The Requester's argument that "[t]his touching is considered a 'positive engagement' due to the deformation that occurs when the loads are increased" (Resp. Br. 7) is also not persuasive. While the sole 3 and the rubber pins 8 may deform upon application of a load, the sole 3 is planar in its construction and does not include any structural features that interact with the rubber pins 8 in a manner that can reasonably be characterized as "positive engagement," as that term is used in the context of the '866 patent. Any indention formed on the sole 3 is merely the elastic compression thereof and while the frictional engagement between the sole 3 and the rubber pins 8 can be characterized as having been increased by such elastic compression, such engagement cannot be reasonably be characterized as positive engagement between the rubber pins 8 and the sole in view of the specification of the '866 patent.

In view of the above, we do not sustain the Examiner's anticipation rejection of dependent claim 8 based on Okabe.

Dependent Claim 11

The Patent Owner argues that the rejection of claim 11 as anticipated by Okabe is erroneous because Okabe fails to disclose the recited "resilient member compris[ing] a profile like hollow element that contains a tubular part." (Rebuttal Br. 11). The Examiner asserts that "Fig. 1 [of Okabe] shows that each cavity has a hollow cross section and is formed as a tube." (RAN 22).

We disagree with the Examiner. It is not apparent to us how Okabe discloses a cavity having "formed as a tube." Whereas the Examiner refers

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to Figure 1 of Okabe as disclosing the claim limitation, we observe that Figure 1 is merely a cross-sectional view (FF 2A) and the general shape of the cavity is shown in Figure 2 which must be considered in conjunction with Figure 1 to understand the shape of the cavity. Figure 2 of Okabe and the discussion in Okabe regarding the same makes clear that the cavities have a planar shape as shown in Figure 2 (FF 2A, 2G), and not "as a tube" as asserted by the Examiner. Thus, the Examiner's anticipation rejection of dependent claim 11 based on Okabe is also reversed.

Rejection of claims 1, 2 and 8-10 as Anticipated by Szentes

The Examiner rejected claims 1, 2 and 8-10 under 35 U.S.C. § 102(b) as anticipated by Szentes (RAN 12).

Findings of Fact Regarding Szentes

3. A. Szentes discloses a sole of a footwear (Abst.). Figure 2 of Szentes is reproduced below.

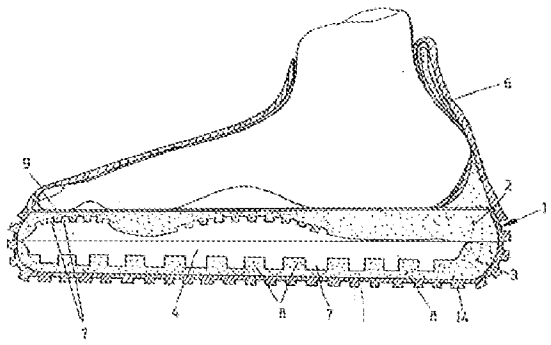


Fig. 2

Figure 2 of Szentes is a cross-sectional view of one embodiment of sole 1 having a liquid filled cavity 4 between an upper layer 2 with notches 7, and a lower layer 3 with notches 7 and

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ribs 8 (pg. 10, ll. 18-35; Fig. 2). Szentes discloses that when the "footwear is loaded by the weight of the user, the upper part 2 moves toward the lower layer 3" and the toe and heel portions of the upper part "bears up against the lower layer 3." (Pg. 9, ll. 30-35).

B. As to the ribs and notches, Szentes states "[i]n accordance with the invention, a further embodiment of the footwear can be characterized in that the ribs formed on one of the soles of the footwear are realized so as to fit into the notches." (Pg. 7, ll. 32-35).

C. In discussing a prior art sole having a hollow cavity filled with a liquid, Szentes states "[t]he drawback of said solution lies in that walking becomes instable." (Pg. 3, ll. 30-31).

D. With respect to prior art soles, Szentes also states:

> Another deficiency lies in, in so far as surfacial parts of the two layers facing each other are sliding easily on one another on effect of sliding force components, as a consequence, the person using the footwear has the sense of uncertainty. Connection between the two layers having been fixed to each other gets torn after a short use, as the two layers lying on each other, sliding frequently and relatively to a large extent, are subjected to considerable load, as a consequence glued material parts get torn apart.
> (Pg. 5, ll. 19-28).

E. Szentes also states with respect to Figure 2, "[i]f along the periphery of the upper layer 2 and the lower layer 3 reinforcement, connection of the sole 1 of the footwear tore, cracked, slip may occur." (Pg. 10, ll. 29-32).

F. With regard to Figure 2, Szentes states "[o]ne of the tasks lies in to prevent sliding of the two layers on one another, when the upper

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layer 2 is lying onto the lower layer 3 in the loaded state, under the effect of the force component transferred by the foot from the upper layer 2, being parallel with the longitudinal direction or cross-direction of the shoe." (Pg. 10, ll. 23-29).

G. Szentes further states that one aim of the invention is that "the person wearing the shoe should always feel the stable support for the foot." (Pg. 6, ll. 14-19).

H. In its discussion of various prior art, Szentes states that a sole disclosed in U.S. Patent No. 4,445,284 which includes elongated cells is deficient in that "wearing results in an unsure and wobbling walk." (Pg. 3, l. 33-pg. 4, l. 3).

Analysis

The Examiner finds that the "inner surfaces of the upper and lower portions [of Szentes] are engaged to prevent relative motion in the longitudinal direction between the portions." (RAN 13). In addition, the Examiner finds that the "engagement of the inner surfaces creates a positive engagement" as recited in dependent claim 8 (RAN 13).

The Patent Owner argues that Szentes does not teach a first configuration of absorbing loads by relative motion in the longitudinal direction and that Szentes "teaches away from allowing any slippage in the longitudinal direction" by its provision of ribs and notches (App. Br. 12, 13). The Patent Owner further argues that the embodiment of Figure 3 of Szentes shows that no relative movement between the upper and lower layers is

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contemplated because of the profile of the footbed suggests alignment of the layers (App. Br. 14).

We are not persuaded by the Patent Owner's arguments. The Patent Owner's argument that Szentes does not teach the first configuration of absorbing loads by relative motion is unpersuasive because it is this very relative motion that the provided notches and ribs of Szentes are designed to address when the shoe is in its loaded state (FF 3A-3C, 3F, 3G). If there is no relative motion between the upper and lower layers, there would be no reason to provide such notches and ribs. In this regard, the Patent Owner ignores the fact that the two layers of Szentes do not contact each other until the wearer's weight is applied to the sole (FF 3A, 3F).

While Szentes teaches the general undesirability of relative movement between the upper layer and the lower layer because such movement can result in the glued material parts tearing, such tearing is described in the context of when layers of the sole "are subjected to considerable load," that is, when the shoe is in the loaded state (FF 3D). Szentes provides the notches and ribs for prevention of relative motion between the layers when the sole is bearing weight of the wearer, not when it is in an unloaded state.

The Patent Owner's argument that the embodiment of Figure 3 of Szentes shows that no relative movement between the upper and lower layers is contemplated (App. Br. 14) ignores the fact that Figure 3 is merely one embodiment and other embodiments, including that shown in Figure 2, do not include such a profile for the footbed (*see* Szentes, Figs. 1, 2, 4). We also observe that in the embodiment of Figure 3, a clamping band (not enumerated) surrounds the periphery of the sole which may impact the

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ability of the layers to move relative to each other (*see, e.g.*, Szentes, pg. 8, l. 3-pg. 9, l. 2; Fig. 3). Such clamping band is not present in Figure 2.

In view of the above, the Examiner's anticipation rejection of independent claims 1 and 9 is sustained. In addition, with the exception of dependent claim 8 which is addressed below, the Patent Owner does not present separate arguments with respect to the other claims rejected based on Szentes. Thus, the Examiner's anticipation rejection of dependent claims 2-5 and 10 over Szentes are sustained as well.

Claim 8

The Patent Owner separately argues that Szentes merely discloses frictional engagement and does not disclose positive engagement as recited by dependent claim 8 because the notches are filled with fluid, the ribs differ in size compared to the notches, and because the notches are only provided under the toes and the arch portions of the sole (App. Br. 14-15).

None of these arguments are persuasive. Fluid is displaceable. The fact that ribs and notches differ in size does not preclude these structural features from interacting to positively engage each other. Whereas the recitation of a positive engagement requires interaction between structural features as discussed *supra*, nothing in the claims requires a specific structure (e.g., same sized ribs and notches). Furthermore, Szentes itself characterizes the ribs as fitting into the notches (FF 3B). Moreover, the disclosure of notches only under the toes and arch does not preclude these structures from providing positive engagement between the upper and lower

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layers. Therefore, we sustain the Examiner's anticipation rejection of claim 8 based on Szentes.

Rejection of Claims 1-11 as Obvious Over Pagani in View of Szentes

The Examiner rejected claims 1-11 as obvious over the combination of Pagani and Szentes (RAN 14, 22).

Findings of Fact Regarding Pagani

4. A. Pagani discloses a sole tread of a footwear (Abst.). Figure 2 of Pagani is reproduced below.

Fig. 2

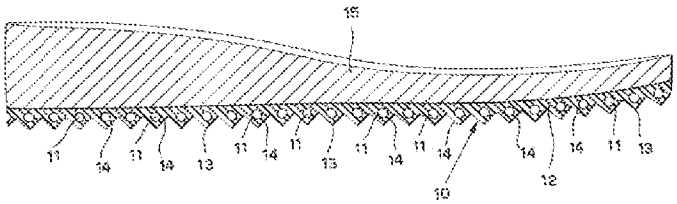


Figure 2 of Pagani reproduced above is a longitudinal cross sectional view of a sole tread 10 having a plurality of through-channels 11 (pg. 1, ll. 47-60; Fig. 2).

B. Pagani teaches that the sole tread "is made from a preferably compressibly resilient polymeric material such as rubber or [] synthetic plastics." (Pg. 1, ll. 8-15).

C. Pagani states that the "closed channels are advantageously holes extending throughout the lengths of the ridges, e.g. from one edge of the sole to the other and provide an array of air-chambers which

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improve the softness of the sole and its adherence to the ground." (pg. 1, ll. 47-60).

D. Pagani states "[t]he channels 11 make the sole tread especially resiliently yieldable, so that the footwear article to which it is applied is very comfortable in use and the triangular embossments 12 tend to yield under the wearer's weight so as to bring their sloping walls in frictional contact with the ground, thus further improving the already good adherence of the sole to the ground." (Pg. 1, ll. 67-75).

5. The Declaration of Mr. Frederick dated May 25, 2010 states:

> Pagani does not explicitly disclose that the inner surface of the upper portion of the channels 11 are engaged with the inner surface of the lower portion of the channels 11 due to absorbed shoe loads in the second configuration. In my opinion, a shoe could undergo very large loads depending on the weight of the user and the type of activity. Since Pagani discloses that the "[t]he channels 11 make the sole tread especially resiliently yieldable" and "the triangular embossments 12 tend to yield under the wearer's weight so as to bring their sloping walls 14 in frictional contact with the ground," it necessarily follows that the structure of the tread 10 is capable of undergoing a complete collapse of at least one of the channels 11 of the tread 10 such that an inner surface of the upper portion of a given channel 11 is engaged with the inner surface of the lower portion of the given channel due to absorbed shoe loads when the absorbed shoe loads are sufficiently large.
> (¶ 83).

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Analysis

The Examiner finds that the resilient members (channels 11) of Pagani have a first configuration where the upper and lower portions of the channels 11 are spaced from each other, and "inherently has a second configuration when a load is absorbed by the resilient member where the inner surfaces of the upper and lower portions move toward one another." (RAN 14). The Examiner also finds that Szentes teaches that such channels "results in an unsure and wobbling walk," citing the prior art discussion in Szentes regarding U.S. Patent No. 4,445,284, which discloses a sole with elongated cells, and finds that Szentes solves the problem by preventing sliding through engagement between the upper and lower portions (RAN 14-15, 29; FF 3H). The Examiner concludes that it would have been obvious to "modify the outsole of Pagani so that the inner surfaces of the channels contact each other upon application of a load oblique to the perpendicular direction, as taught by Szentes, in order to provide a shoe that feels stable when walking or running." (Ans. 15).

The Requester agrees with the Examiner and argues that it would have been obvious to one of ordinary skill in the art "to apply the solution disclosed in Szentes to the outsoles of Pagani" and one of ordinary skill in the art would have known how to modify a resilient member in the form of an open channel structure based on a resilient member in the form of a single enclosed space in the sole, referring to the Declaration of Mr. Frederick in support (Resp. Br. 9; *see also* Decl. of Mr. Frederick ¶¶ 75-91).

The Patent Owner argues, *inter alia*, that Pagani fails to disclose the second configuration because the sole is "especially resiliently yieldable,"

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which would result in relative motion during push off and that Pagani relies on this relative motion for adherence and comfort, whereas Szentes teaches away from any relative motion (App. Br. 15-16). The Patent Owner further argues that because Pagani describes multiple through-channels 11 whereas Szentes relies on one fluid-filled cavity 4, "it is unclear precisely how and why - without the benefit of hindsight reasoning - one of ordinary skill in the art would combine these references to arrive at the Patent Owner's claims." (App. Br. 16).

We agree with the Patent Owner's contention that impermissible hindsight is being applied by the Examiner. In our view, a fair reading of Szentes suggests not using a plurality of small channels such as that disclosed in Pagani, because Szentes disparages such a configuration (FF 3H). In this regard, rather than modifying the plurality of small channels in the sole of the prior art, Szentes suggests using a single, large cavity in all of the different embodiments disclosed.

In addition, it is also evident that in order for the invention of Szentes to work, there must be contact between the upper and lower layers. While we agree with the Examiner that the inner surfaces of the upper and lower portions of Pagani will move toward one another when a load is absorbed, Pagani is silent as to any contact between the inner surfaces of the upper and lower portions, nor does Pagani discuss the extent of this movement. This silence is factually problematic, especially considering the small size and distribution of the channels along the sole (FF 4A, 4C). It is not apparent to us that channels of Pagani would necessarily be compressed to the extent wherein the upper and lower portions are "engaged" as recited in claim 1.

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Whereas the Requester relies on the Declaration of Mr. Frederick (FF 5), the particular statement relied upon is unpersuasive because it is conclusory and unsubstantiated by persuasive objective evidence. In particular, we are not persuaded that the disclosure in Pagani that the channels make the sole tread especially resiliently yieldable and that the triangular embossments yield establishes that "the structure of the tread 10 is capable of undergoing a complete collapse of at least one of the channels 11 of the thread" as asserted by the declarant (*id.*). This opinion appears to be based on application of shoe loads that are "sufficiently large." (FF 4). However, the mere fact that the claims are silent as to the amount of the applied load does not mean that there is no implied limitation as to the amount of load considering the subject matter of the claims and the prior art are soles of shoes. Even the most rigid structures can "completely collapse" if the loads are "sufficiently large."

