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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NIKE, INC., Plaintiff, v. SKECHERS U.S.A., INC., Defendant.	Case No. 2:23–cv–09346–AB–PVC **NIKE, INC.'S RESPONSIVE CLAIM CONSTRUCTION BRIEF**

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I. INTRODUCTION

Skechers' opening brief confirms the problems with its proposed constructions. Skechers attempts to read numerous limitations into Nike's patent claims by ignoring the intrinsic evidence, relying heavily on extrinsic evidence, and misrepresenting irrelevant statements from prior lawsuits. Skechers' proposed constructions and supporting arguments violate well–settled Federal Circuit law, which provides a heavy presumption that claim terms are given their ordinary and customary meanings and further constructions are unnecessary unless: (i) a patentee expressly defines the term in the specification, or (ii) the patentee unambiguously disavows the full scope of a term in the specification or during prosecution. ECF No. 53 (citing Federal Circuit precedent). Skechers has not, and cannot, establish that either of those exceptions apply to the disputed phrases in this case. Nike requests, therefore, that the Court reject Skechers' constructions and give each disputed phrase its ordinary and customary meaning.

II. ARGUMENT

A. "article of footwear"

Skechers asks the Court to deviate from the intrinsic record and define "article of footwear" as including "hose (e.g. socks)." ECF No. 56 at 23. Skechers does not cite any portion of the intrinsic record in support of its proposed construction. ECF No. 56 at 23. Instead, Skechers improperly relies solely on extrinsic evidence, i.e., a dictionary definition that Skechers modifies. *Id.*; *see Mosaic Brands, Inc. v. Ridge Wallet LLC*, 55 F.4th 1354, 1362 (Fed. Cir. 2022) (criticizing party for not citing any intrinsic evidence; only extrinsic dictionary definitions).

Skechers' failure to consider the intrinsic record and reliance solely on a modified dictionary definition is particularly problematic in this case for at least two reasons. First, the intrinsic evidence expressly contradicts Skechers' construction because it

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categorizes hose (e.g. socks) as apparel, not articles of footwear. *See* '562 patent at 4:62–64; '636 patent at 4:65–67. Second, there is no "need to consult a dictionary to determine the meaning of [] well–known terms." *See C.R. Bard, Inc. v. U.S. Surgical Corp.,* 388 F.3d 858, 863 (Fed. Cir. 2004). As Nike explained in its opening brief, the ordinary meaning of an "article of footwear" in the context of the Asserted Patents is well–known and supported by the Asserted Patent's specifications, which explain that an "article of footwear" includes two primary elements: "an upper and a sole structure." '749 patent, 1:25–26; '781 patent, 1:39–40, 4:62–63; '562 patent, 1:20–21; '636 patent, 1:25–26; '484 patent, 1:27–28, 3:10–12; '511 patent, 1:40–41, 4:63–64. Hose (e.g. socks) do not have an upper and a sole structure.

B. "simultaneously knitting a textile element with a surrounding textile structure"

Skechers reads the limitation "on all sides" into this disputed phrase. ECF No. 56 at 2–4. But it "is improper to read limitations from the written description into a claim." *Bradium Techs. LLC v. Iancu*, 923 F.3d 1032, 1049 (Fed. Cir. 2019). None of the limited exceptions to that rule apply in this case.

Skechers incorrectly argues the specification requires the Court to read "on all sides" into this disputed phrase. A specification disclaimer occurs only when "the specification make[s] clear that the invention does not include a particular feature." *Openwave Sys., Inc. v. Apple Inc.,* 808 F.3d 509, 513 (Fed. Cir. 2015). The standard for a specification disclaimer is "exacting." *Id.* That is, the specification must be "both so clear as to show reasonable clarity and deliberateness, and so unmistakable as to be unambiguous evidence of disclaimer." *Id.*

Skechers has not, and cannot, meet that exacting standard here. Skechers' reliance on Figure 9, which is one example embodiment, is insufficient as a matter of law to read "on all sides" into the disputed phrase because "patent coverage is not

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necessarily limited to inventions that look like the ones in the figures." *MBO Lab'ys, Inc. v. Becton, Dickinson & Co.*, 474 F.3d 1323, 1333 (Fed. Cir. 2007); *Martek Biosciences Corp. v. Nutrinova, Inc.*, 579 F.3d 1363, 1381 (Fed. Cir. 2009) ("[E]ven where a patent describes only a single embodiment, claims will not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope using words of expressions of manifest exclusion or restriction."). "To hold otherwise would be to import limitations onto the claim from the specification, which is fraught with danger." *MBO Lab'ys Inc.,* 474 F.3d 1323 at 1333. Moreover, as Nike explained in its opening brief, the patentee used the word "surround[s]" in a manner that contradicts and is broader than Skechers' proposed construction, *i.e.*, to "immediately surround" on three sides – not "all sides" as Skechers suggests. *See* ECF No. 55; '749 patent, 10:45–48; Fig. 14.

