can be the same as the second material. We
6 expressly cite where it does expressly say a first material can be the same or
7 that the fore foot platform shown in Figure 93 is made of one material. The
8 fact that we're relying on other portions of the Spec where it's talking about
9 a first height and a first slope, that's just supporting us. And conveniently,
10 they're -- they also point to nowhere in the -- in the Specification where it
11 says that, when we say first and second, it must mean different. So that they
12 -- they're mischaracterizing what's actually in the Specification.
13 So I'll have you turn to our slide 14 again, referring to their
14 infringement contentions. They -- what they conveniently don't do is
15 disagree that this is actually a single material, right? This is again, where
16 they're making these arguments about whether it's an improper exhibit or
17 whether Mr. Delgatty -- or sorry, Mr. Markison opined on it. Please read the
18 transcript. We think it's very clear that he does know that this is a single
19 material. That's kind of beside the point, they're not actually denying the
20 fact that what's shown in this slide 14 has a single material forefoot and
21 single material heel. It's the same exact material, has the same exact
22 compressibility. They don't refute that.
23 Next I'll talk a little bit about conventional shoe design that was
24 -- I'll try to keep this in the same order as addressed by opposing counsel for
25 convenience. Athalonz suggested on slide 34, that Mr. Delgatty's opinion

1 regarding conventional shoes is essential to all of our grounds. That's just
2 false. We -- that -- that's not true. If you look through, many of the grounds
3 don't rely on conventional shoe design, including grounds 2 through 6 of
4 639 IPR and grounds 1, 2, 3, 5 and 6 in the 640 IPR.
5 In many of these cases and as Your Honor kind of pointed out
6 with Umezawa, the references themselves teach or suggest the limitations,
7 the heel platform, the height of the front of the heel versus the toe or the
8 thickness of the forefoot. And again, if anything, for many of these grounds,
9 Mr. Delgatty's discussion of conventional shoes is just in addition to that
10 further supporting our analysis and further supporting our conclusions.
11 Patent Owner's argument that Mr. Delgatty's supplemental
12 declaration and the new images he provided of the cutaways should be
13 discredited for a number of reasons. He -- I think he mentioned that there
14 was no measurements that were provided, no information on camera angle.
15 All of this is beside the point. When Mr. Delgatty explained in his -- in his
16 deposition -- in his -- in his -- well, both his deposition and his declaration, if
17 you look at the images, it shows what it shows. It shows a flat heel. You
18 don't need to show a measurement that shows that the front of the heel is the
19 same height as the back of the heel. Those are very obvious from the
20 images.
21 To the point of that, some of the images are shown at a closer -
22 - sorry, closer to the camera than some of the parts of the shoe are closer to
23 the camera, I'll have you turn to slide 26 of Petitioner's -- sorry, not slide 26,
24 slide 36. The only parts of the shoe that are shown that are further away
25 from the camera are the parts of the heel that we're saying are shown

1 thicker. If anything, them being further away from the camera would make
2 them look smaller. There's no -- there's no discussion on -- there's no --
3 everyone agrees that what's shown in these figures, it actually shows the
4 claim limitations, right? There's no -- there's no -- there's no debate about
5 that.
6 The reason that Mr. Delgatty didn't provide measurements is
7 because he explained, you can look at the pictures and understand it, let
8 alone the fact that all of this is just in support of what the definition of what
9 a conventional heel is that a person of skill in the art would know. This is all
10 supplemental evidence. He went on record showing we're explaining that,
11 for example, on slide 35. While I don't believe any additional evidence is
12 needed, I provided it just in response to what the new arguments or the
13 arguments made by Patent Owner.
14 Going back to slide 36, discussing the FootJoy golf shoe, what
15 Patent Owner's counsel suggested that shows in the bottom right is, again,
16 wrong. That red line's not showing the heel section, that's showing the
17 thickness of the forefoot looking forward through the shoe. As you can see
18 in comparison to -- that's the thickness of the heel on the bottom of slide 26,
19 right? That's not what we're relying on in slide 36 to show the thickness of
20 the forefoot. The thickness of the heel is much greater than what we're
21 showing on slide 36.
22 Slide 26, bottom right shows the thickness of the heel. I'll have
23 you turn to slide 36, bottom right, that red arrow, that's the thickness of the
24 fore foot proximal to the heel. And again, that's larger than the green arrow
25 showing the thickness of the toe. And these arrows aren't necessary. This

