

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNDER ARMOUR, INC.,
Petitioner,

v.

ATHALONZ, LLC,
Patent Owner.

Case IPR2024-00638
Patent No. 11,064,760

PATENT OWNER'S RESPONSE

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PATENT OWNER'S EXHIBIT LIST

Exhibit	Description
2001	Docket Control Order (Dkt. 35) in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2002	United States District Court Judicial Case Profiles, as of December 2023
2003	Under Armour's Invalidity Contentions in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2004	Exhibit D ('760 Patent Invalidity Chart Based on Kim) to Under Armour's Invalidity Contentions in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2005	Exhibit E ('760 Patent Invalidity Chart Based on Rubin) to Under Armour's Invalidity Contentions in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2006	Exhibit F ('760 Patent Invalidity Chart Based on Dufour) to Under Armour's Invalidity Contentions in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2007	Exhibit S ('760 Patent Obviousness Chart) to Under Armour's Invalidity Contentions in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2008	Declaration of Mr. Timothy Markison in Support of Patent Owner's Response Regarding U.S. Patent No. 11,064,760
2009	CV of Mr. Timothy Markison
2010	Transcript of the 12/19/24 Deposition of Mr. Grant Delgatty in IPR2024-00636, IPR2024-00637, IPR2024-00638, IPR2024-00639, and IPR2024-00640

2011	Excerpts from Holt, Serway & Faughin, Physics (1st ed. 2002)
2012	Presentation Titled “Athletic Positioning Shoe: Presentation to Under Armour, August 22, 2013”
2013	Article Titled “Athalonz Golf Shoes: The Golf Shoe for Distance?” downloaded from https://thelefttrough.com/athalonz-golf-shoes-review/ on December 30, 2024
2014	Claim Charts for U.S. Patent No. 10,674,786; 11,013,291; and 11,064,760 for Athalonz Products

Pursuant to 37 C.F.R. § 42.120, Athalonz, LLC (“Athalonz” or “Patent Owner”) submits this Patent Owner Response to the Petition of Under Armour, Inc. (“UA” or “Petitioner”) seeking *inter partes* review (“IPR”) of U.S. Patent No. 11,064,760 (“the ’760 patent”), and to the Board’s September 12, 2024, Institution Decision (Paper 8).

I. INTRODUCTION

Petitioner’s asserted hodgepodge of prior art references fail to disclose the invention claimed in the ’760 patent. Petitioner argues only that the claims are obvious, not anticipated, based on a combination of single-reference obviousness arguments and a few combinations of prior art.

However, each of Petitioner’s reference fails to teach or suggest one or more limitations of the independent claim. For each reference, Petitioner seeks to supply missing limitations or show they are obvious by citing to expert testimony that either merely quotes the applied reference with no explanation at all as to how it discloses or suggests the relevant limitation, or states without support that a POSITA would just know that the reference disclosed the relevant limitation. This is nothing more than an invitation for the Board to speculate as to the references’ teachings. Petitioner’s cursory citations and unsupported assertions of what a POSITA would know are insufficient to carry Petitioner’s burden to prove invalidity. The fact is that the ’760 Patent is novel and nonobvious—no piece of prior art discloses the

invention, and no combination thereof or teaches or suggests it, and hand waiving by Petitioner and its expert in an attempt to show the claims are obvious necessarily fails.

II. BACKGROUND

A. Overview of the '760 Patent

The '760 patent is directed toward novel athletic shoes. *See* EX1001. The patent recognizes that the prior art offered “a wide variety of shoes” on the market, each with different designs and styles depending on their use. *Id.*, 1:47-49. For example, athletic shoes generally had a “particular sole pattern, a sole design, an insole design, and upper shoe portion design.” *Id.*, 1:51-56. However, prior art athletic shoes were limited in their design for athletic performance. For example, the patent recognizes that prior art baseball cleats were typically designed only to “facilitate[] better traction in grass and/or dirt while playing baseball.” *Id.*, 1:64-65. As such, these prior art shoes consisted of either a “relatively flat platform for the foot within the baseball spikes,” or sometimes offered a “heel portion of the shoe” “higher than the toe portion of the shoe.” *Id.*, 1:65-2:3. In sum, the prior art only used two dimensions to try and place the athlete in an athletic position, which was of limited value to athletes. EX2008 ¶56.

The '760 patent improved on the prior art by inventing shoes that place athletes in an “athletic position” through a novel “athletic positioning” sole. *Id.*,

9:25-27. As the patent explains, an “athletic position” involves having the athletes’ “knees slightly bent, weight more on the inside of the legs than the outside of the legs, knees position aligned with ankles and hips, and/or other athletic positioning characteristics.” *Id.*, 9:25-30. The patent further explains that this athletic positioning can be used in “any type of shoe” “to promote a better athletic position for an athlete.” *Id.*, 9:46-56; EX2008 ¶57. A POSITA would understand that the ’760 patent addresses the problem of athletic positioning through a specific shoe sole uses a particular sole design to manipulate and optimize the athlete’s foot position. EX2008 ¶ 58.

The particular implementation of shoes that provide the athletic position may vary, however, these shoes generally include an upper section, an insole section, and a sole section with an athletic positioning shape, including a heel section, a mid-foot section, and a toe section. *Id.*, 9:12-17; EX2008 ¶59.

The athletic positioning described by the ’760 patent has the heel section higher than the inside edge of a toe section at a first angle, the heel section higher than the outer edge of a toe section at a third angle, and the outside edge of a toe section higher than the inside edge of the toe section at a second angle. *Id.*, 10:59-11:3; EX2008 ¶¶59-70. Figure 8 is an isometric diagram of one embodiment of the athletic positioning shoe described in the ’760 patent:

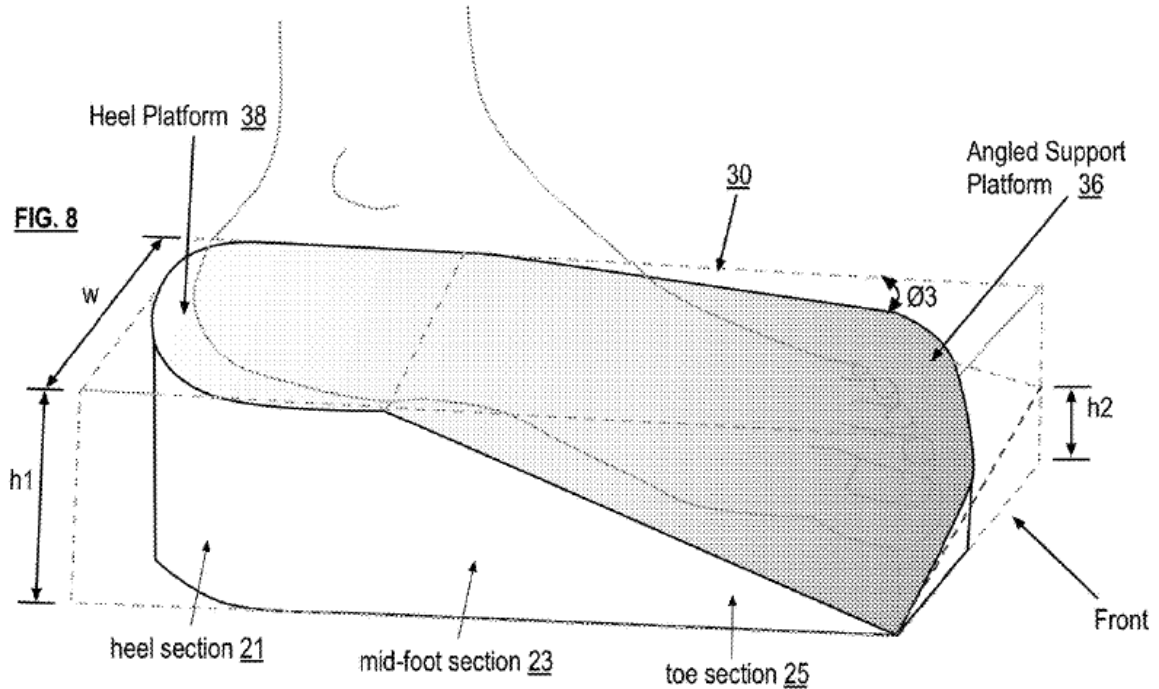
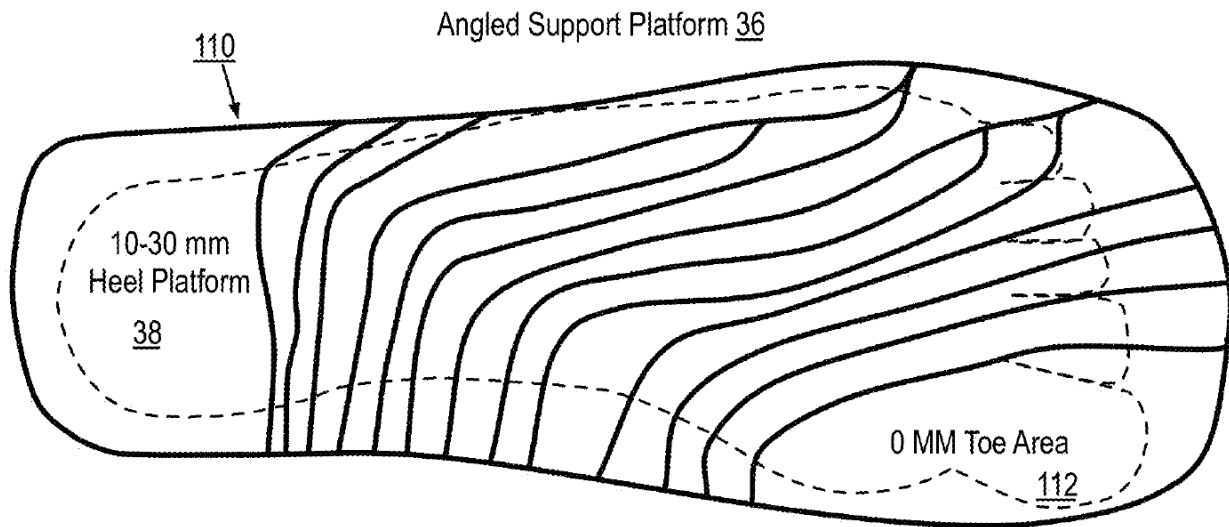


Figure 20 is one of many other illustrations of athletic positioning in a sole of a shoe:



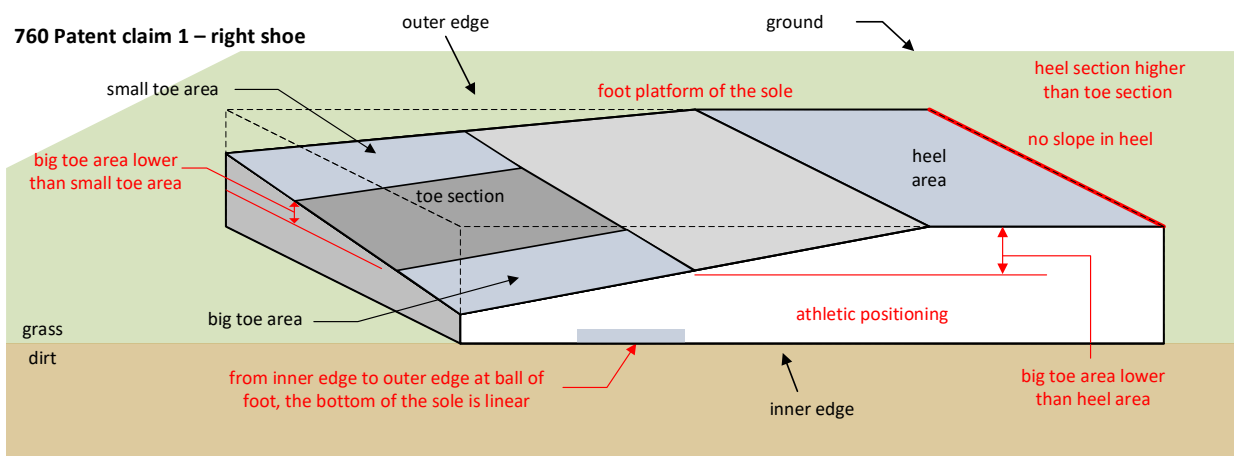
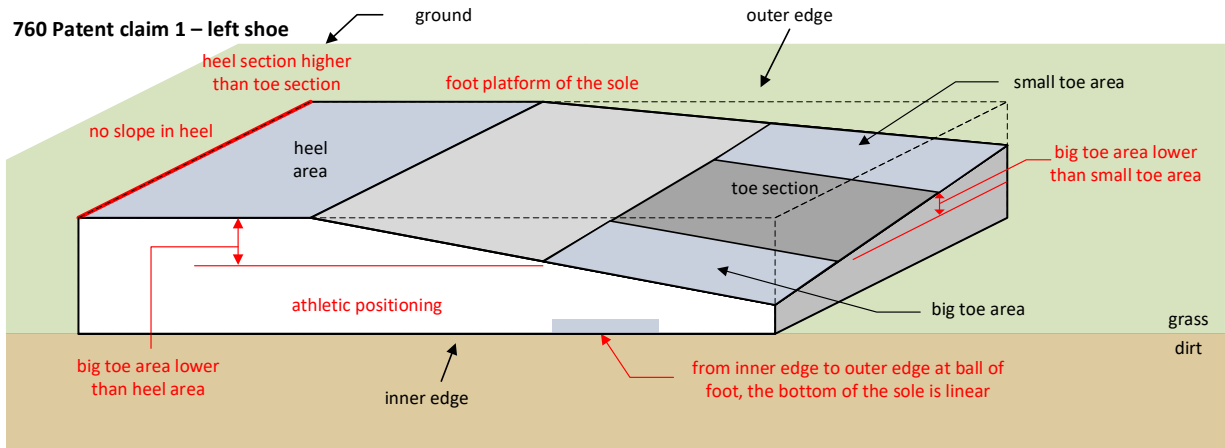
Each of these embodiments shows a shoe with a heel platform at a height greater than the small toe area and the small toe area at a height greater than the big

toe area. EX2008 ¶¶59-61. As such, the heel section is higher than the inside edge of a toe section at a first angle (represented by elevations lines in Figure 20 above), the heel section is higher than the outer edge of a toe section at a third angle (also represented by elevation lines), and the outside edge of the toe section higher than the inside edge of the toe section at a second angle (also represented by elevation lines). *Id.*

The angles of an athletic positioning insole and/or sole correspond to slopes. For instance, a first slope corresponds to the first angle of the inside edge from the heel section to the toe section, a second slope corresponds to the second angle of the outside edge of the toe section to the inside edge of the toe section, and a third slope corresponds to the third angle of the outside edge from the heel section to the toe section. *Id.*, 10:20-31; EX2008 ¶61.

Mr. Markison's block diagrams, included below, show a simplified version of the heights and slopes described in the '760 patent. EX2008 ¶72. These illustrations are consistent with the descriptions of the '760 patent that use block diagrams to show the geometric shape of the shoes being claimed. *Id.*, ¶72 n.1. The illustrations show the sole of the shoes of claim 1 that provides an athletic positioning, including a heel area that has substantially no slope from the inner edge to the outer edge, the big toe area at a lower position than the heel area and the small to area, and the small

toe area at a lower position. The first drawing is of the left shoe and the second is of the right shoe:



EX2008 ¶72.

B. The Claims of the '760 Patent

Exemplary independent claim 1 of the '760 patent is shown below:

A pair of shoes comprises:

a left foot shoe including:

a left upper shoe portion; and

a left sole coupled to the left upper shoe portion, wherein a foot platform of the left sole provides an athletic positioning of a left big toe area of the left shoe at a lower position than a left heel area of the left shoe and at a lower position than an outer small toe area of the left shoe, wherein, from an inner edge to an outer edge of the left shoe, the left heel area has substantially no slope, and wherein, from the inner edge to the outer edge of the left shoe at a cross section at a ball of ball, a bottom of the left sole is substantially linear; and

a right foot shoe including:

a right upper shoe portion; and

a right sole coupled to the right upper shoe portion, wherein a foot platform of the right sole provides an athletic positioning of a right big toe area of the right shoe at a lower position than a right heel area of the right shoe and at a lower position than an outer small toe area of the right shoe and wherein, from an inner edge to an outer edge of the right shoe, the right heel area has substantially no slope, and wherein, from the inner edge to the outer edge of the right shoe at a cross section at a ball of ball, a bottom of the right sole is substantially linear.

EX1001, claim 1. Petitioner also challenges dependent claims 2-11 which add additional limitations.

C. Overview of Petitioner’s Prior Art

Petitioner relies on three primary prior art references for its obviousness arguments, each of which relates to a shoe or shoes that purport to address an improved stance to assist the golfer’s swing. None of those references disclose or render obvious the claims of the ’760 patent. Instead, each of these prior art references incorporate a variation of a “wedge” sole that pushes the golfer’s entire foot inward under certain circumstances to improve weight distribution. EX2008 ¶¶92-93, 169-172. This concept is different than the invention claimed and does not render any of the challenged claims obvious, as set forth in detail below. *Id.*

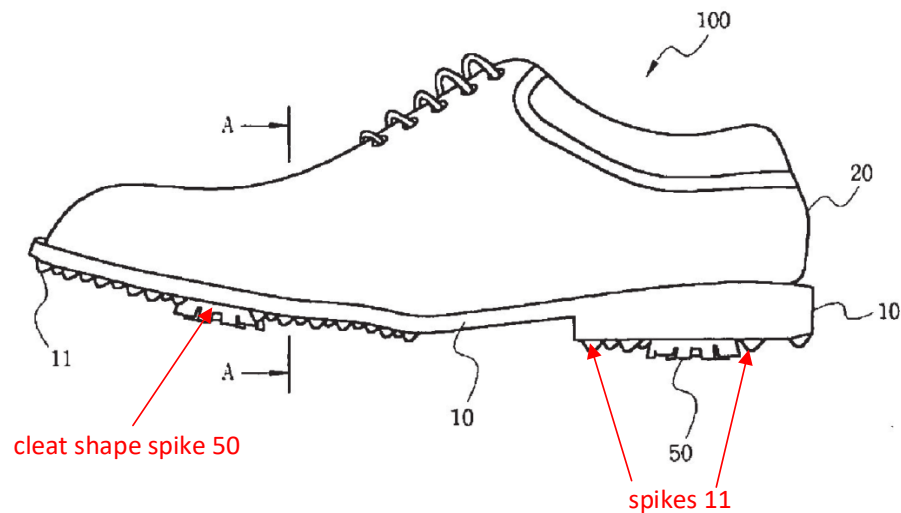
1. Kim (EX1005)

Kim is directed to a pair of golf shoes. EX1005. Kim asserts that its shoes are designed to “assist a golfer in concentrating his/her proper weight balance on the inner edge of soles of feet during the address and swing motions” and to “allow a golfer to stably maintain the lower part of his/her body on the surface of a green during the address and swing motions.” *Id.*, [0012]-[0013]; EX2008 ¶94.

The shoes in Kim include spikes and cleats that are present in both the forefoot and heel section of the shoe, each of which are coupled to the outsole. EX2008 ¶95. Kim explains that “[a] plurality of spikes 11 [that] are protruded from the lower surface 12 of the outsole 10,” as well as “a plurality of cleat-shaped spikes 50 [that]

are also protruded from the lower surface 12 of the outsole.” *Id.*, [0030]. This is shown in Figure 1 (annotated below):

FIG. 1



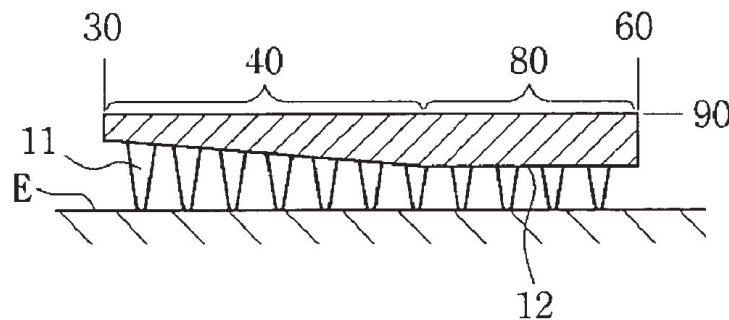
EX2008 ¶95.

