

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NEW BALANCE ATHLETICS, INC.,
Petitioner,

v.

NIKE, INC.,
Patent Owner.

IPR2025-00020
Patent 8,898,932 B2

Before KEN B. BARRETT, MICHAEL J. FITZPATRICK, AND
MATTHEW S. MEYERS, *Administrative Patent Judges*.

MEYERS, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

A. *Background and Summary*

New Balance Athletics, Inc. (“Petitioner” or “New Balance”) filed a Petition to institute an *inter partes* review of claims 11–15 (the “challenged claims”) of U.S. Patent 8,898,932 B2 (Ex. 1001, “the ’932 patent”). Paper 2 (“Pet.”). Nike, Inc. (“Patent Owner” or “Nike”) filed a Preliminary Response. Paper 6 (“Prelim. Resp.”).

We have authority, acting on the designation of the Director, to determine whether to institute an *inter partes* review. 35 U.S.C. § 314; 37 C.F.R. § 42.4(a) (2020). The standard for instituting an *inter partes* review is set forth in 35 U.S.C. § 314(a), which provides that an *inter partes* review may not be instituted unless “the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least [one] of the claims challenged in the petition.”

After considering the Petition, the Preliminary Response, and the evidence of record, we determine that Petitioner has not demonstrated a reasonable likelihood that it would prevail with respect to at least one of claims 11–15. Accordingly, we deny the Petition pursuant to 35 U.S.C. § 314.

B. *Real Parties-in-Interest*

Petitioner identifies itself as the real party-in-interest. Pet. 73. Patent Owner identifies itself as the real party-in-interest. Paper 3, 2.

C. Related Proceedings

Petitioner and Patent Owner state that the '932 patent is involved in *Nike, Inc. v. New Balance Athletics, Inc.*, No. 1:23-cv-12666-JCB (D. Mass.) (“Related Litigation”). Pet. 73; Paper 3, 2.

D. Overview of the '932 patent

The '932 patent is titled, “Article of Footwear Incorporating a Knitted Component” and relates broadly to an article of footwear that “has an upper and a sole structure secured to the upper.” Ex. 1001, code (54), 2:14–15. According to the '932 patent,

[i]n various configurations, the upper includes a knitted component having a plurality of protruding areas that extend outward and away from a void within the upper for receiving a foot of a wearer. The protruding areas include one or both of (a) a first tubular structure and an inlaid strand extending through the first tubular structure and (b) a second tubular structure and yarn sections extending across the second tubular structure. In addition, a skin layer may be secured to the knitted component.

Id. at 2:15–23.

Figure 12, reproduced below, shows an embodiment of one such configuration.

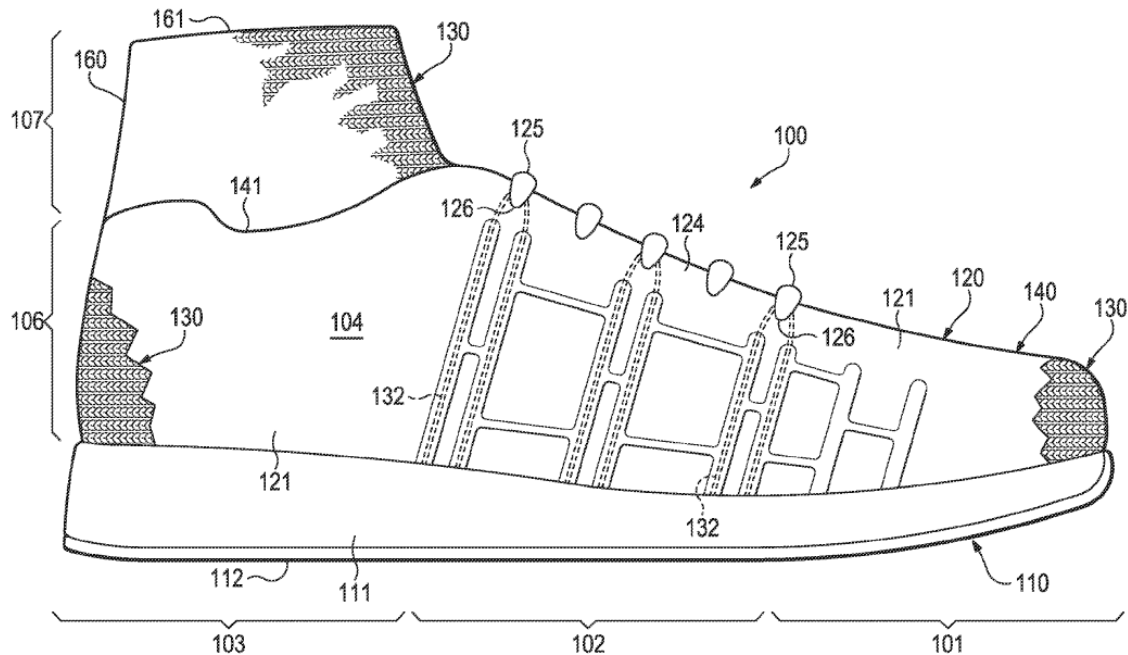


Figure 12

Figure 12 illustrates “a lateral side elevational view of a second configuration of the article of footwear.” Ex. 1001, 3:32–33. More particularly, Figure 12 depicts that the footwear includes sole structure 110 and upper 120, and that “[a] majority of upper 120 is formed from a knitted component 130 and a skin layer 140, which are depicted separate from a remainder of footwear 100.” *Id.* at 5:43–45. The ’932 patent discloses that

[s]kin layer 140 lays adjacent to knitted component 130 and is secured to an exterior of knitted component 130, thereby forming a majority or a relatively large portion of exterior surface 121. Various materials may be utilized to form skin layer 140, including a polymer sheet, elements of leather or synthetic leather, a woven or non-woven textile, or a metal foil.

Id. at 5:63–6:2.

Figure 12 also depicts ankle cuff 160, which “is located in ankle region 107 and forms an ankle part of knitted component 130.” Ex. 1001, 14:45–46. The ’932 patent discloses that “[i]n order to enhance the stretch properties of ankle cuff 160, skin layer 140 may be absent from ankle region

107,” and as such, “ankle cuff 160 may exhibit greater stretch than other portions of upper 120.” *Id.* at 15:19–20, 15:40–41. The ’932 patent identifies that “[t]he combination of the knitted component and skin layer may ‘impart a relatively tight and glove-like fit’ to the upper that secures the foot within the footwear, such as during walking, running, and other ambulatory activities.” *Id.* at 6:11–16.

E. Illustrative Claim

Petitioner challenges claims 11–15 of the ’932 patent. Pet. 1. Challenged claim 11 is the sole independent claim. Claim 11 is illustrative, and is reproduced below.

11.[pre] An article of footwear having an upper and a sole structure secured to the upper, the upper comprising:

[11.a] a knitted component that includes (a) a foot part for covering at least a portion of a foot of a wearer and (b) an ankle part for covering at least a portion of an ankle of the wearer,

[11.b] the foot part and the ankle part being formed of unitary knit construction; and

[11.c] a skin layer that is thermally bonded to the knitted component,

[11.d] the skin layer covering at least a portion of the foot part of the knitted component and forming a portion of an exterior surface of the upper, the skin layer being absent from the ankle part of the knitted component.

Ex. 1001, 19:28–20:2 (bracketing and formatting added to reflect Petitioner’s handling of the claim, *see* Pet. 76).

F. Prior Art and Asserted Grounds

Petitioner asserts that claims 11–15 of the '932 patent are unpatentable on the following three grounds:

Claim(s) Challenged	35 U.S.C. § ¹	Reference(s)/Basis
11–15	103	Becker, ² Dojan ³
11–14	103	Becker, Wildeman ⁴
11–14	103	Farys, ⁵ Knowledge of a Person of Ordinary Skill in the Art (“POSA”)

Pet. 16. Petitioner also relies on the Declaration of Ann Williams (Ex. 1003) and Jaap Schut, Ph.D. (Ex. 1005). Patent Owner relies on the Declaration of M. Coleman Horn (Ex. 2001).