Skechers' reliance on extrinsic evidence fares no better. The Court cannot use a general purpose dictionary to change the meaning of "surrounding" as used in the specification. *See Lexington Luminance LLC v. Amazon.com Inc.*, 601 F. App'x 963, 970 (Fed. Cir. 2015) (holding that the district court erred by adopting a construction based on general-purpose dictionaries that is inconsistent with the intrinsic record). Other courts have rejected attempts like Skechers' to use general purpose dictionary definitions to read "on all sides" into "surrounding." For example, in *Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, 290 F. Supp. 2d 508, 521 (M.D. Pa. 2003), a court rejected an argument that "surrounding" requires bordering on all sides where the claims themselves did not include limiting language, such as "completely [surrounds]" or "entirely [surrounds]" and the WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Philip Babcock Gove ed., 1993) definition of "surrounding" was "not necessarily limited to circumstances in which a [] thing completely envelopes – separating entirely

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from the outside – an individual or item[,]" *e.g.*, "the house [was] surrounded on three sides by a wide veranda." *Id*.

Skechers also mischaracterizes the parties' meet–and–confer and statements made in prior litigations. ECF No. 56 at 4. First, Nike never stated or suggested in any of the parties' meet–and–confers that "on all sides" is consistent with the ordinary meaning of "surrounding." Second, the statements Skechers points to from the prior ITC investigation have nothing to do with whether "surrounding" necessarily means "on all sides." Nike's statements concerned a different party's attempt to construe a different term—"surrounding textile structure"—to include the word "edges." Nike explained it was improper to include the word "edges" in the construction where no "edges" exist between the "surrounding textile structure" and "textile element" prior to removal, *i.e.*, "[t]he 'surrounding textile structure' cannot 'abut and surround' 'edges' that don't exist until after the 'textile element' is removed." ECF No. 56–3 at 36; *see also* ECF No. 56–4 at 52:15–53:14 ("So adidas's construction doesn't make any sense. The surrounding textile structure can't abut and surround edges that don't exist until the element is removed and away from the structure."). Third, the statements Skechers points to in the '749 IPR proceedings are inapposite. As explained in the exhibits relied upon by Skechers, the alleged prior art reference has ***two*** textile structures – each one knitted to only one side of the textile element. *See* ECF No. 56–5 at 33 ("Zuckerman's blank 11 is not knitted with a *surrounding* textile structure, it is knitted with two separate textile structures – one on each side."); *see also* ECF No. 56–6 at ¶¶ 42–43.

C. "a flat knit textile element having: (1) flat knit edges free of surrounding textile structure such that the flat knit edges are not surrounded by textile structure from which the textile element must be removed"

Skechers improperly reads an "only" limitation into this disputed phrase, requiring that the "flat knit textile element" have "only" flat knit edges. Skechers does

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not explain why this phrase requires "only" flat knit edges in view of the plain language of the claims, its surrounding words, or any other portion of the intrinsic record.

Skechers' failure to apply any canon of claim construction should end this dispute. When construing phrases, the "analysis must begin and remain centered on the claim language itself, for that is the language the patentee has chosen to 'particularly point[ ] out and distinctly claim[ ] the subject matter which the patentee regards as his invention.'" *Source Vagabond Sys. Ltd. v. Hydrapak, Inc.*, 753 F.3d 1291, 1299 (Fed. Cir. 2014). Here, the claim language itself does not contain the word "only," nor does it contain any limitations that require the textile element to have "only" flat knit edges. *See* '511 patent, cl. 1 & 15; '781 patent, cl. 1. Likewise, the patentee during prosecution of the '781 patent explained that the phrase "flat knit edges" "have ***a finished edge*** that would be present in a finished article"—not "***only***" finished edges, as Skechers incorrectly suggests. ECF No. 55–7. The patentee's chosen language controls—not Skechers' chosen language developed in the context of litigation.