Kim explains that the spikes 11 and 50 are longer on the inner edge than the outer edge running the entire length of the shoe. EX2008 ¶¶98-100. In particular, the shoes in Kim have an “outsole provided with a plurality of spikes protruded from a lower surface of the outsole,” arranged so that “the lower surface of the outsole is inclined from an outer edge of the outsole to an inner edge of the outsole[.]” *Id.*, Abstract. Kim’s outsole is also designed “so that the spikes at the inner edge of the outsole have a height larger than that of the spikes at the outer edge of the outsole[.]” *Id.* As a result, the shoes disclosed in Kim are designed so that the “upper surface of

the outsole is substantially parallel with a ground,” *id.*, thereby providing a flat surface for an athlete’s foot. *See* EX2008 ¶¶100-104.

According to Kim, “the variation in the height of the spikes 11 and 50 protruded from the lower surface 12 of the outsole 10 is inversely proportional to the variation in the thickness of the outsole 10.” *Id.*, [0033]. Thus, in Kim, “the height of the spikes 11 and 50 at the outer edge 60 of the outsole 10 with the larger thickness is smaller than the height of the spikes 11 and 50 at the inner edge 30 of the outsole 10 with the smaller thickness.” *Id.* This is shown, for instance, in Figure 3b of Kim:

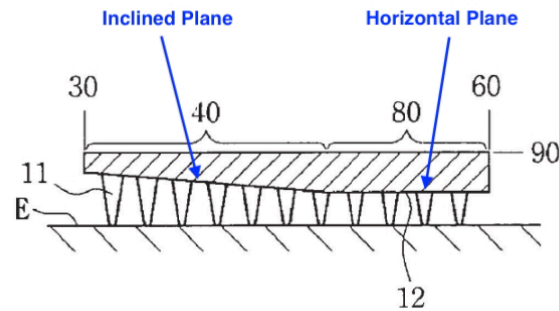
FIG. 3b



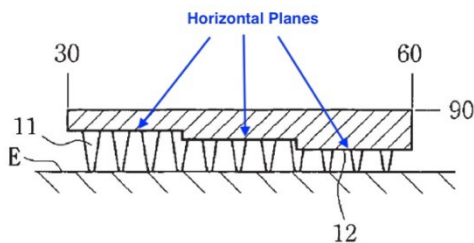
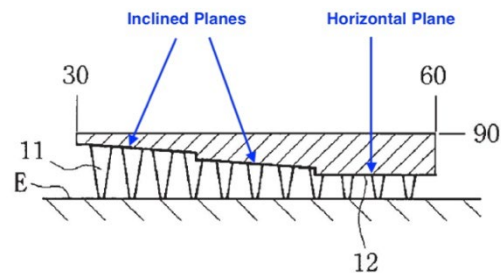
See also EX2008 ¶99.

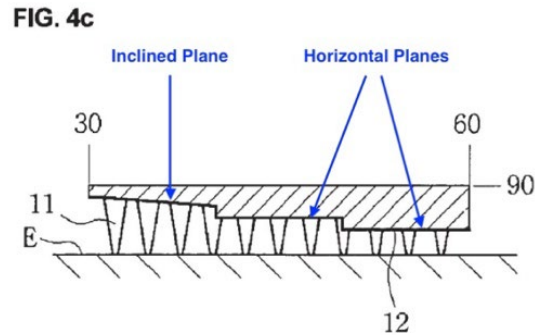
Kim discloses several shapes of the bottom surface of the outsole that maintain the inverse proportionality of the height of the spikes to the height of the outsole. For instance, Figure 3b illustrates a bottom surface of an outsole that has a “horizontal plane 80” across part of the bottom of the outsole and an “inclined plane 40” that extends across the rest of the bottom of the insole. The total height of the

spikes and the outsole, whether that outsole has the horizontal plane or the inclined plane, is the same across the bottom of the shoe, such that the wearer's feet remain parallel to the ground, as is shown below:

FIG. 3b

Similarly, Figures 4a, 4b, and 4c illustrate combinations both inclined and horizontal planes on the bottom of the shoe, and the combined height of the spikes and outsole keeps the wearer's feet parallel to the ground (i.e., heel to toe and inside to outside of foot is parallel to the ground), as can be seen below:

FIG. 4a**FIG. 4b**



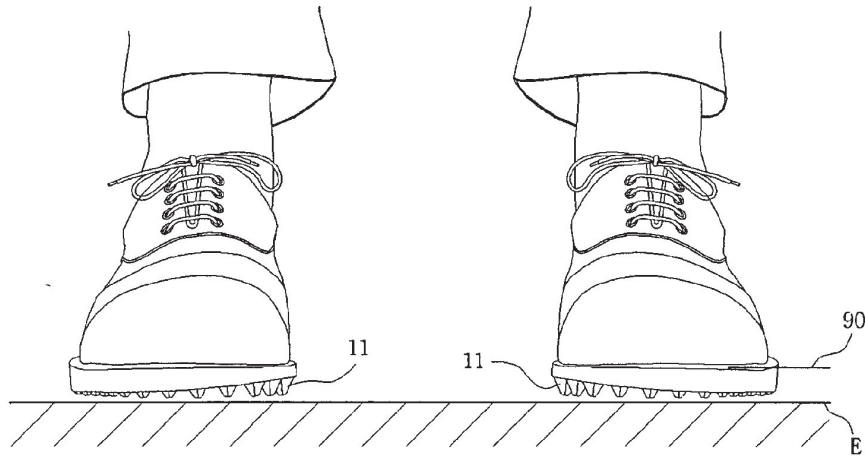
Kim explains that the design of the shoe, with the length of the spikes being inversely proportional to the height of the outsole, has the result that “the upper surface of the outsole is substantially parallel to the ground.” *Id.*, Abstract; *see also* [0014]; claim 1; EX2008 ¶¶103-104.

Kim includes two figures that purport to illustrate what the feet of the wearer of the shoes disclosed therein would look like on different surfaces.

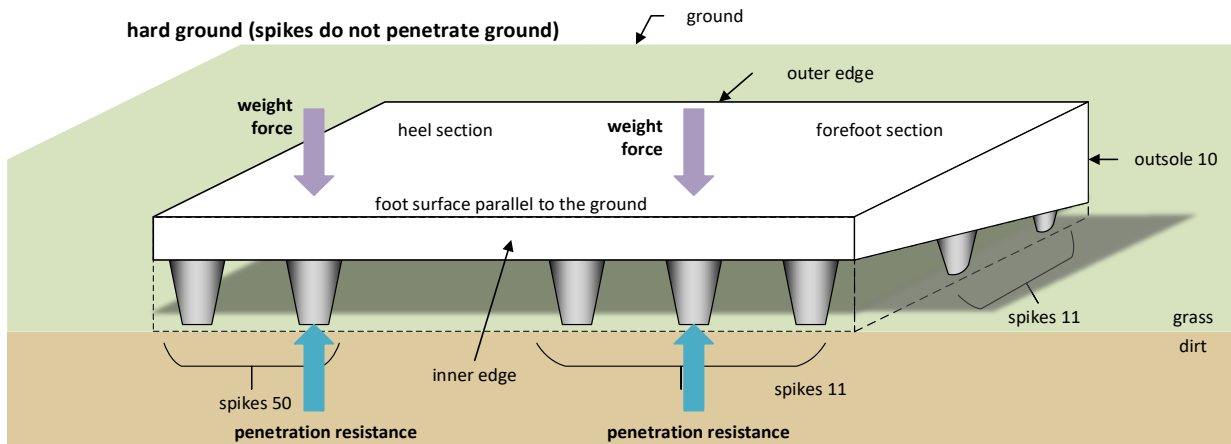
a. Kim’s “Hard Surface” Arrangement

Figure 5a, included below, depicts a “hard surface” arrangement, showing the wearer wearing the shoes on hard surface, like a paved road. *Id.*, [0038]. The bottoms of the spikes, and the upper surface of the outsole where the wearer’s foot rests, are substantially parallel to the ground. *Id.*, [0038]; *cf.* [0014]. In this configuration, the wearer’s feet are substantially parallel to the ground. *Id.*, Abstract; *see also* EX2008 ¶¶99-101.

FIG. 5a



A block diagram illustrating Kim's shoes on hard ground is shown below.



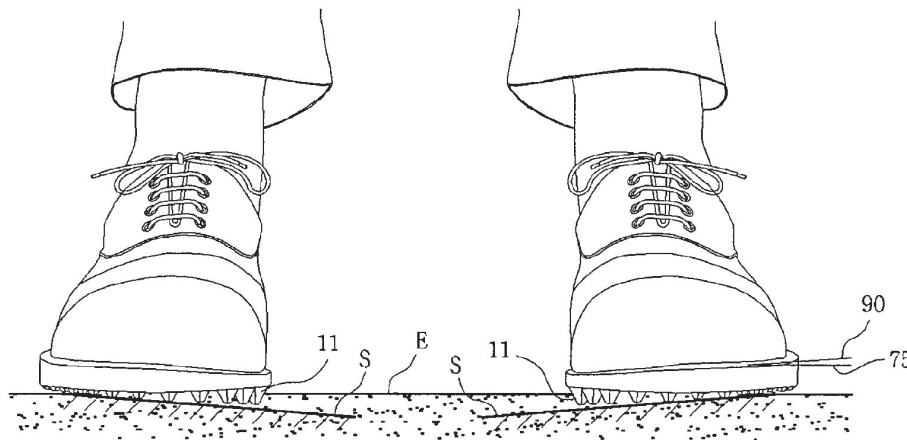
EX2008 ¶110-111. As shown in this illustration, the entire upper surface of the outsole is parallel to the bottom of the spikes, and therefore parallel to the ground on a hard surface. *Id.*

b. Kim’s “Soft Ground” Arrangement

In contrast, Figure 5b, included below, depicts a “soft ground” arrangement, showing a wearer wearing the shoes on soft ground, such as when “standing on a

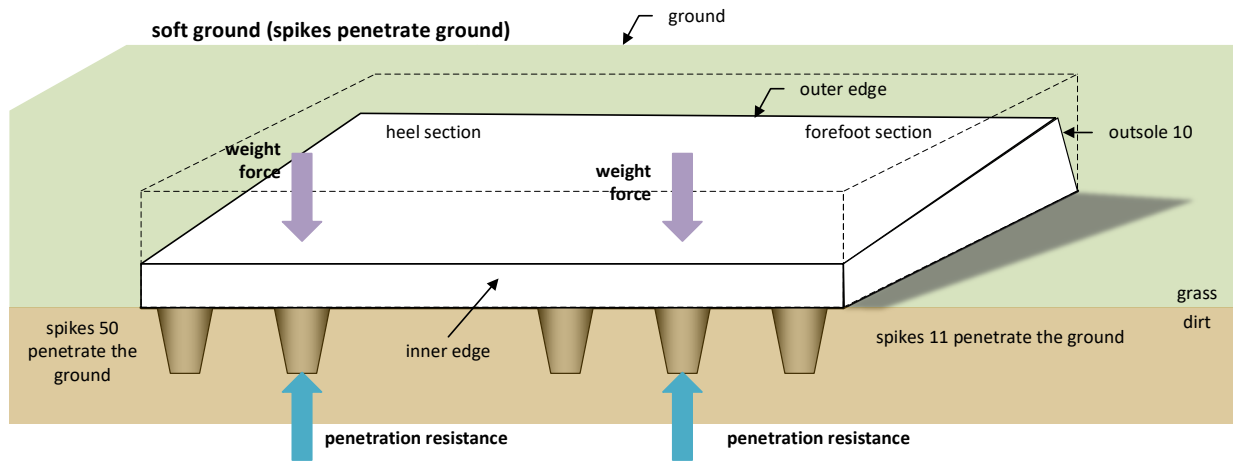
green.” *Id.*, [0024]; *compare* [0023] (showing contrast with Fig. 5a illustrating the wearer’s feet on “hard ground”). As shown in Figure 5b, included below, the spikes on the inside edge of both shoes penetrates the ground, with the result that the entire foot of the wearer, including the heel, is rotated inwardly when the wearer is on soft ground. EX2008 ¶¶112-115.

FIG. 5b



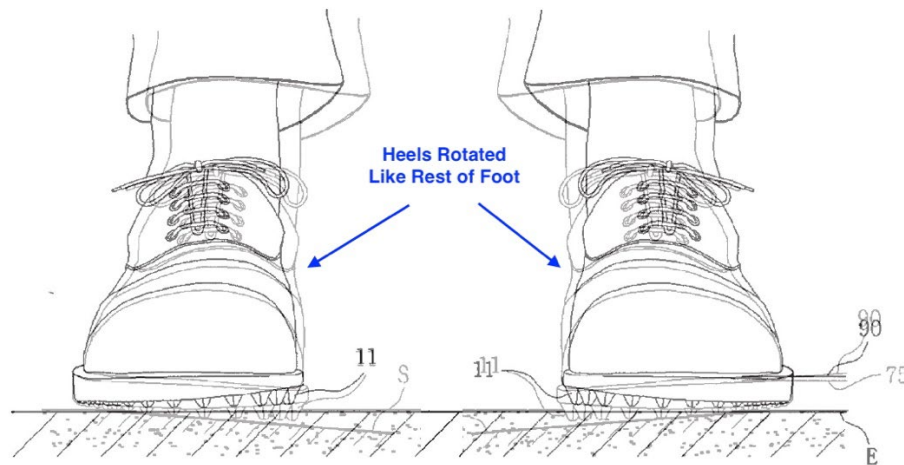
As explained by Kim, “the reference numeral 90 denotes a line representing the level of the golfer’s feet being parallel with the ground E, and the reference numeral 75 denotes a line being parallel with a line (S) representing the level of the bottoms of the spikes 11.” *Id.*, [0039]. Therefore, the golfer’s entire foot (including the heel) is either parallel with the ground when on hard surfaces (Fig. 5a, where 90 is parallel to ground E) or the entire foot (including the heel) is angled inward when on soft surfaces (Fig. 5b, along the reference line S, which slopes upwardly from the inside edge the outside edge of the shoe). EX2008 ¶112.

A block diagram illustrating Kim's shoes on soft ground is shown below:



EX2008 ¶112. As shown in this illustration, when the spikes penetrate the ground, the entire foot of the wearer tilts inward. This can also be seen in a superimposition of Figures 5a and 5b:

FIG. 5a
FIG. 5b



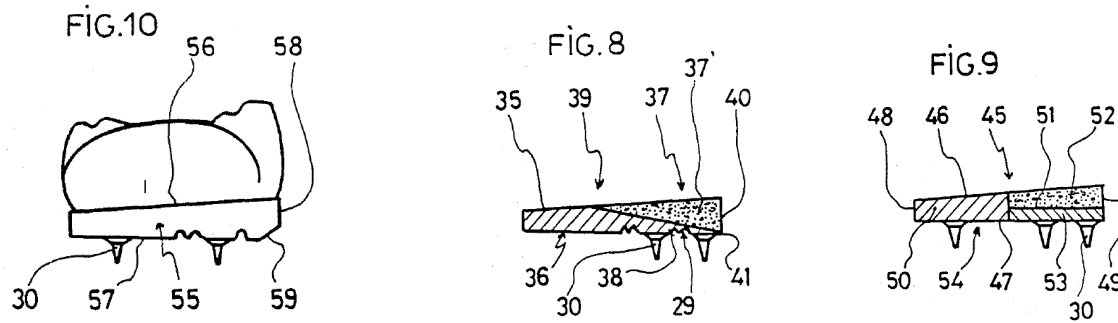
EX2008 ¶113. As Mr. Markison explains, if the heel did not incline inward like the rest of the foot, the ankles in these figures would be in the same position and only the forefoot would rotate, but that is not what the illustrations show. *Id.* ¶¶114-115.

2. Dufour (EX1006)

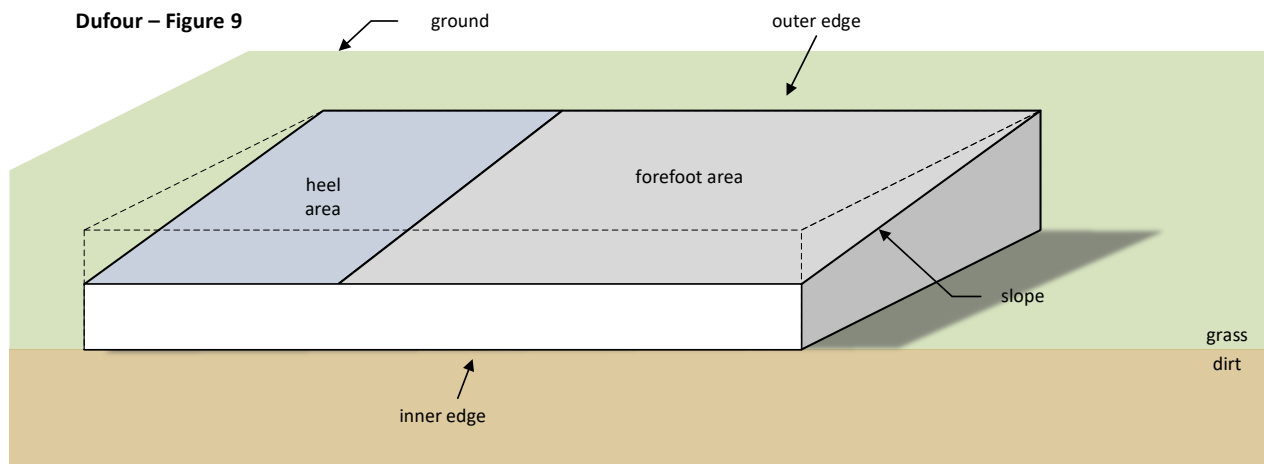
Dufour is directed to a golf shoe. EX1006. In particular, Dufour describes a number of different embodiments of a golf shoe for the front foot in a golfer's swing (the left foot for a right-handed golfer or the right foot for a left-handed golfer). EX2008 ¶122. Generally, Dufour's golf shoe includes an active zone of a shock absorbing material on the outside edge of a golfer's front shoe to promote comfort when the foot rolls to the outer edge of the sole during a golf swing. EX1006, 1:50-55; EX2008 ¶¶124-125.

Dufour has two embodiments that are relevant to this proceeding, the first with minor variations in two implementations shown in Figures 8-10, and the second shown in Figures 11 and 12. EX1006, 3:5-39; *see also* EX2008 ¶126; EX2010, 102:8-103:3 (agreeing Figures 11 and 12 are the same embodiment).

The first embodiment of Dufour corresponds to Figures 8-10, where Figures 8 and 9 are cross sections of the golf shoe of Figure 1 and Figure 10 is a front view of a shoe at cross-section VI – VI. The sole of Figure 10 has the thickness of the sole increasing from inner edge to the outer edge. This is also shown in Figures 8 and 9. EX2008 ¶¶127-128. Figures 8 and 9 also illustrate that the upward slope from the inner edge to the outer edge extends the length of the sole (i.e., heel to toe).