Furthermore, it is not apparent why one of ordinary skill would apply the teachings of notches and ribs as applied to a large, singular cavity as taught in Szentes, to small channels shown in Pagani which is very different from the cavity disclosed in Szentes (*compare* FF 3A *with* FF 4A). Hence, we find merit in the Patent Owner's argument that the Examiner appears to be engaging in hindsight reasoning to arrive at the Patent Owner's claims.

Thus, in view of the above considerations, whereas the Examiner has articulated a reason for modifying the sole of Pagani, and in view of the preponderance of the evidence before us, our impression is that the reason is based in impermissible hindsight. Correspondingly, the Examiner's rejection of claims 1-11 as obvious over the combination of Pagani and Szentes is not

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sustained. The additional arguments such as those directed to dependent claim 8 are moot.

Rejection of Claims 1-11 as Obvious Over Takahashi in View of Szentes

The Examiner rejected claims 1-11 under 35 U.S.C. § 103(a) as being unpatentable over Takahashi in view of Szentes (RAN 17, 23).

Findings of Fact Regarding Takahashi

6. Takahashi discloses a shoe sole (pg. 1, ¶ 1). Figure 1 of Takahashi is reproduced below.

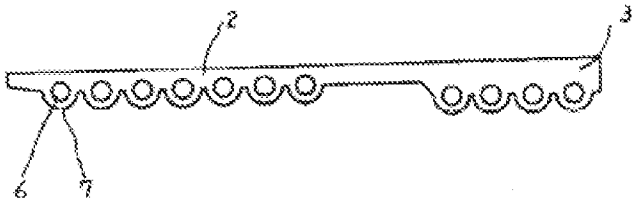


Figure 1 of Takahashi reproduced above shows a side view of an embodiment of shoe sole 1 including a plurality of ridge bodies 7 containing passage holes 6 (pg. 1, ¶ 3; pg. 2, ¶ 2; Fig. 1).

Analysis

The Examiner's rejection of the claims based on the combination of Takahashi and Szentes, and the arguments proffered by the Patent Owner and the Requester are substantively similar to the obviousness rejection based on the combination of Pagani and Szentes discussed *supra* (*see* RAN 17-19, 23; App. Br. 17-19; Resp. Br. 9-10; Decl. of Mr. Frederick, ¶¶ 92-

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107). The disclosure of Takahashi is substantively similar to that of Pagani (*compare* FF 4A *with* FF 6).

Therefore, for substantively the same reasons already discussed with respect to the obviousness rejection based on the combination of Pagani and Szentes, we likewise conclude that the Examiner's obviousness rejection of claims 1-11 based on the combination of Takahashi and Szentes is based on impermissible hindsight, and is not sustained.

Rejection of Claims 1-11 as Obvious Over Inohara in View of Szentes

The Examiner rejected claims 1-11 under 35 U.S.C. § 103(a) as being unpatentable over Inohara in view of Szentes (RAN 19, 23).

Findings of Fact Regarding Inohara

7. Inohara discloses a shoe sole (Abstract). Figure 13 of Inohara is reproduced below.

FIG. 13

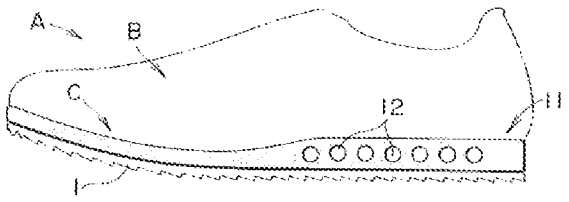


Figure 13 of Inohara reproduced above shows a side view of an embodiment of a shoe having an interlayer body 11 with a plurality of apertures 12 (col. 2, ll. 24-26; col. 5, ll. 16-24; Fig. 13).

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Analysis

The Examiner's rejection of the claims based on the combination of Inohara and Szentes, and the arguments proffered by the Patent Owner and the Requester are also substantively similar to the obviousness rejection based on the combination of Pagani and Szentes discussed *supra* (*see* RAN 19-21, 23; App. Br. 17-19; Resp. Br. 10; Decl. of Mr. Frederick, ¶¶ 108-121). The disclosure of Inohara is substantively similar to that of Pagani (*compare* FF 4A *with* FF 7).

Therefore, for substantively the same reasons already discussed with respect to the obviousness rejection based on the combination of Pagani and Szentes, we likewise conclude that the Examiner's obviousness rejection of claims 1-11 based on the combination of Inohara and Szentes is based on impermissible hindsight, and is not sustained.

Declarations

The Patent Owner argues that the declarations of Mssrs. Bernhard, Corigliano and Sage were not given proper weight in favor of non-obviousness of the claimed invention (App. Br. 29; Rebuttal Br. 5-8). The Examiner states that the declarations relied upon by the Patent Owner are insufficient to overcome the obviousness rejections because "there is no showing that the objective evidence of nonobviousness is commensurate in scope with the claims (RAN 24). The Requester agrees (Resp. Br. 11-13).

This issue is moot because the obviousness rejections are not sustained as discussed *supra*. As to the Examiner's rejections of the various claims under 35 U.S.C. § 102(b) which have been sustained, the declarations

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which attest to the superior results attained by certain commercially implemented shoes are not pertinent. *In re Wiggins*, 488 F.2d 538, 543 (CCPA 1973).

ORDERS

1. A. Rejection of claims 1-5, 9 and 10 as anticipated by Okabe is AFFIRMED.

   B. Rejection of claims 8 and 11 as anticipated by Okabe is REVERSED.
2. Rejection of claims 1, 2 and 8-10 as anticipated by Szentes is AFFIRMED.
3. Rejection of claims 1-11 as obvious over Pagani in view of Szentes is REVERSED.
4. Rejection of claims 1-11 as obvious over Takahashi in view of Szentes is REVERSED.
5. Rejection of claims 1-11 as obvious over Inohara in view of Szentes is REVERSED.
6. Rejection of claim 11 under 35 U.S.C. § 112, second paragraph, as being indefinite is REVERSED.

Requests for extensions of time in this *inter partes* reexamination proceeding are governed by 37 C.F.R. §§ 1.956 and 41.77(g).

AFFIRMED-IN-PART

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cu

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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adidas AG
Petitioner

v.

NIKE, Inc.
Patent Owner

Case IPR2013-00067
Patent 7,347,011 B2

DECLARATION OF RAYMOND F. TONKEL

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I. BACKGROUND INFORMATION

A. Qualifications and Experience

1. My professional background and qualifications are set forth in my Curriculum Vitae, a copy of which is attached. I provide a summary of my background and qualifications below.

2. I have over thirty years of experience in the athletic and casual footwear industries. I have been directly involved with the conception, design and development of more than 500 new footwear products and have supervised the design and development of upwards of a thousand new footwear products. My experience includes direct participation in all aspects of the shoemaking process, including coming up with new product concepts, design, development, commercialization and manufacturing. My experience also includes the choice of materials, constructions and processes.

3. I am currently a partner in U-Turn Sports, Co., LLC, a company I helped establish to conceptualize and develop proprietary inventions for the footwear and related sports industries. I am also currently President of LEXZ9, Inc., a company that provides creative footwear solutions through innovative product design, research and development. Our clients have included numerous well-known companies who design and develop footwear, including Reebok, Keds, Teva, K-Swiss Clarks, Columbia Sportswear and Timberland.

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4. I previously worked as the Managing Director of Footwear Design at Reebok International from 1993-1998. My work at Reebok included supervising the design process for the complete range of Reebok footwear. I managed a group of over 45 designers, color and trend specialists as well as design support groups. I personally designed Reebok's first DMX technology footwear, and this footwear was Reebok's number one volume technology product in 1995 and 1996. In 1996, I received the Reebok Presidential Achievement Award.

5. I also worked at Rockport Corporation from 1991-1993, where I was Vice President, Design and Advanced Concepts. I was responsible for managing line direction, design and development of the complete range of Rockport footwear from conceptual design to final product. I also worked at Adidas USA from 1988-1990, where I was Vice President of Footwear Design and Development, and I was responsible for the complete range of Adidas USA footwear. My work at Adidas included global design and development responsibility for Adidas basketball, fitness, cross training and hard court tennis categories. I also worked at Kangaroos USA from 1984-1987, where I was Vice President of Research and Design. My work at Kangaroos included responsibility for all design of performance athletic products and technology including the patented Dynacoil. I also worked at NIKE, Inc. from 1980-1984, where I was a footwear designer and Advanced Concepts Product Manager. My work at NIKE included designing and developing advance

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concept performance and style components, systems and processes for casual, court and cleated shoe lines. I also directed the development and handled upper and sole design for various categories of footwear. My work also included designing some of the first AIR casual and running products for the NIKE brand.

6. I hold over 40 U.S. utility and design patents (alone or as co-inventor) relating to footwear and I have other applications pending relating to footwear. A list of those patents is included in my Curriculum Vitae.

7. I have been retained on behalf of the Patent Owner of U.S. Patent Number 7,347,011 ("the '011 Patent"), NIKE, Inc. ("NIKE") in connection with the Petition for *Inter Partes Review* of the '011 Patent ("Petition").

8. I understand that at the same time NIKE is submitting this Declaration, it is also filing a Motion to Amend the '011 Patent in which it is cancelling issued claims 1-46, and proposing substitute claims 47-50. I have been asked to offer an opinion regarding whether proposed substitute claims 47-50 are supported by the disclosure of the patent application that led to the issuance of the '011 Patent.

9. I have also been asked to offer my opinion regarding whether substitute claims 47-50 would have been anticipated by or rendered obvious to a person of ordinary skill in the art at the time of the invention of the '011 Patent in light of the prior art references relied on by Petitioner in the Petition ("Petition

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Prior Art"), or in light of the prior art cited by the Patent and Trademark Office ("PTO") during prosecution of the '011 Patent.

B. Data and Other Information Considered

10. In forming my opinions, I have reviewed: (i) Petitioner's Revised Petition for *Inter Partes* Review dated December 10, 2012 ("Petition"); (ii) all of the exhibits and prior art submitted with the Petition, *i.e.*, Exhibits 1001-1013; (iii) Decision Instituting *Inter Partes* Review entered May 17, 2013 (iii) the deposition transcript of Petitioner's Declarant, Mr. Edward Frederick, dated July 23, 2013 (I also attended Mr. Frederick's deposition in person); (iv) the prior art references listed on pages 1-2 of the '011 Patent (Ex. 1002); (v) excerpts from Man-Made Fiber and Textile Dictionary (4th Ed. 1985) (Ex. 2011); and (vi) excerpt from Random House Webster's Unabridged Dictionary (2nd Ed. 2001) (Ex. 2012).

11. I intend to continue to review materials that may inform my opinions expressed in this Declaration. I reserve the right to amend or supplement this Declaration and to rely on additional materials and testimony brought to my attention during the course of this proceeding.

C. Compensation

12. I am being compensated at my normal consulting rate of $225 per hour for my time spent in connection with this case. I am being separately reimbursed for any out-of-pocket expenses. No part of my compensation is

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dependent on the outcome of this proceeding or the nature of the opinions that I express.

D. Principles of Claim Construction, Anticipation and Obviousness

13. To render my analysis, I have been informed about the legal standards for claim construction and patent validity.

14. With regard to claim construction, I understand that in an *inter partes* review, claim terms are given their broadest reasonable construction in light of the specification of the patent in which they appear. (Decision Instituting *Inter Partes* Review entered May 17, 2013, p. 10) (hereinafter "Decision"). I understand that under the broadest reasonable interpretation standard, claim terms are presumed to be given their ordinary and customary meaning as understood by one of ordinary skill in the art at the time of the invention. (*Id.*). I understand that one must be careful not to read a specific embodiment appearing in the written description into the claim if the claim language is broader than the embodiment. (*Id.* at 11).

15. With regard to validity, I understand that a proposed patent claim is not patentable if a single prior art reference "anticipates" the claim. I understand that anticipation requires that the four corners of a single, prior art document describe each and every element recited in a claim, expressly or inherently, such that a person of ordinary skill in the art could practice the invention without undue experimentation. I also understand that the claim elements must be arranged in the

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prior art reference in the same way as in the claim. I also understand that the prior art reference must enable one of ordinary skill in the art to make and use the claimed invention without undue experimentation.

16. I understand that if a prior art reference does not expressly set forth a particular element of the claim, that reference still may anticipate if that element is "inherent" in its disclosure. An element is inherent in a disclosure if one of ordinary skill in the art, at the time of the filing of the patent at issue, would have found that the disclosure makes clear that the missing descriptive matter is *necessarily present* in the thing described in the disclosure. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.

17. In addition to disclosing every element of the claim, a prior art reference must enable one of ordinary skill in the art to make the anticipating subject matter without undue experimentation. I understand that undue experimentation is a conclusion reached by weighing factual considerations, such as the quantity of experimentation necessary and the amount of direction or guidance presented.

18. I also understand that a claim is not patentable if the claimed invention would have been "obvious" to a person of ordinary skill in the art at the time of the claimed invention. With regard to obviousness, I have been informed

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that the inquiry is whether the differences between a claim and the prior art are such that the claimed 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 the claim pertains. I understand that this inquiry involves four factors: (1) determining the scope and content of the prior art; (2) ascertaining the differences between the claim and the prior art; (3) resolving the level of ordinary skill in the prior art; and (4) considering any secondary or objective evidence of nonobviousness. I understand that objective evidence of nonobviousness includes a long felt need for the invention.

19. I understand that a patentable invention can be a new combination of new and/or old elements. I understand that a patent claim composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.

20. I have been informed that even if many patents exist in a particular field (*e.g.*, footwear), that fact alone would not make it obvious to combine their features. I understand that the obviousness analysis requires that there must be some *reason* why a person of ordinary skill in the art would have thought to combine *particular* available elements of knowledge, as evidenced by the prior art, to reach the claimed invention. I further understand that examples of rationales that may support a conclusion of obviousness include: (a) combining prior art

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elements according to known methods to yield predictable results; (b) simple substitution of one known element for another to obtain predictable results; (c) use of a known technique to improve similar devices in the same way; (d) applying a known technique to a known device ready for improvement to yield predictable results; (e) "obvious to try" – choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success; (f) known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations are predictable to one of ordinary skill in the art; or (g) some teaching, suggestion, or motivation, either in the prior art references themselves, or in the knowledge generally available to one of ordinary skill in the art, that would have led one of ordinary skill in the art at the time of the invention to modify the prior art reference or to combine prior art reference teachings to arrive at the claimed invention.

21. I understand that a 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. However, I also understand that if a person of ordinary skill in the art would have had reason to attempt to make the claimed device, it must be shown that such a person would have had a reasonable expectation of success in doing so.