Skechers' reliance on statements from prior litigations does not warrant re–writing this disputed phrase to include the word "only." Skechers cherry–picks portions of various statements from prior litigations to incorrectly argue Nike and its experts are taking inconsistent positions in this case. For example, Skechers quotes Nike as saying: "In other words, there isn't any material around the edges of this flat knit textile element. It doesn't have to be cut out of anything." ECF No. 56 at 20. But Skechers does not include the rest of the quote:

> Well, what about adidas's construction? Well, they include this language that all the edges of the upper have to be formed from flat weft knitting and finished without cutting….We don't think there's any support in the intrinsic record for including this limitation….And, by the way, this language "all edges of the upper" isn't consistent with the claim language. The claim language nowhere – I mean, you can read it. It's right there. Nowhere does the claim language say that all of the edges of the upper are formed from flat weft knitting and finished without cutting.

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ECF No. 56–4 at 67:21–68:13.

Skechers also incorrectly points to a statement of Mr. Tonkel, Nike's expert in a prior case, that flat knit edges "are environmentally beneficial because they reduce the expense and waste associated with the extra material that must be removed from the textile element." *See, e.g.*, ECF No. 56–10 at ¶ 46. Mr. Tonkel's statement is accurate, but it does not support Skechers' addition of the word "only" to this disputed phrase. Mr. Tonkel did not state that reducing expense and waste is a zero–sum game requiring only flat–knit edges on all sides. *See id.*

Skechers' remaining argument that the Federal Circuit has held this disputed phrase requires "***only***" flat knit edges is also wrong. The Federal Circuit never held that none of the edges of the textile element can be removed, or cut, from a surrounding textile structure. *See Nike, Inc. v. Adidas AG*, 812 F.3d 1326, 1346–47 (Fed. Cir. 2016). The Federal Circuit held that "the scope of this claim is limited to a flat–knit, textile element where the flat knit edges have not been removed, or cut, from a surrounding textile structure." *Id*. at 1346. Nike does not dispute, and never has disputed, that flat knit edges must have a finished edge. As explained herein and in Nike's opening brief, Nike disputes Skechers' litigation–driven re–writing of this phrase to include a modifier that the patentee could have included but chose not to: the modifier "only."

D. "portion of the knitted component defining an upper"

Skechers incorrectly argues this non–technical phrase (i) precludes the use of non–knitted components and (ii) is limited to the example upper 120 shown in the example embodiments in the '562 and '636 patents. Skechers' hyper–technical and limiting interpretation of this phrase finds no support in the '562 or '636 intrinsic record.

For the first dispute, Skechers incorrectly argues "the intrinsic evidence makes clear that the claims do not cover uppers defined by a combination of knit and non–knit components." ECF No. 56 at 15. Skechers ignores that the specifications of the '562

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and ’636 patents expressly contemplate claimed uppers that include “a combination of knit and non–knit components.” Specifically, upper 120 is present in several figures illustrating “an exemplary embodiment of an article of footwear incorporating a knitted component including an upper and an integral knit tongue.” *See, e.g.,* ’562 and ’636 patents at Figures 1–4. In a direct comparison to conventional footwear uppers, the ’562 and ’636 patents explain that “a ***majority***” – not the entirety of – “upper 120 is formed from a knitted component[.]” *See, e.g.,*’636 patent at 6:57–63; ’562 patent at 6:54–59.

Skechers’ argument regarding the “importance of a one–piece construction” is also misplaced. ECF No. 56 at 15–16. For the ’562 patent, the claim language requires only that the “integral knit tongue” be of “unitary knit construction with the upper.” This is different than requiring each and every component be of “unitary knit construction,” as Skechers suggests. Nor would such a requirement make sense in view of the patents’ express acknowledgment that a portion of the upper need not be knit. *See, e.g.,*’636 patent at 6:57–63; ’562 patent at 6:54–59.

For the second dispute, Skechers improperly limits the meaning of “upper” to the example upper 120 described in the specifications of the ’562 and ’636 patents. Skechers reads in this limitation under a theory of specification disclaimer, which requires that the specification be “so clear as to show reasonable clarity and deliberateness, and so unmistakable as to be unambiguous evidence of disclaimer.” *See Openwave Sys., Inc.,* 808 F.3d at 513; ECF No. 56 at 16. No such disclaimer exists.