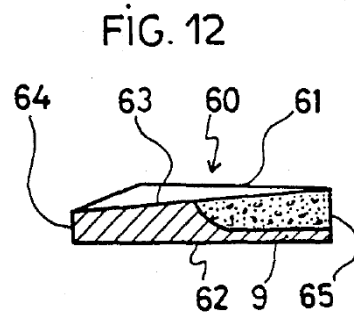
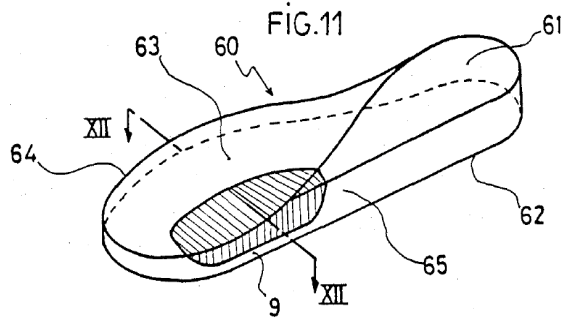


A block diagram illustrating the arrangement of Embodiment #1 is illustrated below:

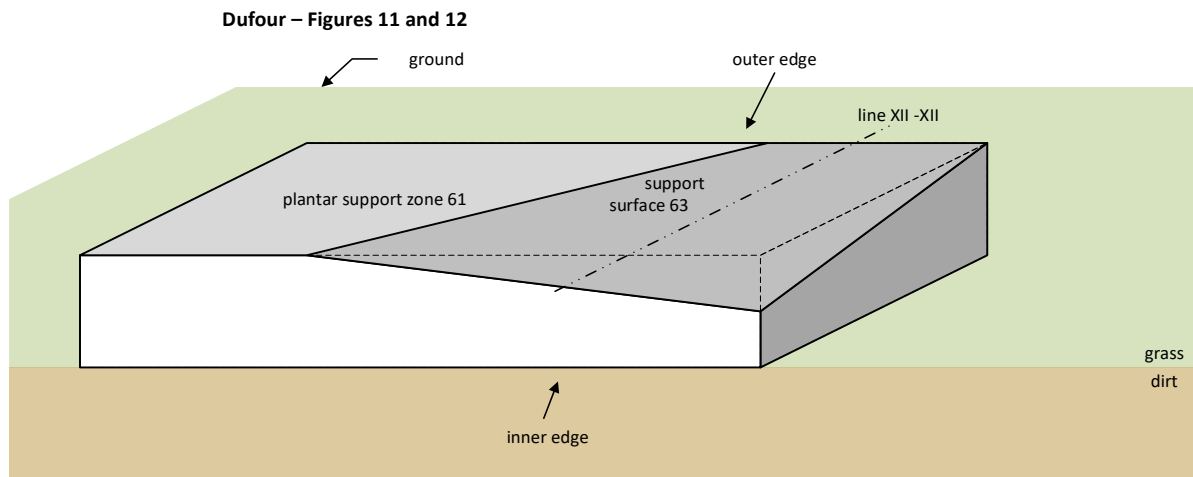


EX2008 ¶128.

The second relevant embodiment of Dufour is illustrated in Figures 11 and 12. In this embodiment, the outsole has two regions: the plantar support zone 61 and the support surface 63. The plantar support zone 61 is substantially parallel to the ground, whereas the entire support surface is angled. *Id.*, 5:7-14; *see also* EX2008 ¶¶129-130. In this embodiment, the height of the outer edge of the shoe remains the same as the height of the heel, while the inner edge angles downward. EX2008 ¶¶130-137.



A block diagram illustrating the arrangement of Embodiment #2 is shown below:



EX2008 ¶134.

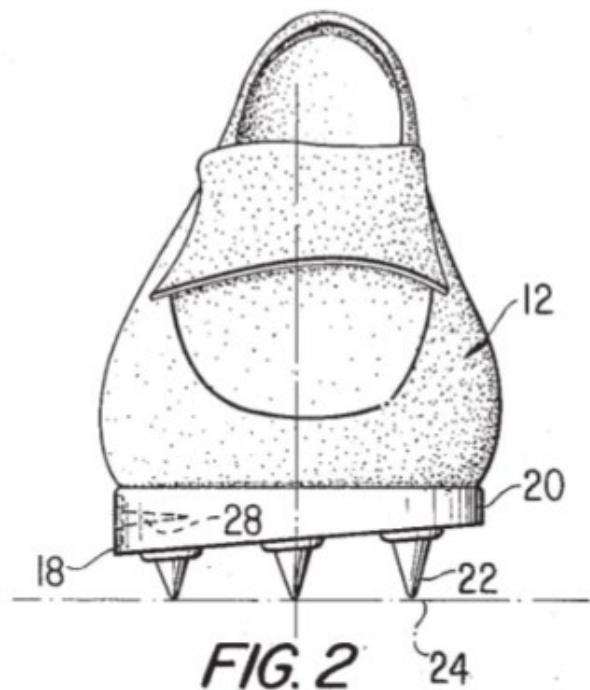
3. Rubin (EX1007)

Rubin is directed to a single golf shoe designed to be worn on the rearwardmost foot of a golfer in a stance addressing the golf ball. EX1007. The shoe disclosed in Rubin is similar to Kim in that it uses a wedge-shaped sole with differing cleat lengths to position the foot of the golfer. EX2008 ¶138.

Rubin discloses a golf shoe for the “rearmost foot positioned when the golfer takes his stance over the ball.” *Id.*, 3:2-5. Rubin’s shoe includes a “wedge-shaped sole 14” that has an “outer side 18” of the sole that “extends downwardly from the

shoe upper 12 to a lower elevation than the inner side 20 of [the] sole.” *Id.*, 3:9-11, 3:59-61. The shoe 10 includes cleats 22, which are shorter near the outer side 18 than at the inner side 20. The difference in cleat length is the same as the difference in the thickness of Rubin’s sole moving from the outer side to the inner side of the shoe. *Id.*, 3:29-33; EX2008 ¶¶141-142.

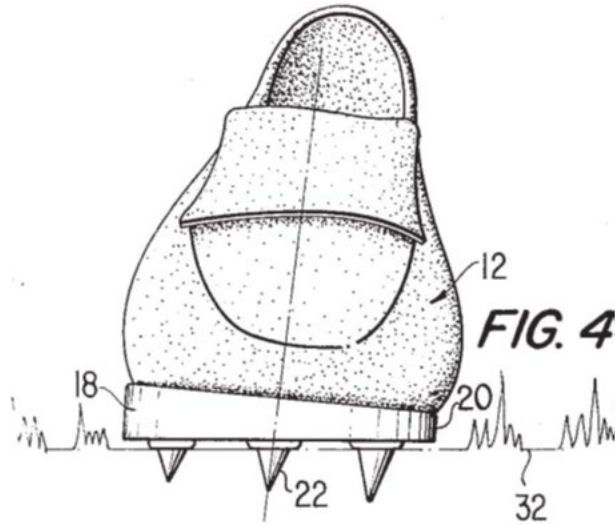
Rubin explains throughout its disclosure that the inverse relationship between the height of the cleats and the thickness of the sole enables the wearer to keep the foot “substantially level” to the ground when walking, as shown in Figure 2. *Id.*, 4:4-8; EX2008 ¶142.



For instance, Rubin explains the inverse relationship results in the sole being parallel to the ground on hard surfaces, such as concrete decks: “Cleats 22 adjacent the outer

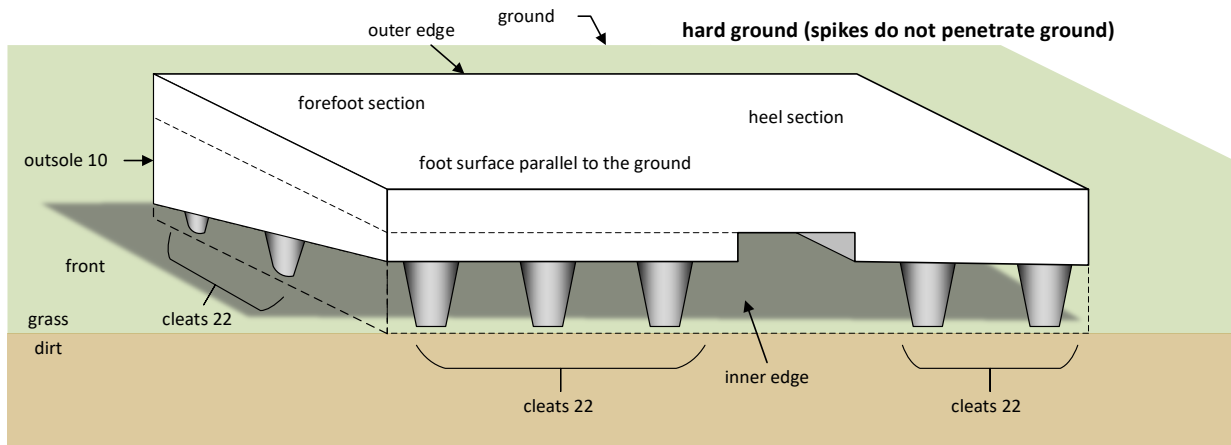
side 18 of the sole 14 are smaller than the cleats adjacent the inner side 20 of the sole 14 by an amount approximately equal to the difference in elevation between the outer side 18 and inner side 20 of the sole 14 so that when the wearer walks on a nonplaying surface, such as a concrete deck 24 as illustrated in FIG. 2, the foot of the wearer will be substantially level.” EX1007, 3:29-37. Rubin reiterates this concept several times, explaining that the relationship between cleat height and sole thickness has the effect that “when the golfer walks on a planar surface, his foot will be substantially level.” EX1007, Abstract; *see also id.*, 2:16-25 (difference in cleat size between inside and outside of sole is approximately equal to difference in elevation between the inside and outside of sole “so that when the golfer walks his foot will be substantially level”). Thus, in Rubin, the bottom of the cleats and the top of the sole are parallel to each other under all circumstances. EX2008 ¶143.

Rubin further discloses that when standing on a soft playing surface, “the golfer will imbed cleats 22 in a golf playing surface 32 when addressing a golf ball. The[] rearwardmost *foot* of the golfer will be tilted inwardly because of the wedge-shaped sole 14 of shoe 10. This will tend to provide a more satisfactory weight distribution when hitting the ball.” *Id.*, 3:56-62 (emphasis added). This inward tilt of the entire foot is shown in Figure 4, which shows both the heel and toe of the rear foot tilted inward based on the vertical line over the shoe:

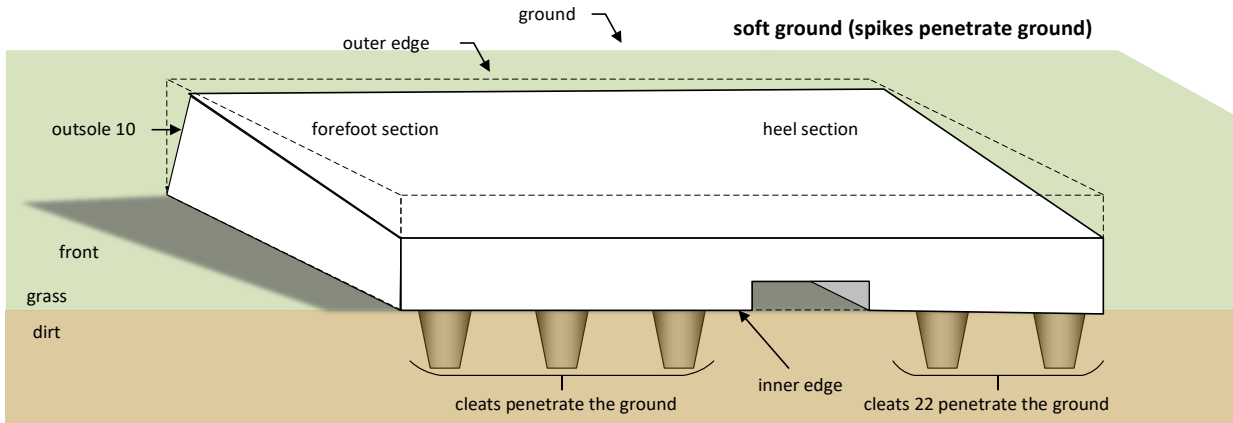


See also EX2008 ¶¶144-146.

Block diagrams showing the arrangement of Rubin's shoes on hard and soft ground are illustrated below.



EX2008 ¶148.

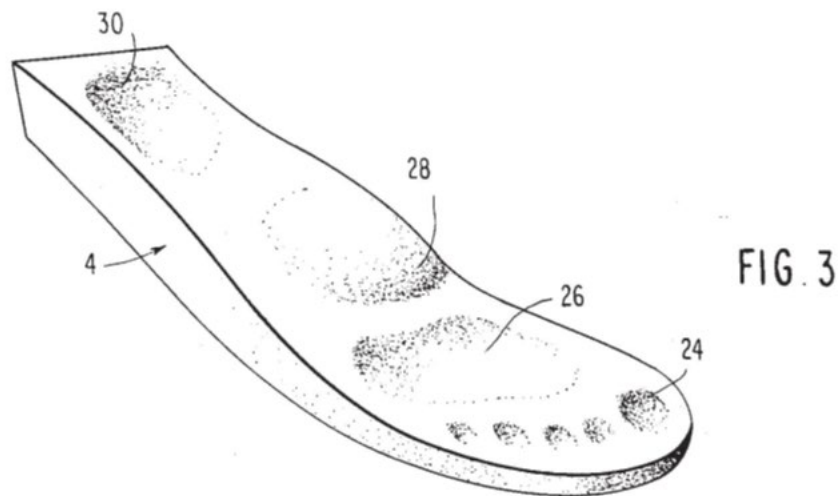


EX2008 ¶149. As these diagrams show, the entire foot surface of Rubin is parallel to the bottom of the cleats under all circumstances. Even when the cleats penetrate the ground, the foot surface remains parallel between the forefoot and the cleats.

Id. ¶¶148-149.

4. De Obaldia (EX1008)

De Obaldia is directed to “molded footwear,” which it describes preferably as a “jogging sandal.” EX1008, 1:1-9. De Obaldia discloses a sandal that includes a foot support member 4 as shown in Figure 3.



De Obaldia explains that its foot support member 4 includes at least one toe recess 24, a ball of foot recess 26, an arch support portion 28, and a heel recess 30. *Id.*, 2:65-68.

III. PRIORITY DATE OF THE '760 PATENT

The '760 patent claims priority to U.S. Provisional Patent Application No. 61/450,485, filed on March 8, 2011. Patent Owner does not dispute, for purposes of this proceeding, that all of Petitioner's prior art pre-dates the priority date of the '760 patent.

IV. LEVEL OF ORDINARY SKILL

Petitioner asserts that a POSITA would have (1) at least a B.S. or equivalent degree related to industrial or product design and at least two years' experience designing or developing athletic shoes; or (2) at least five years designing or developing athletic shoes. Pet., 15. For purposes of this proceeding, Patent Owner does not dispute Petitioner's level of ordinary skill.

Here, Patent Owner's expert is the inventor of the '760 patent¹ and the CEO of Athalonz, Mr. Timothy Markison. As set forth in his declaration, Mr. Markison

¹ Petitioner's expert failed to consider the education level of the inventor in analyzing the level of skill in the art, EX2010, 23:7-26:18, and had no opinion on whether the inventor here should be considered a POSITA, *id.*, 27:9-19.

began designing and developing athletic shoes shortly before the priority date of the patent. EX2008 ¶¶17-25, 29, 42-43. His current knowledge and experience, which includes 13 years of designing and developing athletic shoes that embody the patent at issue here, far exceeds the proposed level of ordinary skill in the art. *Id.* ¶¶43-44. Moreover, given his familiarity with the technology at issue, Mr. Markison can readily understand and apply this level of ordinary skill at the time of the invention. EX2008 ¶44; see *Osseo Imaging, LLC v. Planmeca USA Inc.*, 116 F.4th 1335, 1341 (Fed. Cir. 2024) (“an expert can acquire the necessary skill level later and develop an understanding of what a person of ordinary skill knew at the time of the invention.”). Based on Mr. Markison’s duties as a registered patent attorney and licensed attorney, he can offer good faith and objective opinions on the issues in this proceeding. EX2008 ¶¶11-13, 26-30.

V. RELATED MATTERS

Patent Owner is presently asserting the ’760 patent in the following district court action: *Athalonz, LLC v. Under Armour, Inc.*, No. 2:23-cv-00193 (E.D. Tex.). Petitioner has also filed four other petitions for *inter partes* review on the four other patents asserted in the district court action: *Under Armour, Inc. v. Athalonz, LLC*, No. IPR2024-00636 (P.T.A.B. Mar. 4, 2024) (U.S. Pat. No. 10,674,786); *Under Armour, Inc. v. Athalonz, LLC*, No. IPR2024-00637 (P.T.A.B. Mar. 4, 2024) (U.S. Pat. No. 11,013,291); *Under Armour, Inc. v. Athalonz, LLC*, No. IPR2024-00639

(P.T.A.B. Mar. 4, 2024) (U.S. Pat. No. 11,375,768); *Under Armour, Inc. v. Athalonz, LLC*, No. IPR2024-00640 (P.T.A.B. Mar. 4, 2024) (U.S. Pat. No. 11,510,456).

VI. CLAIM CONSTRUCTION

A. Petitioner's Claim Constructions

Petitioner claims that no terms require construction for purposes of this IPR but identifies constructions for two terms “for purposes of clarity only” based on its description of Patent Owner's infringement contentions. Pet., 12. Specifically, Petitioner states the following:

- ***“Heel Area That Has Substantially No Slope from the Inner Edge to the Outer Edge”***: Petitioner asserts that Patent Owner construes “inner” and “outer” edge of the heel area to mean “the edges of the portion of the shoe where the heel of the foot sits, not the inner and outer-most edges of the shoe.” Pet., 12. Petitioner also asserts that Patent Owner construes this limitation “to include a heel area that includes some degree of curvature and height change from its inner edge to its outer edge.” Pet., 12.
- ***“From the Inner Edge to the Outer Edge of the [Left/Right] Shoe at a Cross Section at a Ball of [Foot], a Bottom of the [Left/Right] Sole is Substantially Linear”***: Petitioner asserts that Patent Owner construes

this limitation “to encompass a sole that is curved, textured and/or includes protrusions on the bottom of the sole.” Pet., 13.

Petitioner’s construction of “inner edge” and “outer edge” to mean the “edges of the portion of the shoe where the foot sits” is consistent with how a POSITA would understand those terms in light of the specification. EX2008 ¶¶85, 90-91. As Mr. Markison explains, the ’760 patent consistently illustrates the inner and outer edges of the shoe in terms of how the shoe places the wearer in an athletic position, which requires reference to how the foot engages with the foot assembly. *Id.* ¶¶85-89. In light of the specification, the “inner” and “outer edges” in the claims do not refer to the edges of the exterior of the shoe. *Id.* ¶¶90-91.

B. Construction of “Athletic Positioning”

Patent Owner offers the following additional claim construction for the term “athletic positioning.” To the extent that the Board does not agree with the Patent Owner’s offered construction, Patent Owner submits that this Petition still fails for the reasons described below.

Term	Meaning
“Athletic positioning” (claim 1)	“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”

Even though each of the individual words in the phrase “athletic positioning” have their own meaning in the abstract, the phrase as a whole does not have a clear, immediate ordinary meaning to a POSITA. EX2008 ¶83. However, its meaning is clear from the specification of the ’760 patent. *Id.* ¶84. Every embodiment in the specification consistently shows a heel section higher than the outside edge of the toe section higher than the inside edge of the toe section, and the specification provides an unambiguous definition:

an athletic positioning shape as formed by a heel section 21, a mid-foot section 23, and/or a toe section 25. In general, the athletic positioning shape has the heel section 21 higher than the toe section by a particular angle (e.g., Ø1, . . .) and the outside edge of the shoe higher than the inside edge of the shoe by another angle (e.g., Ø2, . . .) at the ball of foot and/or toe section of the shoe.

EX1001, 9:15-24 (emphasis added); EX2008 ¶80.