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22. I further understand that "hindsight" may not be used to determine obviousness. In other words, the claims of a patent cannot be used as a blueprint or plan to merely lump together multiple prior art references that each disclose some element of the claims.

23. I have also been informed that it is improper to combine references where the references "teach away" from their combination. I understand that a reference may be said to teach away when the reference's disclosure would discourage or dissuade a person of ordinary skill, upon reading the disclosure, from doing what the inventor actually and successfully did.

24. I further understand there is no suggestion or motivation to make a modification to a prior art reference if the proposed modification would render the prior art invention unsatisfactory for its intended purpose.

25. I also understand that an obviousness allegation cannot be supported by a modification or combination of the prior art that would require a substantial reconstruction and redesign of the elements shown in the primary reference as well as a change in the basic principle under which the primary reference was designed to operate.

26. I have also been informed that conclusory statements are insufficient to support a conclusion of obviousness. Instead, I understand that there must be an

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articulated basis on which it can be concluded that it would have been obvious to make the claimed invention.

27. I also understand that claims may not be patentable if they are directed to obvious design choices. Specifically, I understand that a patent claim that simply arranges old elements with each performing the same function it had been known to perform is not patentable. I understand that the combination of familiar elements according to known methods can be obvious when it does no more than yield predictable results.

28. Finally, I understand that the patent owner in an *inter partes* review has the burden to show each proposed claim is patentably distinct over the prior art.

II. SUMMARY OF MY OPINIONS

29. It is my opinion that, as explained below, proposed substitute claims 47-50 are supported by the originally filed application ("'011 application") that became the '011 Patent.

30. It is also my opinion that the substitute claims are not anticipated by the Petition Prior Art and they would not have been obvious to a person of ordinary skill in the art as of the filing date of the '011 Patent (March 3, 2004). In addition, the substitute claims are not anticipated by, or obvious in view of, the prior art references cited during prosecution of the '011 Patent.

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III. OVERVIEW OF THE '011 PATENT

31. The '011 application was filed on March 3, 2004. The '011 Patent issued on March 25, 2008. Except for the claims, the specification of the '011 application and the specification of the '011 Patent are the same. The '011 application drawings and the '011 Patent drawings are the same. When citing to portions of the '011 Patent, I will also include a citation to the corresponding portion of the '011 application (where applicable). The '011 Patent was previously submitted as Ex. 1002. The '011 application is contained in Ex. 1003 (the '011 Patent file history) at pages 159-198.

32. The '011 Patent is generally directed to an article of footwear having a textile upper. The '011 Patent explains that the upper incorporates a textile element that can be formed using various different processes:

> Textile element 40 is primarily formed from one or more yarns that are mechanically-manipulated through either an interweaving, intertwining and twisting, or interlooping process, for example. As discussed in the Background of the Invention section above, interweaving is the intersection of two yarns that cross and interweave at right angles to each other. The yarns utilized in interweaving are conventionally referred to as warp and weft. Intertwining and twisting encompasses procedures such as braiding and knotting where yarns intertwine with each other to form a textile. Interlooping involves the formation of a plurality of columns of intermeshed loops, with knitting being the most common method of interlooping. Textile element 40 may, therefore, be formed from one of these processes for manufacturing a textile.
>
> A variety of mechanical processes have been developed to manufacture a textile. In general, the mechanical processes may be

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> classified as either warp knitting or weft knitting. With regard to warp knitting, various specific sub-types that may be utilized to manufacture a textile include tricot, raschel, and double needle-bar raschel (which further includes jacquard double needle-bar raschel). With regard to weft knitting, various specific sub-types that may be utilized to manufacture a textile include circular knitting and flat knitting. Various types of circular knitting include sock knitting (narrow tube), body garment (seamless or wide tube), and jacquard.
>
> Textile element 40 may be formed through any of the mechanical processes discussed above. Accordingly, textile element 40 may be formed on either a warp knitting machine or a weft knitting machine.
> ...

(Ex. 1002 at 6:51 – 7:14); (Ex. 1003 at 168-169, ¶¶141-143).

33. The '011 Patent also explains that the textile element is "a single material element that is formed to exhibit a unitary (*i.e.*, one-piece) construction ..." (Ex. 1002 at 5:38-39); (Ex. 1003 at 166, ¶135). The patent further states that "[a]s defined for purposes of the present invention, unitary construction is intended to express a configuration wherein portions of a textile element are not joined together by seams or other connections ..." (Ex. 1002 at 6:42-46); (Ex. 1003 at 168 ¶140).

34. The '011 patent includes multiple different embodiments of the invention. One embodiment is shown in Figure 9, which is reproduced below.

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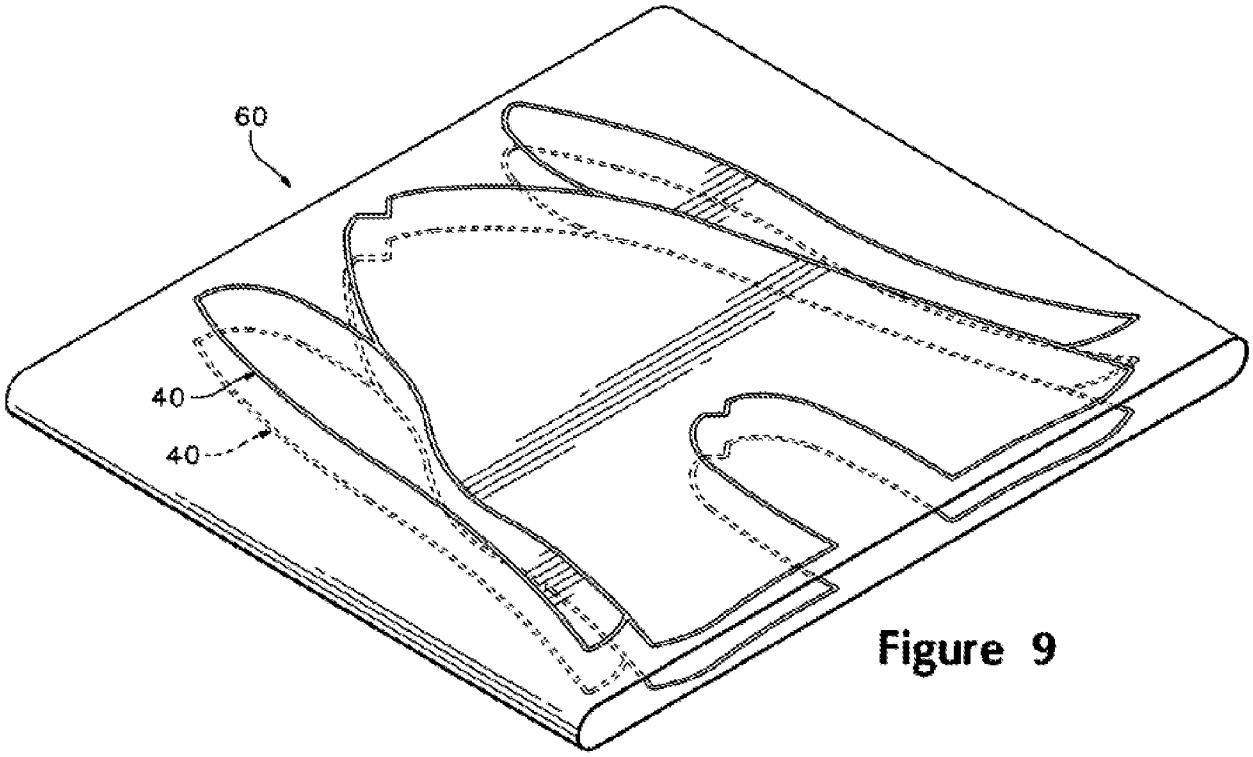


Figure 9

(Ex. 1002, Fig. 9); (Ex. 1003 at 193).

35. The '011 Patent describes this embodiment as follows:

> An example of a textile structure 60 that may be formed with a wide-tube circular knitting machine is depicted in FIG. 9. Textile structure 60 has a generally cylindrical configuration, and the types of stitches vary throughout textile structure 60 so that a pattern is formed with the outline of textile element 40. That is, differences in the stitches within textile structure 60 form an outline with the shape and proportions of textile element 40.
>
> ... The outlines for at least two textile elements 40 may, therefore, be formed on textile structure 60. Referring to FIG. 9, the outline of textile element 40 is depicted on a front portion of textile structure 60, and the outline of another textile element 40 is depicted on a rear portion of textile structure 60. Accordingly, a first textile element 40 and a second textile element 40 may be simultaneously formed in a single textile structure 60. As the diameter of textile element 60 is increased or the width of textile element 40 decreases, however, an

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> even greater number of textile elements 40 may be outlined on textile structure 60.
>
> … The types of stitches that form textile structure 60 may be varied to form an outline of one or more textile elements 40 on textile structure 60. That is, the wide-tube circular knitting machine may be programmed to form different types of stitches in textile structure 60 so as to outline one or more textile elements 40. Each textile element 40 is then removed from textile structure 60 with a die-cutting, laser-cutting, or other conventional cutting operation. Once textile element 40 is removed from textile structure 60, seams 51-54 may be formed and textile element 40 may be incorporated into footwear 10.

(Ex. 1002 at 7:41 – 8:14); (Ex. 1003 at 169-70 ¶¶45-47).

36. As Figure 9 and the above-quoted discussion illustrate, this embodiment is made using a circular knitting process and requires that the textile element [40] be formed as part of a larger textile structure [60]. Because this embodiment is formed as part of a larger textile structure, it requires additional processing to remove the textile element [40] from the textile structure [60]. (*E.g.*, (Ex. 1002 at 8:8-10); (Ex. 1003 at 170, ¶47) ("Each textile element 40 is then removed from textile structure 60 with a die-cutting, laser-cutting, or other conventional cutting operation."). One of the five independent claims in the '011 Patent is directed specifically to this embodiment. For example, claim 36 requires:

> 36. An article of footwear comprising: an upper incorporating a knitted textile element formed with a knitting machine, *the textile element being removed from a textile structure that includes an outline of the textile element*, and the textile element having edges that are joined together to define at least a portion of a void for receiving a foot, wherein the textile element incorporates a single type of textile

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having a plurality of knit constructions; and a sole structure secured to the upper.

(Ex. 1002 at 13:47 – 14:6) (emphasis added).

37. The '011 Patent makes it clear that the invention described in the specification also covers textile elements that are **not** formed as part of a larger textile structure from which they must be removed. For example, the '011 patent states that the "[t]extile element **may be** formed as a part of larger textile element [from which it is removed]." (Ex. 1002 at 5:43-45); (Ex. 1003 at 166, ¶35) (emphasis added). Moreover, the '011 Patent illustrates multiple examples in which the textile element is shown in its final shape and is **not** described as being formed as part of a larger textile structure from which it must be removed. Such examples are shown in Figures 8, 10 and 11. Figure 8 is reproduced below.

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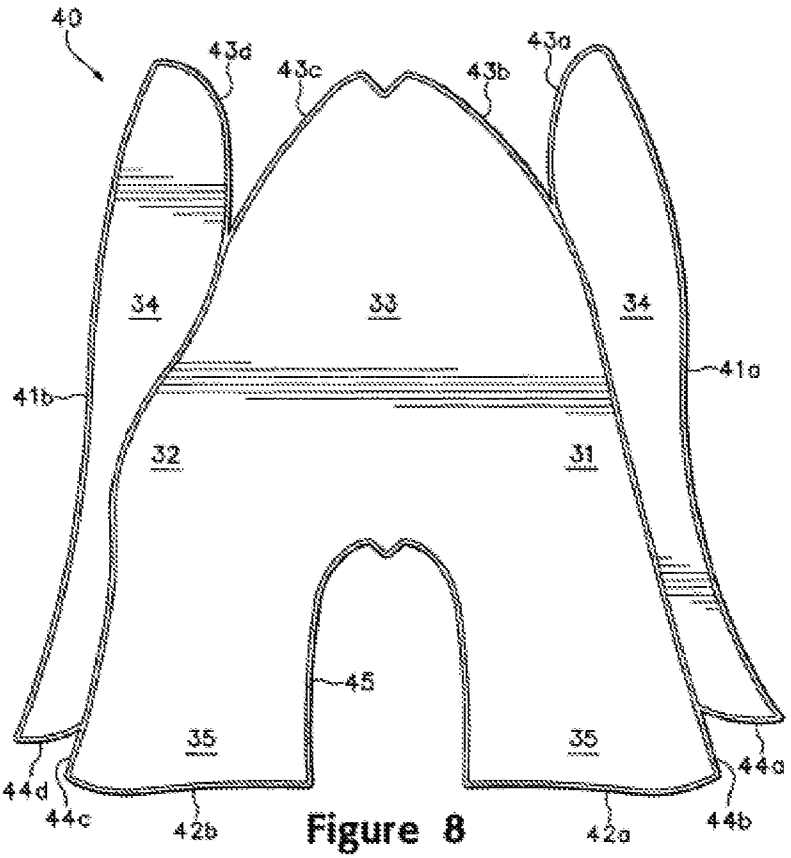


Figure 8

(Ex. 1002 at Fig. 8); (Ex. 1003 at 192).

38. The '011 Patent repeatedly discloses flat knitting as one way of making the textile element. (*E.g.*, Ex. 1002 at 7:5-8; Ex. 1003 at 168-69, ¶42 "With regard to weft knitting, various specific sub-types that may be utilized to manufacture a textile include circular knitting and flat knitting."; (Ex. 1002 at 10:8-14; Ex. 1003 at 173, ¶54 "The types of knitting that may be utilized to form different zones with different properties (e.g., yarn characteristics, textures, etc.) may vary significantly to include . . . flat knitting . . ."); (Ex. 1002 at 11:38-41, Ex. 1003 at 175-76, ¶59 "Similarly, other types of knitting, such as [] flat knitting, may be utilized within the scope of the present invention to impart various textures,

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different properties, or different yarn types to the textile element."); (Ex. 1002 at 12:32-33, Claim 15, "... the weft-knitted textile element is created by flat knitting."); (Ex. 1002 at 14:32-42, Claim 44, "... an upper incorporating a flat-knitted textile element, the flat-knitted textile element having ...").

39. The '011 Patent thus makes it clear that the textile elements in Figures 8, 10 and 11 can be made using flat knitting. During his deposition, Petitioner's declarant (Mr. Frederick), agreed that the '011 Patent teaches that what is shown in Figure 8 can be made on a flat knitting machine. (Frederic Dep. Tr., Ex. 2009 at 116). The disclosure in the '011 Patent that the textile elements in Figures 8, 10 and 11 can be made using flat knitting makes it clear that these textile elements can be knit to the shapes shown in these figures (*i.e.*, without surrounding textile structure) using flat knitting.