1 is, again, a demonstrative. We're trying to make this, you know, a clear
2 discussion for the Board when we're talking about areas of a picture that we
3 can't point to in person. But it's very clear without the arrows, a person of
4 skill in the art as Mr. Delgatty explains, can tell that the heel platform in
5 each one of these -- sorry, the fore foot platform proximal to the heel is
6 thicker than the toe.
7 So next I'll turn to the Umezawa reference. So on slide 52 and
8 elsewhere, Patent Owner makes -- on their slide 52, makes much of a single
9 paragraph in Umezawa 39 and somehow suggests that indicates all of the
10 other teachings of Umezawa. Throughout Umezawa it describes
11 compressibility, it describes sloping of the heel from the in -- or slipping of
12 the forefoot from the inside to the outside. And they make much of the fact
13 that one paragraph 39 should somehow change all of that despite the Board
14 and both experts are agreeing that Umezawa does in fact teach compression
15 and that the bones of the foot as Your Honor, was inquiring about are
16 actually on that compressibility area.
17 Right. So if you'll turn to Petitioner slide 50. If you look at
18 Petitioner slide 50 and actually in -- what they're suggesting is where the
19 foot sits is where the actual compression area in that sloped area is. And it
20 absolutely meets the increasingly less compressible proposed construction
21 from where the foot sits. Even if you got rid of -- if we neglected the fact
22 that the claim requires it to be near where the foot sits on the edge of the
23 shoe -- we don't agree with that, but even if you did that, their own evidence
24 suggests that the foot actually sits on the portion of the shoe that's more

1 compressible than less compressible. So on slide 50, that's actually the part
2 that's becoming less compressible down that slope on slide 50.
3 And again, that's supported by all of their own Patent Owner
4 annotated images. We're not even saying we agree with the Patent Owner's
5 annotated images, but based on their own arguments, these claims are met.
6 In fact, Patent Owner's counsel admitted that the foot sits mostly on the
7 inside part, the inside more compressible part. If it's sitting mostly on the
8 inside compressible part, it's not only near the increasingly compressible
9 part, it's on it. That meets the claim limitation whether or not you're
10 required to be near the edge or on the edge, it's there.
11 The other thing Patent Owner doesn't address is the fact that its
12 own -- it mentioned Figure 93 as disclosing compressibility and a
13 compressibility gradient. It doesn't address the other Figures 112, 115, 35
14 through 37. They all should all demonstrate gradient compression. None of
15 them have it go from edge to edge. And we would even posit that Figure 93
16 doesn't require it going from edge to edge. But they don't address any of
17 the other figures that they've gone on record, including during the
18 prosecution, that states that, for example, Figures 35 through 37 and Figures
19 112 and 115 all established gradient compression or practice gradient
20 compression or show it. And none of them go from edge to edge or even
21 near it.
22 Furthermore, I do want to talk about paragraph 39 and
23 Umezawa that they keep referencing. Our expert, Mr. Delgatty actually was
24 asked about this during his deposition. This doesn't appear anywhere in the
25 record because they chose not to address what Mr. Delgatty actually said

about paragraph 39. What he said was that while 39 suggests that force can be transferred through the high elastic part 26, this is where they hang their hat, it must absolutely be the thing that changes Umezawa's analysis. He said that force can be transferred through that high elastic part 26, even when the foot's not touching it, much like a trampoline transfers force to the ground through the frame when you jump close to the edge. Please go and look at his deposition testimony on this from page 45 to 46 in Exhibit 2022. This is cited nowhere by Patent Owner because it directly refutes their total reliance on one paragraph on paragraph 39 suggesting that Umezawa somehow doesn't teach everything else it teaches in the rest of the panel.

Turning to the Won reference. Just kind of on an overall mention on the Won reference, we rely on Figure 5 and we rely on the part of the disclosure that discusses Figure 5. Somehow, Patent Owner tries to discredit the fact that there's different embodiments disclosed in figure -- in Won and that Won is less important or something. I -- I'm not sure why it's any -- why we can't rely on one embodiment over others. Each of these patents disclosed many different things and the prior -- we're relying on what's shown in Figure 5. It's one embodiment. Conveniently, it's also claimed. Look at claim 1, what's shown in Figure 5 is also described in claim 1 where it's more compressible on the inner edge than the outer edge. So this isn't just some outlier disclosure that no one would look to in Won, it's actually claimed and disclosed in the Specification as well as the figures.