It is true that the specification also provides a result-oriented description of “athletic positioning”—that the athlete have “knees slightly bent, weight more on

the inside of the legs than the outside of the legs, knees position aligned with ankles and hips” EX1001, 9:26-30; EX2008 ¶79. However, this general description does not describe the actual shape or positioning of the *shoe* at all, but rather describes one possible *result* of athletic positioning. A result does not accurately capture how to identify a shoe sole, particularly when the specification provides physical descriptors. And statements of intended results do not limit claims even when they appear directly in the claim language, let alone when they appear in the specification, as they do here. *E.g., Bristol–Myers Squibb Co. v. Ben Venue Labs., Inc.*, 246 F.3d 1368, 1376 (Fed. Cir. 2001) (claim language that “is only a statement of purpose and intended result” and “does not result in a manipulative difference in the steps of the claim” is not limiting).

Patent Owner’s proposal incorporates the specification’s consistent descriptions of “athletic positioning” in terms of relative heights and slopes. For example, one embodiment of an “athletic positioning shape” is where “the heel platform may be 10 to 30 mm higher” than “the toe cup and/or the ball of foot cup.” *Id.*, 13:49-51. Another embodiment discloses “an athletic positioning sole that includes an overall geometric shape” including “the heel of the sole [at] a particular height (e.g., h1, which may be 1’s to 10’s of mm) that slopes at an angle (e.g., Ø1) to the toe on the inside edge of the sole” which “may have a height of zero to a few millimeters.” *Id.*, 10:20-46. More embodiments, still, are illustrated throughout,

including Figures 3–15, 19–23, 44–47, 63–64, 87, 93–94, and 119–121. Every athletic position shown includes a heel section higher than the toe section and the outside edge of the shoe higher than the inside edge of the shoe. *See Merck & Co. v. Teva Pharms. USA, Inc.*, 347 F.3d 1367, 1371 (Fed. Cir. 2003) (“[C]laims must be construed so as to be consistent with the specification, of which they are a part.”). Allowing “athletic positioning” to have some broader or different meaning, or no meaning because of other limitations, is inconsistent with the patent’s own description.

The institution decision found that Patent Owner’s construction was unnecessary because the claims appeared to define the term “athletic positioning” themselves in the same manner. Paper 8 at 8. However, “interpretations that render some portion of the claim language superfluous are disfavored.” *Power Mosfet Technologies, L.L.C. v. Siemens AG*, 378 F.3d 1396, 1410 (Fed. Cir. 2004). Finding that “athletic positioning” has no standalone meaning other than through descriptions provided elsewhere in the claims runs afoul of that canon of claim construction. Moreover, Petitioner’s expert agrees that “athletic positioning” has to

mean something more than simply having the slopes described in the claims.

EX2010, 53:1-20.²

Finally, Patent Owner’s construction is consistent across all three patents at issue in the IPRs—which all share a specification—that use the term “athletic positioning” in a similar way. The Board should adopt Patent Owner’s construction.

VII. PETITIONER HAS NOT PROVEN THAT ANY CHALLENGED CLAIMS ARE UNPATENTABLE

A. Ground 1: Kim Does Not Disclose or Render Obvious Independent Claim 1.

Every challenged claim of the ’760 patent requires having a left shoe whose “foot platform of the left sole provides an athletic positioning of a left big toe area of the left shoe at a lower position than a left heel area of the left shoe and at a lower position than an outer small toe area of the left shoe.” Regardless of the construction

² While Petitioner’s expert indicated at his deposition that the term meant something to do with “weight distribution,” he did not offer any such construction in his declaration and was unable to provide any meaningful definition to a POSITA when questioned. He also did not actually perform any claim construction analysis and simply applied the constructions provided to him by counsel. EX2010, 45:15-13 (“I wasn’t hired to provide claim construction”). His testimony should therefore be afforded no weight in the claim construction analysis.

of “athletic positioning,” Kim does not disclose a foot platform that provides an athletic positioning of a big toe area at a lower position than a heel area. And, in fact, Kim does not disclose or render obvious these limitations and is instead directed to a different solution to the problem solved by the patent. EX2008 ¶¶173-177. Further, Kim does not disclose or render obvious a toe section lower than a heel platform section. Thus, Ground 1 of the Petition fails.

1. Kim Does Not Disclose a Big Toe Area at a Lower Position than a Heel Area, as Required by Claim 1.

Ground 1 must fail as to all claims because Petitioner has not shown that Kim discloses or renders obvious an athletic positioning of a big toe at a lower position than a heel area found in challenged independent claim 1. Because big toe position is the same as the position of the heel area is the same in all embodiments of Kim, none of Kim’s embodiments disclose this limitation.

Claim 1 of the ’760 Patent requires the sole to provide an athletic position that has a big toe at a lower position than the heel area. EX1001, 43:17-21 (claim 1, left shoe), 43:30-34 (claim 1, right shoe). Petitioner has failed to cite any evidence that Kim discloses or renders obvious these limitations.

Instead, Kim’s figures and specification all make clear that the big toe area is at the same position as the heel. EX2008 ¶180. For instance, Figure 5a of Kim shows the wearer’s feet on a hard surface. As discussed above, Kim’s disclosure makes clear that the upper surface of the outsole is flat, from front to back and side to side.

Starting in the Abstract, Kim discloses that the “upper surface of the outsole is substantially parallel with a ground.” EX1005, [0014] equates the angle of the bottom of the spikes with the upper surface of the outsole, and notes they are both parallel to the ground: “a pair of golf shoes, each comprising an outsole provided with a plurality of spikes protruded from a lower surface of the outsole, wherein: bottoms of the spikes (an upper surface of the outsole) are substantially parallel with the ground.” *See also Id.*, [0015] (“the bottoms of the spikes are substantially parallel with the ground”); *id.* [0033] (same). Paragraph 39 explains, “In FIGS. 5a and 5b, the reference numeral 90 denotes a line representing the level of the golfer’s feet being parallel with the ground E.” *See also* EX2008 ¶¶180-184.

Kim’s cross-sectional figures support that the heel section is no higher than the rest of the outsole. Each such figure, Figs. 3b, and 4a-4c, is a cross section taken well in front of the heel and looking back toward the heel of the shoe. Each of these figures is flat across the top of the outsole along the line identified as item 90, as is shown below.

FIG. 3b

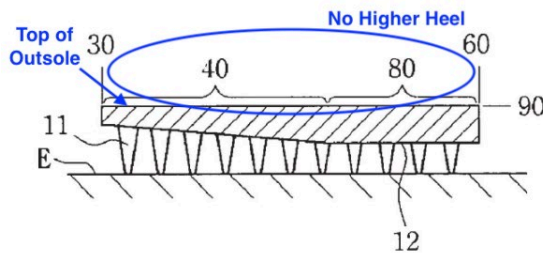


FIG. 4a

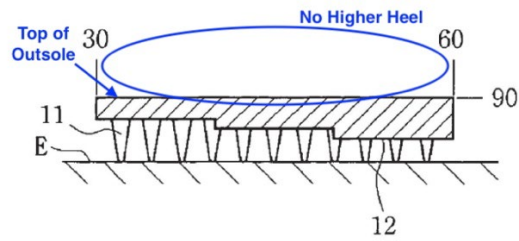


FIG. 4b

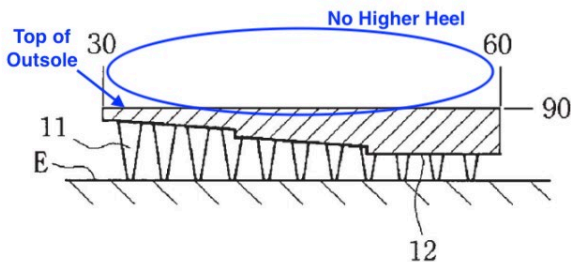
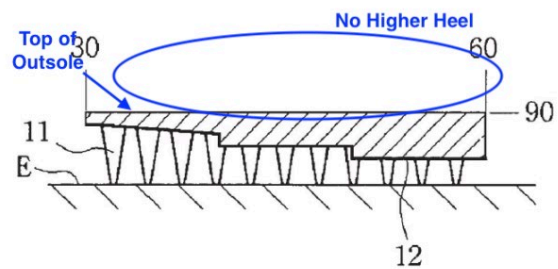


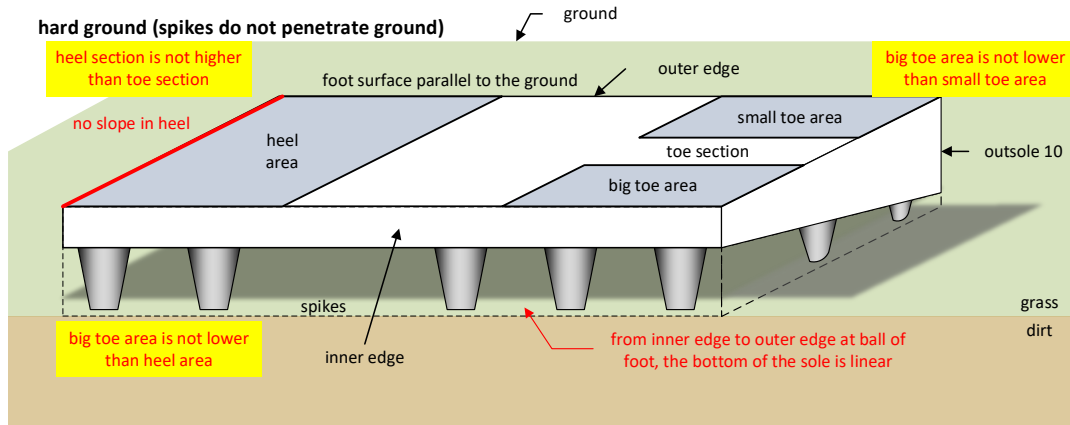
FIG. 4c



If the heel were to rise to a level above the toe section, there would be some representation of the heel (likely a trapezoidal shape) above line 90 in each figure. But there is not.

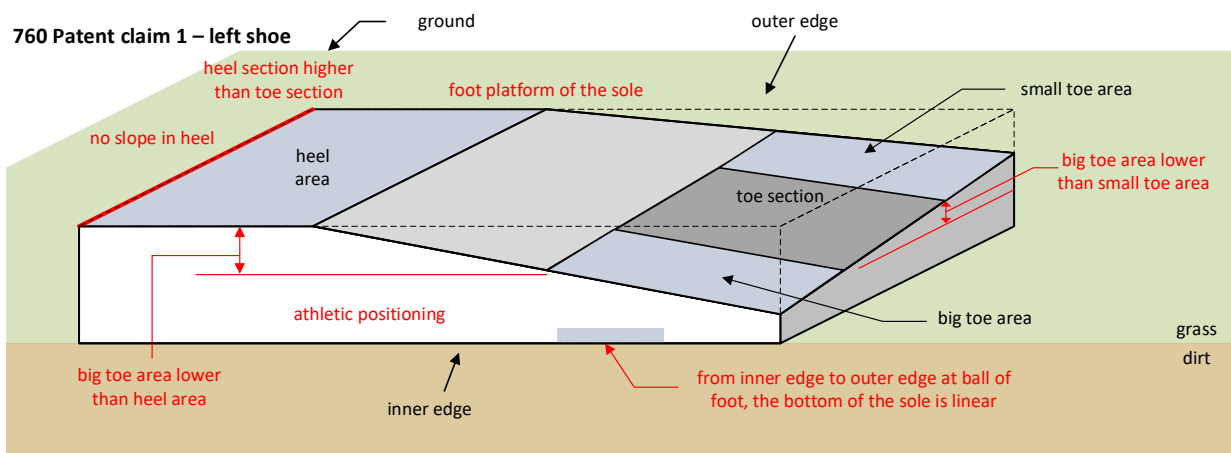
A POSITA would understand from Kim's disclosures and its cross sectional figures that the outsole is parallel to the ground from front to back, i.e., the same height at all points on a line running from the front to the back of the shoe. EX2008 ¶¶99-106, 180-184. None of Kim's disclosure, including Petitioner's annotated Figures 2 and 3a, supports the notion that the heel of Kim's shoe is higher than the toe. In sum, Kim's disclosure demonstrates that Kim's big toe area *is not* lower than its heel area. *Id.* ¶186.

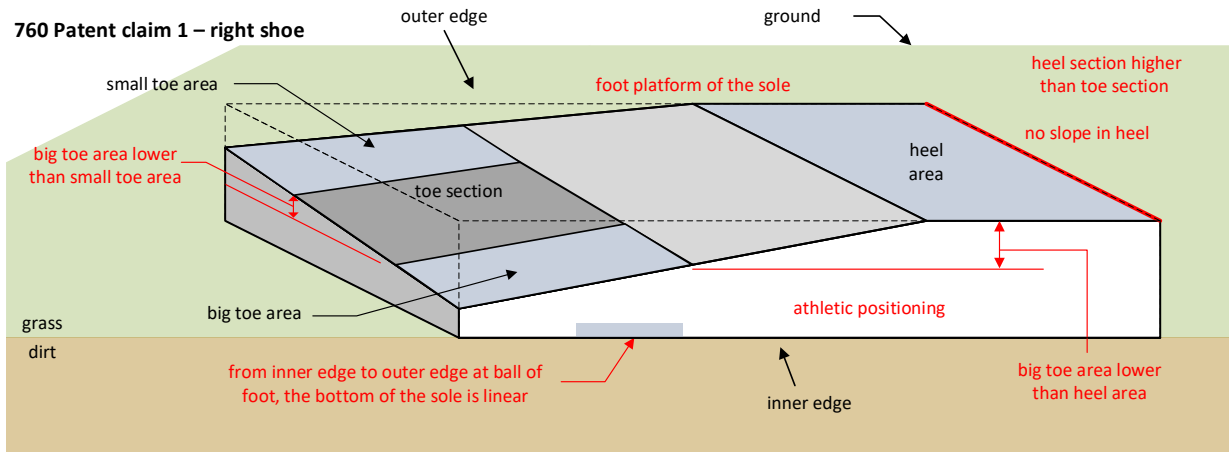
The following block diagram illustrates the foot surface of Kim's shoe on a hard surface:



EX2008, ¶180. As can be seen from the diagram above, the big toe area is not at a lower position than the heel area. They are at the same position. *Id.*

This is different from the positions in claim 1. The following block diagrams illustrate the big toe area being in a lower position than the heel area that is claimed in claim 1:

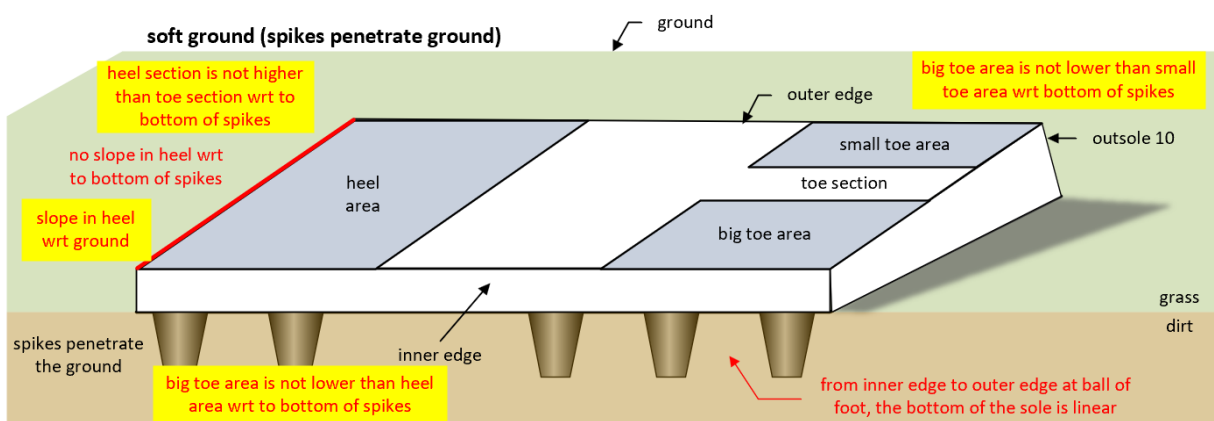




EX2008 ¶179. The first image is the claimed left shoe and the second is the claimed right shoe. As can be seen in these figures, the big toe area is below both the small toe area and heel area in the claimed shoes.

Because the big toe area is at the same height relative to the bottom of the shoe as the heel area, in Kim's hard ground arrangement, Kim does not teach or suggest a big toe area at a lower position than the heel area. EX2008 ¶186.

Nor does Kim's soft ground arrangement disclose these limitations. *Id.* ¶187. The following block diagram illustrates the foot platform of Kim's soft ground arrangement:



Id. As can be seen from this figure, the heel section is still at the same position as the toe section at all points along a line running parallel to the inner or outer edge.

Id. ¶189. In other words, along lines running longitudinally down the shoe, the toe section is not lower than the heel section. As such, the soft ground arrangement does not disclose a big toe area at a lower position than a heel area, as required by claim

1. *Id.* ¶¶187-190.

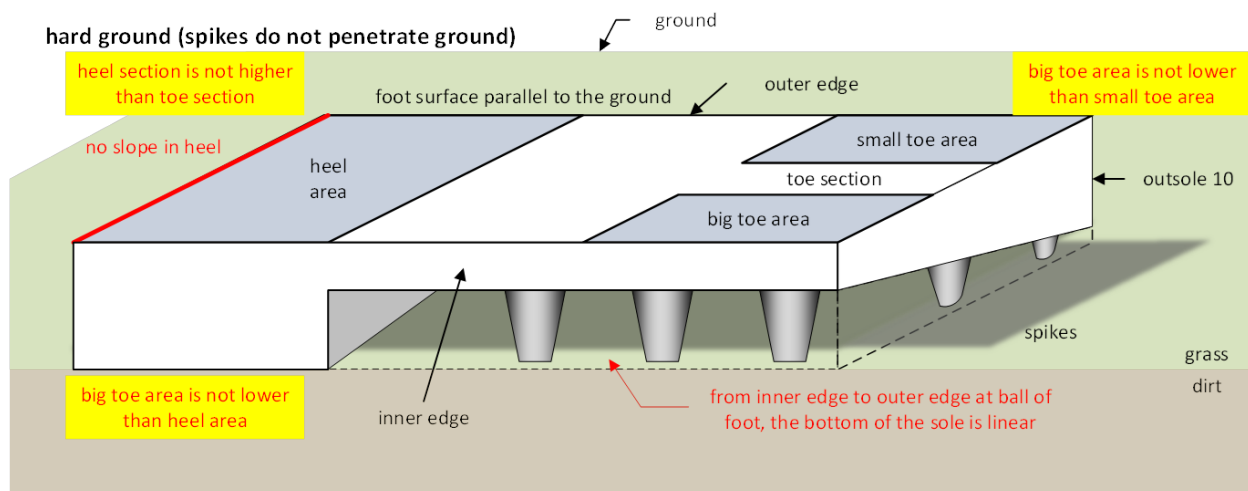
2. Petitioner Has Not Proven Claim 1 is Otherwise Obvious in View of Kim.

Petitioner's analysis relies solely on obviousness, but never actually identifies any modifications or changes to Kim that a POSITA would make to render the claims obvious. Therefore, Petitioner should be held to the arguments in the petition and should not be permitted to argue in reply for new modifications to Kim that it did not previously describe. Based on the actual arguments presented, the analysis above shows that Kim does not render the claims obvious.