II. ANALYSIS

A claim is unpatentable under 35 U.S.C. § 103(a) if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which that subject matter pertains. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying

¹ The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284 (2011), amended 35 U.S.C. § 103 effective March 16, 2013. Because the '932 patent's priority date is before the AIA's amendments to § 103, this decision refers to the pre-AIA versions of § 103. *See* Pet. 6 (“The '932 patent was filed on May 9, 2014, and claims priority to an application filed on November 15, 2012. For purposes of this Petition, New Balance does not challenge that the '932 is entitled to its earliest filing date.”).

² US 2010/0313447 A1, published December 16, 2010 (Ex. 1007, “Becker”).

³ US 2011/0088285 A1, published April 21, 2011 (Ex. 1010, “Dojan”).

⁴ WO 2004/012544 A2, published February 12, 2004 (Ex. 1013, “Wildeman”).

⁵ 6,862,820 B2, issued March 8, 2005 (Ex. 1011, “Farys”).

factual determinations including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of ordinary skill in the art; and (4) objective evidence of nonobviousness when presented. *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

In analyzing the obviousness of a combination of prior art elements, it can be important to identify a reason that would have prompted one of skill in the art “to combine . . . known elements in the fashion claimed by the patent at issue.” *KSR*, 550 U.S. at 418. A precise teaching directed to the specific subject matter of a challenged claim is not necessary to establish obviousness. *Id.* Rather, “any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *Id.* at 420. Accordingly, a party who petitions the Board for a determination of unpatentability based on obviousness must show that “a skilled artisan would have been motivated to combine the teachings of the prior art references to achieve the claimed invention, and that the skilled artisan would have had a reasonable expectation of success in doing so.” *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016) (citations omitted).

We analyze the challenges presented in the Petition in accordance with the above-stated principles.

A. Level of Ordinary Skill in the Art

We review the grounds of unpatentability in view of the understanding of a person of ordinary skill in the art at the time of invention. *Graham*, 383 U.S. at 17. Factors pertinent to determining the level of

ordinary skill in the art include (1) the educational level of the inventor; (2) the type of problems encountered in the art; (3) prior-art solutions to those problems; (4) the rapidity with which innovations are made; (5) the sophistication of the technology; and (6) the educational level of workers active in the field. *Envtl. Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 696–97 (Fed. Cir. 1983). Not all factors may exist in every case, and one or more of these or other factors may predominate in a particular case. *Id.* Moreover, these factors are not exhaustive, but merely a guide to determining the level of ordinary skill in the art. *Daiichi Sankyo Co. v. Apotex, Inc.*, 501 F.3d 1254, 1256 (Fed. Cir. 2007). Further, the prior art itself may reflect an appropriate skill level. *Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001).

Petitioner asserts that one of ordinary skill in the art (“POSITA” or “POSA”) would have had “at least a bachelor’s degree in design, footwear design, textile design and technology, or a similar technical degree with at least 3 years of experience working with knitted textiles for use in fabric-based articles, including apparel such as footwear.” Pet. 13 (citing Ex. 1003 ¶ 25). In addition, Petitioner asserts that one of ordinary skill in the art “would have worked with team members including those with knowledge and experience in garment manufacturing,” and

[t]he team would have included individuals with a bachelor’s degree in chemical engineering, textile engineering, mechanical engineering, or a similar degree and at least 3 years of experience working with different methods of applications for securing material to knitted textiles, including footwear. [Ex. 1003 ¶ 25]. For individuals with different educational backgrounds, a person could still be of ordinary skill in the art provided that person’s additional experience compensates for any differences in that person’s education as stated above. *Id.*

Pet. 13.

For purposes of the instant Decision, “Nike applies New Balance’s definition for a person of ordinary skill in the art.” Prelim. Resp. 11.

Based on the record presented, we determine that Petitioner’s definition of a person of ordinary skill in the art is consistent with the scope and content of the ’932 patent and the asserted prior art, and, at this stage, we apply Petitioner’s definition for purposes of this Decision.

B. Claim Construction

Pursuant to 37 C.F.R. § 42.100(b), we apply the claim construction standard set forth in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). Under that standard, we give the words of a claim their plain and ordinary meaning as would have been understood by one skilled in the art at the time of the invention and in the context of the entire patent disclosure. *Id.* at 1312–13.

Petitioner points out that Patent Owner previously asserted the ’932 patent against another party in a proceeding before the International Trade Commission (“ITC”). Pet. 13–14. According to Petitioner, Patent Owner agreed to constructions for the terms “unitary knit construction” and “thermally bonded” in the ITC. *Id.* at 14. According to Petitioner, Patent Owner agreed to construe “unitary knit construction” as “formed as a one-piece element through a knitting process” and “thermally bonded” as “a securing technique between two elements that involves a softening or melting of a thermoplastic polymer material within at least one of the elements such that the materials of the elements are secured to each other when cooled.” *Id.* Petitioner contends that it used these constructions for

purposes of this Petition, and no other claim terms require an explicit construction. *Id.* at 15.

Patent Owner acknowledges that it agreed to the constructions identified by Petitioner. Prelim. Resp. 12. Patent Owner also notes that it agreed to these proposed constructions in the Related Litigation. *Id.* at 13. However, Patent Owner argues that for purposes of this Preliminary Response, “no terms require construction.” *Id.* (citing *Realtime Data, LLC v. Iancu*, 912 F.3d 1368, 1375 (Fed. Cir. 2019)).

Based on the record before us, we need not expressly construe any claim terms.

C. Alleged Obviousness Over Becker and Dojan (Ground 1)

Petitioner asserts that claims 11–15 are unpatentable as obvious over Becker and Dojan. Pet. 19–44. Petitioner also relies on the declaration testimony of Ms. Williams (Ex. 1003) and Dr. Schut (Ex. 1005) to support its arguments. *Id.* Relying on the declaration testimony of Mr. Horn, Patent Owner presents arguments disputing Petitioner’s assertions. *See* Prelim. Resp. 14–27 (citing Ex. 2001).

We address Petitioner’s contentions and Patent Owner’s arguments below. We first provide a brief overview of the asserted art.

1. Overview of Becker (Ex. 1007)

Becker is entitled “Lightweight and Flexible Article of Footwear.” Ex. 1007, code (54). Becker discloses an article of footwear (e.g., basketball shoe) comprising upper 112 that “may be made of any material that is both durable and flexible.” *Id.* ¶ 49. Figure 1 of Becker is reproduced below.

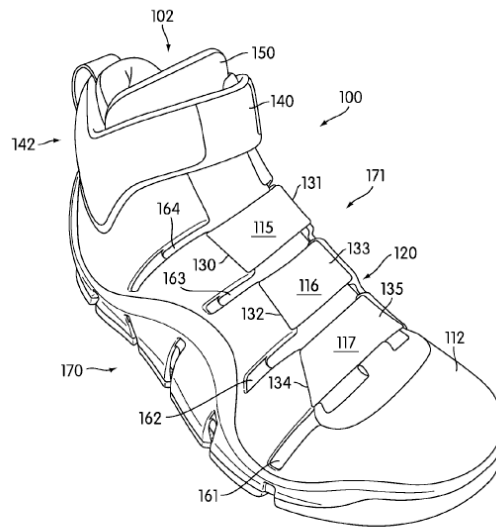


FIG. 1

Figure 1 is an isometric view of a preferred embodiment of Becker's article of footwear. *Id.* ¶ 36. Figure 1 depicts upper 112 including ankle strap 140 which is “configured to wrap around upper 112 at ankle portion 142.” *Id.* ¶ 53. Figure 1 also depicts upper 112 “includ[ing] first flexible strap 115, second flexible strap 116 and third flexible strap 117” for fastening upper 112 to a wearer's foot. *Id.* ¶ 50.

Becker further discloses that its article of footwear 100 “may include an inner lining or ‘bootie’ configured to wrap around a wearer's foot in a manner similar to a sock.” Ex. 1007 ¶ 78. Figure 10 of Becker is reproduced below.