Patent Owner's analysis of Won really hinges on the fact that they're requiring you to look at it and throw the entire reference away all because it says press down, right? So obviously when you look at the

reference and as Mr. Delgatty explained, when you look at this as a compressibility issue where the spikes are compressed more into the softer material than the harder material, which makes sense to a person of skill in the art, and I hope it makes sense to all of you, the reference makes total sense. When you step down, the more compressible the area, compresses more and that causes your feet to tilt in towards the inside.

Mister -- sorry. Patent Owner's counsel talked at length about how the sloping would actually work if they -- if you read it the way that they read it. What they don't acknowledge is it would slope the opposite way. Nothing makes sense with what they say. If pressing down means pressing the spikes into the dirt, which that doesn't mention that anywhere, the only -- they're hanging their hat on the word down, means press down into the dirt. The opposite of all the things in the rest of the Won reference that discloses the foot tilting inward, the knees being bent in that's described in the claims, all those things would happen in the opposite direction if they were talking about pressing the spikes into the dirt.

And they acknowledge that in their -- in their briefs and their -- Mr. Markison acknowledges that in his declaration, that their analysis doesn't make any sense and that they're -- they want you to just throw the reference away because no one would understand how it would work. Conveniently, they also don't discuss when asked about Figure 5, what Mr. Delgatty explained. The reason he provided supplemental -- he provided his analysis on why they would say push down or press down. It goes on Figure 5, you're looking at the bottom of the shoe that's pressed down into the shoe. In comparison to when they were looking at Figure 4, for example, on

slide 87, that's with Figure 4, down is relative to the shoe on looking from the side.

So you can't read into what the description is regarding slide -- sorry, shown on slide 87 or 89, 87 through 89 and the description of what down means with respect to Figure 4. If you did that, down would mean down into the paper much like Figure 5 is showing from the bottom of the shoe. Mr. Delgatty explained this during his deposition. Again, this isn't addressed by Patent Owner.

So finally, I'll talk about the Talarico reference. I -- first thing I'd like to address is Patent Owner's counsel's characterization of what happened during Talarico in prosecution is just false. So what actually happened during prosecution in the -- there was pending claims in the '768 patent, one of these two compressibility patents that are identical claims to the '456 patent claims. That claim was rejected based on Talarico '911 as an anticipatory reference. Mr. Markison, who is the prosecuting attorney, rather than argue that either one of the two limitations that are missing here, they argue that there's no flat heel, which we'll show, and they argue that the compressibility difference isn't there. They -- he amended the claims. So when presented with this exact same situation, the exact same claim at issue in the '456 patent during prosecution, Mr. Markison himself didn't make either of the two arguments they're currently making, and the fact that they're trying to say that it was somehow cited on the patents and should be ignored just totally glosses over what actually happened.

Please do look at the prosecution history. It's very obvious what actually happened, and when asked about this during his deposition,

1 Mr. Markison concluded the same. This is from, in his deposition, Exhibit
2 1023. Pages 158 through 168 makes very clear that the Talarico reference
3 discloses these elements and that Mr. Markison amended the claims around
4 it.
5 Patent Owner's suggestion that it lacks the claim to heel
6 platform, this is in slide 97, that's also directly contradicted by Mr.
7 Markison's deposition where he admits that claim 1 teaches that limitation,
8 and we showed that in the last two lines of claim 1 where it shows that the
9 heel platform section in Talarico is flat, and it's not just the midsole section.
10 It's the entire sole.
11 Finally, I'll just address Patent Owner discussion on
12 combinability -- these -- of these references. Yes, a person who's skilled in
13 the art would know how to combine elements of shoes. It would -- it -- as --
14 obviously, this analysis doesn't require that the insole of one shoe has to fit
15 on top of the midsole of another shoe. It's well within -- as Mr. Delgatty
16 explained, it's well within the knowledge and expertise and ability of a
17 person of skill in the art to change how a midsole would fit with an insole, or
18 how that would work together with an outsole.
19 These are all things that are readily within the ability of a
20 person of skill in the art. Mr. Delgatty explained why they would do it, and
21 also provided -- sorry. Explained that they could do it and also explained
22 why they would do it. Why would you include an insole and a midsole? It
23 would provide for additional cushioning, more comfort. This is all in Mr.
24 Delgatty's declarations. This isn't as if we're just slapping together, you
25 know, different cogs in a wheel and they don't -- the teeth don't fit together.