However, Petitioner's expert appears to rely in places on a "what if" embodiment based on Kim that modifies its consistent disclosure regarding the location of the spikes. *See* EX2008 ¶¶116-121; 192-200. To the extent Petitioner is allowed to make new arguments based on this disclosure, those arguments should still fail. These modifications to Kim come from Petitioner's expert incorrectly interpreting Kim's suggestion (in a single paragraph at the end of the specification) that the incline plane can be formed only at the front portion of the outsole (EX1005

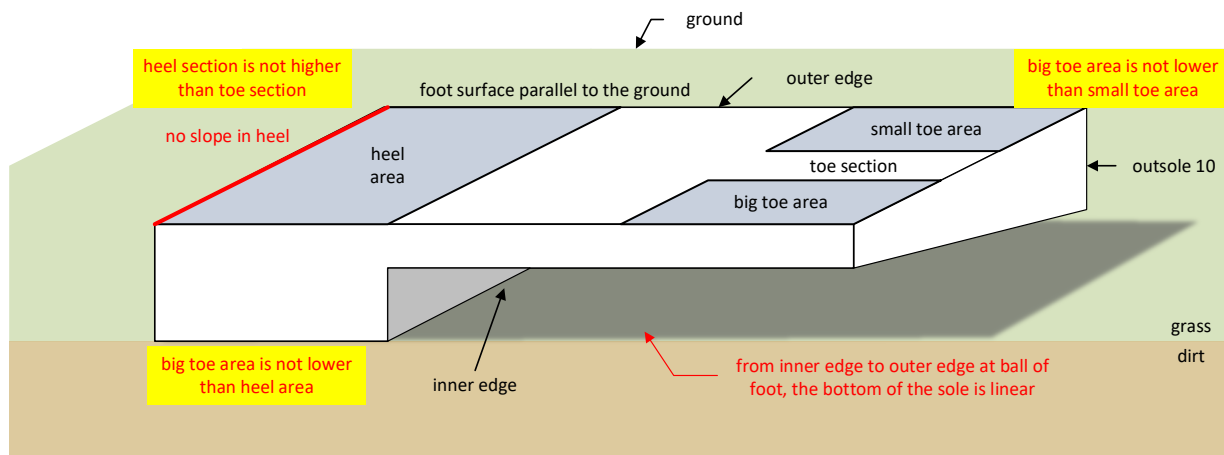
¶46) to mean that Kim could show a shoe with a heel higher than the toe or a heel without the spikes that are disclosed throughout Kim as extending through the heel. EX2008 ¶¶195-200.

As Mr. Markison explains at length, Petitioner's expert relies on a portion of Kim (in a single paragraph at the end of the specification) stating that the incline plane can be formed only at the front portion of the outsole. EX2008 ¶¶116-121; 192-194 (citing EX1005, ¶46). Using this passage, Mr. Delgatty suggests that Kim discloses a sole with no different length spikes and no corresponding slope in the heel at all. *Id.* Even if this were true (which it is not), such a modified version of Kim would still not render claim 1 obvious. *Id.* ¶192. Instead, as set forth in the block diagram below, a version of Kim without different length spikes and no corresponding slope in the heel would still have the same height at the heel area as at the big toe and small toe areas—that is, it would still not disclose a big toe area at a lower position than a heel area or at a lower position than a small toe area:



EX2008 ¶¶192-194; *see also id.* ¶¶120-121 (explaining why the “what if” embodiment also fails to render the claims obvious on soft ground because such an embodiment is illogical and does not disclose the claim elements).

Mr. Markison explains that Petitioner’s expert also suggests a second “what if” embodiment of Kim without spikes in either the heel or the forefoot:



EX2008 ¶195. As he explains, this embodiment does not disclose a big toe area lower than a heel area either (on either hard or soft surface), and in any event would not make any sense to a POSITA. *Id.* ¶¶196-200.

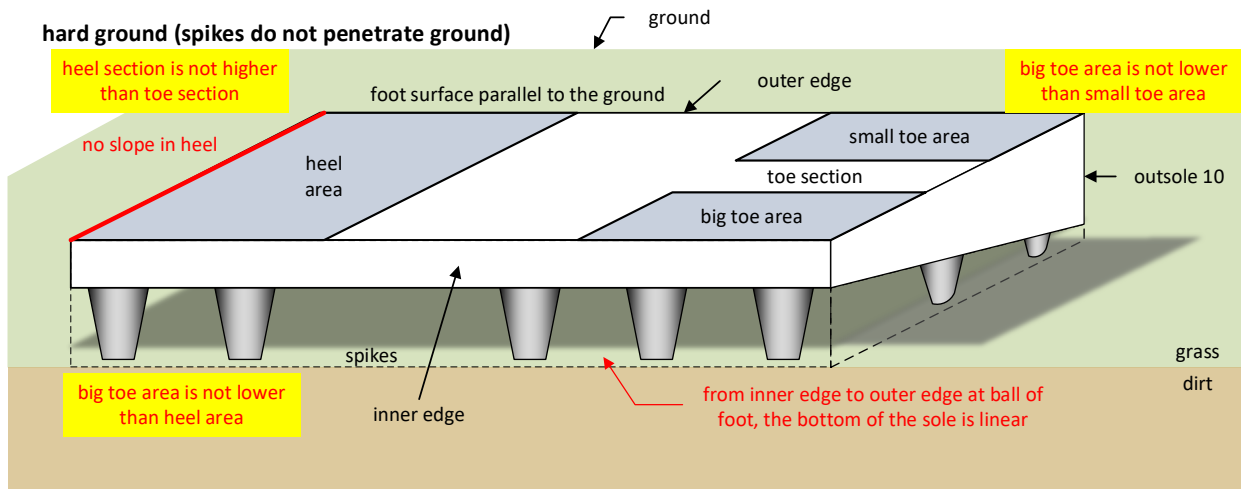
3. Kim Does Not Disclose a Sole that Provides an Athletic Positioning, as Required by Claim 1

Claim 1 requires an “athletic positioning.” Under the correct construction, this 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. *Supra* ¶ VI.B. Applying this construction, Petitioner fails to prove that any of the three prior art references render claim 1 obvious.

Kim does not disclose or render obvious a sole that provides an “athletic positioning.” Instead, Kim discloses an entire sole at a single height parallel to the bottom surface of the shoes, which is true regardless of a hard or soft surface.

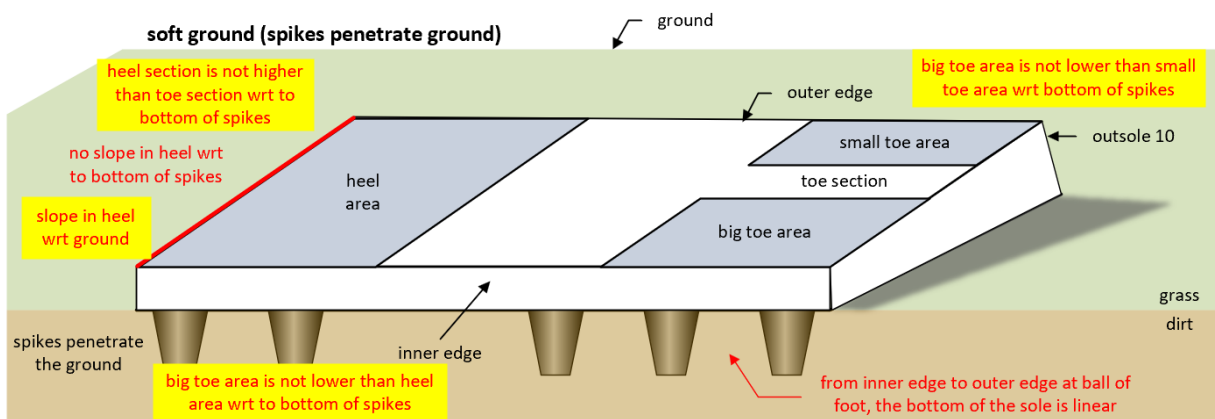
EX2008 ¶¶110, 112, 180, 187.

Kim (hard surface)



EX2008 ¶180.

Kim (soft surface)



EX2008 ¶187.

Regardless of whether on a hard surface or soft ground, the heel section of Kim at the same height as the toe section. *Id.* The athletic positioning term requires the heel section be higher than the toe section. Therefore, none of Kim's embodiments disclose this limitation.

Because Kim fails to disclose the limitations of claim 1, and because Petitioner makes no other obviousness arguments as to Kim, Ground 1 fails.

4. Claims 2-11 are Patentable Over Kim.

Because independent claim 1 is patentable over Kim, the more specific dependent claims are also patentable for the same reasons. EX2008 ¶202.

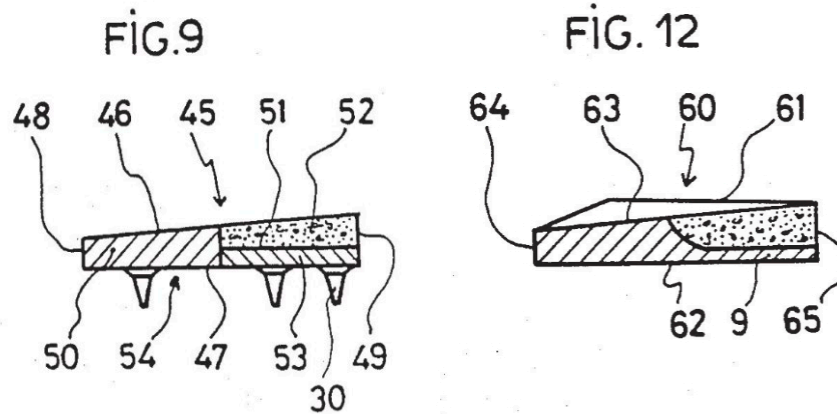
B. Ground 2: Dufour Does Not Disclose or Render Obvious Independent Claim 1.

As discussed above, every challenged claim of the '760 patent requires having a left shoe whose "foot platform of the left sole provides an athletic positioning of a left big toe area of the left shoe at a lower position than a left heel area of the left shoe and at a lower position than an outer small toe area of the left shoe." Additionally, every challenged claim requires a heel area with substantially no slope. Petitioner primarily relies on Figures 9-12 of Dufour in its attempt to show that Dufour discloses all the limitations of the challenged claims. *See generally* EX2010, 101:13-102:2 (Petitioner's expert relies only on Figs. 9, 10, and 11 to show three slopes). These figures represent two separate embodiments. The first is depicted in Figures 8-10, which has a consistently upwardly inclined sole from the inner edge

to the outer edge running the full length of the shoe (i.e., the front to the back of the shoe). The second is depicted in Figures 11 and 12, which has a tilted support surface at the front of the shoe and a flat plantar support zone (or platform) at the rear of the shoe. Neither of these embodiments, nor any combination of them, discloses the athletic positioning claimed in the '760 patent because Dufour is directed to a different solution to the problems solved by the patent. EX2008 ¶¶203-207. Thus, Ground 2 of the Petition fails.

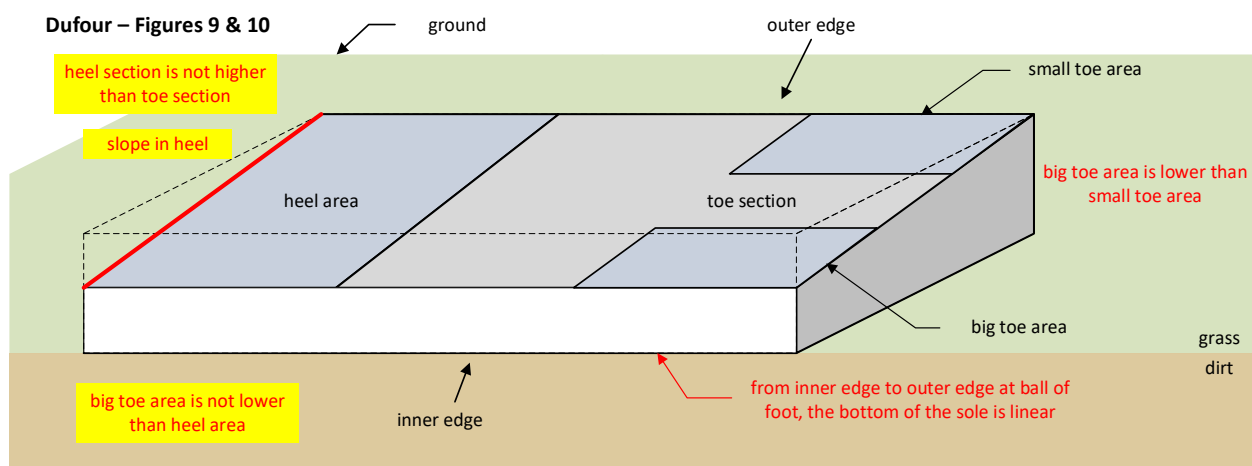
1. Dufour Does Not Disclose the “Athletic Positioning” Including the Claimed Heel Area with Substantially No Slope.

Dufour discloses a number of separate embodiments of a golf shoe with different foot positioning, but none of those embodiments show a shoe with the athletic positioning claimed in the '760 patent. Petitioner mixes and matches different figures from different embodiments without admitting it is doing so and without providing any obviousness rationale for making any modifications. In particular, Petitioner relies on both the Figures 9 and 12 embodiments, which show cross sections of shoe, looking from the front of the shoe toward the heel, as shown below:



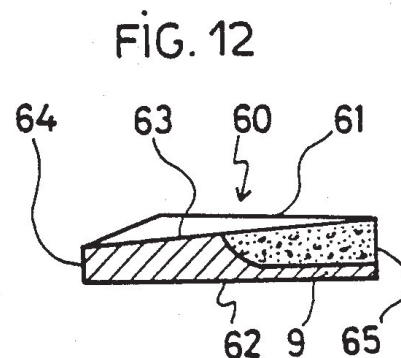
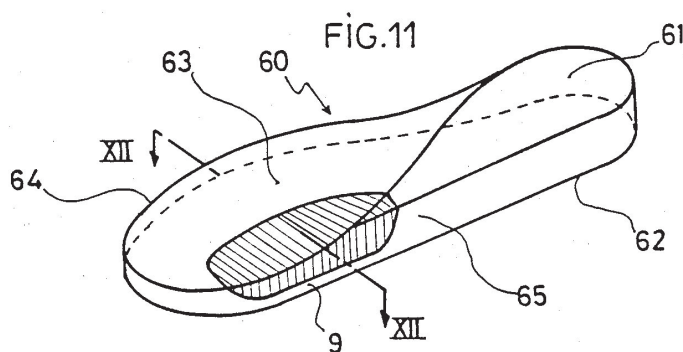
As can be seen from the figures, the support surfaces—46 in Fig. 9 and 63 in Fig. 12—are inclined upward from the inside edge (48 in Fig. 9 and 64 in Fig. 12) to the outside edge (49 in Fig. 9 and 65 in Fig. 12) of the shoe. EX2008 ¶¶209-212.

First, Figures 8-10 (Embodiment #1) do not show a shoe with a heel area having substantially no slope. Instead, as shown below in the block diagram, Figure 9 of Dufour shows a golf shoe where the entire sole is inclined consistently from the inner edge to the outer edge:

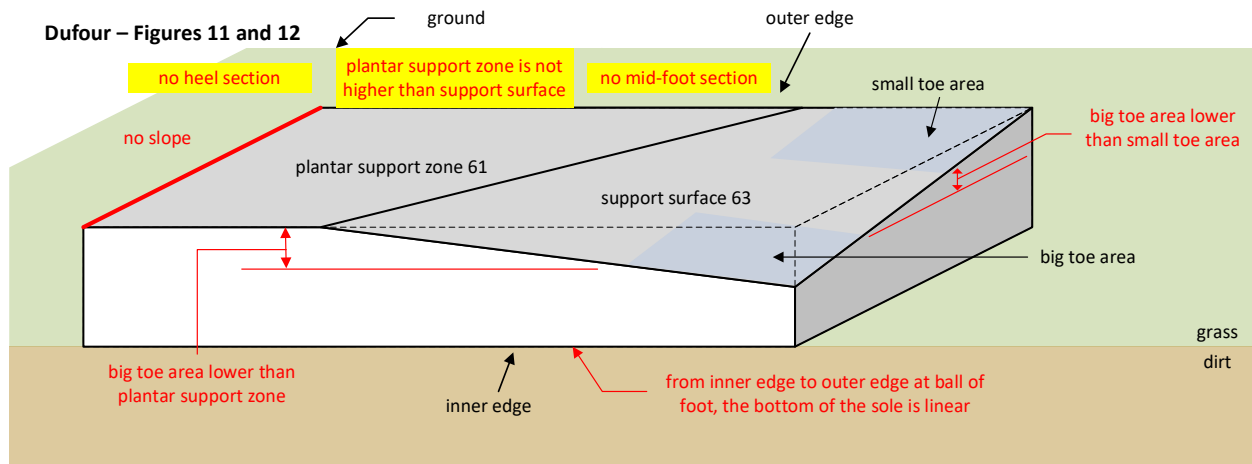


EX2008 ¶213. As can be seen from the figure above, the heel area has the same upward angle from the inner edge to the outer edge as the rest of the shoe. *Id.*, ¶212-214. That is, in this embodiment of Dufour, the heel at the inner edge of the shoe (left side of the figures) is at the same height as the big toe area, and the heel at the outer edge of the shoe (right side of the figures) is at the same height as the small toe area. *Id.* ¶214. In this embodiment, Dufour does not disclose a shoe where “from an inner edge to an outer edge of the left shoe, the left heel area has substantially no slope.” *See Pet.*, 32. Petitioner appears to rely on this embodiment for certain limitations, but then abandons citations to Figures 9 and 10 for the rest of the limitations. herefore, Embodiment #1 does not disclose a heel area with substantially no slope from an inner edge to an outer edge, as required by claim 1.

Second, Figures 11 and 12 of Dufour show a different embodiment (Embodiment #2) of a golf shoe where the plantar support surface 61 is flat and the support surface 63 inclines from the inner edge to the outer edge, which is at the same height as the plantar support surface 61. EX2008 ¶¶215-217.



The following block diagram illustrates Embodiment #2 of Figures 11 and 12:



EX2008 ¶218. As can be seen from the figures above, along the outer edge of the shoe, the small toe area of support surface 63 is at the same height as plantar support zone 61 (which extends well beyond the heel area). *Id.* ¶¶215-220.

Embodiment #2, therefore, does not disclose the “athletic positioning” in the claims. Under Petitioner’s construction, this term 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.” In Figures 11 and 12 of Dufour, the heel section 60 is at the same level as the outside edge 65 of the shoe. This fails to provide the athletic positioning claimed in the ’760 patent because the heel is not elevated with respect to the rest of the foot. EX2008 ¶220. Petitioner makes no obviousness argument that a POSITA would have modified Dufour to achieve this positioning. Moreover, as Mr. Markison explains, this embodiment does not have a separate heel area, but instead has an area

that extends forward into the midfoot section of the shoe, as required by the claims.

Id. ¶¶219-220.

Finally, Petitioner presented no analysis and offered no expert testimony about combining the various embodiments to modify Dufour to create a new shoe that had the claimed heel section or athletic positioning. As explained above, each of the individual embodiments of Dufour lacks critical claim elements standing alone. Mr. Markison provides a detailed explanation about why a POSITA would not have found it obvious to combine the various embodiments to pull different portions together and redesign a new shoe that met the elements of the claims here. EX2008 ¶¶221-234. Petitioner’s expert does not even offer a conclusory explanation of such a combination; instead, he simply mixes and matches embodiments without providing any rationale or reasoning, which is improper. *See, e.g., Abiomed, Inc. v. Maquet Cardiovascular, LLC*, IPR2017-01204, -01205, Paper 8 at 8-12 (P.T.A.B. Oct. 23, 2017) (“Petitioner’s challenge treats the various features of [the prior art]’s different embodiments as if they are interchangeable with one another” and the failure to “explain sufficiently why one skilled in the art would have found it obvious to combine those teachings” rendered analysis unreliable).

2. Dufour Does Not Disclose “A Pair of Shoes” With a “Left Foot Shoe” and a “Right Foot Shoe.”

Ground 2 also fails for an independent reason: Dufour is directed to a single shoe among a pair of shoes that has a unique positioning to aid in a golf swing,

whereas the '760 patent expressly claims a pair of shoes, each of which have the claimed athletic positioning. Dufour explains in its abstract that the invention is designed “to allow the golfer’s foot to roll on the outer edge of the sole” and provides a shock absorbing element and deformable structure to achieve this goal. EX1006, Abstract; *see also* Figs. 1, 3. Thus, Dufour is specifically designed to provide “a left shoe, thus a shoe for right-handed golfers,” *id.* 1:51-57, meaning it is directed only to the front, rolling foot in a golfer’s swing. EX2008 ¶235. Dufour is not directed to a “pair of shoes” for that purpose.