40. Moreover, one of ordinary skill in the art would understand that such textile elements knit to the shape of Figures 8, 10 and 11 using flat knitting would have flat knit edges because the edges, rather than being formed by cutting from a larger textile structure, are formed directly by the flat knitting machine. Such flat knit embodiments shown in Figures 8, 10 and 11 are consistent with independent claims in the '011 Patent such as issued independent claims 1, 16, 24 and 44, which can be made using flat knitting and (unlike issued claim 36) do not require removal of the textile element from a larger textile structure.

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41. Moreover, one of ordinary skill in the art would understand from the '011 Patent that if the textile element is cut from a surrounding textile structure, it would have cut edges (not knit edges) that would require further processing to finish the edges. (*See, e.g.*, '011 Patent, Ex. 1002 at 8:8-10, "Each textile element 40 is then removed from textile structure 60 with a die-cutting, laser-cutting, or other conventional cutting operation."); (Glidden, Ex. 1007 p. 2, ll. 43-63, "Where the cutting of the textile upper ... leaves a raw textile edge which might ravel or fray, the edges may be protected, as by an overcast stitch ..."); (Whiting, Ex. 1009 at 3:68 – 4:16, "[T]he last 16 may be provided with a guide groove 20 along which a cutter effects severance of portion 13 from the ultimate upper 11. ... The shoe is now complete except for providing a finish for the contour edge of the upper. ... [S]aid edge may be seared with a heated tool to fuse the fibers of the yarn along the severance line to coagulate the same and form a finishing bead 21. ... Fig. 5 shows another edge-finishing method, the same entailing the application of a binding 22 by stitching, cementing or pasting the same in place.").

42. After a flat knit textile element such as that shown in Figure 8 is knit to shape, various flat knit edges of the element are joined together to form an upper. An example of the upper that is formed is shown in Figures 2-7 of the '011 Patent and '011 application. (Ex. 1002 at Figs. 2-7); (Ex. 1003 at 188-91). As shown in Figures 2 and 4 (which are reproduced below), the specification describes

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the upper as having a lateral region [31], an opposite medial region [32], an instep region [33], a lower region [34], and a heel region [35], and an ankle opening [36]. (Ex. 1002 at 5: 18-20, 6:22-24); (Ex. 1003 at 166, ¶ 34).

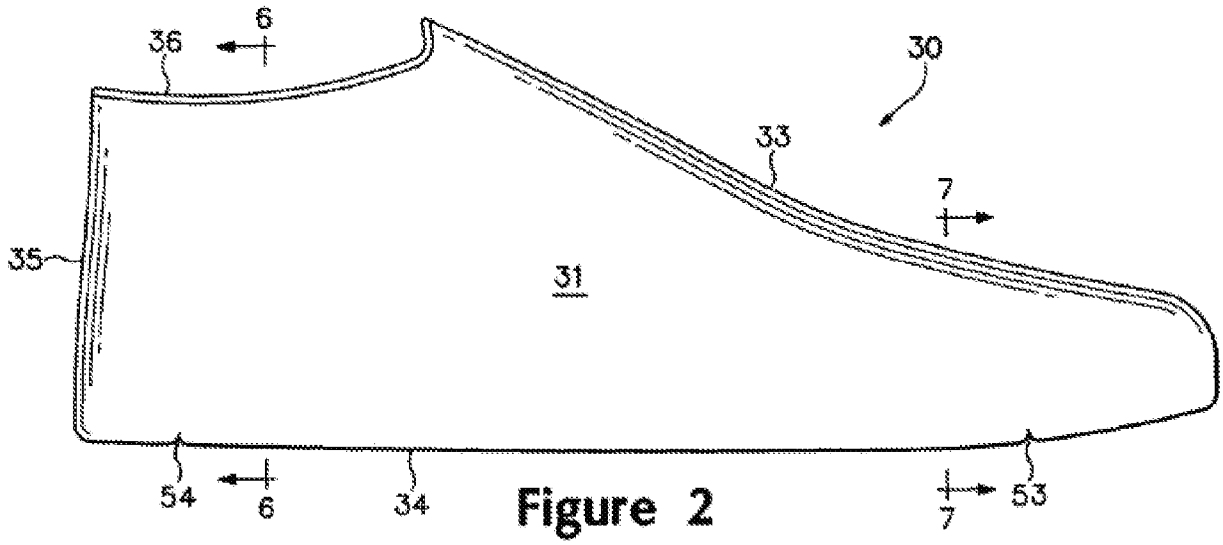


Figure 2

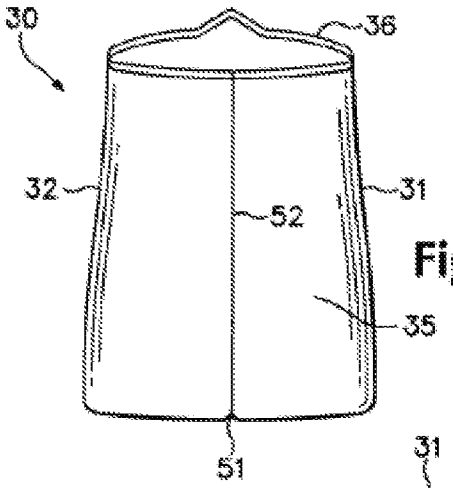


Figure 4

43. The '011 Patent describes how the generally planar textile element is formed into an upper as follows:

> Textile element 40 exhibits the general shape depicted in FIG. 8 prior to the formation of seams 51-54. Following formation of seams 51-54,

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> however, textile element 40 exhibits the shape of upper 30 depicted in FIGS. 2-7. Seams 51-54 are formed by securing various edges of textile element 40 together. …
> Textile element 40, as depicted in FIG. 8, has a generally planar configuration. Upon the formation of seam 51, however, one portion of textile element 40 overlaps the other portion of textile element 40. The volume between the overlapping portions effectively forms a portion of the void within upper 30 for receiving the foot.
> The folding or overlapping of textile element 40 to form seam 51 places edge 42a adjacent to edge 42b, which facilitates the formation of seam 52. With reference to FIG. 8, an edge 45 forms a generally u-shaped area in textile element 40. Upon the joining of edges 42a and 42b to form seam 52, the u-shaped area becomes an aperture in textile element 40 and effectively forms ankle opening 36. …
> Following the formation of each of seams 51-54, the manufacturing of upper 30 is essentially complete.

(Ex. 1002 at 5:58 – 6:30); (Ex. 1003 at 167-68, ¶¶ 36-39).

44. The '011 patent teaches that the various embodiments shown in Figures 8-11 provide certain advantages over the prior art. One advantage is that the invention is more efficient than the prior art from a manufacturing perspective. For example, the '011 Patent explains that conventional uppers include various different materials that individually are stitched together or adhesively joined. (Ex. 1002 at 1:16-18); (Ex. 1003 at 175, ¶¶ 58). In contrast, by forming the textile element to be a single, knitted element of a unitary construction, efficiency is increased because it is not necessary to join together numerous different materials. (*Id.*; *see also* Ex. 1002 at 2:62 – 3:16, and 9:23-35).

45. One of skill in the art would also understand that by flat knitting the embodiments shown in Figures 8, 10 and 11 efficiency can be increased. As

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discussed above, the embodiment described in Figure 9 (and claimed in issued claim 36) requires that "[e]ach textile element 40 [be] removed from textile structure 60 with a die-cutting, laser-cutting, or other conventional cutting operation." (Ex. 1002 at 8:8-10). In contrast, the embodiments shown in Figures 8, 10 and 11 are formed without a surrounding textile structure from which the textile element must be removed. Such embodiments are more efficient from a manufacturing perspective because they eliminate the additional "cutting operation" after knitting associated with the embodiment shown in Figure 9.

46. In addition, such embodiments are efficient because they also eliminate the extra processing steps associated with stabilizing the cut edges. (*E.g.*, Glidden, Ex. 1007 p. 2, ll. 43-63; "Where the cutting of the textile upper ... leaves a raw textile edge which might ravel or fray, the edges may be protected, as by an overcast stitch ..."); (Whiting, Ex. 1009 at 3:68 – 4:16; "[T]he last 16 may be provided with a guide groove 20 along which a cutter effects severance of portion 13 from the ultimate upper 11. ... The shoe is now complete except for providing a finish for the contour edge of the upper. ... [S]aid edge may be seared with a heated tool to fuse the fibers of the yarn along the severance line to coagulate the same and form a finishing bead 21. ... Fig. 5 shows another edge-finishing method, the same entailing the application of a binding 22 by stitching, cementing or pasting the same in place."). Furthermore, such embodiments are

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environmentally beneficial because they reduce the expense and waste associated with the extra material that must be removed from the textile element.

47. As explained above, the '011 Patent describes that the textile element can be made using various different processes for mechanically manipulating yarns, including knitting. Knitting is commonly defined as a method of creating fabric by interlocking loops of one or more yarns. (*E.g.*, Ex. 2011 at 8). The '011 Patent uses the term "knitting" in a manner consistent with its common and ordinary meaning. For example, the '011 Patent states that "[i]nterlooping involves the formation of a plurality of columns of intermeshed loops, with knitting being the most common method of interlooping." (Ex. 1002 at 6:61-63; Ex. 1003 at 168, ¶ 41).

48. Knitting techniques can be divided into two main types: warp knitting and weft knitting. (*E.g.*, Ex. 2011 at 8). Warp knitting is a type of knitting in which multiple yarns with interlocking loops generally run lengthwise. (*Id.*). "Lengthwise" in this context refers to a machine direction, *i.e.*, a direction in which the warp knitted fabric grows as it is being knitted. This definition is consistent with the definition of warp knitting cited in the Board's decision, *i.e.*, "'[a] knitting process in which a group of yarns form rows running lengthwise by an interlocking process.'" (Decision at 14).

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49. Weft knitting is a type of knitting in which a continuous thread runs cross-wise (*i.e.*, across the machine direction) in the fabric and forms loops in a row (or "course"). (*E.g.*, Ex. 2011 at 8). This definition is consistent with the definition of weft knitting cited in the Board's decision, *i.e.*, "'[a] knitting process in which a continuous yarn is carried in crosswise rows.'" (Decision at 14). Weft knitting includes circular knitting and flat knitting. (*E.g.*, Ex. 2011 at 8).

50. In circular knitting, fabric is produced on a knitting machine in the form of a tube, with yarns running continuously around that tube. (*E.g.*, Ex. 2011 at 8). In flat knitting, fabric is produced on a machine in generally a flat form, with yarn alternating back and forth across the width of the fabric. (*E.g.*, *id.*). A flat knit fabric is a fabric that has been knit on a flat knitting machine. (*E.g.*, Ex. 2011 at 6). The '011 Patent and the '011 application use the terms "warp knitting", "weft knitting", "circular knitting" and "flat knitting" in a manner consistent with the common and ordinary meaning of those terms set forth above.

51. The '011 Patent also describes using various types of stitches in making the textile element. (*E.g.*, Ex. 1002 at 9:7-12; Ex. 1003 at 172, ¶ 51: "The wide-tube circular knitting machine may, therefore, vary the stitches within textile element 40 ... Various types of stitches may also be formed with other types of knitting machines."). In the context of knitting, Spencer (a knitting book submitted as an exhibit by Petitioner) indicates a stitch commonly refers to three or more

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intermeshed yarn loops. (*See, e.g.*, Ex. 1012 at 69). The '011 Patent uses the term "stitch" in a manner consistent with this common meaning. For example, the '011 Patent refers in several places to varying types of stitches within an element. (*E.g.*, Ex. 1002 at 9:7-12; Ex. 1003 at 172, ¶ 51). Normally, this refers to varying the manner in which loops are intermeshed.

IV. PERSON HAVING ORDINARY SKILL IN THE ART AT THE TIME OF THE INVENTION

52. It is my opinion that a person of ordinary skill in the art (POSITA) at the time of the invention for the '011 Patent would have a few years of experience with design and development of footwear and knowledge of textiles used in such footwear. For purposes of this proceeding, I have assumed that the invention date is around the filing date of the '011 application, *i.e.*, March 2004.

53. I have been informed that my comments and opinions regarding what is shown in the prior art should be from the perspective of one of ordinary skill in the art at the time of the invention.

V. SUPPORT IN ORIGINAL APPLICATION, AND CLAIM CONSTRUCTIONS, FOR PROPOSED SUBSTITUTE CLAIMS

54. I have been informed that NIKE is cancelling issued claims 1-46 in the '011 Patent, submitting one amended independent claim as a substitute for issued independent claim 16, submitting two amended dependent claims as substitutes for issued dependent claim 19, and submitting one amended dependent

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claim as a substitute for issued dependent claim 20. The substitute claims are set forth below (elements in the substitute claims that represent features added to the issued claims are indicated in underlining; language deleted from the issued claims is enclosed in brackets):

Claim 47. (Substitute for independent claim 16) An article of footwear comprising an upper incorporating a [weft-knitted] flat knit textile element, the flat knit textile element (1) having 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, some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges; and (2) having a first area and a second area with a unitary construction, the first area being formed of a first stitch configuration, and the second area being formed of a second stitch configuration that is different from the first stitch configuration to impart varying properties to the textile element; and
a sole structure secured to the upper.

Claim 48. (Substitute for dependent claim 19) The article of footwear recited in claim [16] 47, wherein at least one of the first stitch configuration and the second stitch configuration forms an aperture in the [weft-knitted] flat knit textile element and the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper.

Claim 49. (New (Second) Substitute for dependent claim 19) The article of footwear recited in claim [16] 47, wherein at least one of the first stitch configuration and the second stitch configuration forms [an aperture] a plurality of apertures in the [weft-knitted] flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces.

Claim 50. (Substitute for dependent claim 20) The article of footwear recited in claim 16, wherein the [weft-knitted] flat knit textile element is one of an exterior layer, an intermediate layer, and an interior layer of the upper,

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and the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper.

A. Support and Claim Constructions For Proposed Substitute Independent Claim 47

55. Proposed claim 47 is a substitute for issued claim 16 that more specifically defines the invention as set forth above. As set forth below, it is my opinion that substitute claim 47 is supported by the disclosure of the '011 application. It is also my opinion that portions of substitute claim 47 representing amendments to issued claim 16 should be given their ordinary and customary meaning as understood by one of ordinary skill in the art at the time of the invention.

1. Claim Terms in Issued Claim 16 Construed By the Board: "the textile element having a first area and a second area with a unitary construction"

56. In its decision, the Patent Trial and Appeal Board ("PTAB") construed several terms that appear in issued claim 16. The constructions are relevant to substitute claim 47 because the terms remain in substitute claim 47. With regard to the term "unitary construction," the PTAB found that the '011 Patent "expressly defines" this term at column 6, lines 41-46. (Decision, pp. 14-15). In particular, the PTAB found that the '011 Patent states that "[a]s defined for purposes of the present invention, unitary construction is intended to express a configuration wherein portions of a textile element are not joined together by

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seams or other connections, as depicted with textile element 40 in Figure 8." (*Id.* at 15). I agree that the '011 Patent expressly defines the term "unitary construction" as set forth in the preceding sentence.