1 This is -- this is very easy -- you know, the combinations here Mr. Delgatty
2 explained were well within a person of skill in the arts' ability, and should
3 expect success in combining them.
4 And, finally, just kind of a more general context. This was --
5 this was raised with slide -- with respect to slide 93, but this kind of is
6 relevant to everything where Patent Owners try to suggest that you can't just
7 look at a figure and take any kind of measurements away from a figure. As
8 the Board knows, a person of skill in the art is allowed to look at a figure in
9 a -- in a patent and take all that it suggests to a person of skill in the art and
10 apply that. This isn't read -- you know, suggested in a vacuum or anything.
11 So when you look at a figure, when you look at a specification,
12 that figure teaches a person of skill in the art all that he would take -- he or
13 she would take away from it even if you're not, you know, measuring
14 different things on the figure. It seems very obvious, for example, on slide
15 93 that the forefoot platform is thicker in that image, and a person of skill in
16 the art is certainly allowed to make inferences or even just use the images as
17 disclosures supporting in validity.
18 So with that, I'll just ask if Your Honors have any questions?
19 JUDGE JUNG: No.
20 MR. BUGG: Thank you, Your Honor. I appreciate the time.
21 JUDGE JUNG: Mr. Bosco, you have 17 minutes.
22 MR. BOSCO: I just want to check if my audio is okay. I'm
23 having issues.
24 Your Honors, can you hear me?
25 JUDGE JUNG: Yes.

1 MR. BOSCO: Thank you. Sorry. I had a technical issue
2 during Petitioner's presentation where my earphones lost their battery, but
3 I'm back now, and I was able to hear virtually all of it other than about 30
4 seconds.
5 So Your Honors, I'll start with slide 93, which I think is where
6 Petitioner ended, and this is about the Won reference, and the issue of
7 looking at figures in generic schematics like this. I think if you look at
8 Figure 6 of Won, which is on slide 93, I mean, we don't disagree, I guess,
9 with what Petitioner just said in the sense that, sure, a person of ordinary
10 skill can look at figures and look at them, take everything they teach, and
11 nothing about this figure teaches anything about dimensions, and nothing
12 about this figure would tell a person of ordinary skill, you should look at this
13 and make judgments about the relative thicknesses of different parts of the
14 shoe or what the structure of the heel is. None of that is there.
15 So this is not the kind of thing a person of ordinary skill would
16 look at and say, I can tell from this that one dimension here is bigger than
17 the other dimension, but that's what Petitioner's theories rely in part on.
18 You know, with Won more broadly, I think Petitioner
19 confirmed exactly what I said in the opening, is that their position relies on
20 down being up, that they want to rewrite the reference where it says the
21 spikes go down and say that that really means up, and that makes no sense.
22 And even if you look at, you know, this new argument they
23 make, which, to my recollection, is nowhere in their briefing -- but that
24 Figure 5 somehow teaches that down means up, that's inconsistent with the
25 rest of Won. I already showed the slides that show that Won talks -- uses the

1 word downward and it means down towards the ground. I don't think
2 there's any way you can reasonably look at the language that spikes are
3 pressed down and not understand that to mean into the ground. There -- I
4 just don't know that it can mean anything other than that.
5 So I think I'll shift gears to Umezawa. There was a lot about --
6 unless, Your Honors, if there are any questions about Won?
7 JUDGE JUNG: No questions.
8 MR. BOSCO: Thank you, Your Honors. I'll go to Umezawa.
9 And there was a lot of discussion about paragraph 39, and Petitioner's
10 counsel suggested that it was something of an outlier or some isolated
11 reference. It's not. It's a core part of Umezawa. And if you look at --
12 there's more to Umezawa that says the same thing. Paragraph 62, which --
13 of -- and I'm in Umezawa itself right now. Paragraph 62 of Umezawa,
14 which we cited in our Patent Owner Response, which Mr. Markison cited
15 repeatedly.
16 This talks about the -- in the last two lines, how inner high
17 elastic part 60 does not absorb much of the force transferred from a foot to
18 the ground. So it's repeating the same thing. Now, it calls it inner high
19 elastic part 60 because -- the interesting thing is, with Umezawa, every
20 embodiment has that same configuration. Everything has the configuration
21 where you have the inner high elastic, you have the middle part that has
22 more compressibility, and then you have the less compressible part on the
23 outside. Every embodiment has got that. So they use different labels for it
24 in the different embodiments, but it's always there because it's a core part of
25 the invention.