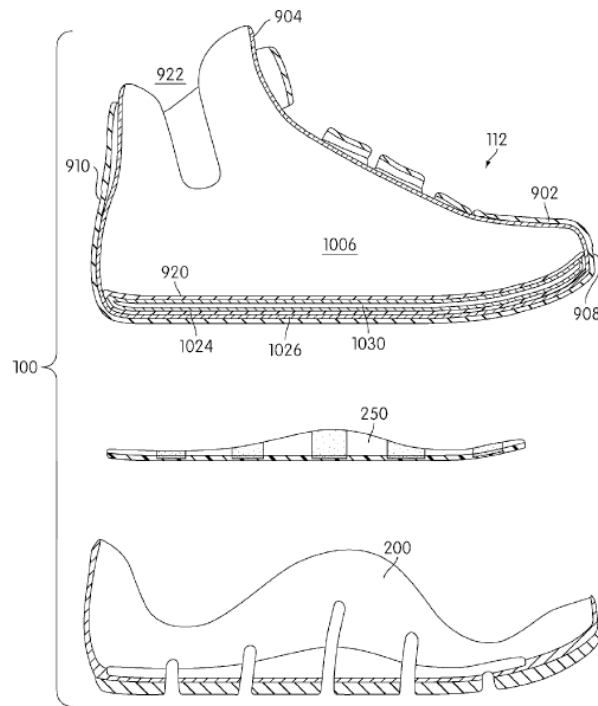


FIG. 10

Figure 10 is a side cross sectional view of a preferred embodiment of Becker's article of footwear including upper 112, outer member 200, and inner plate 250. *Id.* ¶¶ 45, 79. Becker discloses that "upper 112 includes outer lining 902 and inner lining 904." *Id.* ¶ 80. Becker describes that "outer lining 902 may be configured to provide additional support or to reinforce inner lining 904. Preferably, outer lining 902 is made of a more durable material than inner lining 904." *Id.* ¶ 81.

2. Overview of Dojan (*Ex. 1010*)

Dojan is entitled "Composite Shoe Upper and Method of Making Same." *Ex. 1010*, code (54). Dojan describes different techniques for creating "an upper that includes a bonded mesh composite panel." *Id.* ¶ 4. More particularly, Dojan discloses creating a multilayer bonded mesh composite by tacking a substrate layer, a mesh layer, and skin layer panels together, placing the tacked layers together in a heated press, and applying

heat and pressure to cause the various layers to bond to become a one-piece panel. *Id.* ¶¶ 34–35.

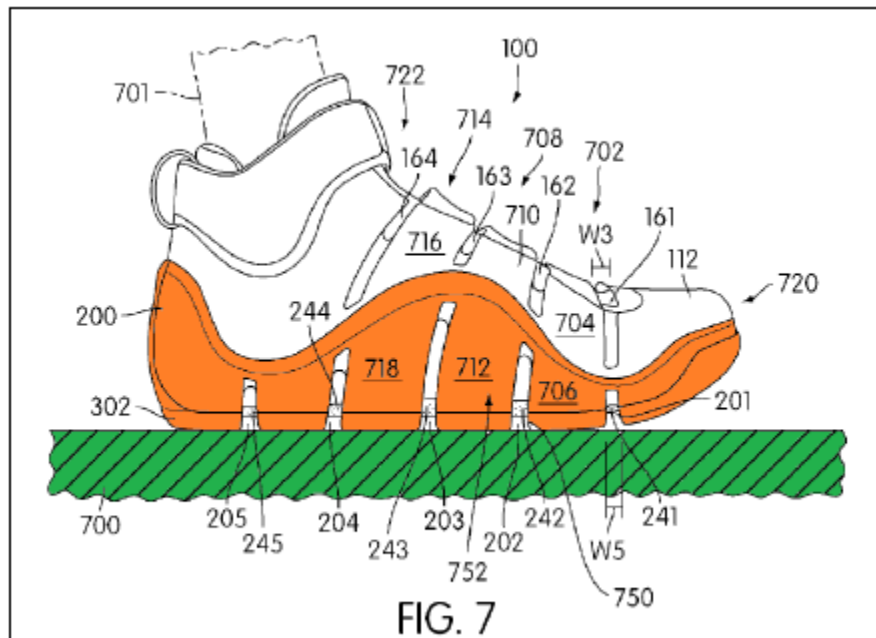
3. Analysis of Claim 11

Petitioner asserts that claim 11 is unpatentable as obvious over Becker and Dojan. Pet. 19–34 (citing Exs. 1001, 1003, 1005, 1007, 1010, 1023, 1026, 1027, 1029). To provide context, we begin by providing an overview of Petitioner’s contentions with respect to each element of claim 11, but focus on dispositive claim limitation [11.d] in our discussion below.

We use Petitioner's notations to identify the claim elements.

a) 11 [pre] An article of footwear having an upper and a sole structure secured to the upper, the upper comprising:

Petitioner argues that if the preamble is limiting, Becker discloses a shoe “having an upper and a sole structure secured to the upper.” Pet. 19–21 (citing Ex. 1003 ¶¶ 92–94; Ex. 1007 ¶¶ 3, 70 80, 85, Figs. 7, 10). Petitioner reproduces an annotated version of Figure 7 illustrating Becker’s article of footwear. Pet. 20–21 (citing Ex. 1007, Fig. 7).



Annotated Figure 7 is a side view of a preferred embodiment of Becker's article of footwear 100 depicting upper 112 with outer member 200 (highlighted in orange) making contact with ground surface 700 (highlighted in green). *Id.* at 20 (citing Ex. 1007 ¶ 70; Ex. 1003 ¶ 93). Petitioner asserts that Becker discloses that “upper 112 includes outer lining 902 and inner lining 904” (*id.* (citing Ex. 1007 ¶ 80)), and notes that Becker describes that outer member 200 may be fixed directly to outer lining 902 using glue or another type of adhesive (*id.* (citing Ex. 1007 ¶ 85; Ex. 1003 ¶ 92)).

b) [11.a] a knitted component that includes (a) a foot part for covering at least a portion of a foot of a wearer and (b) an ankle part for covering at least a portion of an ankle of the wearer;

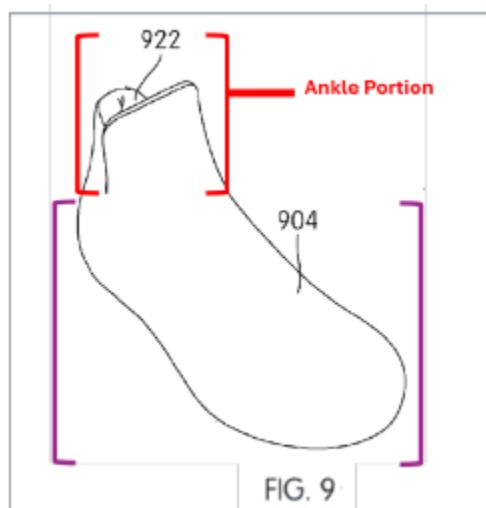
Petitioner asserts that Becker discloses the subject matter of limitation [11.a]. Pet. 21–26 (citing Ex. 1003 ¶¶ 96–105).

With respect to the upper comprising “a knitted component that includes (a) a foot part for covering at least a portion of a foot of a wearer,” Petitioner asserts that Becker discloses an upper lining that is designed to “accommodate a user's foot” in the form of a “bootie” designed to wrap around the foot like a sock. Pet. 22 (citing Ex. 1007 ¶¶ 49, 78, 80; Ex. 1003 ¶ 96). Relying on the declaration testimony of Ms. Williams, Petitioner asserts that one of ordinary skill in the art would have “understood that Becker's disclosures include inner linings made from a knitted fabric” (*id.* (citing Ex. 1003 ¶ 97)) because “Becker discloses that the inner lining ‘is made of soft and flexible material that helps provide comfort,’ and may be made from any natural or synthetic materials, including those soft and flexible materials commonly used in ‘booties’ found in footwear.” *Id.* (citing Ex. 1007 ¶ 80; Ex. 1003 ¶ 97); *see also id.* at 22–23 (citing Ex. 1003 ¶ 97) (Ms. William declaring that one of ordinary skill in the art “would have

known that knitted fabrics were often used in footwear — particularly for the construction of ‘booties’ or socks”)).