The intrinsic record expressly acknowledges that example upper 120 is just that – an example. Namely, the specification explains that the examples provided in Figures 1–4 (which contain upper 120) are “illustrated as having a general configuration suitable for running.” ’562 patent at 5:22–24; & ’636 patents at 5:26–27. However, “[t]he concepts may also be applied to footwear types that are generally considered to be non–athletic, including dress shoes, ***loafers, sandals***, and work boots.” ’562 patent at 5:28–

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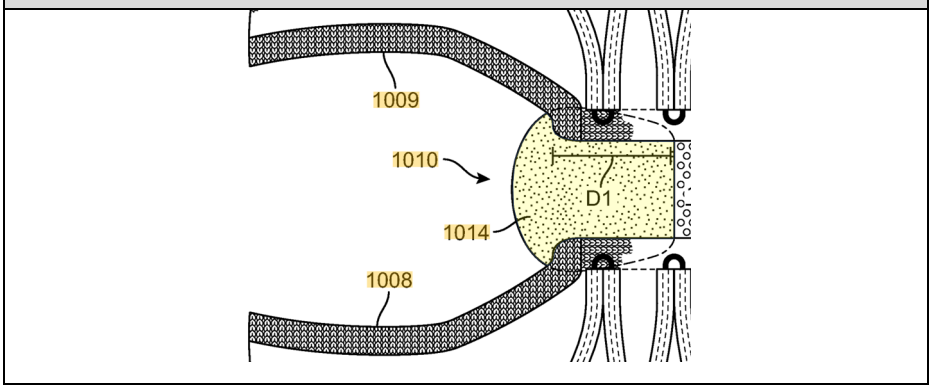
29; ’636 patents at 5:31–34 (emphasis added); *see also* ECF No. 56 at 23 (Skechers’ construction of the claimed phrase “article of footwear” as including “slippers”).

E. “ankle opening”

Skechers improperly reads a limitation into this disputed phrase requiring the edges of the upper to fully “encircle the ankle when a foot is fully inserted into the opening.” Skechers argues its proposed construction “comports with common sense and each and every embodiment in the specification.” ECF No. 56 at 11. But the very specification citations Skechers relies on contradict its proposed construction.

Skechers, for example, points to the following portion of the specification describing the embodiment shown in Figure 10: “The inner perimeter of third knitted component 1000 includes a lateral inner edge 1008 and a medial inner edge 1009 which may form an ankle opening.” ’562 patent at 12:31–33. But as Figure 10 makes clear, even if the heel seams are joined, the “edges of the upper” will not “encircle the ankle” because there is an opening in the area of “free portion 1014[,]” highlighted in yellow below:

Figure 10 (Annotated)



’562 & ’636 patents, Fig. 10. The same inconsistency between Skechers’ proposed construction can be seen in Figure 8. *Id.*, Fig. 8.

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Skechers' proposed construction also ignores that the specifications of the '562 and '636 patents are directed to "knitting a portion of the knitted component defining an upper," and do not recite any limitations requiring that the "knitted component" have, *e.g.*, its edges joined (*see, e.g.,* '562 patent, cl. 1; '636 patent, cl. 1), which is an additional limitation imposed by Skechers' proposed construction. ECF No. 56 at 11 ("encircling the ankle when a foot is fully inserted into the opening."). As Nike explained in its opening brief, this limitation is unsupported by the specifications which confirm that no such requirement exists. ECF No. 55 at 10–22.

F. "throat area"

Skechers improperly reads two limitations into this disputed phrase: (i) its improper construction of "ankle opening," and (ii) a limitation requiring that the throat area "extend[] from an ankle opening." ECF No. 56 at 12–13.

Skechers incorrectly argues its construction should be adopted because the patentee acted as a lexicographer and defined "throat area" to mean "an area of the upper that extends from an ankle opening over the instep to an area adjacent to the forefoot region." ECF No. 56 at 12. ("In light of this unambiguous description of throat area, Skechers has proposed exactly this definition as the proper construction of the term."). However, Skechers has not – and cannot – establish lexicography.