Petitioner’s attempt to extend Dufour’s disclosure to a pair of shoes fails. Petitioner relies on the fact that Dufour states that the characteristics “can be applied to a right shoe,” but ignores that this is in the context of a shoe “for left-handed golfers.” *Id.* 3:43-48. That is, Dufour’s invention is clearly about a new design for the front foot in a golf swing, and explains that the shoe can be adapted to work for the front foot in the stance of either a right-handed or left-handed player. Dufour does not suggest in any way that its design would be applied to both shoes for a single golfer. EX2008 ¶235.

Petitioner’s only other obviousness argument is that “it would have been obvious to a POSITA to apply these features to both shoes to provide the associated benefits for both feet.” Pet., 33. Petitioner’s claimed rationale for this modification is that it would provide “the transverse seating for the foot having an inclined support

surface from the inner edge to the outer edge, as shown in Figs. 11-12, that provides for an improved golf stance.” *Id.* But Petitioner’s argument is illogical and conflicts with Dufour’s own disclosure—that the shoe is designed to allow the front foot of a golfer to roll over more effectively during a swing on the outside, front edge of the shoe. Petitioner also provides no explanation about why this alleged benefit would actually be beneficial to a golf swing, particularly where the rear foot of the golf swing would never roll over on its outside edge during a swing. EX2008 ¶236.

Moreover, Petitioner has no support for this alleged benefit other than a conclusory statement from its expert—the entire paragraph of the expert declaration is taken directly from the paragraph in the Petition with only a few non-substantive word changes. *Compare* Pet., 33 (paragraph beginning “To the extent Dufour suggests providing the described features to only one of the shoes . . .”), *with* EX1002, ¶ 81 (“To the extent Dufour suggests providing the described features to only one of the shoes . . .”). This type of conclusory expert testimony, copied from the Petition, fails to support an obviousness argument. *See, e.g., Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 9, at 15-16 (P.T.A.B. Aug. 24, 2022) (rejecting expert testimony that “merely repeats, *verbatim*, the conclusory assertion for which it is offered to support,” which is “particularly problematic in cases where, like here, expert testimony is offered not simply to provide a motivation to combine

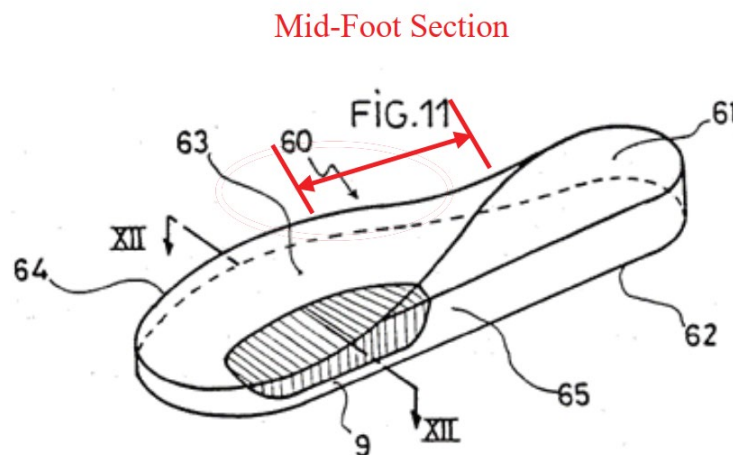
prior-art teachings, but rather to supply a limitation missing from the prior art.”)

(citing 37 C.F.R. § 42.65(a) and Federal Circuit case law).

3. Dufour Does Not Disclose a Separate Mid-Foot Section Having a Shape to Transition from the Heel Section to the Toe Section Required, as by Claims 2 and 7.

Dufour does not disclose the mid-foot section required by claims 2 and 7, which depends from claim 1. EX2008 ¶237. In addition to the limitations of claim 1, claims 2 and 7 require that the sole of the shoes of claim 1 comprise three separate sections: a heel section, a toe section, and a mid-foot section. EX1001, 43:41-50. The mid-foot section must have “a shape to transition from the heel section to the toe section.” *Id.*, 42:49-50. Dufour has no such mid-foot section. EX2008 ¶238.

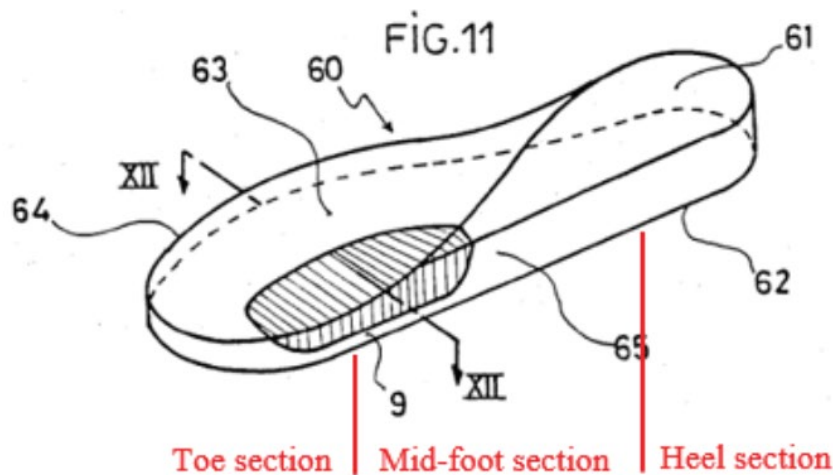
Petitioner relies on the following annotated version of Figure 11 in attempting to show the Dufour discloses a mid-foot section:



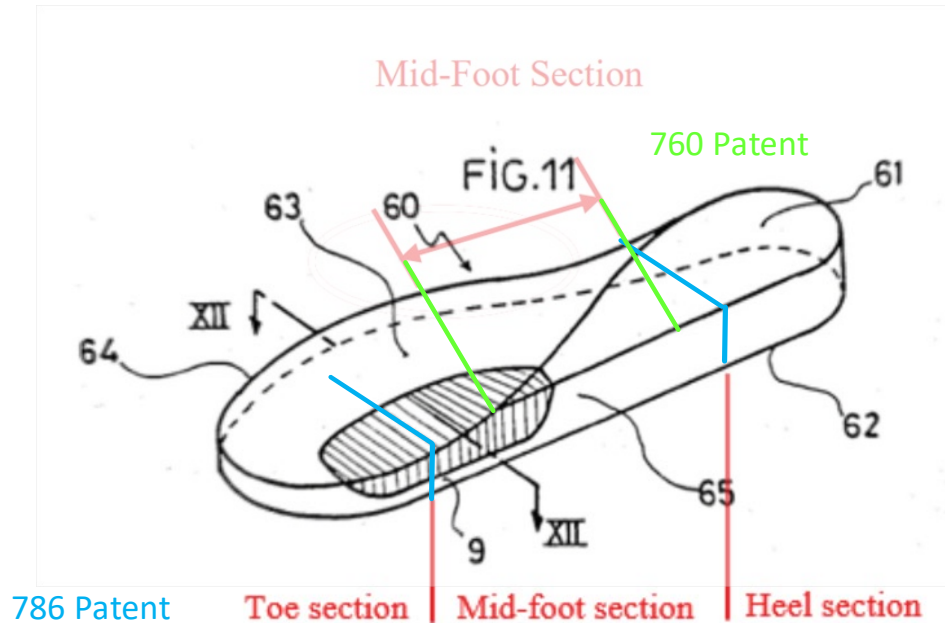
Pet. at 35; EX1002 at 64-65. Petitioner’s expert, Mr. Delgatty, offers no evidence to support his understanding that a POSITA would know that Dufour discloses the

claimed mid-foot section. In fact, Petitioner contradict itself as to the portion of Dufour constitutes the claimed mid-foot section. EX2008 ¶239.

In this proceeding, Petitioner relies on Mr. Delgatty's identification of a relatively narrow portion of the shoe, which is closer to the heel than to the forefront of the shoe. However, in IPR2024-00636, in seeking to invalidate claims of U.S. Patent No. 10,674,786, which are based on the same specification, Petitioner urges a different, inconsistent understanding of the claimed "mid-foot section." In the 00636 proceeding, Petitioner identifies the following mid-foot section in the embodiment of Figure 11 of Dufour:



IPR2024-00636, Pet. at 32; IPR2024-00636, EX1002 at 52. A superimposition of these two figures over one another demonstrates the difference in Petitioner's positions between the two proceedings:

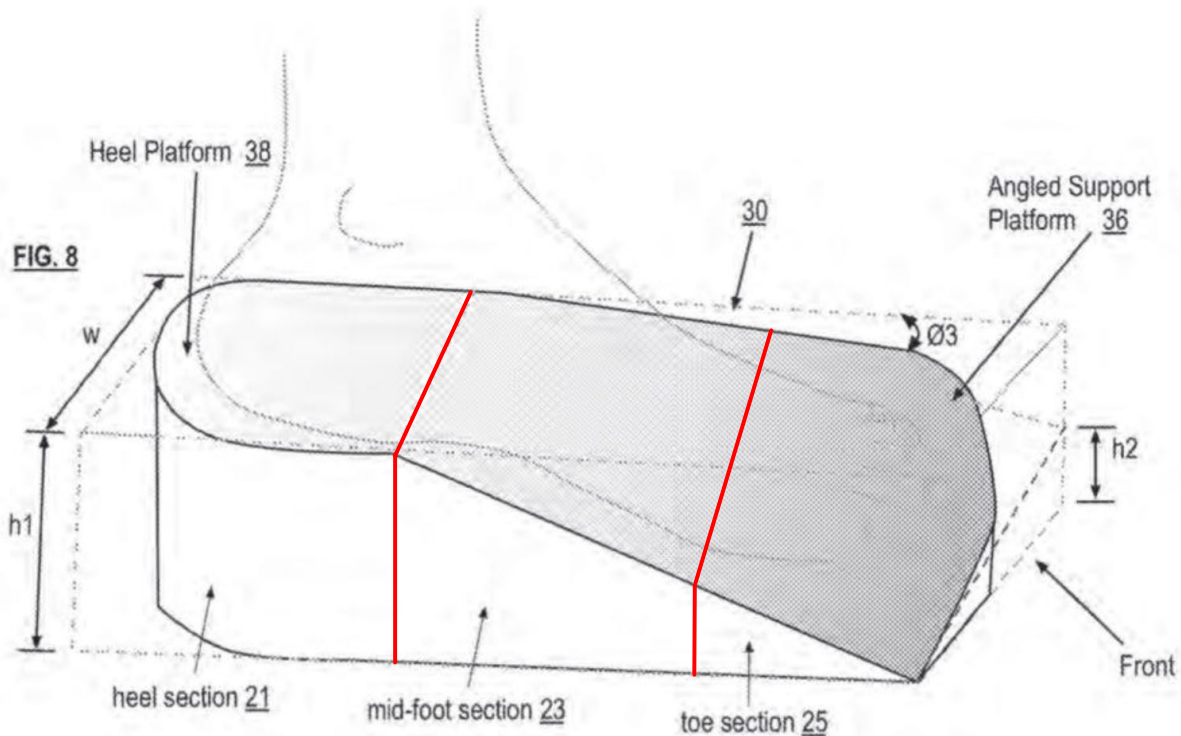
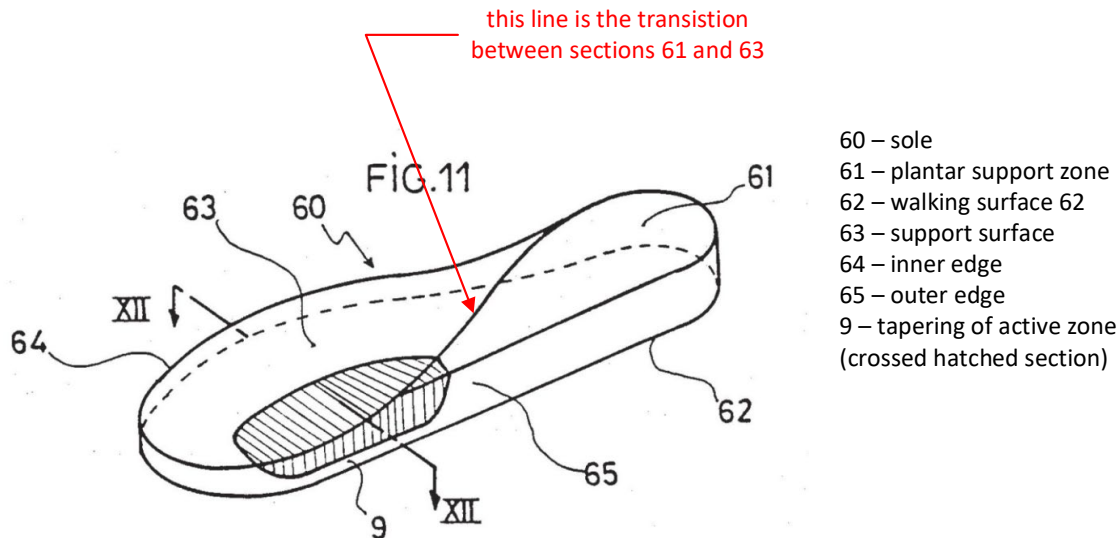


EX2008 ¶240. As can be seen from the figure above, in the -00636 Petitioner identified a larger area, which includes significantly more area at the front of the shoe and slightly more at the back, near the heel. *Id.* ¶241. If Petitioner were correct that a POSITA would know that Dufour discloses a mid-foot section, it is unclear why Petitioner would posit such different understandings of the mid-foot section between the two proceedings.

Instead, Dufour actually discloses only two sections of its sole, not three: plantar support section 61 and support surface 63. There is no section in between these two. As such, Dufour does not disclose a separate mid-foot section of its sole. EX2008 ¶242-245.

The error in Petitioner's position is underscored the surrounding context of claim 2, which requires that the mid-foot section have "a shape to transition from

the heel section to the toe section.” EX1001, 43:49-50. There is no such shape in the region identified by Petitioner. EX2008 ¶¶242-243. There is only a line dividing the plantar support section 61 from support surface 63. The difference between Dufour’s sole and the sole in the patent highlights that this element is lacking:



Id. (annotating Dufour Fig. 11 and '760 patent Fig. 8).

If Petitioner is to be believed, the words of Dufour that identify and describe the plantar support section and support surface would be rejected in favor labels that are wholly external to the reference itself. The Board should not accept the unsupported testimony of what a POSITA would know over the express disclosure of the Dufour reference. Because Dufour's sole has only two sections and does not disclose a mid-foot section shaped to transition from the heel section to the toe section, Dufour does not disclose or render obvious claims 2 and 7.

4. Claims 2-11 are Patentable Over Dufour.

Because independent claim 1 is patentable over Dufour, the more specific dependent claims are also patentable for the same reasons (in addition to the separate arguments for claims 2 and 7 above). EX2008 ¶246.

C. Ground 3: Rubin Does Not Disclose or Render Obvious Independent Claim 1.

Rubin discloses a golf shoe with variable height of the sole and variable height of the cleats, which are inversely proportional. Similar to Kim, Rubin's shoe is depicted in arrangements that show the shoe on a hard surfaces and soft ground. EX2008 ¶247. Regardless of whether Rubin's shoe is on a hard surface or soft ground, Rubin's disclosure is insufficient to disclose or render obvious several limitations of the independent claims and is instead directed to a different solution than the '760 patent claims. *See id.* ¶¶248-251.

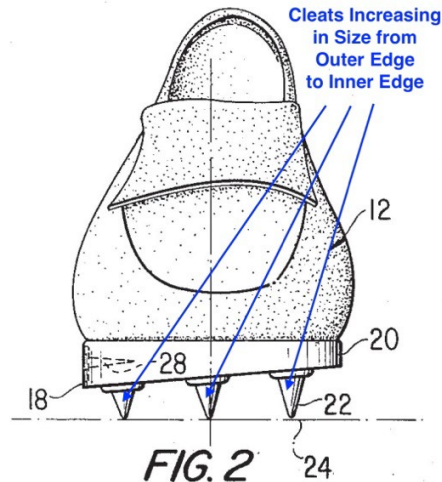
1. Rubin Does Not Disclose a Big Toe Area at a Lower Position than a Heel Area.

Ground 3 must fail because Petitioner has not shown that Rubin discloses or renders obvious a big toe area at a lower position than a heel area. Because the big toe is not lower than, but is the same height, as the heel area in all embodiments of Rubin, none of Rubin's embodiments disclose this limitation. EX2008 ¶246.

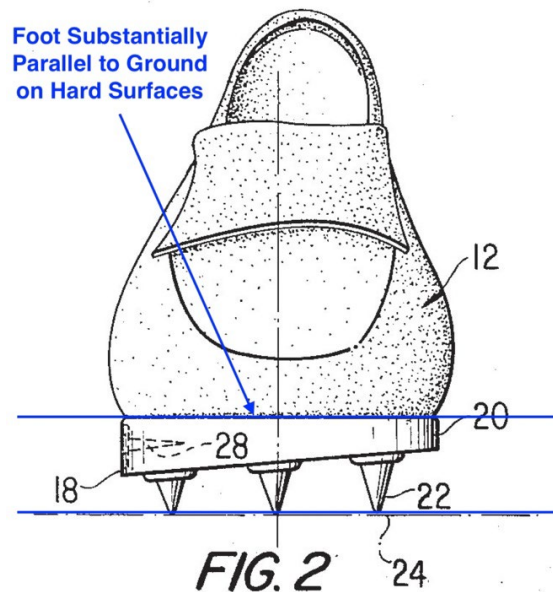
As discussed above, claim 1 of the '760 Patent requires the sole to provide an athletic position that has a big toe be at a lower position than the heel area. EX1001, 43:17-21 (claim 1, left shoe), 43:30-34 (claim 1, right shoe). Petitioner has failed to cite any evidence that Rubin discloses or renders obvious these limitations.

Rubin's specification and disclosure make clear that these limitations are absent. Rubin's disclosure consistently describes how the top of the sole, where the wearer's foot rests, is substantially parallel to the ground. EX2008 ¶260. This results from the combination of Rubin's cleats and sole. When moving from the inside edge to the outside edge of the shoe, the sole gets thicker and the cleats get longer. Thus, the height of Rubin's spikes is inversely proportional to the thickness of its sole. *Id.* Rubin explains that "[p]rojecting downwardly from the bottom of sole 14 are a plurality of cleats 22. . . . Cleats 22 adjacent the other side 18 of the sole 14 are smaller than the cleats adjacent the inner side 20 of the sole 14 by an amount approximately equal to the difference in elevation between the outer side 18 and inner side 20 of the sole 14" EX1007, 3:24-37. This relationship between the

length of the spikes and the thickness of the sole is illustrated in Figure 2 of Rubin, an annotated version of which is shown below.



The combination of the sole decreasing in thickness and the cleats increasing in height is “that when the wearer walks on a non-playing surface, such as a concrete deck 24 as illustrated in FIG. 2, the foot of the wearer will be substantially level,” i.e., parallel to the ground, as shown below:



Id., 3:34-37; EX2008 ¶¶260-263.