Petitioner argues that one of ordinary skill in the art “would have been aware that knitted fabrics were commonly used in footwear and were known for their many advantages, such as air and moisture permeability, attractive look, and appropriateness for the foot of the wearer,” and as such, would have been “motivated to use a knitted fabric for Becker’s inner lining, with a reasonable expectation of success.” Pet. 23 (citing Ex. 1003 ¶¶ 98–99). Petitioner adds that Dojan identifies that a warp knit liner may be “used for its ‘numerous advantages,’ such as its ability to ‘reduce weight and to facilitate ventilation of the shoe interior.’” *Id.* (citing Ex. 1010 ¶ 87; Ex. 1003 ¶ 98). Thus, Petitioner concludes that one of ordinary skill in the art “would have understood that Becker, either alone or in combination with Dojan, discloses or teaches a knitted upper that includes a foot part for covering at least a portion of a foot of a wearer.” *Id.* at 24 (citing Ex. 1003 ¶ 100).

With respect to the upper comprising a knitted component that includes “(b) an ankle part for covering at least a portion of an ankle of the wearer,” Petitioner asserts that “Becker discloses an article of footwear comprising an upper that covers at least a portion of the ankle.” Pet. 24 (citing Ex. 1007 ¶ 53; Ex. 1003 ¶¶ 101–102). Petitioner reproduces an annotated version of Figure 9 illustrating Becker’s article of footwear. Pet. 24–25 (citing Ex. 1007, Fig. 9).



Annotated Figure 9 is an isometric view of Becker’s article of footwear identifying the ankle portion in red and the foot portion in purple. *Id.* at 24 (citing Ex. 1003 ¶¶ 101–104). In addition, Petitioner adds that “Becker discloses that the upper preferably comprises elements for tightening the opening around the ankle,” and as such, one of ordinary skill in the art would have understood that “the upper must necessarily cover at least a portion of the ankle.” *Id.* at 25–26 (citing Ex. 1007 ¶ 53; Ex. 1003 ¶ 103).

c) [11.b] the foot part and the ankle part being formed of unitary knit construction; and;

Petitioner asserts that “Becker discloses or teaches all of the elements of limitation 11.b.” Pet. 26–28 (citing Ex. 1003 ¶¶ 106–109). More particularly, Petitioner asserts that “Becker’s upper includes an inner lining configured as a ‘sock-like bootie that wraps around the wearer’s foot.’” *Id.* at 26 (citing Ex. 1007 ¶ 80; Ex. 1003 ¶ 107). Relying on the declaration testimony of Ms. Williams, Petitioner explains that one of ordinary skill in the art “would have understood Becker to disclose that the inner lining could be made of a knitted fabric, or alternatively, a POSA would have been motivated to use a knitted fabric based on, for example Dojan.” *Id.* (citing

Ex. 1003 ¶ 107). Petitioner takes the position that one of ordinary skill in the art “would have understood the ‘sock-like bootie’ to be configured like a traditional sock, i.e., formed from a single knitted textile” (*id.* (citing Ex. 1003 ¶ 107)), and argues that Becker’s Figure 9 “shows the foot portion and ankle portion of the inner lining as a single unit.” *Id.* at 27 (citing Ex. 1007, Fig. 9). Petitioner contends that one of ordinary skill in the art would have understood and been motivated to use a unitary construction for Becker’s “sock-like” lining based on several advantages related to comfort and manufacturing. *Id.* at 27–28 (citing Ex. 1003 ¶ 108).

d) [11.c] a skin layer that is thermally bonded to the knitted component;

Petitioner asserts that the combination of Becker and Dojan renders obvious limitation [11.c]. Pet. 28–31 (citing Ex. 1003 ¶¶ 110–116; Ex. 1005 ¶¶ 27–30, 43–45). More particularly, Petitioner asserts that Becker’s “outer lining covers the inner lining and may provide additional support or reinforcement” because “[t]he outer lining is made of a material more durable than the inner lining and could be made from any material commonly used in footwear, including natural or synthetic fabrics, leather, or even phylon (the thermoplastic known as EVA).” *Id.* at 28 (citing Ex. 1007 ¶¶ 49, 81; Ex. 1003 ¶¶ 112–113). According to Petitioner, “Becker explains that this configuration may ‘reinforce inner lining 904’” in a manner similar to the ’932 patent’s disclosure “that the skin layer ‘is secured to an exterior of knitted component 130’ and is ‘utilized to reinforce areas of upper 120.’” *Id.* at 28–29 (citing Ex. 1007 ¶ 81; Ex. 1001, 5:63–64, 6:18–19).

Relying on the declaration testimony of Dr. Schut, Petitioner contends that one of ordinary skill in the art “would have been aware that there were

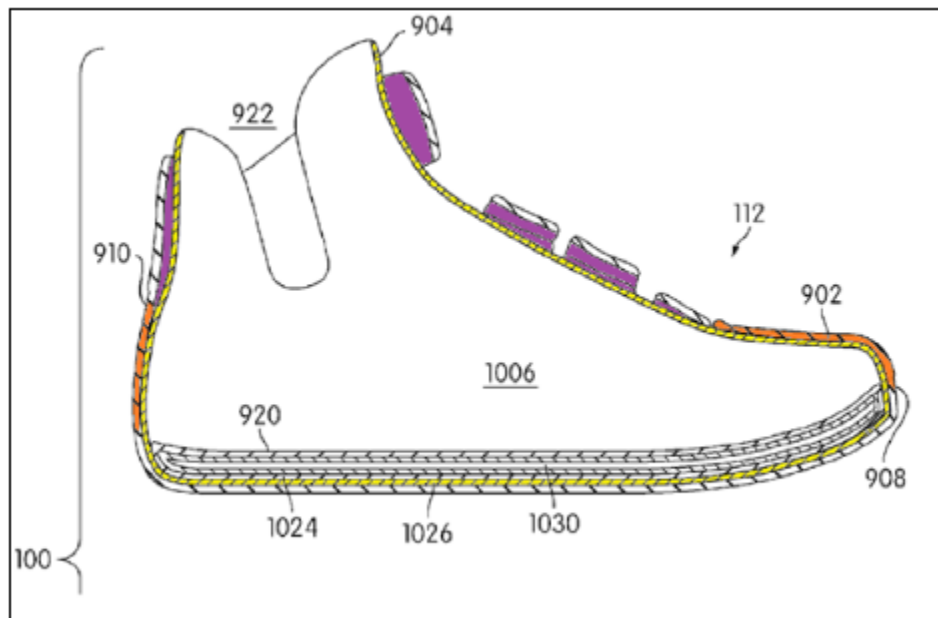
several ways to attach the outer lining to the inner lining to achieve the multi-layered upper disclosed in Becker.” Pet. 29 (citing Ex. 1005 ¶¶ 20–30). For example, one of ordinary skill in the art “would have understood that using thermal bonding could be used to secure the layers of the upper disclosed in Becker” (*id.* (citing Ex. 1005 ¶ 44)), and been motivated to use thermal bonding techniques due to its cost, strength, time efficiency, and decreased environmental damage and health concerns (*id.* (citing Ex. 1005 ¶¶ 27–30, 44–45; Ex. 1003 ¶ 115; Ex. 1026, 554)). Petitioner also identifies that “Dojan teaches that using a thermoplastic as the skin layer requires less material and is more efficient.” *Id.* at 30 (citing Ex. 1010 ¶ 35; Ex. 1005 ¶ 45).

Petitioner also notes that the outer lining in Becker “can be made of phylon, otherwise known as ethylene vinylacetate, a known thermoplastic material that can be attached using thermal bonding.” Pet. 30 (citing Ex. 1007 ¶ 81; Ex. 1005 ¶¶ 25, 43). Petitioner reasons that one of ordinary skill in the art “would have been motivated to use thermal bonding to affix the disclosed thermoplastic outer lining to the inner lining, based on the advantages of thermal bonding and the disclosures in Becker” and had a reasonable expectation of success in doing so based on the teachings in Dojan. *Id.* (citing Ex. 1005 ¶ 45).