The "standard for lexicography is exacting." *Baxalta Inc. v. Genentech, Inc.*, 972 F.3d 1341, 1349 (Fed. Cir. 2020). For the patentee to redefine a phrase, they must "clearly express that intent in the written description" with "sufficient clarity to put one reasonably skilled in the art on notice that the inventor intended to redefine the claim term." *Merck & Co.,* 395 F.3d at 1370. Far from "clearly expressing" an intent to redefine the phrase "throat area," the portion of the specification Skechers relies upon unambiguously explains that it is providing an example of a throat area in specific, non–limiting embodiments. '562 Patent at 6:28–31 ("In ***some*** embodiments…."). And

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contrary to Skechers' representation, the majority of the references to a "throat area" in the specification do not describe its location in connection with an "ankle opening." *See, e.g.*,'562 patent at Abstract; 2:29–32; 2:39–67; 3:1–17; 9:49–59; 9:60–63; 11:41–45; 13:28–38; 13:39–42; 13:57–61; 14:8–18; 14:32–37; 15:21–24; 15:40–45; 15:46–49; 16:42–50; 16:59–17:1; 17:30–35; 23:26–35; 23:52–55. Thus, the specification itself confirms that the patentee did not act as a lexicographer and define "throat area" to mean "an area of the upper that extends from an ankle opening over the instep to an area adjacent to the forefoot region."

Skechers' proposed construction would also lead to non–sensical results. As Nike explained in its opening brief, adopting Skechers' proposed construction would result in claim 1 of the '636 patent requiring that the "integral knit tongue" be joined in an area that "extends from an ankle opening" (Skechers' construction) "to an ankle opening" (surrounding claim language). ECF No. 55 at 17.

G. "extending…toward the heel region"

Skechers improperly reads several limitations into this disputed phrase, including: (i) its improper construction of "ankle opening," discussed above, and (ii) an exclusion of extending in a certain direction, i.e., "in a diagonal or vertical orientation up towards the ankle opening of the article of footwear." ECF No. 56 at 21–22.

Skechers incorrectly argues the patentee disclaimed the full scope of this phrase during the prosecution of the '781 patent. As with other types of disclaimers, the standard for prosecution history disclaimer is "exacting, requiring clear and unequivocal evidence that the claimed invention includes or does not include a particular feature." *Cisco Sys. Inc. v. ITC,* 873 F.3d 1354,1361 (Fed. Cir. 2017). Here too, an "ambiguous disclaimer" will not "limit a claim term's ordinary meaning." *SanDisk Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1287 (Fed. Cir. 2005).

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Skechers fails to establish through clear and unequivocal evidence that Nike intended to limit the ordinary meaning of the phrase "extending … toward the heel region." Skechers' instead focuses on cherry–picked portions of sentences in the prosecution history and not the patentee's complete statements or the context behind any of these statements, including with respect to the specific prior art references, the plain claim language, or its surrounding words.

For example, Skechers argues the patentee distinguished Bellak and Holden because Bellak's "ribs 'extend along the lateral or medial side in a diagonal or vertical orientation up towards the ankle opening" and Holden's "ribs 'extend[] from the toe region or the bottom portion up towards the ankle opening." ECF No. 56 at 21. This argument ignores what the patentee actually said in the preceding statement: "Bellak and Holden describe footwear that either does not have longitudinal ribs or with ribs that do not terminate in one of the midfoot or the heel region." ECF No. 56–14 at 7.

As another example, Skechers removes portions of its citations that confirm that the patentee was not focused on the direction of the "ribs,"[1] but rather where the "ribs" terminated. Skechers excluded the following portion in red from its quotation in its opening claim brief: "Accordingly, as shown in Figure 4 of Holden (reproduced below), the rib stitches in Holden extend through the entire footwear, extending from the toe region or the bottom portion up towards the ankle opening." ECF No. 56–14 at 8.

Finally, for the reasons Nike explained in its opening brief, Skechers' construction is also inconsistent with the specification. ECF No. 55 at 12–13. For example, Skechers' interpretation would read out Figure 10 of '781 patent, which depicts ribs that would extend in a diagonal orientation when the heel edges are secured to each other. *See* '781 patent, Fig. 10.

[1] The patentee did not refer to the structures in Bellak and Holden as ribs, but as "bands and hollows" and "rib stitches," respectively.

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H. "knitting an integral knit tongue that is of unitary knit construction with the upper with the knitting machine, the integral knit tongue extending through a throat area of the knitted component"

Skechers improperly reads two limitations into this disputed phrase, including (i) Skechers' improper constructions of "throat area" and "ankle opening," as discussed above, and (ii) the limitation that an "integral knit tongue" is formed as a "one–piece element with ***the rest of*** the upper." ECF No. 56 at 13–14.