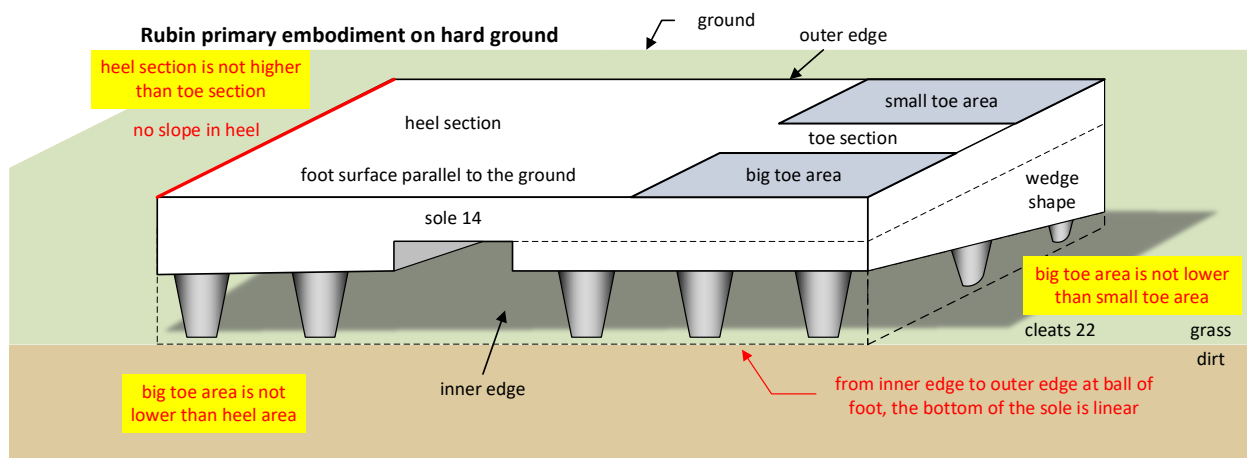
This concept of providing an outsole surface that keeps the foot of the wearer parallel to the ground is emphasized in Rubin’s disclosure. EX2008 ¶263. The following passages in Rubin reinforce that on hard surfaces, the foot of the golfer wearing Rubin’s shoe is “substantially level” to the ground:

- “The cleats adjacent the outer side of the sole are smaller than the cleats adjacent the inner side of the sole by an amount approximately equal to the difference in elevation between the outer and inner sides of the sole so that when the golfer walks on a planar surface, his foot will be substantially level.” EX1007, Abstract.
- “However, the cleats adjacent the outer side of the sole are smaller than the cleats adjacent the inner side of the sole by an amount

approximately equal to the difference in elevation between the outer and inner sides of the sole so that when the golfer walks his foot will be substantially level.” EX1007, 2:16-25.

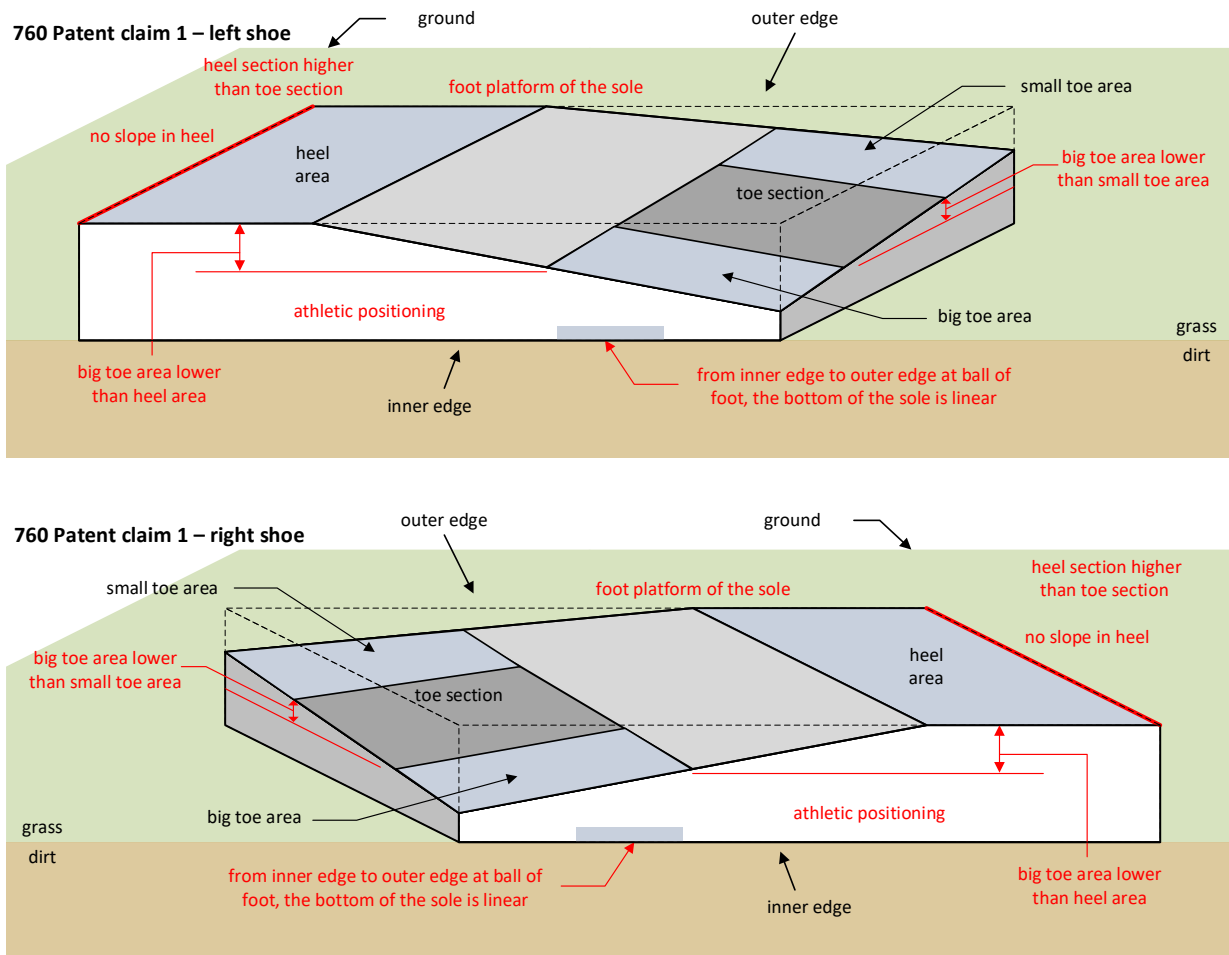
- “In between shots, and when walking on other planar surfaces, shoe 10 on the foot of the golfer will remain substantially level as illustrated in FIG. 2. This is due to the difference in sizes of the cleats 22 and will preclude undue strain on the golfer's foot.” EX1007, 4:4-8.

In short, Rubin consistently describes how the foot of the golfer wearing its shoe will be substantially level, i.e., parallel to the ground. EX2008 ¶260. This can be seen in the following figure, which represents Rubin’s shoe, identifying the heel section and big toa area.



EX2008 ¶258. As can be seen from the diagram above, the big toe area is not at a lower position than the heel area. They are at the same position relative to the bottom the shoe.

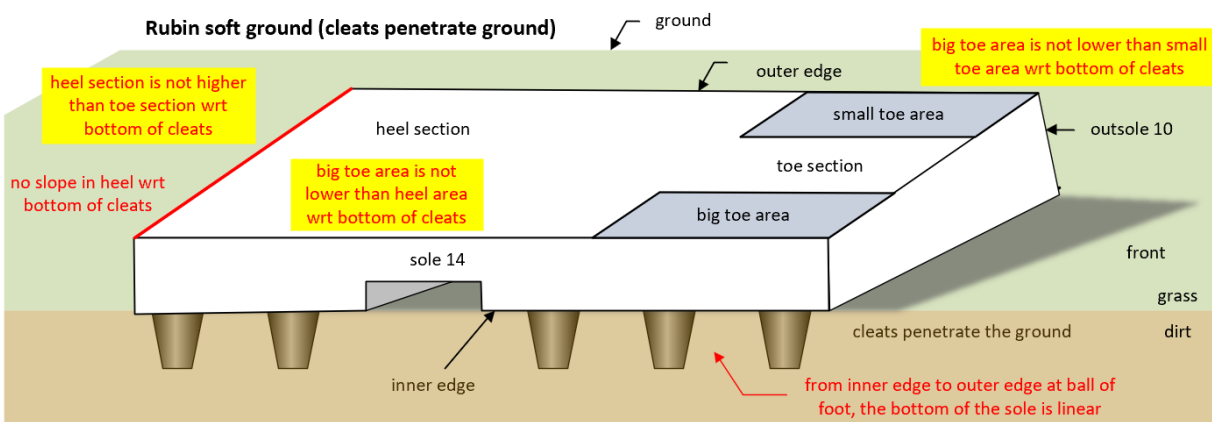
This is different from the positions in claim 1. The following block diagrams illustrate the big toe area being in a lower position than the heel area that is claimed in claim 1:



EX2008 ¶257. The first image is the claimed left shoe and the second is the claimed right shoe. As can be seen in these figures, the big toe area is below both the small toe area and the heel area in the claimed shoes.

Because the big toe area is at the same height relative to the bottom of the shoe as the heel area, in Kim's hard ground arrangement, Kim does not teach or suggest a big toe area at a lower position than the heel area.

Nor does Rubin's soft ground arrangement disclose these limitations. The following block diagram illustrates the foot platform of Rubin's soft ground arrangement:



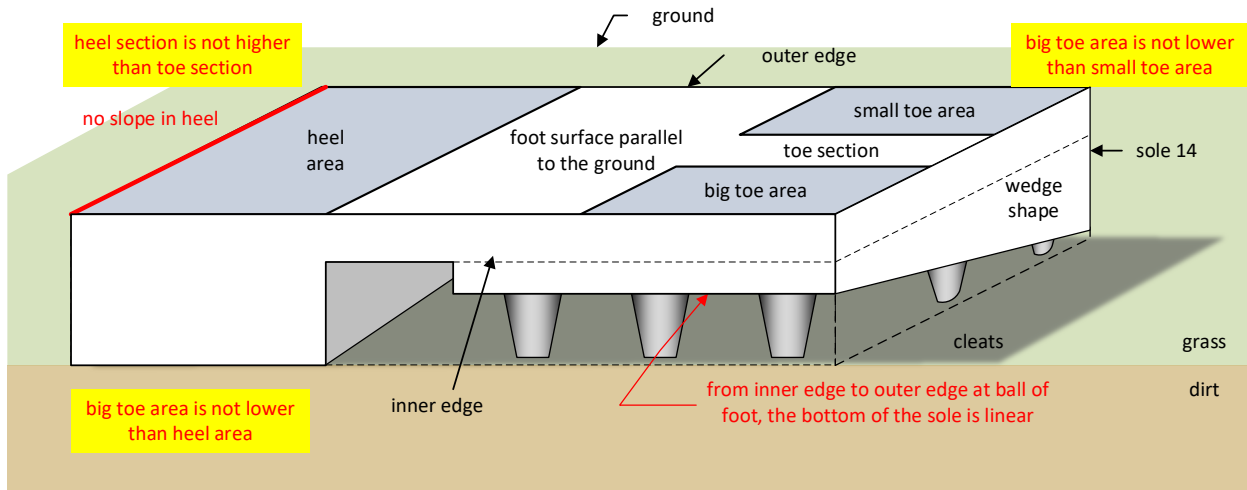
EX2008 ¶264. As can be seen from the figure above, the heel section is still at the same position as the toe section at all points along a line running parallel to the inner or outer edge. *Id.* ¶¶265-267. In other words, along lines running longitudinally down the shoe, the toe section is not lower than the heel section. As such, the soft ground arrangement of Rubin does not disclose a big toe area at a lower position than a heel area, as required by claim 1.

2. Petitioner Has Not Proven Claim 1 Is Otherwise Obvious Based on Rubin.

Petitioner's analysis relies solely on obviousness, but never actually identifies any modifications or changes to Rubin that a POSITA would make to render the claims obvious. Therefore, Petitioner should be held to the arguments in the petition and should not be permitted to argue in reply for new modifications to Rubin that it did not previously describe. Based on the actual arguments presented, the analysis above shows that Rubin does not render the claims obvious.

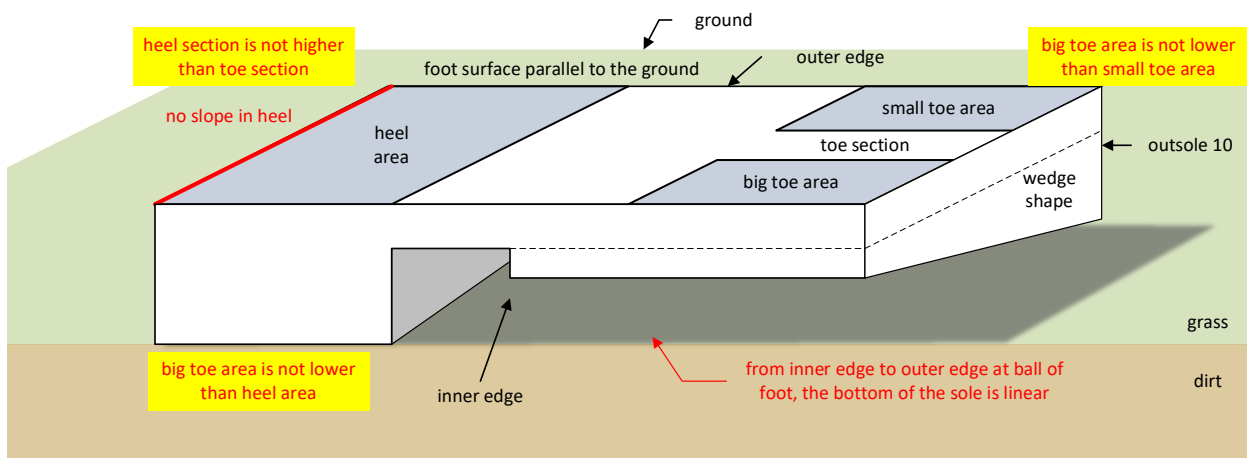
However, Petitioner's expert appears to rely in places on a "what if" embodiment based on Rubin that modifies its consistent disclosure, similar to the Kim ground above. *See* EX2008 ¶¶138-155. To the extent Petitioner is allowed to make new arguments based on this disclosure, those arguments should still fail.

As Mr. Markison explains at length, Petitioner's expert relies on a portion of Rubin's Figures 1 and 3 that he claims show no spikes in the heel of Rubin. *Id.* ¶269. However, as set forth in the block diagram below, a version of Rubin without different length spikes and no corresponding slope in the heel would still have the same height at the heel area as at the big toe and small toe areas—that is, it would still not disclose a big toe area at a lower position than a heel area or at a lower position than a small toe area:



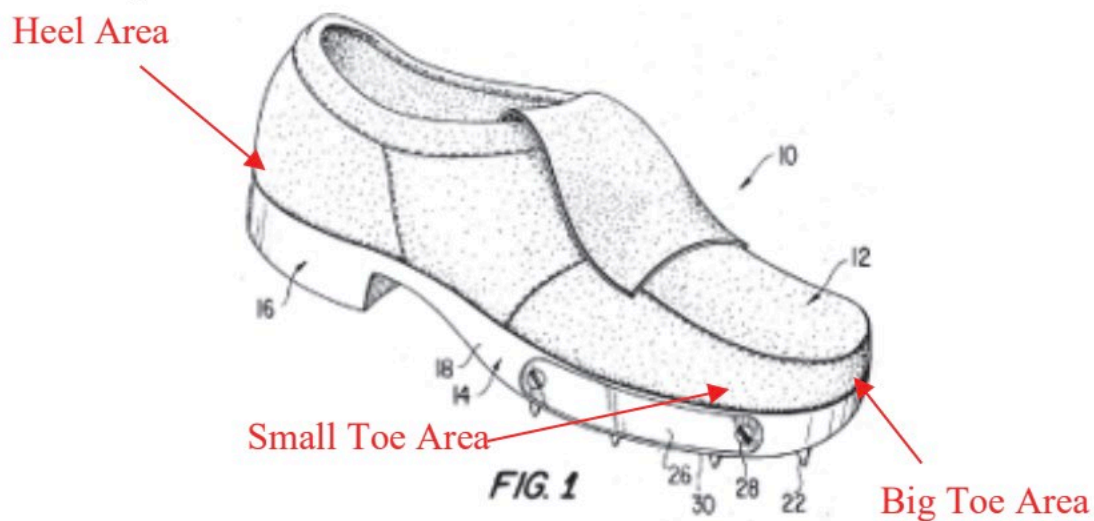
EX2008 ¶¶269-271; *see also id.* ¶¶154-155 (explaining why the “what if” embodiment also fails to render the claims obvious on soft ground because such an embodiment is illogical and does not disclose the claim elements).

Mr. Markison explains that Petitioner’s expert also suggests a second “what if” embodiment of Kim without spikes in either the heel or the forefoot:



EX2008 ¶272. As he explains, this embodiment does not disclose a big toe area lower than a heel area either (on either hard or soft surface), and in any event would not make any sense to a POSITA. *Id.* ¶¶272-277.

Finally, even taking Mr. Delgatty's annotated figures at face value, they still fail to provide any evidence that Rubin's big toe area is lower than the small toe area. All Mr. Delgatty does is point to locations on the outside of Rubin's shoe to identify the heel, big toe, and small toe areas in Figure 1 without *any explanation at all* as to **how** a POSITA would know that the big toe area was lower than the heel and the big toe area was lower than the small to area, as shown below.



EX1002, 73. Petitioner contends that these figures somehow “depict[]” that Rubin “teaches and/or suggests that the big toe area is at a lower position than the heel area.” *Id.* Petitioner fails to explain the height of the heel or big toe area or even to explain the relative heights of the heel and big toe areas. And Petitioner's expert's testimony claims, without any explanation of Figure 1 **or any other evidence**, that a POSITA would understand Rubin's big toe is below its heel. Such unsupported testimony is entitled to little or no weight. 37 C.F.R. § 42.65; *see also In re Ethicon*,

844 F.3d 1344 (Fed. Cir. 2017) (affirming Director’s assignment of little weight to conclusory expert testimony).

In fact, in deposition, Petitioner’s expert’s own testimony further undermines his own position. In deposition, this expert was shown the following image of a shoe which he claims to have designed:



When asked whether measurements at the front and rear of the heel of the shoe above would be the same height, Petitioner’s expert, Mr. Delgatty, responded “That’s the height of the sidewall of the midsole, which isn’t representing where the heel would be actually seated in the shoe. So the surface that the heel would sit on would be flat.” EX2010, 35:7-16. Patent Owner’s counsel followed up: “So you can’t see from the exterior of the shoe whether the heel platform is a consistent height. Correct?” *Id.*, 35:22-36:2. Mr. Delgatty replied, “From the view that you’re

looking at here on the screen, no, you can't. But I can tell you that me as the designer of that shoe knows that the heel platform would be flat." *Id.*, 36:5-8.

Mr. Delgatty was then shown another shoe, shown below, and asked about an "upwards dip in the outsole" near the front of the shoe.



Patent Owner's counsel asked Mr. Delgatty to confirm that the outsole was "thicker" at that upwards dip than closer to the heel. *Id.*, 37:4-7. Mr. Delgatty responded that "typical athletic shoes have lots of variability on what that top silhouette line would look like. *It has no bearing on where the actual foot sits inside the shoe where the top of the midsole would be.*" *Id.*, 37:9-13 (emphasis added). Petitioner's counsel asked Mr. Delgatty, "Can you tell what the interior dimensions of the shoe are from this picture of the shoe on the outside?" *Id.*, 38:19-21. Mr. Delgatty answered, "You can't . . . see specifically what the dimensions are from this view." *Id.*, 39:1-2.