- e) *[11.d] the skin layer covering at least a portion of the foot part of the knitted component and forming a portion of an exterior surface of the upper, the skin layer being absent from the ankle part of the knitted component.*

Petitioner asserts that “Becker teaches or discloses all elements of limitation 11.d.” Pet. 31–34 (citing Ex. 1003 ¶¶ 117–124). More particularly, Petitioner asserts that “Becker discloses that the outer lining

covers a portion of the foot portion of the upper.” *Id.* at 31 (citing Ex. 1007, Fig. 10; Ex. 1003 ¶ 118). Petitioner reproduces an annotated version of Figure 10 illustrating Becker’s article of footwear. Pet. 32 (citing Ex. 1007, Fig. 10).



Annotated Figure 10 is a side cross sectional view of Becker’s article of footwear identifying outer lining 902 (highlighted in orange), inner lining 904 (highlighted in yellow), and what Ms. Williams refers to as “a gap between the outer lining and inner lining” highlighted by Petitioner in purple above.⁶ Ex. 1003 ¶¶ 118–121.

With reference to Figure 10 above, Petitioner contends that “the outer lining—highlighted in orange—is adhered to the inner lining and covers at least a portion of the foot part of the shoe,” but does not cover the ankle portion of the shoe. Pet. 31 (citing Ex. 1003 ¶ 119). Petitioner further

⁶ We do not see, and Petitioner does not direct our attention to, any discussion in Becker regarding a “gap.” Indeed, Becker does not even label the purported feature with a reference numeral. Ex. 1007, Fig. 10.

contends that “the inner lining—highlighted in yellow—extends further up to cover the ankle portion, whereas the outer lining—highlighted in orange—is not bound to inner lining 904 around the ankle.” *Id.* at 32 (citing Ex. 1003 ¶ 119). Petitioner argues that Becker’s shoe “includes an ankle strap, configured to wrap around the ankle and allow for tightening,” and takes the position that one of ordinary skill in the art

would have understood that the ankle strap would be configured to move independently of the inner lining and would not be adhered to the inner lining entirely around the ankle, as doing so would thwart the ankle strap’s intended function—allowing for different degrees of tightness around the ankle.

Id. (citing Ex. 1007, ¶ 51; Ex. 1003 ¶¶ 120–121). And, according to Petitioner, “the ankle strap is not part of the skin layer because it is not attached to the knitted component.” *Id.* at 33 (citing Ex. 1003 ¶ 121). Relying on the declaration testimony of Ms. Williams, Petitioner asserts that one of ordinary skill in the art “would have further understood that the stiffer, more durable outer lining material would not be applied to the ankle portion, as it would restrict the mobility of the ankle and would not allow for tightening.” *Id.* (citing Ex. 1003 ¶ 122); *see also id.* (citing Ex. 1003 ¶ 123) (Ms. Williams opining that it was known in the art for the inner lining to extend up above the outer lining).

Alternatively, Petitioner asserts that one of ordinary skill in the art would have considered removing the ankle strap of Becker in order to provide greater mobility of the ankle. Pet. 34 (citing Ex. 1003 ¶ 123). According to Petitioner “Becker teaches that “[a]lthough three flexible straps at the instep and one ankle strap are shown in this preferred embodiment, in other embodiments any number of straps or other fasteners may be used.”” *Id.* (citing Ex. 1007 ¶ 55). Thus, Petitioner concludes that one of ordinary

skill in the art “would have had a reasonable expectation of success in removing the ankle strap.” *Id.* (citing Ex. 1003 ¶ 123).

4. Patent Owner’s Contentions regarding limitation [11.d]

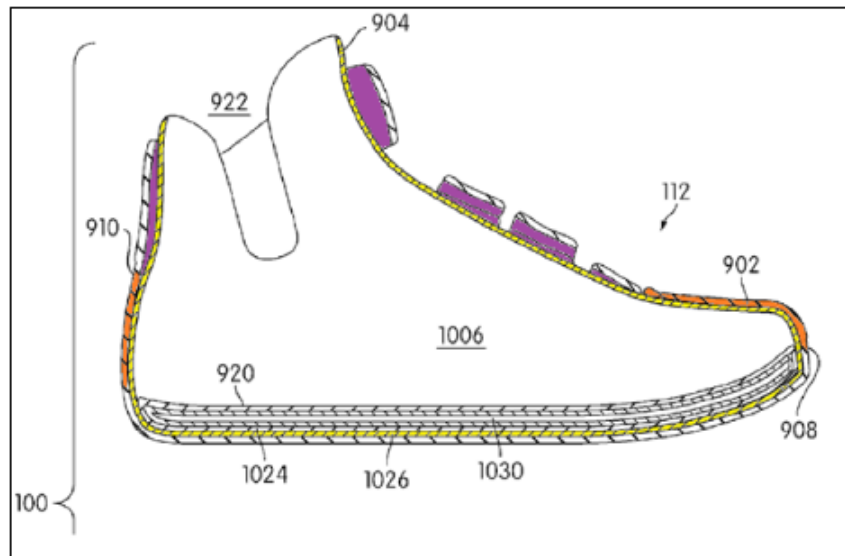
Patent Owner contends that Petitioner’s ground of unpatentability based on the combination of Becker and Dojan is deficient because it fails to teach or suggest “the skin layer being absent from the ankle part of the knitted component,” as required by limitation [11.d] of independent claim 11. Prelim. Resp. 14–20. More particularly, Patent Owner argues that Petitioner “incorrectly annotates Becker’s Figure 10 to identify only a portion of outer lining 902” to support Petitioner’s assertion that “Becker’s outer lining 902 does not cover the ankle portion of the shoe.” *Id.* at 14–15 (citing Ex. 2001 ¶ 32; Pet. 31–21). According to Patent Owner, Becker’s Figures 9 and 10 “make clear that outer lining 902, like inner lining 904, extends up to cover at least a portion of the ankle portion of a wearer.” *Id.* at 15 (citing Ex. 2001 ¶ 32).

5. Discussion of Claim 11

Having considered the conflicting positions of the parties, we conclude that Petitioner has not shown a reasonable likelihood that it would prevail in challenging the patentability of independent claim 11. More specifically, we agree with Patent Owner that Petitioner has not demonstrated that the cited prior art discloses or suggests “the skin layer being absent from the ankle part of the knitted component,” as required-in-part by limitation [11.d].

Petitioner’s analysis for this limitation begins with the contention that Becker’s outer lining 902, i.e., “skin layer,” covers a portion of the foot portion of the upper (Pet. 31 (citing Ex. 1007, Fig. 10; Ex. 1003 ¶ 118)), but

that the “outer lining does not cover the ankle portion of the shoe” (*id.* at 32 (citing Ex. 1003 ¶ 119)). To support its argument, Petitioner reproduces an annotated version of Figure 10 illustrating Becker’s article of footwear. *Id.* at 32 (citing Ex. 1007, Fig. 10).

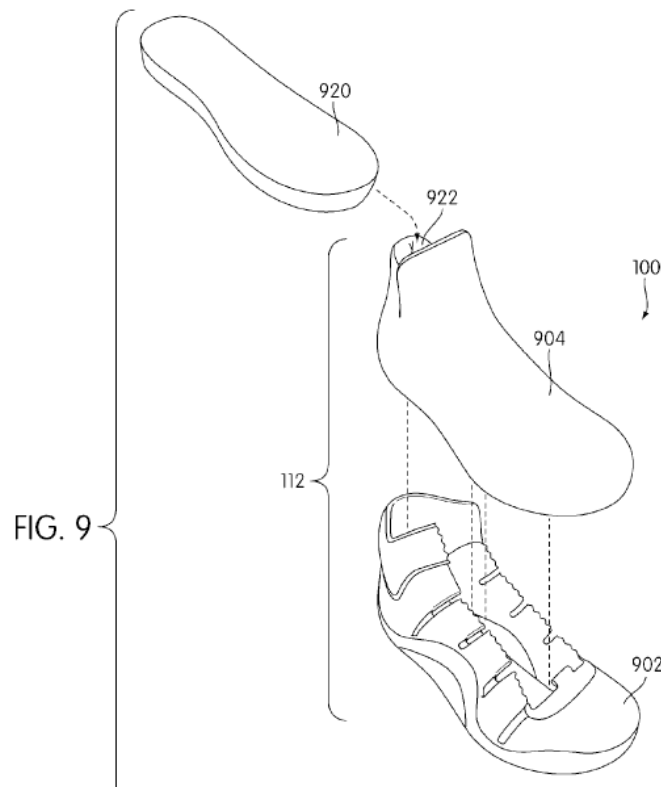


Annotated Figure 10 is a side cross sectional view of Becker’s article of footwear identifying outer lining 902 (highlighted in orange), inner lining 904 (highlighted in yellow), and what Petitioner refers to as a gap (highlighted in purple) between outer lining 902 and inner lining 904. Ex. 1003 ¶¶ 118–121. Petitioner argues that outer lining 902 does not cover the ankle portion of the shoe because “the ankle portion includes an ankle strap” (*id.* at 32 (citing Ex. 1007, Figs. 1 and 10)), and “the ankle strap is not part of the skin layer because it is not attached to the knitted component” (*id.* at 33 (citing Ex. 1003 ¶ 121)).