Skechers incorrectly argues the specification requires the Court to read the "throat area," "ankle opening," and "*rest of* the upper" limitations into this disputed claim phrase because, it argues, the disputed phrase allegedly "lacks sufficient clarity[.]" ECF No. 56 at 13. But "courts do not rewrite claims; instead, [courts] give effect to the terms chosen by the patentee." *Oplus Techs., Ltd. v. Vizio, Inc.*, No. 2:12–CV–05707, 2012 WL 5519198, at *1 (C.D. Cal. Oct. 31, 2012).

Tellingly, Skechers brief is devoid of any explanation as to how this phrase supposedly "lacks sufficient clarity"—Skechers does not raise issues with the scope or meaning of any of the words in this disputed phrase. Instead, Skechers asks the Court to "clarify" two phrases within the disputed phrase: (i) "unitary knit construction with the upper," and (ii) "extending through a throat area of a knitted component." As to (i), the parties agreed on a construction for "unitary knit construction", therefore the term Skechers is actually construing is "with the upper." But the words "with the upper"[2] are not technical words that require further clarification. *See, e.g.*, *Wilson Sporting Goods v. Monsta Athletics, LLC*, No. 5:19–CV–00738, 2020 WL 5835321, at *4 (C.D. Cal.

[2] Skechers' construction re-writes this portion of the disputed phrase to require that the "integral knit tongue" be of unitary knit construction with the entire, or "rest of," the upper. As Nike explained in its opening brief, this is inconsistent with the claim language and the specification, which contains no express requirement that the knitted component defining the upper must include the entire, or "rest of," the upper. ECF No. 55 at 21–22.

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Sept. 24, 2020). As to (ii), Skechers' similarly fails to explain why a POSITA would need "clarity" to understand this phrase.

Skechers' proposed construction also ignores the surrounding claim language, making a clearly recited claim confusing. For example, Skechers' proposed construction replaces "integral knit tongue" with "tongue" and omits "knitted component" altogether.[3] Skechers further concedes that its proposed construction imports language from its improper construction of "throat area," as discussed above. But the term "throat area" likewise appears three times in the third limitation of claim 1. Further, Skechers' construction of the second limitation would require the "tongue" to "extend[] … to an ankle opening," while the third limitation clearly recites how the "integral knit tongue" is joined by knitting to "at least along a portion of both of a lateral side and a medial side of the knitted component extending through a portion of the length of the throat area in a longitudinal direction from the forward portion to an ankle opening of the upper." Skechers' proposed construction of this 31–word phrase would thus render the claim unintelligible and confusing. *Oplus Techs.*, 2012 WL 5519198, at *1 ("The focus of the courts in recent years has been to analyze either *a single word* or at most a *short phrase*" [..] "[i]ndeed, construing 50–word phrases heightens the risk of a Court rewriting claims.") (emphasis in original) (citations omitted).

Skechers' sole support for its proposed construction relies on non–limiting exemplary embodiments of the specification while ignoring other embodiments of the specification that contradict its construction. For example, Skechers cites the '562 Patent at 9:34–38 and at 2:43–49 as being consistent with part (2) of Skechers proposed construction "extending through a throat area of a knitted component." Skechers,

[3] Skechers is inconsistent with whether "integral knit tongue" means "tongue" or "throat area between overhanging portions of the upper or adjacent to one or more raised elements" as discussed in Section II.J.

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however, omits the rest of the citation. Specifically, Skechers ignores terms which indicate their construction is *not required*.

> ***In some embodiments***, integral knit tongue 512 ***may*** be centrally–located in throat area 520 of first knitted component 500 and ***may*** extend from an ankle opening in a heel region over an area corresponding to an instep of the foot to an area adjacent to a forefoot region, as well as extending between a lateral side and a medial side of first knitted component.

'562 Patent at 9:34–39 (emphasis added).

> ***In one aspect***, . . . the integral knit tongue extending through a throat area of the knitted component; and wherein the integral knit tongue is joined by knitting with the knitting machine to a forward portion of the throat area and at least along a portion of a lateral side and a medial side of the throat area of the knitted component extending from the forward portion to an ankle opening of the upper.

Id. at 2:35–49 (emphasis added).