1 So paragraph 62, as I said, we cited that. Mr. Markison cited it.
2 I just want to underscore that Petitioner's expert and Petitioner never cited
3 any of this in any filing ever, so, you know, their argument that they just
4 made now with a belated explanation from the deposition that Mr. Delgatty
5 proffered, it's waived. It's improper, but honestly, Your Honors, we've had
6 no issue with you looking at it because I think if you look at it, you'll see it's
7 facially ridiculous.
8 I mean, Umezawa is always is talking about force coming down
9 on the inner high elastic part and deforming it. That can't mean anything
10 other than the foot is coming down and deforming it. There's no reasonable
11 reading of that. And, you know, once again, Petitioner just now
12 acknowledged that even they agree that part of the foot is coming down on
13 that inner high elastic part, and in our view, that's dispositive. So if the foot
14 is coming down on it, then the gradient compression factor has to go all the
15 way to wherever the foot comes down. And the foot comes down on the
16 inner edge, and it comes down on the outer edge as well. So we think,
17 essentially, Petitioner has -- their arguments make our point, that they
18 haven't established that Umezawa has a gradient compression factor under
19 their own construction.
20 A little bit about Talarico '911. You know, one thing that I
21 think I alluded to before but I want to talk about a little more with respect to
22 Talarico '911 in response to Petitioner's arguments, they gave so little
23 evidence as to the motivation to combine Won and Talarico '911. They
24 essentially just incorporated by reference their Norton grounds. So they
25 said, essentially, and we make this point in our slides, that it's a similar

1 ground. In our view, it's totally cumulative of Norton. And we go into a lot
2 of detail in our briefing about why the Norton-Won combination makes no
3 sense and how it's totally contrary to the teachings of Norton, so I encourage
4 the Board to look at that because, essentially, what Petitioner ends up doing
5 is just piggybacking on Norton for Talarico '911. And Norton clearly fails
6 in our view.
7 I think I'll move now to what I think will be the last point, slide
8 23 of our presentation, and this goes back to the claim construction issue and
9 this Exhibit 1026. And, frankly, I was a little surprised Petitioner's counsel
10 went back here, but they -- but he talked about Exhibit 1026 a lot. The
11 reality is, you know, we look at this -- the black -- the version on the right
12 with all the black redactions. None of us here who aren't under the
13 protective order -- I'm in the same position as the Board here. None of us
14 know what Petitioner decided to leave out, except to the extent we've
15 described in our Motion to Exclude, at a high level, there are -- there's
16 dimensional information. There's color coding. There's a lot there.
17 So what Petitioner is saying here is, well, we get to take this
18 confidential exhibit from the district court. We get to choose the parts we
19 like. We get to put digital Wite-Out over the parts we don't like. Then we
20 get to put that in front of Patent Owner's expert and ask him a bunch of
21 questions about it without ever disclosing that fact and then rely on his
22 testimony. And we think that's completely improper for a number of
23 reasons.
24 The exhibit should be excluded, as we laid out in our motion,
25 but to the extent it's not, it should be given no weight. And the resulting

1 testimony should be given no weight, and in any event, the testimony, as I
2 explained in my opening, shows that Mr. Markison had no idea what this
3 thing was. And he didn't say what Petitioner says he did. With that, Your
4 Honors, unless there are any questions, I think I may give us all back some
5 time.
6 JUDGE JUNG: No questions, Mr. Bosco. Thank you for
7 giving back some of your time.
8 Thank you all, too, for your presentation. Well, gentlemen,
9 your cases are submitted, and we are adjourned. Thank you.
10 (Whereupon, the above-entitled matter went off the record at
11 4:16 p.m.)

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