In response, Patent Owner asserts that Petitioner “incorrectly annotates Becker’s Figure 10 to identify only a portion of outer lining 902.” Prelim. Resp. 14–15 (citing Ex. 2001 ¶ 32; Pet. 32). Patent Owner argues that Figure 10 of Becker “make[s] clear that outer lining 902, like inner

lining 904, extends up to cover at least a portion of the ankle portion of a wearer.” *Id.* at 15 (citing Ex. 2001 ¶ 32). According to Patent Owner, “whether outer lining 902 is attached to (or in contact with) inner lining 904 has no bearing on whether outer lining 902 is present at the ankle part of inner lining 904.” *Id.* at 18 (citing Ex. 2001 ¶ 35). Patent Owner contends that “a skin layer may be present (i.e., not ‘absent’) at the ankle part of the knitted component without necessarily being attached to (or in contact with) the knitted component at the ankle part.” *Id.* at 18–19 (citing Ex. 2001 ¶ 36). We agree with Patent Owner.

Figure 10 of Becker clearly depicts that outer lining 902 extends up to cover at least a portion of the ankle portion in a manner similar to inner lining 904. *See* Ex. 1007, Fig. 10. Becker’s Figure 9 supports this understanding. A modified version of Becker’s Figure 9 enlarging upper 112 and omitting outer member 200 and inner plate 250 is reproduced below.



Modified Figure 9 is an isometric view of a preferred embodiment of Becker's article of footwear illustrating upper 112 including outer lining 902 and inner lining 904. Ex. 1007 ¶¶ 44, 80.

Relying on the declaration testimony of Ms. Williams, Petitioner contends that Becker's "ankle strap is not part of the skin layer because it is not attached to the knitted component." Pet. 33 (citing Ex. 1003 ¶ 121). However, other than asserting that one of ordinary skill in the art "would have understood that outer lining 902 is not adhered to the inner lining 904 around the ankle of the wearer" (Ex. 1003 ¶ 121), neither Petitioner nor Ms. Williams points to any disclosure in Becker to support the contention that Becker's "ankle strap . . . is not attached to the knitted component." To the extent Petitioner argues that its annotated Figure 10 "show[s] that the area around the ankle includes a gap [highlighted in purple] between the outer

lining and inner lining 904” (*see* Pet. 33 (citing Ex. 1007, Fig. 10 (annotated))), we do not see, and Petitioner does not adequately explain where Becker discusses any “gap.” Further, Petitioner does not explain why such a “gap” would preclude outer lining 902 from being attached to inner lining 904. Indeed, although claim 1 recites “a skin layer that is thermally bonded to the knitted component,” claim 1 does not specify that the skin layer be thermally bonded to the knitted component across the entire inner surface of the skin layer. Accordingly, we agree with Patent Owner that “a skin layer may be present (i.e., not ‘absent’) at the ankle part of the knitted component without necessarily being attached to (or in contact with) the knitted component at the ankle part.” Prelim. Resp. 18–19 (citing Ex. 2001 ¶ 36).

Thus, Petitioner has not shown sufficiently that Figures 1 or 10, of Becker, show “the skin layer being absent from the ankle part of the knitted component,” as claimed.

We also are not persuaded by Petitioner’s contention that the argued limitation would have been obvious because one of ordinary skill in the art would have understood that Becker’s stiffer outer lining would have “restrict[ed] the mobility of the ankle, “not allow[ed] for tightening,” and known to “hav[e] the inner lining extend up above the outer lining.” Pet. 33 (citing Ex. 1003 ¶¶ 122–123). Petitioner relies on conclusory reasoning grounded in hindsight to assert that it would have been obvious for “the skin layer [to be] absent from the ankle part of the knitted component,” as required by limitation [11.d]. The difficulty with Petitioner’s position is that neither Becker nor the other cited references disclose, teach, suggest, or

otherwise provide motivation for “the skin layer being absent from the ankle part of the knitted component,” as claimed.

In the alternative, Petitioner asserts that one of ordinary skill in the art would have considered removing the ankle strap of Becker in order to provide greater mobility of the ankle. Pet. 34 (citing Ex. 1003 ¶ 123). According to Petitioner, “Becker teaches that ‘[a]lthough three flexible straps at the instep and one ankle strap are shown in this preferred embodiment, in other embodiments any number of straps or other fasteners may be used.’” *Id.* (citing Ex. 1007 ¶ 55). Thus, Petitioner concludes that one of ordinary skill in the art “would have had a reasonable expectation of success in removing the ankle strap.” *Id.* (citing Ex. 1003 ¶ 123).

However, we agree with Patent Owner that Petitioner’s alternative theory is flawed at least because Petitioner “relies on the inclusion of the ankle strap in support of the assertion that ‘the upper must necessarily cover at least a portion of the ankle.’” Prelim. Resp. 19 (citing Pet. 25–26). We also agree with Patent Owner that Petitioner “provides no rationale for removing the remainder of the upper portion of outer lining 902 extending up towards an upper edge of inner lining 904 and covering the portion of inner lining 904 that [Petitioner] alleges corresponds to the claimed ‘ankle part.’” *Id.* at 19–20 (citing Ex. 2001 ¶ 37). Nor do we see where Becker suggests doing so. In this regard, Figure 9 of Becker depicts Becker’s article of footwear without an ankle strap, but still depicts outer lining 902 covering a portion of the ankle part. Ex. 1007, Fig. 9. Thus, we find Petitioner relies on conclusory reasoning grounded in hindsight to assert that it would have been obvious for “the skin layer [to be] absent from the ankle part of the knitted component.”

Accordingly, Petitioner has not adequately established on this record that the combination of Becker and Dojan discloses or suggests “the skin layer being absent from the ankle part of the knitted component,” as recited-in-part by limitation [11.d].

6. Conclusion on Claim 11

Having considered the parties’ arguments and evidence, we determine that Petitioner has not shown a reasonable likelihood of demonstrating that independent claim 11 would have been obvious over Becker and Dojan.

7. Conclusion on Claims 12–15

We have considered Petitioner’s arguments and evidence for dependent claims 12–15. Pet. 34–44. Petitioner does not provide contentions for these claims that remedy the deficiency discussed with respect to claim 11. Accordingly, for the reasons discussed with respect to claim 11, we conclude that Petitioner has not demonstrated a reasonable likelihood that it would prevail in showing that claims 12–15 are unpatentable under 35 U.S.C. § 103 as obvious over Becker and Dojan.

D. Alleged Obviousness over Becker and Wildeman (Ground 2)

Petitioner challenges claims 11–14 by substituting the teachings of Dojan, as applied above in Ground 1, for the teachings of Wildeman. Pet. 45–51. Petitioner, however, continues to rely upon Becker to address limitation [11.d] and, thus, does not remedy the deficiency of Becker discussed, with respect to claim 11, above. *See, e.g.*, Pet. 50 (“For the same reasons as explained in [Ground 1] above, Becker discloses “. . . the skin layer being absent from the ankle part of the knitted component.”). Accordingly, for the same reasons discussed above with respect to Ground 1, Petitioner fails to demonstrate a reasonable likelihood of prevailing in its

assertion that the subject matter of claims 11–14 would have been obvious over the combination of Becker and Wildeman.