Here, the patentee did not state any intention for the claims and embodiments in specification to be strictly coextensive. *See Zadro Prod., Inc. v. Feit Elec. Co.*, No. SA-CV-20101, 2021 WL 144247, at *2 (C.D. Cal. Jan. 6, 2021) (citing *JVW Enters., Inc. v. Interact Accessories, Inc.,* 424 F.3d 1324, 1335 (Fed. Cir. 2005) (internal citations omitted)); *Phillips v. AWH Corp*., 415 F.3d 1303, 1323 (Fed. Cir. 2005) (en banc) ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments."). Therefore, Skechers cannot justify its request to import limitations into claims from examples or embodiments appearing only in the written description. *Id.*

I. "raised element"[4]

Skechers improperly reads a limitation into this disputed phrase requiring that the

[4] Skechers incorporates its construction of "raised element" into its construction of "integral knit tongue" for both the '562 and '636 patent. This is improper for the reasons

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"raised element" is limited to a "flap or overhanging portion" that extends "along the length of the side of the tongue." ECF No. 56 at 5–11.

Skechers incorrectly argues the Court should import its proposed limitations into this disputed phrase because the patentee acted as a lexicographer and "implicitly defined" this phrase to mean "a flap or overhanging portion that extends outward away from the surface of the upper and along the length of the side of the tongue." *See* ECF No. 56 at 11. However, Skechers has not – and cannot – establish lexicography.

Skechers concedes the applicant did not provide an explicit intent to redefine "raised element" by its repeated reference to a purported "implicit" definition. *See, e.g.*, ECF No. 56 at 11. Instead, Skechers attempts to show lexicography "by implication." *See, id.*, 7.

Skechers' own caselaw establishes it cannot meet the "exacting" standard required for providing lexicography because the specification contemplates a meaning for "raised element" that contradicts Skechers' narrow, litigation–driven construction. *See Baxalta Inc.*, 972 F.3d at 1349; *Merck & Co., Inc.*, 395 F.3d at 1370. Specifically, in *Bell Atlantic Network Services, Inc. v. Covad Commc'ns Group, Inc.*, the court refused to read a limitation into the phrase "selectively changing" that would require that the change only occur during a communication session where "the patent clearly contemplates the possibility of selectively changing the transmission mode or rate at times other than during a communication session." 262 F.3d 1258, 1278 (Fed. Cir. 2001). Because of this alternative possibility, the Court explained, "the specification does not define the limitation, either expressly or by implication, as a change made only during a communication session." *Id.*

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discussed herein, including because the plain language of the independent claims of the '562 patent – unlike the '636 patent – do not recite a "raised element." *See, e.g.*, '562 patent, cl. 1.

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As in *Bell Atlantic*, the '636 patent clearly contemplates the possibility that a "raised element" is neither a "flap" nor an "overhanging portion," and may be located in areas other than "along the length of the side of the tongue." For example, the '636 patent states that "[r]aised elements ***may*** be a portion of integral knit tongue 512 that are formed through the knitting process to be a flap or overhanging portion of integral knit tongue 512" – ***not*** that "raised elements" must be a flap or overhanging portion. *See, e.g.*, '636 patent, 10:1–8. As a further example, the '636 patent states that "[i]n ***some*** embodiments, integral knit tongue 512 ***may include raised elements*** disposed on opposite sides of throat area 520 and ***extending along the length of integral knit tongue***[.]" *Id.* Far from a clear expression of intent to redefine the term "raised element" to include Skechers' limitations, the patentees' choice of words here introduce possibilities – not limitations.

The plain language of the claims of the '636 patent also show why Skechers' proposed construction is improper. For example, while claim 1 of the '636 patent requires that the "raised element" "extend[] a height above the exterior surface of the knitted component," it contains no requirement that it must also extend "along the length of the side of the tongue[,]" as Skechers' suggests.

J. "integral knit tongue"

Skechers improperly reads two limitations into this disputed phrase: (i) that an "integral knit tongue" must include "overhanging portions of the upper," and (ii) that an "integral knit tongue" must include "one or more raised elements, where a raised element is a flap or overhanging portion that extends outward away from the surface of the upper and along the length of the side of the tongue." ECF No. 56 at 5–11.

Skechers incorrectly argues the specification requires the Court to read these limitations into the claims. But there is no support for the proposition that an "integral knit tongue" must have "overhanging portions of the upper" or "one or more raised

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elements, where a raised element is a flap or overhanging portion that extends outward away from the surface of the upper and along the length of the side of the tongue." For example, Skechers argues the patentee used the term "integral knit tongue" in a manner consistent only with its proposed construction throughout the entire patent. ECF No. 56 at 7–8. But the specifications state that "***[i]n some embodiments***, integral knit tongue 512 ***may include raised elements***" and that such "raised elements" "***may*** be a portion of integral knit tongue 512 that are formed through the knitting process to ***be a flap or overhanging portion***." '562 patent, 9:60–66; '636 patent, 10:1–8 (emphasis added). And the specifications of the '636 and '562 patents explain that "raised elements" are not required. '562 patent, 11:45–47; '636 patent, 11:58–60 ("In an exemplary embodiment, integral tongue 812 of second knitted component 800 does not include raised elements."). Accordingly, Skechers cannot – as a matter of law – show that the phrase "integral knit tongue" requires the additional limitations in its construction.