57. The PTAB further construed the complete phrase "the textile element having a first area and a second area with a unitary construction" to "require a textile element having a unitary construction and having a first area and a second area." (Decision at pp. 14-15). For purposes of this IPR proceeding, I agree with the Board's construction of this phrase.

2. "flat knit textile element"

58. Substitute claim 47 recites an article of footwear that comprises "an upper incorporating a flat knit textile element." This amended claim element is supported by the express language of the original '011 application. Paragraph [31] in the '011 application describes footwear 10 (a shoe) having a sole structure 20 and an upper 30, with "[u]pper 30 at least partially formed from a textile element 40 . . ." (Ex. 1003 at 165, ¶ 31). The '011 application further describes an upper as incorporating a *flat knit* textile element. For example,

- originally filed claim 19 recites "[t]he article of footwear recited in claim 1 [i.e., "[a]n article of footwear comprising . . . an upper incorporating a textile element formed through a weft knitting process"], wherein the weft knitting process is flat knitting" (*Id.* at 179);

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- originally filed claim 38 recites that "the weft knitting process is one of circular knitting and flat knitting" (*Id.* at 181), and
- originally filed claim 65 recites "an upper incorporating a textile element formed through a flat knitting process." (*Id.* at 184).

59. Additional portions of the '011 application show that embodiments of the invention include uppers incorporating flat-knit textile elements. For example, paragraphs [42] and [43] describe element 40 being a flat knit element. (Ex. 1003 at 168-69, "With regard to weft knitting, various specific sub-types that may be utilized to manufacture a textile include circular knitting and flat knitting. . . . Textile element 40 may be formed through any of the mechanical processes discussed above."). In addition, paragraph [59] states that "other types of knitting, such as [] flat knitting, may be utilized within the scope of the present invention to impart various textures, different properties, or different yarn types to the textile element." (*Id.* at 175-76). Accordingly, the '011 application supports this amended claim element.

60. With regard to the proper construction of "flat knit textile element," these are commonly understood terms that should be given their ordinary and customary meaning. As I discussed above, in flat knitting a fabric is produced on a machine in generally flat form, with yarn alternating back and forth across the fabric. (*E.g.*, Ex. 2011 at 8). Moreover, a flat knit fabric is a fabric that has been

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knit on a flat knitting machine. (*E.g.*, Ex. 2011 at 6). Consequently, the term "flat knit textile element" should be construed as a textile element that has been flat knit. This construction is consistent with the support in the '011 application that I cited above.

3. "flat knit textile element (1) having 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"

61. Substitute claim 47 further recites a "flat knit textile (1) having 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". This amended claim element is also supported in the '011 application because, as discussed below, the '011 application describes embodiments in which a textile element has flat knit edges free of surrounding textile structure from which the flat knit textile element must be removed.

62. As previously discussed, the '011 application includes multiple different embodiments of the invention. One embodiment is shown in Figure 9 of the '011 application. (Ex. 1003 at 193). The '011 application explains that this embodiment is made using a circular knitting process and requires that the textile element [40] be formed as part of larger textile structure [60]. (Ex. 1003 at 169-70, ¶¶ 45-47). Because this embodiment is formed as part of a larger textile structure, it requires additional processing to remove the textile element [40] from the textile

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structure [60]. (*E.g.*, Ex. 1003 at 170, ¶ 47 ("Each textile element 40 is then removed from textile structure 60 with a die-cutting, laser-cutting, or other conventional cutting operation.")). One of the original independent claims in the '011 application is directed to this embodiment. In particular, original claim 41 required:

> 41. An article of footwear comprising:
> an upper incorporating a textile element formed with a knitting machine, the textile element being removed from a textile structure that includes an outline of the textile element, and the textile element having edges that are joined together to define at least a portion of a void for receiving a foot; and
> a sole structure secured to the upper.

(Ex. 1003, p. 181).

63. The '011 application makes it clear that the invention also includes embodiments in which uppers include textile elements that are not formed as part of larger textile structures from which they must be removed. For example, the '011 application states that the "[t]extile element *may be* formed as a part of larger textile element [from which it is removed]." (Ex. 1003 at 166, ¶ 35) (emphasis added). Moreover, the '011 application illustrates multiple examples in which the textile element is shown in its final shape and is *not* described as being formed as part of a larger textile structure from which it must be removed. Such examples are shown in Figures 8, 10 and 11. (Ex. 1003 at 192-95).

64. As described above, the '011 application repeatedly discloses flat knitting as one of the ways for making the textile element. The '011 application

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thus makes it clear that the textile elements in Figures 8, 10 and 11 can be made using flat knitting. During his deposition, Petitioner's declarant (Mr. Frederick), agreed that the '011 Patent teaches that what is shown in Figure 8 can be made on a flat knitting machine. (Ex. 2009 at 116). The disclosure in the '011 application that the textile elements in Figures 8, 10 and 11 can be made using flat knitting makes it clear that these textile elements can be knit to the shapes shown in the figures (i.e., without surrounding textile structure) using flat knitting.

65. Moreover, one of ordinary skill in the art would understand that such textile elements knit to the shape of Figures 8, 10 and 11 using flat knitting would have flat knit edges because the edges, rather than being formed by cutting from a larger textile structure, are formed directly by the flat knitting machine. (*E.g.*, Ex. 2009 at 116). Such flat knit embodiments shown in Figures 8, 10 and 11 are consistent with independent claims submitted with the original application. For example, as-filed independent claims 19, 38 and 65, cover articles of footwear in which uppers include textile elements made using flat knitting. (Ex. 1003 at 179-84). Unlike as-filed claim 41, however, these as-filed claims do not require removal of those textile elements from larger textile structures. As I understand patent claims, this means that these original claims had scopes that include footwear with uppers that incorporate flat knit textile elements that are not

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removed from larger textile structures. This indicates to me that the inventors thus contemplated such footwear as part of their invention.

66. Moreover, one of ordinary skill in the art would understand from the '011 application that if the textile element is cut from a surrounding textile structure, it would have cut edges (not knit edges) that would require further processing to finish the edges. (*See, e.g.*, Ex. 1003 at 170, ¶ 47; "Each textile element 40 is then removed from textile structure 60 with a die-cutting, laser-cutting, or other conventional cutting operation."); (*see also* Glidden, Ex. 1007 p. 2, ll. 43-63; "Where the cutting of the textile upper ... leaves a raw textile edge which might ravel or fray, the edges may be protected, as by an overcast stitch ..."); (Whiting, Ex. 1009 at 3:68 – 4:16; "[T]he last 16 may be provided with a guide groove 20 along which a cutter effects severance of portion 13 from the ultimate upper 11. ... The shoe is now complete except for providing a finish for the contour edge of the upper. ... [S]aid edge may be seared with a heated tool to fuse the fibers of the yarn along the severance line to coagulate the same and form a finishing bead 21. ... Fig. 5 shows another edge-finishing method, the same entailing the application of a binding 22 by stitching, cementing or pasting the same in place.")).

67. Thus, the '011 application describes an embodiment in which an article of footwear includes an upper incorporating a flat knit textile element, with

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the flat knit textile element having 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.

68. Finally, with regard to the proper construction of the phrase "flat knit textile element (1) having 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", this phrase should be construed as requiring that edges of the textile element have flat knit edges without surrounding textile structure such that the flat knit edges are not surrounded by textile structure from which the textile element must be removed. This construction is consistent with the support in the '011 application that I discuss in the preceding paragraphs.

4. "flat knit textile element (1) having... some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot"

69. Substitute claim 47 further recites a "flat knit textile element (1) having ... some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot." This amended claim element is also supported in the '011 application. For example, the '011 application states:

> Textile element 40 exhibits the general shape depicted in FIG. 8 prior to the formation of seams 51-54. Following formation of seams 51-54, however, textile element 40 exhibits the shape of upper 30 depicted in FIGS. 2-7. Seams 51-54 are formed by securing various edges of textile element 40 together. ...

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> Textile element 40, as depicted in FIG. 8, has a generally planar configuration. Upon the formation of seam 51, however, one portion of textile element 40 overlaps the other portion of textile element 40. The volume between the overlapping portions effectively forms a portion of the void within upper 30 for receiving the foot.
>
> The folding or overlapping of textile element 40 to form seam 51 places edge 42a adjacent to edge 42b, which facilitates the formation of seam 52. With reference to FIG. 8, an edge 45 forms a generally u-shaped area in textile element 40. Upon the joining of edges 42a and 42b to form seam 52, the u-shaped area becomes an aperture in textile element 40 and effectively forms ankle opening 36.

(Ex. 1003 at 167-68, ¶¶36-39).

70. The ankle opening 36 and the seam 52 (formed by joining edges 42a and 42b) are illustrated below in Figure 4 of the '011 application:

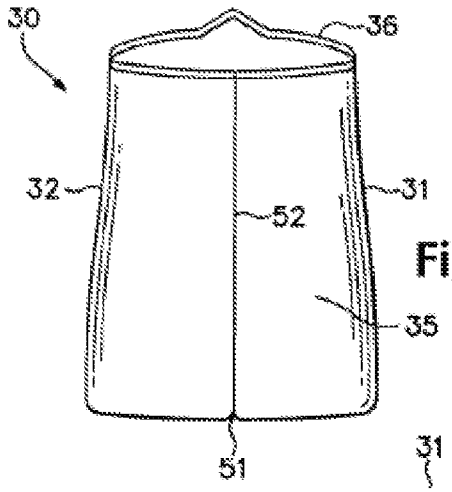


Figure 4

(Ex. 1003 at 190).

71. With regard to the proper construction of the phrase "flat knit textile element (1) having... some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot", the phrase uses words commonly

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understood that are neither unfamiliar nor confusing. Such words do not need clarification and should be given their ordinary and customary meaning. Therefore, the phrase should be construed as follows: "flat knit textile element having (1)… some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot." This construction is consistent with the support in the '011 application that I discuss in the preceding paragraphs.

5. "the ankle opening having an edge comprised of one of the flat knit edges"

72. Substitute claim 47 further recites "the ankle opening having an edge comprised of one of the flat knit edges." This amended claim element is also supported in the '011 application. For example, as I described above in connection with the limitation reciting "… flat knit edges …", one of ordinary skill in the art would understand that textile elements knit to the shape of Figures 8, 10 and 11 using flat knitting would have flat knit edges. Referring to Figure 8, one of the flat knit edges formed by the flat knitting machine is the edge [45] that forms a generally u-shaped area. As explained by the '011 application:

> With reference to Fig. 8, an edge 45 forms a generally u-shaped area in textile element 40. Upon the joining of edges 42a and 42b to form seam 52, the u-shaped area becomes an aperture in textile element 40 and effectively forms ankle opening 36.

(Ex. 1003 at 167, ¶ 38).

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73. Thus, the '011 application teaches an ankle opening having an edge comprised of one of the flat knit edges.

74. With regard to the proper construction of the phrase "the ankle opening having an edge comprised of one of the flat knit edges," the phrase uses words commonly understood that are neither unfamiliar nor confusing. Such words do not need clarification and should be given their ordinary and customary meaning. Therefore, the phrase should be construed as follows: "the ankle opening having an edge comprised of one of the flat knit edges, i.e., one of the previously recited edges that is not surrounded by textile structure from which the textile element must be removed." This construction is consistent with the support in the '011 application that I discuss in the preceding paragraphs.

6. The '011 application Supports Substitute Claim 47 As a Whole

75. As explained above, the '011 application provides support for features of substitute claim 47 that represent amendments to issued claim 16. The '011 application also supports claim 47 as a whole. Figures 1-7 and the corresponding description discussed above contemplate incorporation into an upper a textile element in the form shown in one of Figures 8, 10 or 11. As indicated above, the '011 application discloses that such textile elements can, in some embodiments, be flat knit as recited in claim 47. Incorporating a flat knit textile element having the shape shown in any of Figures 8, 10 and 11 into an article of footwear as shown in

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Figures 1-7 results in an article of footwear having the features of substitute claim 47.

B. Support and Claim Construction For Proposed Substitute Dependent Claim 48

76. Substitute claim 48 amends issued claim 19 as follows:

> **Claim 48.** (Substitute for dependent claim 19) The article of footwear recited in claim [16] 47, wherein at least one of the first stitch configuration and the second stitch configuration forms an aperture in the [weft-knitted] flat knit textile element and the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper.

77. The amended claim element in this substitute dependent claim is supported in the '011 application. For example, the '011 application includes the following passages that describe the amended features recited in this substitute claim: "[u]pper 30 is depicted . . . as having a lateral region 31, an opposite medial region 32, an instep region 33, a lower region 34, and a heel region 35." (Ex. 1003 at 166, ¶ 34); "Upper 30 is at least partially formed from textile element 40, which forms regions 31-35." (*Id.* at 166, ¶ 35); "Textile element 40 exhibits the general shape depicted in Figure 8 prior to the formation of seams 51-54. Following formation of seams 51-54, however, textile element 40 exhibits the shape of upper 30 depicted in Figures 2-7. Seams 51-54 are formed by securing various edges of textile element 40 together." (*Id.* at 167, ¶ 36)

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78. With regard to the proper construction of the amended language, the phrase "the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper" uses words commonly understood that are neither unfamiliar nor confusing. Such words do not need clarification and should be given their ordinary and customary meaning. Therefore, the phrase should be construed as follows: "the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper." This construction is consistent with the support in the '011 application that I discuss in the preceding paragraphs.

79. As explained above, the '011 application provides support for features of substitute claim 48 that represent amendments to issued claim 19. The '011 application also supports claim 48 as a whole. Incorporating a flat knit textile element having the shape shown in any of Figures 8, 10 and 11 into an article of footwear as shown in Figures 1-7 results in an article of footwear having the features of substitute claim 48.

C. Support and Claim Construction For Proposed Substitute Dependent Claim 49

80. Substitute claim 49 amends issued claim 19 as follows:

> **Claim 49.** (Second substitute for dependent claim 19) The article of footwear recited in claim [16] 47, wherein at least one of the first stitch configuration and the second stitch configuration forms [an aperture] a plurality of apertures in the [weft-knitted] flat knit textile element, the

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apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces.

81. The amended claim language is supported in the '011 application. For example, the '011 application describes a textile element like element 40 that includes apertures as recited in substitute claim 49:

> An article of footwear 110 is depicted in Fig. 12 and includes a sole structure 120 and an upper 130. Upper 130 includes a textile element 140 having the general configuration of textile element 40 . . . In addition, upper 130 includes a lace 131 and a plurality of elements 132-135 that also form a portion of the exterior surface. Lace 131 extends through a plurality of apertures formed in textile element 140. The apertures may be formed by omitting stitches at specific locations.

(Ex. 1003 at 173-74, ¶ 55).