E. Alleged Obviousness over Farys and the Knowledge of One of Ordinary Skill in the Art (Ground 3)

Petitioner asserts that claims 11–14 are unpatentable as obvious over Farys and the knowledge of one of ordinary skill in the art. Pet. 53–68. Petitioner also relies on the declaration testimony of Ms. Williams (Ex. 1003) and Dr. Schut (Ex. 1005) to support its arguments. *Id.* Relying on the declaration testimony of Mr. Horn, Patent Owner presents arguments disputing Petitioner’s assertions. *See* Prelim. Resp. 27–32 (citing Ex. 2001).

We address Petitioner’s contentions and Patent Owner’s arguments below. We first provide a brief overview of the asserted art.

1. Overview of Farys (Ex. 1011)

Farys is entitled “Footwear Article Having an Elastic Tightening.” Ex. 1011, code (54). Farys discloses “an article of footwear, of the shoe type, that allows a tightening and an improved hold of the foot while being as lightweight as possible.” *Id.* at 1:48–50. Figure 1 of Farys is reproduced below.

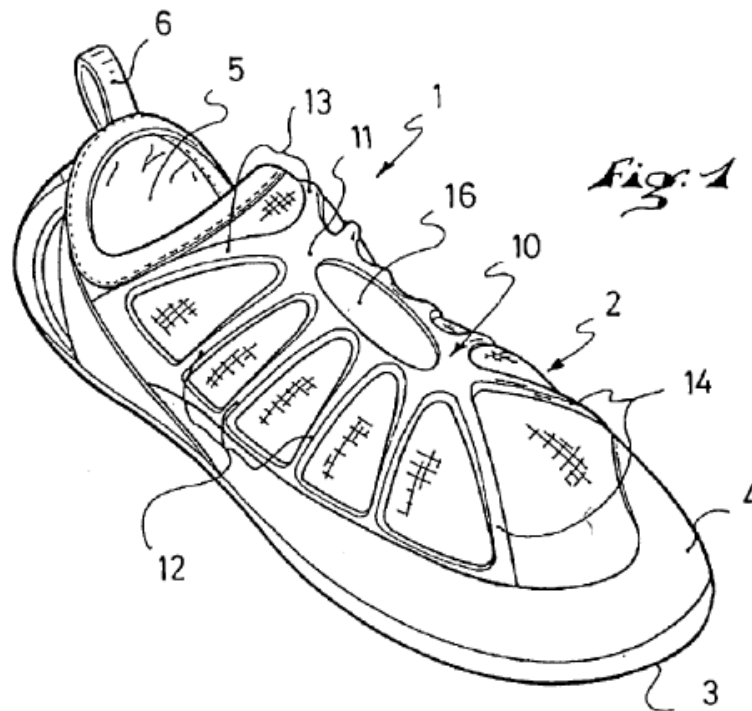


Figure 1 is a perspective view of a climbing shoe according to Farys' invention comprising upper 2, outer sole 3, and elastic tightening system 10. *Id.* at 2:4–5. More particularly, Farys discloses that “shoe 1 mainly has a closed low upper 2, provided with an upper opening 5 and with a pull tab 6 for fitting the shoe, an outer sole 3, and an elastic tightening system 10.” *Id.* at 2:30–33. In addition, Farys discloses that “upper 2 is low, meaning that it extends below the malleoli so as not to hinder the ankle articulation,” but notes that “upper 2 could also be mid-high, i.e, covering the malleoli without nevertheless hindering the mobility of the ankle.” *Id.* at 2:34–39.⁷ Farys further discloses “upper 2 is preferably made of a completely elastic yet lightweight material, such as LYCRA® or neoprene.” *Id.* at 2:39–40.

⁷ The '932 patent explains that the “malleoli” are “the bony prominences on each side of the ankle.” Ex. 1001, 14:35–39.

Farys further discloses that its

elastic tightening system 10 is composed of a central portion 11 extending over the top of the instep and substantially over the entire length thereof, and of a series of 45 branches 12, 13, 14 extending radially from the central portion 11 to the area of the sole 3 of the shoe.

Ex. 1011, 2:42–46. Figure 2 of Farys is reproduced below.

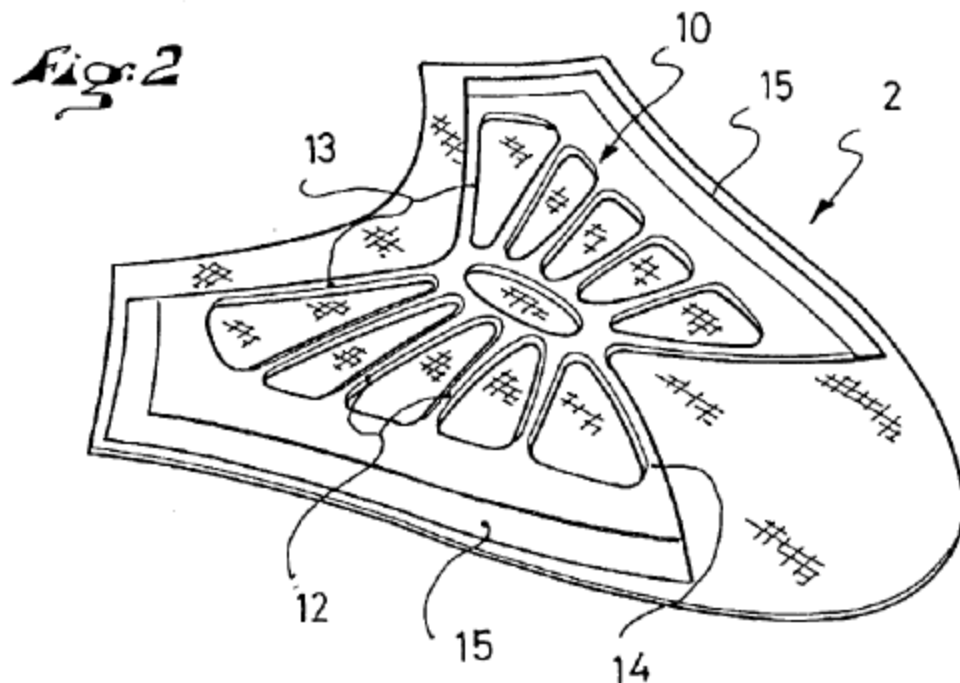


Figure 2 is a top view of upper 1 before assembly. *Id.* at 2:6–7. Farys discloses that “the lower ends of each of the branches 12, 13, 14 are connected together by a semi-peripheral edge 15, or border, on the lateral and medial sides of the shoe.” *Id.* at 2:47–50. In this regard, Farys discloses that its “tightening system 11, 12, 13, 14 constitutes a type of elastic ‘cage’ that completely envelops the foot from the area of the instep toward the heel and toes, and allows exerting a tightening force that is improved, uniform, and equally distributed over the entire foot.” *Id.* at 2:57–61. Farys describes that “such an equally distributed tightening force allows proprioceptive

sensations that are further reinforced by the use of an upper made of elastic material(s).” *Id.* at 2:65–67. Farys discloses that its elastic tightening system 10 may be affixed to upper 2 by any known means, such as gluing, sealing, duplicate molding, stitching, or high frequency sealing. *Id.* at 3:9–12, 3:25–27.

2. Analysis of Claim 11

Petitioner asserts claim 11 would have been obvious over Farys and the knowledge of one of ordinary skill in the art. Pet. 53–63. We use Petitioner’s notations to identify the claim elements, and focus on the dispositive claim limitation.