Nor would it make sense to hold otherwise. When construing claim phrases, the "analysis must begin and remain centered on the claim language itself, for that is the language the patentee has chosen to 'particularly point[ ] out and distinctly claim[ ] the subject matter which the patentee regards as his invention.'" *Source Vagabond Sys.*, 753 F.3d at 1299. Here, Skechers asks the Court to read in the "raised element" limitation into the independent claims of the '562 patent, which does not use the phrase "raised element" once. Moreover, reading in the "raised element" limitation into the phrase "integral knit tongue" would render the phrase "raised element" elsewhere in the independent claims of the '636 patent superfluous, as shown below.

> 1. An article of footwear having an upper and a sole structure secured to the upper, the article of footwear incorporating a knitted component comprising:
>
> a portion of the knitted component defining the upper, the upper including a portion of at least one of an exterior surface of the knitted

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component and an opposite interior surface of the knitted component, the interior surface defining a void for receiving a foot; and

[[a] throat area between overhanging portions of the upper or adjacent to one or more raised elements, where a raised element is a flap or overhanging portion that extends outward away from the surface of the upper and along the length of the side of the tongue] formed with the upper and extending through a throat area of the knitted component; and

~~at least one raised element extending a height above the exterior surface of the knitted component,~~

wherein the [throat area between overhanging portions of the upper or adjacent to one or more raised elements, where a raised element is a flap or overhanging portion that extends outward away from the surface of the upper and along the length of the side of the tongue] is joined to a forward portion of the throat area and at least along a portion of a lateral side and a medial side of the throat area of the knitted component extending from the forward portion to an ankle opening of the upper.

Skechers also incorrectly argues that the phrase "integrally knit tongue" must be construed because it has "no ordinary and customary meaning in the footwear field." But Skechers concedes that the word "tongue" has an "ordinary and customary meaning" by using this word both in this construction and in its construction of the phrase "knitting an integral knit tongue that is of unitary knit construction with the upper with the knitting machine[…], the integral knit tongue extending through a throat area of the knitted component[.]" As such, Skechers is asserting that the phrase "integral knit" is either a technical term or modifies the word "tongue" in such a way that requires construction. Neither is correct.

To the extent "integral knit" modifies the word "tongue," it does not do so in the way that Skechers suggests. As Nike explained in its opening brief, a skilled artisan would readily ascertain that the ordinary meaning of the phrase "integral knit" as used in the '562 or '636 patents relates to how a "tongue" is affixed – not what additional,

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extraneous features the "tongue" may have. *See, e.g.*, '562 patent, 9:53–54 ("integral knit tongue 512 is joined through knitting to upper 502[.]"); *see Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363,1372 (Fed. Cir. 2003) (construing "boot selection flag" by applying the ordinary meanings of "boot" and "selection" as "descriptive modifiers of 'flag.'"); ECF No. 55 at 17–20.

III. CONCLUSION

For the foregoing reasons, and the reasons Nike provided in its opening brief, Nike respectfully asks the Court to resolve the parties' claim construction disputes by rejecting Skechers' improper constructions, "giv[ing] effect to the terms chosen by the patentee," *Helmsderfer v. Bobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1383 (Fed. Cir. 2008), and giving each disputed phrase its ordinary and customary meaning, which requires no further construction.

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Dated: June 7, 2024 ARNOLD & PORTER KAYE SCHOLER LLP

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2024, I electronically transmitted the foregoing document using the CM/ECF system for filing, which will transmit the document electronically to all registered participants as identified on the Notice of Electronic filing, and paper copies have been served on those indicated as non–registered participants.

/s/ Timothy Haugh
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CERTIFICATE OF COMPLIANCE

Pursuant to the Standing Order (ECF No. 18), Judge Birotte's Individual Practices, and LR 11–6.1, the undersigned, counsel of record for Nike, Inc. ("Nike"), certifies that Nike's Responsive Claim Construction brief does not exceed 25 pages, excluding the caption, table of contents, table of authorities, and the signature block.

/s/ Bridgette C. Gershoni
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