82. Figure 12, which is referenced in the preceding paragraph, is reproduced below.

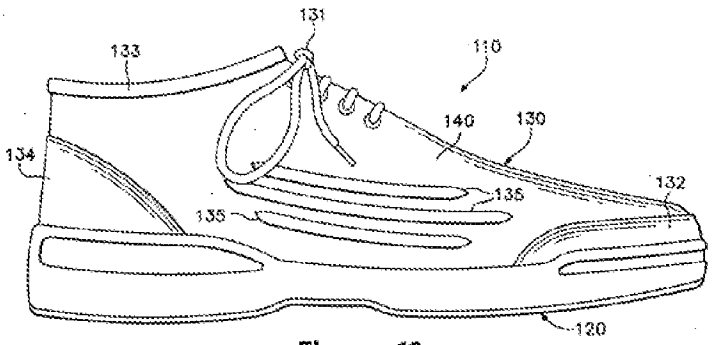


Figure 12

(Ex. 1003 at 196).

83. With regard to the proper construction of the amended language, the phrase "a plurality of apertures in the flat knit textile element, the apertures formed

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by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces" uses words commonly understood that are neither unfamiliar nor confusing. For example, the term "aperture" is a commonly understood word that means "an opening, as a hole, slit, crack, gap, etc." (Ex. 2012 at 3; *Random House Webster's Unabridged Dictionary*, p. 97 (2nd Ed. 2001)). Such words do not need clarification and should be given their ordinary and customary meaning. Therefore, the phrase should be construed as follows: "a plurality of apertures in the flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces". This construction is consistent with the support in the '011 application that I discuss in the preceding paragraphs.

84. As explained above, the '011 application provides support for features of substitute claim 49 that represent amendments to issued claim 19. The '011 application also supports claim 49 as a whole. Incorporating a flat knit textile element having the shape shown in any of Figures 8, 10 and 11 into an article of footwear as shown in Figures 1-7 results in an article of footwear having the features of substitute claim 49.

D. Support and Claim Construction For Proposed Substitute Dependent Claim 50

85. Substitute claim 50 amends issued claim 20 as follows:

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Claim 50. (Substitute for dependent claim 20) The article of footwear recited in claim 16, wherein the [weft-knitted] flat knit textile element is one of an exterior layer, an intermediate layer, and an interior layer of the upper, and the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper.

86. The amended claim element in this substitute dependent claim is similar to the amended claim element in substitute dependent claim 48. Consequently, the amended claim element in substitute claim 50 is supported in the '011 application for the same reasons discussed above in connection with substitute claim 48.

87. With regard to the proper construction of the amended language, the phrase "the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper" should be given the same construction discussed above in connection with the same phrase that appears in substitute claim 48. In particular, the words do not need clarification and should be given their ordinary and customary meaning, *i.e.*, "the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper."

88. As explained above, the '011 application provides support for features of substitute claim 50 that represent amendments to issued claim 20. The '011 application also supports claim 50 as a whole. Incorporating a flat knit textile element having the shape shown in any of Figures 8, 10 and 11 into an article of

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footwear as shown in Figures 1-7 results in an article of footwear having the features of substitute claim 50.

VI. THE PROPOSED SUBSTITUTE CLAIMS ARE PATENTABLY DISTINCT FROM THE PRIOR ART RELIED ON IN PETITIONER'S PETITION

89. Petitioner relies on the following prior art references in its petition ("Petitioner Prior Art"):

Nishida	US 5,345,638	(Ex. 1005)
Osamu	JP H06-113905	(Ex. 1006)
Glidden	US 2,147,197	(Ex. 1007)
McDonald	US 2,314,098	(Ex. 1008)
Whiting	US 2,641,004	(Ex. 1009)
Curley	WO 90/03744	(Ex. 1010)
Shiomura	US 4,785,558	(Ex. 1011)

90. In its decision instituting the trial, the PTAB relied only on Nishida and Glidden. (Decision, p. 17).

91. Proposed substitute claim 47 is a substitute for issued claim 16, substitute claims 48-49 are substitutes for issued claim 19, and substitute claim 50 is a substitute for claim 20. Petitioner alleges that issued claims 16, 19 and 20 in the '011 Patent are unpatentable under 35 U.S.C. § 102 or § 103, or both, based upon the Petitioner Prior Art, alone or in various combinations. Petitioner's specific grounds for issued claims 16, 19 and 20 are as follows:

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Table 1		
Petitioner's Grounds for Issued Claims 16, 19 and 20		
Reference(s)	**Basis**	**Claims Challenged**
Nishida	§ 102	16, 19, 20
Nishida	§ 103	16, 19, 20
Nishida and McDonald or Whiting or Curley	§ 103	16, 19, 20
Glidden	§ 102	16, 19, 20
Glidden and McDonald or Whiting	§ 103	16, 19, 20
Osamu	§ 103	16, 19, 20
Osamu and McDonald or Whiting or Nishida or Glidden or Curley	§ 103	16, 19, 20

92. For reasons that include the reasons set forth below, it is my opinion that proposed substitute claims 47-50 are patentably distinct over all the prior art relied on in Petitioner's Petition and claims 48-49 are patentably distinct from each other.

A. Nishida

93. According to the Nishida '638 Patent, the disclosed invention

> relates to a process for the production of a shoe shaped part using a web of material with a plurality of patterns in the form of the layout of a shoe upper, cutting out these layouts from the web of material and stitching the parts of the shoe upper to a top part, and fastening the related part of the sole to the edge area of the cut-open outside edge of the assigned layout and to a shoe shaped part produced according to this process.

(Ex. 1005 at 1: 10-18).

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94. Nishida claims his process is an improvement of the prior art technology represented by German Patent No. 627,878. According to Nishida:

> A process according to this general type is known from German Patent No. 627 878. There, a web of material is produced so that it successively has three crosswise strips of different weaves. Patterns in the form of the U-shaped layout of a shoe upper are printed on these crosswise strips. The crosswise strips are produced so that the first strip is suitable for the counter-stiffener, the second strip for the vamp and the side portions, and the third strip for the toe cap. Consequently, the second crosswise strip is elastic and multilayered, and the two other crosswise strips are produced in a nonelastic, hard-wearing way. Stiffening threads can also be worked in, and the crosswise strip for the counter-stiffener can be produced as a tubular material into which a heel counter can be inserted. The U-shaped parts are cut out of the material, stitched on the open U-side, which forms the counter-stiffener, and then a sole applied in a way not described in detail.

(Ex. 1005 at 1: 19-37).

95. In view of the teachings of prior art German Patent No. 627,878, Nishida states that:

> the primary object of this invention is to further develop this previously known process so that a shoe upper, in many cases, can be configured together with the related sole part, for example, can be produced with strip-like markings, decorations or the like, and so that, in this case, the production of such a shoe upper is nevertheless possible in an efficient and economical way.

(*Id.* at 1: 40-47).

96. Nishida claims that he achieves this object by the following process steps:

> [I]n the production of a web of material, both the patterns or partial patterns in the form of layouts of the shoe upper and the patterns or

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> partial patterns in the form of a sole part, are produced by a fabric printing process (which is generally well known in the textile industry) on the web of material and/or by a textile production process inside the web of material;
> to each layout of the shoe upper there is directly assigned a sole part and is attached to the layout in the correct position of the shoe upper;
> in the production of the web of material, the layouts or the areas in which the layouts are provided are produced in a woven and/or knitted type different from the sole parts or those areas in which these patterns are provided;
> those areas of the layouts and/or sole pans, which are exposed to the different stresses when wearing the shoe, are produced in the woven and/or knitted types correspondingly matched to the stresses they will experience;
> the layouts and the sole parts assigned to one another are not completely separated from one another when cut out of the web of material, and remain connected with one another, as a cut-out unit, by corresponding material sections;
> from the cut-out units, each of which has a layout with an associated sole part, first the layout is connected on the provided seams to a shoe upper, and then, the sole part is stitched or basted to the free outside edge of the corresponding layout.

(*Id.* at 1:50 to 2:10).

97. Nishida claims that his invention has certain advantages over the prior art. One advantage identified by Nishida is reducing the cost associated with "cutting waste." Nishida describes this advantage as follows in the section entitled "Summary of the Invention":

> By the process according to the invention, only just those parts of the web of material are produced in the necessary quality, thickness, multilayers or the like which correspond to the pattern or to an area of a pattern of the shoe upper or the related sole part. The remaining area of the web of material in contrast can consist of a simple, lightweight or inexpensive material quality, which holds together only the patterns or areas of such patterns in the web of material after their completion.

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> The cutting waste accumulating with cutting out therefore represents a simple, lightweight and inexpensive material. In contrast, with the known material that has crosswise strips [*i.e.*, German Patent No. 627,878], the entire cutting waste, for example, consists of an expensive tubular material, multilayer material or the like.

(*Id.* at 2:11-26).

98. Nishida includes several figures that illustrate his invention. Below are Figures 1 and 2 from Nishida.

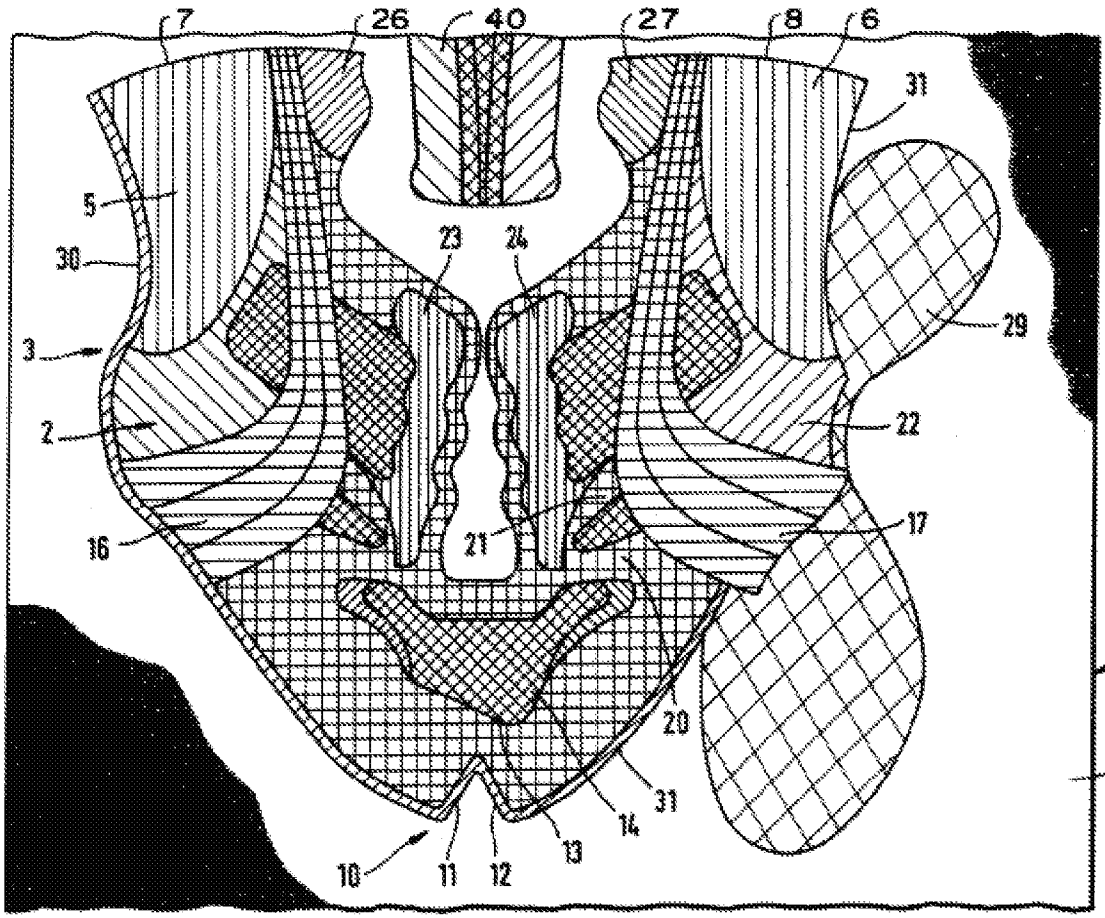
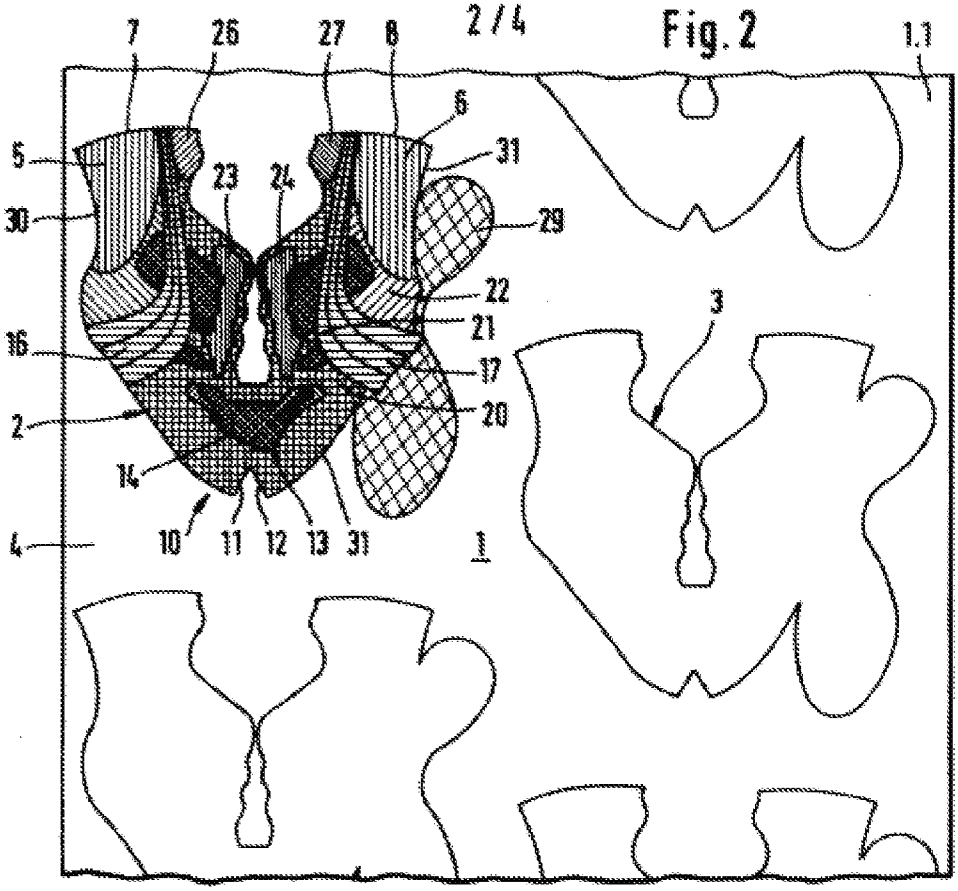


Fig. 1

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99. In the section entitled "Detailed Description of the Preferred Embodiments", Nishida describes his invention as follows:

> In FIGS. 1 and 2, a web of material is identified by 1, and is produced by a conventional textile process, tier [sic] example, by weaving and/or knitting and/or embroidering. The web of material 1 can be provided with a single or with a plurality of layouts 2 of the shape of a shoe upper 3, as it is represented from the side, for example, in FIG. 3. The web of material has a backing 4 that can be a conventionally used material formed, for example, of a warp and filling or a knitted fabric. Layout 2 is divided into different individual parts or areas, which differ from one another, such as by being of another material style and/or by being of different fibers or yarns, for example, from wool, wool with metal yarns, silk, silk with metal yarns, wool with plastic fibers or the like and/or by being formed of different colors, such as from fibers or yarns of different colors, including those of metals, or by different color prints, and/or by being differently designed fiber

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> extrudates or fiber extrudate compositions, such as twisted, processed parallel or the like.
>
> The individual parts or areas of shoe upper 3 can be representations of those areas on which a trimming, for example, a part resistant to wear, is applied. For example, areas 5 and 6 are provided for applying an inside or outside heel counter 9 (FIG. 3). After cutting out layout 2 from the web of material 1, the edges 7 and 8 are stitched together and a heel seam thus is formed. Then, heel counter 9, represented in FIG. 3, is applied, for example, glued and/or stitched, to adjacent areas 5 and 6.
>
> Correspondingly, the contours of edges 11 and 12 are stitched together in the form of shoe toe 10, and a seam is formed on the shoe toe. To reduce wear, a toe cap 15, represented in FIG. 3, can be applied, especially glued and/or stitched, on the front area, adjacent to front edge 13 of toe area 14.
>
> Since, generally, toe area 14 is designed to be relatively deformably soft or elastic, and optionally, also permeable to air, the web of material 1, in toe area 14, according to the present invention, is correspondingly designed by suitable selection of the weave pattern, knit pattern and/or the material used, such as, for example, Silk or plastic. The type of production can, additionally, insure that the toe area 14 has a good air exchange capability. For example, this can be achieved by a net-like woven or knitted structure.