- a) *[11.d] the skin layer covering at least a portion of the foot part of the knitted component and forming a portion of an exterior surface of the upper, the skin layer being absent from the ankle part of the knitted component.*

(1) Petitioner’s Contentions

Petitioner asserts that “Farys discloses all elements of limitation 11.d.” Pet. 61–63 (citing Ex. 1003 ¶¶ 191–194). More particularly, Petitioner asserts that Farys discloses an elastic tightening system⁸ that “extends over the entire foot area” and “is attached directly to the upper.” *Id.* at 61 (citing Ex. 1011, 1:56–59, 3:17–19). Petitioner identifies that Farys includes a “mid-high” upper embodiment that “would cover the ankle bone without impeding the mobility of the ankle.” *Id.* (citing Ex. 1011, 2:34–39). Relying on the declaration testimony of Ms. Williams, Petitioner argues that one of ordinary skill in the art “would have understood that, to avoid

⁸ Relying on the declaration testimony of Ms. Williams, Petitioner contends that one of ordinary skill in the art “would have understood the elastic tightening system to be the ‘skin.’” Pet. 59 (citing Ex. 1003 ¶ 187; Ex. 1011, 1:28–31).

impeding the mobility of the ankle, the elastic tightening system of Farys's 'mid-high' upper would not extend up the ankle portion." *Id.* at 62 (citing Ex. 1003 ¶ 193). According to Petitioner, one of ordinary skill in the art would have "known that [Farys'] elastic tightening system was used to tighten and secure the shoe to the foot of the wearer and would thus restrict some degree of movement," and as such, "would have been motivated to refrain from adding the tightening system to the ankle portion to keep the stretch and mobility provided by the knitted component, so as not to impede the mobility of the ankle." *Id.* (citing Ex. 1003 ¶ 193). In addition, Petitioner adds that "the design of having the knitted component extend beyond the outer lining was known to" one of ordinary skill in the art. *Id.* (citing Ex. 1003 ¶ 193).

(2) Patent Owner's Contentions

Patent Owner argues the Petition is deficient because it relies on "unsupported and conclusory assertions about what [one of ordinary skill in the art] 'would have known' to supply limitations that Farys does not otherwise teach or suggest." Prelim. Resp. 31. According to Patent Owner, Petitioner "relies entirely on conclusory assertions of obviousness in alleging that Farys's elastic tightening system would not extend up to the ankle portion in the briefly mentioned 'mid-high' embodiment." *Id.* at 30. Patent Owner asserts that the declaration testimony of Ms. Williams regarding what one of ordinary skill in the art "'would have understood' or 'would have also known'" fails to cure this deficiency because it "does not cite any supporting evidence for the assertions; nor does Ms. Williams endeavor to elaborate or explain why the assertions are correct based on her expertise." *Id.* at 31 (citing Pet. 62 (citing Ex. 1003 ¶ 193)).

While Patent Owner acknowledges that Farys briefly describes “an embodiment where the upper may be ‘mid-high,’” Patent Owner argues that “Farys does not disclose that the elastic tightening system would not also extend up to this part of the upper.” Prelim. Resp. 31 (citing Ex. 2001 ¶ 50). In contrast, Patent Owner contends that Farys describes that its “elastic tightening system extends substantially over the entire volume and length of the foot in embodiments where the upper only covers the foot and does not extend up to cover the malleoli.” *Id.* (citing Ex. 1001, 1:56–59, 2:42–46, 2:57–61; Ex. 2001 ¶ 50). Additionally, Patent Owner argues that Ms. Williams reliance on the Nadler reference in support of the assertion that one of ordinary skill in the art “would have been aware of shoe designs wherein the outer linings do not cover the entire inner lining and provide an inner component that extended above the outer lining allowing for greater mobility” is inadequate because it relates to a “separate sock-like liner 21b that extends upwardly beyond the top edge 15b of a leg cover 1211.” *Id.* at 32 (citing Ex. 1003 ¶ 193 (citing Ex. 1012, 2:62–64); Ex. 2001 ¶ 51)).

(3) Discussion

Having considered the conflicting positions of the parties, we conclude that Petitioner has not shown a reasonable likelihood that it would prevail in challenging the patentability of independent claim 11. Instead, we agree with Patent Owner that Petitioner has not demonstrated that the cited prior art discloses or suggests “the skin layer being absent from the ankle part of the knitted component,” as recited-in-part by limitation [11.d].

Petitioner argues that Farys’ disclosure of a “mid-high” shoe that covers the malleoli without “hindering the mobility of the ankle” combined with Ms. Williams’ declaration testimony that one of ordinary skill in the art

would have understood that, to avoid impeding the mobility of the ankle, the elastic tightening system of Farys’s ‘mid-high’ upper would not extend up the ankle portion” teaches or suggests the argued limitation. Pet. 62 (citing Ex. 1003 ¶ 193). In contrast, Patent Owner persuasively argues that Petitioner’s argument is conclusory and unsupported by Farys’ disclosure, and as such, inadequate to establish that Farys combined with the knowledge of one of ordinary skill in the art teaches or suggests “the skin layer being absent from the ankle part of the knitted component.” Prelim. Resp. 29–31.

We credit Mr. Horn’s declaration testimony that Farys discloses that its “elastic tightening system extends substantially over the entire volume and length of the foot in embodiments where the upper only covers the foot and does not extend up to cover the malleoli.” Prelim. Resp. 31 (citing Ex. 2001 ¶ 50; Ex. 1011, 1:56–59, 2:42–46, 2:57–61). Although Petitioner suggests that one of ordinary skill in the art would have “would have been motivated to refrain from adding the tightening system to the ankle portion to keep the stretch and mobility provided by the knitted component” (Pet. 62 (citing Ex. 1003 ¶ 193)), Petitioner does not explain persuasively why a skilled artisan, per the teachings of Farys, would not have simply extended Farys’ elastic tightening system, i.e., “skin” to cover the ankle portion in its “mid-high” embodiment in a manner similar to its other embodiments. In this regard, we note that Farys already contemplates that its “mid-high” shoe embodiment would not “hinder[] the mobility of the ankle” (Ex. 1011, 2:36–39) without any suggestion that its elastic tightening system would need to be modified from its teachings regarding the “low” shoe embodiment.

We also are not persuaded by Petitioner’s contention that the argued limitation would have been obvious simply because “the design of having the knitted component extend beyond the outer lining was known to a POSA.” Pet. 62 (citing Ex. 1003 ¶ 193). Instead, we agree with Patent Owner that Ms. Williams’ reference to Nadler⁹ in her declaration testimony fails to provide the missing limitation. Prelim. Resp. 32 (citing Ex. 1003 ¶ 193). More particularly, we agree with Patent Owner that “Nadler does not teach or suggest the described ‘upper 14 of the foot covering’ as extending above the outer lining, as alleged, but instead describes a separate sock-like liner 21b that extends upwardly beyond the top edge 15b of a leg cover [sic, 12b].” *Id.* (citing Ex. 1012, 2:62–64). Thus, we are not persuaded that the knowledge of “the knitted component extend[ing] beyond the outer lining” (Ex. 1003 ¶ 193 (citing Ex. 1012)) would have provided a sufficient reason or motivation to modify Farys to “refrain from adding the tightening system to the ankle portion to keep the stretch and mobility provided by the knitted component” (Pet. 62 (citing Ex. 1003 ¶ 193)).

Accordingly, Petitioner has not adequately established on this record that the combination of Farys and the knowledge of one of ordinary skill in the art discloses or suggests “the skin layer being absent from the ankle part of the knitted component,” as recited-in-part by limitation [11.d].

(4) Conclusion on Claim 11

Having considered the parties’ arguments and evidence, we determine that Petitioner has not shown a reasonable likelihood of demonstrating that independent claim 11 would have been obvious over Farys and the knowledge of one of ordinary skill in the art.

⁹ 3,319,360, issued May 16, 1967 (Ex. 1012, “Nadler”).

3. *Claims 12–14*

We have considered Petitioner’s arguments and evidence for dependent claims 12–14. Pet. 63–68. Petitioner does not provide contentions for these claims that remedy the deficiency discussed with respect to claim 11. Accordingly, for the reasons discussed with respect to claim 11, we conclude that Petitioner has not demonstrated a reasonable likelihood that it would prevail in showing that claims 12–14 are unpatentable under 35 U.S.C. § 103 as obvious over Farys and the knowledge of one of ordinary skill in the art.

III. CONCLUSION

For the foregoing reasons, we are not persuaded that the Petition establishes a reasonable likelihood that Petitioner would prevail in any of its challenges to claims 11–15 of the ’932 patent. *See* 35 U.S.C. § 314(a); 37 C.F.R. § 42.108.

IV. ORDER

In consideration of the foregoing, it is hereby ordered that the Petition is *denied*, and no trial is instituted.

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Patent 8,898,932 B2

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