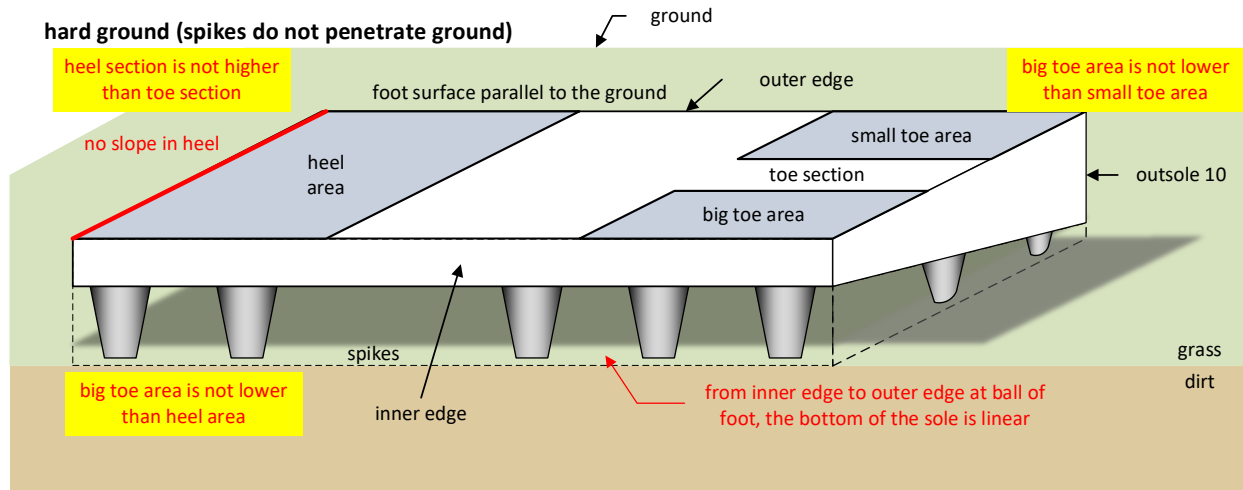
In other words, Mr. Delgatty repeatedly admitted that the exterior features of shoe have no bearing on where the foot sits within the shoe, and that you cannot tell the interior dimensions of the shoe from an outside view. Yet Petitioner relies only on an eyeballing of exterior features of the shoe to dissect it (in annotated Figure 1), and then authoritatively state that Rubin teaches and/or suggest the big toe area is at a lower position than the heel area. Mr. Delgatty's contradictory testimony should be afforded no weight. Petitioner has failed to bring forth any evidence showing that Rubin's toe area is lower than the heel area.

3. Rubin Does Not Disclose a Sole that Provides an Athletic Positioning, as Required by Claim 1.

Claim 1 requires an "athletic positioning." Under the correct construction, this 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. *Supra* ¶ VI.B. Applying this construction, Petitioner fails to prove that any of the three prior art references render claim 1 obvious.

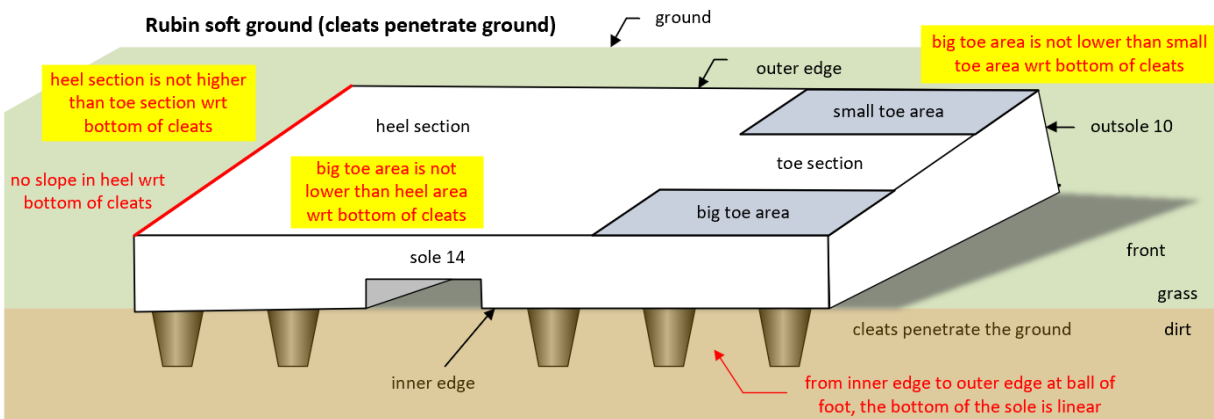
Rubin does not disclose or render obvious a sole that provides an "athletic positioning." Instead, Rubin discloses an entire sole at a single height parallel to the bottom surface of the shoes, which is true regardless of a hard or soft surface.

Rubin (hard surface)



EX2008 ¶258.

Rubin (soft surface)



EX2008 ¶264. Regardless of whether on a hard surface or soft ground, the heel section of Rubin is at the same height as the toe section. EX2008 ¶¶ 258-267. The athletic positioning term requires the heel section be higher than the toe section. Therefore, none of Rubin's embodiments disclose this limitation.

Because Rubin fails to disclose the limitations of claim 1, and because Petitioner makes no other obviousness arguments as to Rubin, Ground 1 fails.

4. Rubin Does Not Disclose “A Pair of Shoes” With a “Left Foot Shoe” and a “Right Foot Shoe”

Like with Dufour, *see* §VIII.B.2, Petitioner’s Ground 3 based on Rubin also independently fails because Rubin is directed only to a single shoe and not a pair of shoes with both a right and left shoe, as required by the ’760 patent.

Rubin is directed to a “golf shoe,” EX1007, Title, and never once references or shows a pair of golf shoes. Rubin explains that the purpose of its golf shoe is to “aid a golfer in assuming a proper stance on a golf playing surface so that when addressing the ball the golfer pivots about a more or less stationary vertical line rather than swaying during his swing.” *Id.*, Abstract. Rubin explains that when its golf shoe is used, the “rearwardmost foot of the golfer will be tilted inwardly because of the wedge-shaped sole 14 of [the] shoe 10,” which “will tend to provide a more satisfactory weight distribution when hitting the ball” and will result in a “more desirable pivot.” *Id.*, 3:56-64. That is, Rubin’s express disclosure is that it applies only to the rear foot of the golfer, not to both shoes. EX2008 ¶278.

Rubin also includes other features that would only make sense for the rear foot, such as a “metal plate” fixed to the sole “along the outer side thereof so as to be substantially flush therewith and to preclude undue bending and wear of the sole edge during the pivotal portion of a golfer’s swing.” *Id.*, 4:14-32. Thus, Rubin is clear that its design is aimed at improving only the rear shoe in a golfer’s swing. EX2008 ¶¶278-280. Because Rubin’s design is focused on improving only the

rearward shoe in a golfer's stance, its design is simply not applicable to a "pair" of golf shoes.

Petitioner's attempt to extend Rubin's disclosure to a pair of shoes fails. Petitioner first claims that Rubin "discloses golf shoes designed to aid a golfer in assuming a proper stance, and thereby develop a more consistent swing." Pet., 38. None of the portions of Rubin cited by Petitioner or its expert, however, refer to a pair of shoes or a left and right shoe—they consistently refer to a single shoe. *See* EX1007, 1:5-22 (referencing a "golf shoe" three times); 1:63-68 ("The golf shoe of the present invention . . ."); EX1002, § IX.C.a (citing Abstract and 1:6-11). And other portions of Rubin make clear that its disclosure is limited to use in the rearwardmost foot of the golfer when taking a swing. EX1007, 3:56-64.

Petitioner's only other obviousness argument is that "it would have been obvious to provide both left and right shoes with the disclosed features based on Rubin's teachings and the knowledge of a POSITA." Pet., 38-39. Petitioner's claimed rationale for this modification is that it would improve a golfer's stance and weight distribution further to provide the golfer's weight to be placed on the inside of both feet. *Id.* But Petitioner does not rely on anything in Rubin for this argument—Rubin never discusses weight distribution of both of a golfer's feet, and consistently refers only to a single rearward shoe, including features like a metal plate designed

particularly to prevent bending in the rolling motion of a golfer's rear foot. EX1007, Abstract; EX2008 ¶279.

Moreover, Petitioner has no support for this alleged benefit other conclusory testimony its expert—most of the entire paragraph of the expert declaration is taken directly from the paragraph in the Petition with only a few non-substantive word changes. *Compare* Pet., 38-39, *with* EX1002 ¶ 94. This type of conclusory expert testimony, copied from the Petition, fails to support an obviousness argument. *See, e.g., Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 9, at 15-16 (P.T.A.B. Aug. 24, 2022) (rejecting expert testimony that “merely repeats, *verbatim*, the conclusory assertion for which it is offered to support,” which is “particularly problematic in cases where, like here, expert testimony is offered not simply to provide a motivation to combine prior-art teachings, but rather to supply a limitation missing from the prior art.”) (citing 37 C.F.R. § 42.65(a) and Federal Circuit case law). The only other addition in the expert declaration is a string of citations from Kim that purportedly describe additional benefits of providing both shoes with the claimed features. But Petitioner does not rely on Kim in combination with Rubin and does not even rely on this portion of the expert declaration in the Petition in any detail. Petitioner's attempt to modify Rubin using teachings from Kim without actually doing an obviousness analysis or combination is improper.

5. Claims 2-11 are Patentable Over Rubin.

Because independent claim 1 is patentable over Rubin, the more specific dependent claims are also patentable for the same reasons. EX2008 ¶281.

D. Grounds 4-6: De Obaldia Does Not Solve the Problems in Grounds 1-3 For the Independent Claims

Petitioner relies on De Obaldia in Grounds 4, 5, and 6 solely for the “stabilizing cup” limitation in dependent claims 4-5 and 9-10. Petitioner does not argue or show that De Obaldia would be combined with Kim, Dufour, or Rubin to resolve the issues each reference has for independent claim 1, as described above. EX2008 ¶282. Thus, Grounds 4, 5, and 6 all fail because none of Kim, Dufour, or Rubin, alone or as combined with De Obaldia, disclose or render obvious independent claim 1.

VIII. SECONDARY CONSIDERATIONS OF NONOBVIOUSNESS

For the reasons given above, the challenged claims of the '760 Patent are not obvious over the prior art on which Petitioner relies. However, in addition to those arguments, secondary considerations of nonobvious, discussed further below, also demonstrate that the challenged claims are not obvious.

The objective evidence of nonobviousness includes, among other factors, long felt but unsolved need, skepticism by others, and industry praise. *See, e.g., In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998). Secondary considerations may be accorded substantial weight when there is a “nexus between the evidence and the

merits of the claimed invention.” *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010) (citations omitted). “A patent owner is entitled to a presumption of nexus when it shows that the asserted objective evidence is tied to a specific product that embodies the claimed features, and is coextensive with them.” *Volvo Penta of the Ams., LLC v. Brunswick Corp.*, 81 F.4th 1202, 1210 (Fed. Cir. 2023) (internal quotation marks and citation omitted).

As discussed below, the requisite nexus exists here, owing to the legally and factually sufficient connection between the evidence of non-obviousness and the patented invention. *See Demaco Corp. v. F. Von Langsdorff Licesning Ltd.*, 851 F.2d 1378, 1392 (Fed. Cir. 1988). In particular, Mr. Markison has provided un rebutted evidence that its products practice and are coextensive with the claims of the ’760 patent, entitling it to a presumption of nexus. EX2008 ¶285; EX2014.

A. Petitioner’s Expert Failed to Consider Any Evidence of Secondary Considerations.

Secondary considerations of nonobviousness must be considered in every case where present. *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 839 F.3d 1034, 1048 (Fed. Cir. 2016) (en banc) (citations omitted). This requirement arises from the fact that every factor “helps inform the ultimate obviousness determination.” *Id.* (citations omitted). Secondary considerations may be the most probative evidence of nonobviousness. *Crocs, Inc. v. ITC*, 598 F.3d 1294, 1310 (Fed. Cir. 2010).

Mr. Delgatty did not perform any analysis of any of the secondary considerations. In fact, at his deposition, Mr. Delgatty admitted that his declaration acknowledged that secondary considerations were “something you’re supposed to consider for obviousness.” EX2010, 117:14-118:2. He even read descriptions of several of the factors which were *included in his declaration*. *Id.*, 120:17-121:21. Yet, when asked whether he applied any secondary considerations or even analyze whether any evidence of secondary considerations existed, he replied, “I didn’t apply any.” *Id.*, 121:17-122:1. Mr. Delgatty’s stunted obviousness analysis is infirm for his failure to perform any assessment of the secondary considerations of nonobviousness.

As discussed below, numerous secondary considerations weigh heavily in favor of a finding that the invention embodied in the ’760 Patent was *not* obvious.

B. Long-Felt, Unmet Need

The age of the references on which Petitioner relies demonstrates that there was a long-felt need for an athletic shoe that put an athlete in a better athletic position. Rubin was filed in October 1972 (39 years prior to the priority date of the ’760 Patent); Dufour was filed in May 1987 (24 years prior to the priority date of the ’760 Patent); and Kim was filed in July 2003 (8 years prior to the priority date of the ’760 Patent). EX2008 ¶286.

Moreover, golf shoes that incorporate the concepts of Rubin, Dufour, and Kim are not prevalent in the market, if they even exist at all. EX2008 ¶287. Petitioner's expert, Mr. Delgatty, admitted in his deposition that he was unaware of any products in the market that embody the concepts of any of the prior art asserted against these claims. EX2010, 123:8-124:6. This suggests that the concepts disclosed in these patents have not been accepted as solving the problem of the need for putting the golfer into a better athletic position.

The combination of the recognition of the problem nearly four decades prior to the filing of the '760 Patent and the lack of solutions in the market in the intervening time period indicates that there was a long-felt and unmet until the '760 Patent was filed.

C. Skepticism by Others

Athalonz introduced a baseball shoe in 2015 that embodied the invention of the '760 Patent, and was met with limited success. EX2008 ¶288. At that time, the industry did not believe that the shoes would improve athletic positioning. This lack of success was largely attributable to the fact that, until that time, achieving a better athletic position was viewed primarily as a problem for the athlete to solve with their body. *Id.*

D. Industry Praise and Unexpected Results

In addition, in 2018, Athalonz released the EnVe golf shoe, which embodied the invention of the '760 Patent. EX2008 ¶¶289. The Athalonz golf shoes were praised by people in the industry, including by Bernhard Langer and professional World Long Drive (WLD) athletes. EX2013.

For example, Mitch McDowell, who was a teaching pro and WLD athlete, took a prototype of the EnVe golf shoes, which embodied the '760 Patent's invention, to a competition the summer of 2018. Another golfer, Ryan Steenberg, who was at the event, asked Mr. McDowell if he could try the Athalonz golf shoes, and Mr. McDowell agreed to let him try them. At the time, Mr. Steenberg had been competing in WLD for 8 years, was ranked number 6 in the world, but had never won an event. Mr. Steenberg got his first WLD win while wearing the Athalonz shoes. Mr. Steenberg won the next event, as well, again while wearing the Athalonz shoes. When other players asked him what he had changed, he responded that it was his shoes. *See* EX2008 ¶¶290-292.

Initially, the other WLD athletes did not believe Mr. Steenberg's shoes could make such a difference. However, one by one, the other WLD players began wearing Athalonz golf shoes. By the middle of the 2019 WLD season, approximately half of all WLD athletes were wearing Athalonz golf shoes that embodied the invention of the '760 Patent. In addition, a majority of the top ten men and women were wearing

Athalonz golf shoes, including the men's and women's 2019 WLD champions. *Id.* ¶292.

In 2020, after more than 40 years wearing Adidas golf shoes, Bernhard Langer switched to Athalonz golf shoes, which embodied the invention of the '760 Patent. Mr. Langer made the switch to Athalonz golf shoes because he hit the ball better in them than when he wore other golf shoes. He has repeatedly touted the benefits of the athletic positioning created for him personally by the Athalonz shoe embodying the invention of the '760 Patent. EX2008 ¶294; *see also* EX2013.

E. Copying

There is substantial evidence that Under Armour, the Petitioner here, copied Athalonz's patented technology claimed in the '760 patent. EX2008 ¶296. In August 2013, Athalonz (then known as Ad-Mark Athletic Ventures) met with personnel from Under Armour and gave a detailed presentation about the company, its products, and its patents. *See* EX2012; EX2008 ¶297. The presentation included detailed figures straight from the patents, and described in detail why the concept of "athletic positioning" claimed in the '760 patent was important for improving athletic performance. EX2008 ¶298. Indeed, Athalonz presented specific concepts and figures that were part of the patent applications that became the '760 patent, including its figures disclosing athletic positioning:

Creating A Solution

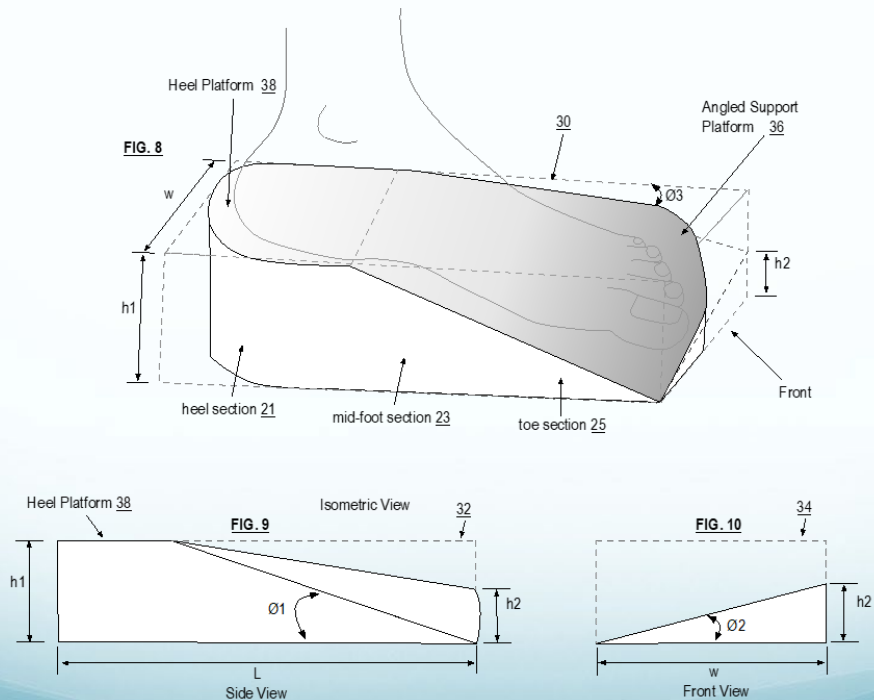
- We created a sole and/or an insole that provides:
 - a linear heel section that is higher than the toe section (i.e., downward slope from heel to toe); and
 - The inner edge of the ball of the foot and/or big toe portion of the toe section is lower than the outer edge of the toe section (i.e., inward slope from outside edge of front foot area to inside edge of front foot area);
- **Our Athletic Positioning Concept gives the athlete the optimal foot positioning for an optimal Athletic Start;**

AdMark Athletic Ventures Confidential Information

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EX2012, 13.

Athletic Positioning with Heel Platform



AdMark Athletic Ventures Confidential Information

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Id., 54. And Athalonz offered Under Armour the opportunity to acquire or license Athalonz's technology. *Id.*, 47-49; EX2008 ¶300.

Under Armour continued to engage with Athalonz after the presentation, including receiving physical sample products of the Athalonz shoes in 2014 to test internally before deciding whether to license or partner with Athalonz on its technology. *Id.* ¶310. However, Under Armour eventually stopped responding to Athalonz, and instead proceeded to release infringing products that copied the athletic positioning claimed in the '760 patent. *Id.*, ¶302; EX1009. Under Armour's

copying is strong evidence of secondary considerations of nonobviousness. EX2008 ¶303.

F. Conclusion

The above secondary considerations are further evidence that the challenged claims of the '760 patent are not obvious over the prior art cited by Petitioner.

IX. CONCLUSION

For the reasons stated above, the Board should find that Petitioner has failed to prove that any challenged claim of the '760 patent is unpatentable.

Dated: January 3, 2025

Respectfully submitted,

/Michael Matulewicz-Crowley/
Michael Matulewicz-Crowley
Counsel for Patent Owner

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Patent Owner's Response (the "POR") consists of 13,534 words, excluding the table of contents, certificate of service, this certificate of compliance, or table of exhibits. The POR complies with the type-volume limitation of 14,000 words as mandated in 37 C.F.R. § 42.24. In preparing this certificate, counsel has relied on the word count of the word-processing system used to prepare this paper (Microsoft Word).

Dated: January 3, 2025

/Michael Matulewicz-Crowley/
Michael Matulewicz-Crowley
Counsel for Patent Owner

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, the undersigned certifies that on January 3, 2025
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