(*Id.* at 3:6-52).

1. Substitute Claims 47-50 Are Not Anticipated by Nishida

100. In my opinion, Nishida does not anticipate the substitute claims because Nishida does not describe every feature of those substitute claims. For example, Nishida does not describe the following limitations in substitute claim 47: "flat knit textile element, the flat knit textile element having 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, some of the

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flat knit edges joined together to form an ankle opening in the upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges …"

101. While Nishida has general references to knitting, Nishida does not specify either warp knitting or weft knitting. (*E.g.*, Ex. 1005 at 3:6-12). Nishida also does not specifically refer to flat knitting. (*Id.*). In addition, as the Board acknowledges, "Nishida is directed to the production of a shoe upper by (1) cutting out a layout in the form of the shoe upper from a web of material …" (Decision at 17-18). Because Nishida's "layout" is made as part of a larger textile structure or web and must be cut out of the web, Nishida's "layout" has a structure that is distinct from that of the textile element recited by substitute claim 47. In particular, the textile yarns forming the edges of Nishida's layout, even if formed by knitting, must be individually broken as the layout is cut out of the web that completely surrounds the layout. Nishida does not actually describe how this cutting operation is conducted. However, as noted in the '011 patent, a textile element can be removed from a surrounding textile structure with a die-cutting, laser-cutting, or other conventional cutting operation. (Ex 1002, 8:8-10).

102. Nishida also does not expressly describe how the cut edges are processed prior to the step in which the as-cut layout is shaped in the form of a shoe upper by connecting certain edges to form seams. However, in the absence of any processing, the prior art recognizes that such edges would be prone to fraying

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and, in a weft knit structure, would even be susceptible to unraveling. For example, Glidden explains:

> [T]he upper may be slit as at 22, preferably after vulcanization, to provide a vent extending from the top of the shoe to the instep in a forward direction ... Where the cutting of the textile upper, to provide the slit 22, or for any other purpose, leaves a raw textile edge which might ravel or fray, the edges may be protected, as by an overcast stitch 26, as illustrated in Fig. 5, where the stitch is shown as extending not only along the margins of the slit, but also along the top margin of the upper at the leg opening.

(Ex. 1007 p. 2, ll. 43-63).

103. Similarly, Whiting explains that:

> As shown in Fig. 1, the last 16 may be provided with a guide groove 20 along which a cutter effects severance of portion 13 from the ultimate upper 11. If desired, the last may terminate along the line of groove 20, in which case, the top of the last will serve to guide a severing cutter. ... The shoe is now complete except for providing a finish for the contour edge of the upper. As shown in Fig. 4, said edge may be seared with a heated tool to fuse the fibers of the yarn along the severance line to coagulate the same and form a finishing bead 21. ... Fig. 5 shows another edge-finishing method, the same entailing the application of a binding 22 by stitching, cementing or pasting the same in place. Since binding-applying machines are available, the latter edge-finishing step can be effectively accomplished.

(Ex. 1009 at 3:68 – 4:16).

104. Consequently, a person of ordinary skill in the art would readily have understood that the cut edges of the Nishida layouts would need to be treated to stabilize and secure the edges before any additional processing.

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105. Regardless of how Nishida's overall web and associated layouts are constructed, however, edges of a layout (or textile element) that are first cut and then stabilized such as required by Nishida, have a significantly distinct structure from flat knit edges formed directly as a consequence of knitting the textile element in its final shape. Flat knit edges inherently have a stable configuration where the stitches of yarn at the edges of the textile element are unbroken and joined from one row to the next row. Segments of yarn forming edges of the textile element retain their integrity. Examples of this are shown in several Figures of the Spencer textbook relied on by Petitioner as Exhibit 1012

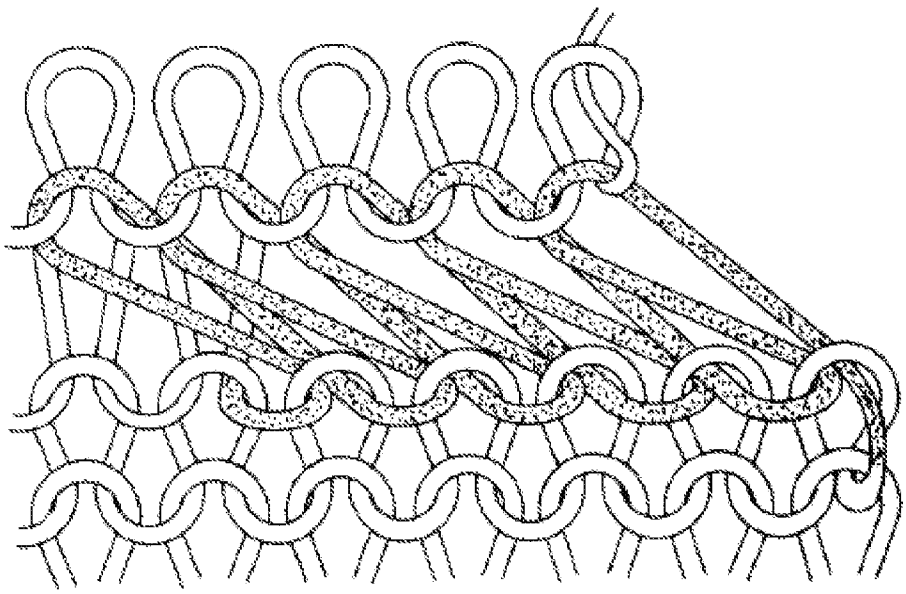


Fig. 16.7 Wale fashioning (narrowing).

(Ex. 1012 at 211)

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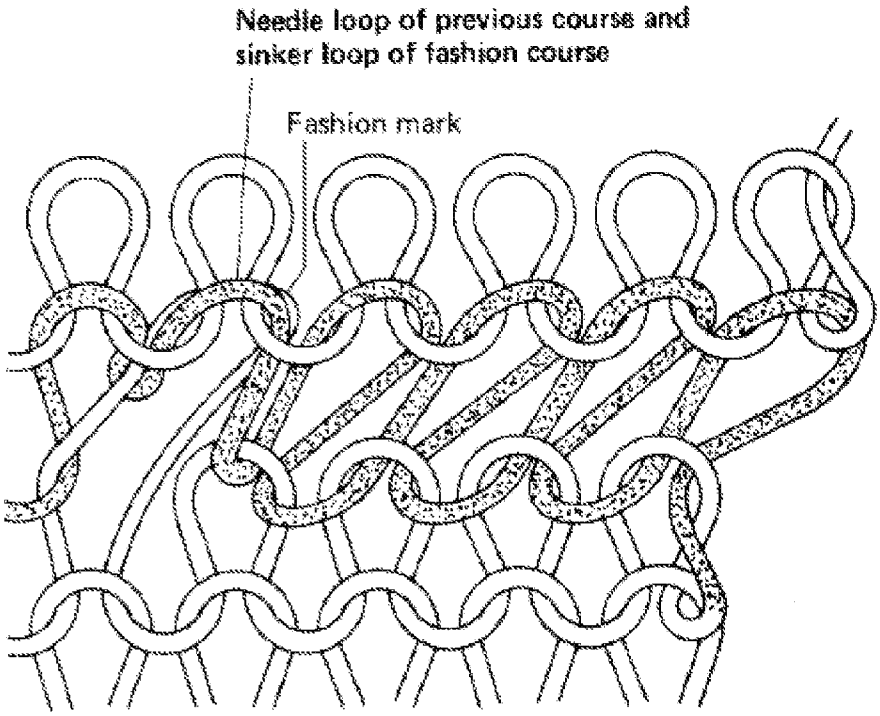
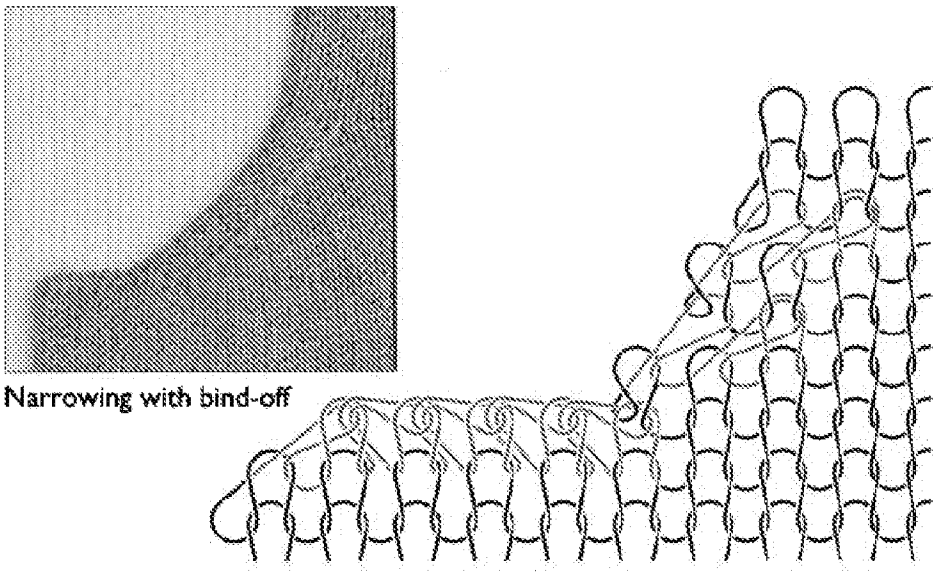


Fig. 16.8 Wale fashioning (widening).

(Ex. 1012 at 212)



(Ex. 1012 at 214) (top portion of figure 16.10)

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106. As a result, the footwear article defined by substitute claim 47, and the substitute claims dependent on substitute claim 47, are novel over Nishida (*i.e.*, claims 47-50 are not anticipated by Nishida).

107. With regard to substitute claim 49, Nishida also does not teach the limitation requiring "a plurality of apertures in the flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces." While figure 3 of Nishida indicates the upper includes openings for laces, Nishida contains no description or suggestion of forming such openings by omitting stitches in the layout. Thus, it appears such openings were created by an additional manufacturing step, e.g., punching out the openings. Accordingly, because Nishida does not describe the additional requirements recited in substitute claim 49, this substitute claim is not anticipated by Nishida for these additional reasons.

2. Substitute Claims 47-50 Would Not Have Been Obvious In View of Nishida Alone Or Combined With McDonald, Whiting or Curley

108. It is also my opinion that the substitute claims would not have been obvious based on Nishida alone. In its decision, the Board found as follows with respect to Nishida:

> Petitioner contends that claims 1-16 and 19-46 are rendered obvious by Nishida.

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* * *

> Because anticipation is the epitome of obviousness, a disclosure that anticipates under 35 U.S.C. § 102 also renders the claim unpatentable under 35 U.S.C. § 103. … Therefore, for the reasons set forth above, we hold that Petitioner has demonstrated a reasonable likelihood that independent claims 1, 16, 24, 36 and 44, as well as dependent claims 2-15, 19-23, 25-34, 39-43, 45, and 46, are rendered obvious by Nishida.

(Decision, p. 31).

109. This obviousness rationale that the Board applied to issued claims 16, 19 and 20 does not apply to the proposed substitute claims. In particular, the Board's obviousness holding is based solely on a finding that there was a reasonable likelihood that Nishida anticipates issued claims 16, 19 and 20. As explained above, however, the claims that have been substituted for issued claims 16, 19 and 20 include additional limitations that are not described by or inherent in Nishida. Consequently, anticipation cannot form the basis for a finding of obviousness with respect to the substitute claims.

110. It is also my opinion that substitute claims 47-50 would not have been obvious to a person of ordinary skill in the art based on Nishida alone for the additional reason that there was no reason that would have prompted a person of ordinary skill in the art at the time of the invention to modify Nishida to arrive at the inventions claimed in the substitute claims. As I discussed above, Nishida's approach to making a shoe upper was touted as an improvement of the prior art technology represented by German Patent No. 627,878. (Ex. 1005 at 1: 19-47). In

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particular, Nishida indicates the German patent formed its textile web by weaving strips having different properties completely across its cross-section. According to Nishida, patterns in the shape of upper elements were then printed on the web and were subsequently cut-out from the web. Nishida asserted that with this approach textile material in the area between the individual upper elements was wasted. Nishida further observed that, according to the German patent, this wasted textile material constituted the same valuable textile material used to form the uppers. Nishida attempted to avoid this waste by using "simple, lightweight and inexpensive material" to form those portions of the web not constituting the layouts for the uppers. According to Nishida, this approach minimizes the waste of valuable textile material. However, Nishida's solution also is imperfect.

111. First, Nishida does nothing to eliminate the added processing also required by the cited German patent that is associated with the steps of cutting the layout from a web of material, and then finishing the cut edges. In addition, Nishida only partially addresses the problem of material waste. Just like the German prior art, Nishida's article is made by a subtractive process. The portion of the textile web not constituting a layout is wasted, just as it was wasted in the prior art. While Nishida contends that there is a cost savings because the material wasted is not as valuable as the material retained, there nonetheless remain the problems of additional processing and wasted material associated with the article.

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112. In contrast, the flat knit upper described in the substitute claims is made by an additive process. Such an additive process avoids the added processing steps associated with cutting and then finishing the cut edges, as well as the wasting of textile material. The article of the substitute claims accomplishes these improvements by virtue of its textile element having flat knit edges – an entirely different structure than the cut edges in Nishida that must be finished and result in wasting of material. In sum, there was no teaching, suggestion, motivation or other reason that would have prompted one of ordinary skill in the art at the time of the invention to modify Nishida to achieve the inventions described in substitute claims 47-50.

113. As discussed above, dependent substitute claim 49 includes additional limitations that are not disclosed in Nishida, *i.e.*, "a plurality of apertures in the flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces." Nishida contains no description or suggestion of forming such openings by omitting stitches in the upper and positioning them in the upper for receiving laces. Moreover, there was no motivation or other reason that would have prompted one of ordinary skill in the art at the time of the invention to modify Nishida to include this additional feature that has been added to substitute dependent claim 49. Consequently, the additional feature added to this substitute dependent claim provides further

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grounds for concluding that substitute dependent claim 49 would not have been obvious.

114. It is also my opinion that substitute claims 47-50 would not have been obvious based on Nishida in combination with McDonald or Whiting or Curley. Petitioner's expert stated the following with respect to issued claim 16:

> Nishida discloses producing the material that forms the upper with a "conventional textile process…by weaving and/or knitting…" At the time Nishida was filed in the U.S. (June 17, 1992) the skilled person would have known and understood that "conventional" knitting processes include both warp knitting and weft knitting (and further including both circular and flat knitting), since these knitting processes existed for many decades before 1992 and had been used in the making of shoe uppers for many decades as well.
>
> For example, McDonald dates to 1943 and describes a method of making shoes including use of a "conventional type of circular knitting machine" to form a "weft knit fabric" used to make the upper of a shoe. (McDonald, p. 1 at 2:26-39)
>
> As another example, Whiting dates to 1953 and describes a method for producing knitted shoe uppers of shrinkable yarn, including knitting the sock-like structure that forms the upper on "flat or circular knitting machines." (Whiting, 2:39-56)
>
> As another example, Curley, published in April 1990, describes shoes made with knitted layers in the upper, including both warp and weft knitting. (Curley, p. 7, line 32 – p. 8, line 25)
>
> It is my opinion that Nishida discloses both weft (including circular and flat) and warp knitting by disclosing that "conventional" knitting processes can be used for his invention.
>
> Even if Nishida was determined not to describe weft-knitting, it would have been obvious to the skilled person to use weft knitting from Nishida's disclosure of using a knitted material for the upper. Weft

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> knitting was a well known knitting process in March 2004, when the '011 patent was filed. Weft knitting had been used for years in shoe uppers, as shown by McDonald, Whiting, and Curley, for many years. It would simply have been a matter of design choice from among a finite number of types of knitting processes one could use.

(Ex. 1001, Frederick Dec. pp. 51-52).

115. Even if Nishida is combined with any one of McDonald, Whiting or Curley, the combinations would still not include all of the elements in substitute claims 47-50.

116. With regard to McDonald, McDonald states that his "invention is a shoe comprising a circular-knit fabric sock having a stretchable elastic welt and a reinforced sole devoid of ridge-forming seams permitting intimate attachment of inner and outer soles adhesively throughout the area of the sock sole." (Ex. 1008 at p. 2 ll. 1-5).

117. Similarly, with regard to Whiting, Whiting explains that his upper is a "sock" that is initially "knitted on a sock-knitting machine in the conventional manner for such items." (Ex. 1009 at 2:39-42). Whiting further states that:

> It will be realized that the sock may be otherwise produced, whether initially seamless or not, as by knitting the same on flat or circular knitting machines, or by hand, or crocheting or weaving the same. *In any case, the result sought is a generally conventional soft sock form* ...

(Ex. 1009 at 2:53 – 3:2) (emphasis added).

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118. While Whiting refers to the possible use of a flat knitting machine, he expressly states that his intent "in any case" is to form a "conventional" sock. (*Id.*). Indeed, the only structure described in his patent is a sock. Even if one assumes Whiting's conventional sock could be made using a flat knitting machine, Whiting still does not disclose a flat knit textile element having flat knit edges. Notably, Whiting gives no indication of how a sock produced on a flat knitting machine would be converted into the apparently tubular form shown and described by Whiting.

119. Whiting also does not disclose a textile element having flat knit edges joined together to form an ankle opening in the upper for receiving a foot. Whiting's technique for forming an opening to receive a foot is significantly different than the teachings in the '011 Patent. Whiting describes forming an opening by following a series of steps that include: (i) pulling the sock [10] over a last [16]; (ii) subjecting the sock to a shrinking step in a heated receptacle [18]; and (iii) cutting/trimming away an extension portion at the top of the sock—[13] in Fig. 1, or [25] in Figs. 3, 6 and 7. (Ex. 1009 at 3:13 – 4:62). The embodiment shown in Fig. 1 further requires that certain "edge-finishing" techniques be used to finish the edges in the area of the opening that was cut. (Ex. 1009 at 3:66 - 4:16, Figs. 4-5). Even if one were to assume for purposes of argument that Whiting's

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sock is formed on a flat knitting machine, Whiting gives no indication that edges of such a flat knitted sock would be somehow connected to form an ankle opening.

120. With regard to Curley, Curley describes a one piece shoe upper made of resilient foam material sandwiched between inner and outer layers and embossed on the upper layer to melt and depress regions of the foam. (*E.g.*, Ex. 1010at 1, Abstract). Curley does not describe or suggest a textile element with flat knit edges as recited by substitute claim 47. Similarly, Curley does not describe or suggest flat knit edges that are joined together to form an ankle opening in an upper. Curley also does not describe or suggest edges free of surrounding textile structure such that the flat knit edges are not surrounded by a textile structure from which the textile element must be removed. Indeed, Curley relies on the embossing procedure to seal the three-layered structure at its edges.

121. In sum, McDonald, Whiting and Curley do not teach or suggest a flat knit textile element having flat knit edges free of surrounding textile structure such that the flat knit edges are not surrounded by a textile structure from which the textile element must be removed, nor do they teach or suggest forming a flat knit textile element having flat knit edges that are joined together to form an ankle opening in an upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges.

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122. Accordingly, it is my opinion that the substitute claims would not have been obvious in view of Nishida in combination with McDonald or Whiting or Curley because even if Nishida is combined with these references, the combinations still do not include limitations in the substitute claims, including the following limitations: "flat knit textile element (1) having 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, some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges" (substitute claim 47, and the claims dependent thereon, *i.e.*, substitute claims 48-50); "a plurality of apertures in the flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces" (dependent substitute claim 49).

123. It is also my opinion that the substitute claims would not have been obvious to a person of ordinary skill in the art in view of Nishida in combination with McDonald or the circular knit embodiment in Whiting for the additional reason that there was no reason that would have prompted a person of ordinary skill in the art at the time of the invention to combine the references to arrive at the inventions claimed in the substitute claims. While these references generally relate to uppers, attempting to combine a structure like Nishida with circular knit sock

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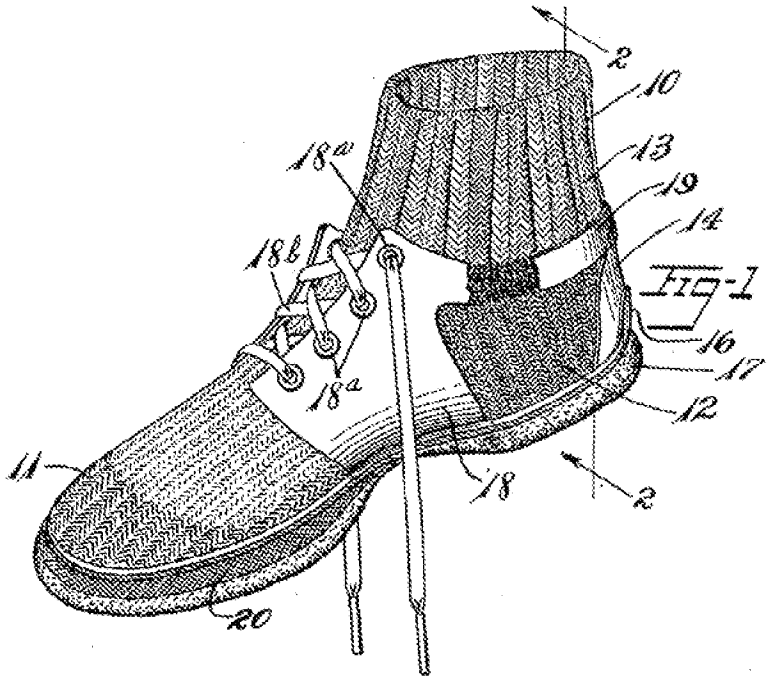
structures to arrive at the claimed inventions would require a substantial reconstruction of the elements shown in Nishida and would change the basic principle under which Nishida was designed to operate. Nishida's upper is initially a layout that is formed as part of a generally planar web from which it must be cut. After Nishida's layout is cut out of the web it is flat and is not shaped as an upper with an opening for receiving a foot. In order to shape the flat textile element into an upper with an opening for receiving a foot, edges of the textile element must be finished and joined together.

124. In contrast, McDonald and the circular knit embodiment in Whiting teach the direct formation of sock-like uppers using a circular knitting machine. The structures are not flat and instead are formed as tubular structures on the circular knitting machine. The circular knitting process results in an opening at one end of the tubular structure that serves as an opening for receiving a foot. No edges of the tubular structure are joined to form the opening that receives the foot. In light of these substantial differences, there was no motivation or other reason that would have prompted one of skill in the art at the time of the invention to combine these references to achieve the inventions claimed in the substitute claims.

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B. Glidden

125. The Glidden '197 Patent states that it is directed to the manufacture of shoes having textile uppers. (Ex. 1007 p. 3, 1: 1-4). Glidden states that the entire upper "is fabricated as an integral, shaped, sock-like article." (*Id.* p. 3, 2:45-47). Below is an example of Glidden's sock-like tubular structure illustrated in Figure 1 of Glidden.



126. Petitioner's Declarant, Mr. Frederick, states the following with respect to Glidden: "the skilled person would know that knitting the unitary upper in a 'sock-like' fabrication process would have utilized circular knitting ..." (Ex. 1001, Federick Dec. pp. 84-85). I agree that one of skill in the art would understand that circular knitting would have been used to fabricate the sock-like upper described in Glidden. For example, McDonald shows that circular knitting was a known

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technique for making socks around the time Glidden was filed. (Ex. 1008 p. 2, l. 1-2 ("My invention is a shoe comprising a circular knit fabric sock ...")). Glidden does not disclose or refer to the use of flat knitting.

127. Glidden further teaches that the sock-like upper must be used in combination with a "reinforcing structure":

> A reinforcing structure, preferably of rubber[,] is provided on the outer face of the upper in form-fitting contact therewith without wrinkling or buckling of either of the parts, while preferably leaving extensive portions of the textile upper exposed to provide breathability and facility of flexing.

(*Id.* p. 3, l. 11-17).

128. Glidden illustrates the reinforcing structure in the figures of his patent. For example, the reinforcing structure in Figure 1 includes blucher saddle 18 having an integral heel strap 19, which encircles the rear of the shoe. (*Id.* p. 4, l. 8-14). Glidden also identifies the reinforcing structure as a requirement in all five of the claims that define his invention. (*Id.* pp. 4-5). Glidden's claims refer to the "reinforcing structure" as a "bracing structure," and indicate that the bracing structure is required to "restrain the upper from being excessively stretched." (*Id.* at p. 3, l. 4-5). Following are excerpts from all five of Glidden's claims illustrating this requirement:

> 1. A shoe having an upper ... a sole on said upper and a *bracing structure secured to the sole and extending over the instep portion of the upper to restrain the upper from being excessively stretched*, the

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bracing structure covering only a portion of the upper thereby leaving extensive ventilating area of the latter exposed.

2. A shoe having an upper of knitted material ... a sole on the upper, and a *bracing structure secured to the sole and extending over the instep portion of the upper to restrain the upper from being excessively stretched* ...

3. A shoe having an upper of knitted material ... a sole adhered to the upper, and a *bracing structure secured to the sole and a adhered at least in part directly to said upper and extending over the instep portion of the upper to restrain the upper from being excessively stretched* ...

4. A shoe having an upper of such knitted construction ..., a sole on the upper, and *a bracing structure secured to the sole and extending over the instep portion of the upper to restrain the knitted upper from being excessively stretched* ...

5. A shoe having a sock-like upper of such knitted construction ... a sole essentially of rubber adhered to the upper and a *bracing structure essentially of rubber for restraining the upper from being excessively stretched*, said structure comprising a portion adhered to the sole and extending over the instep of the upper and a portion adhered to the sole at the heel and extending forwardly around the upper ...

(*Id.* p. 4 2 73 to p. 5 2 34) (emphasis added).

1. Substitute Claims 47-50 Are Not Anticipated by Glidden

129. In my opinion, Glidden does not anticipate the proposed substitute claims because Glidden does not describe every limitation of those substitute claims. As set forth above, Glidden discloses a sock-like tubular upper made using circular knitting. Thus, Glidden does not describe a "flat knit" textile element having "flat knit edges."

130. Glidden also does not teach a textile element having "flat knit edges joined together to form an ankle opening in the upper for receiving a foot, the

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ankle opening having an edge comprised of one of the flat knit edges." This limitation highlights a substantial difference between the teachings of Glidden and the teaching of the invention described in the substitute claims. The textile element described in the substitute claims is flat knitted as a generally planar (flat) element. (E.g., Ex. 1002 at 6:12-15). Examples of such a generally planar textile element are shown in Figures 8, 10 and 11 in the '011 Patent. As those figures in the '011 Patent show, in its planar configuration the textile element does not have an ankle opening for receiving a foot. However, the generally planar textile element has flat knit edges that are joined together to form an ankle opening in the upper for receiving a foot. (Ex. 1002 at 6:22-24; Fig. 4).

131. In contrast, while Glidden has an opening at the top of the upper for receiving a foot, the opening is formed on the circular knitting machine when the sock is knitted to "final form" on the machine. (*E.g.*, Ex. 1007 p. 3, 2:21-23; Fig. 1). Thus, Glidden does not have a "flat knit textile element (1) having… some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges." Accordingly, substitute claim 47, as well as the substitute claims dependent on claim 47, are not anticipated by Glidden.

132. With regard to substitute dependent claims 48 and 50, Glidden also does not teach the limitation requiring "the joined edges shape the flat knit textile

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element to form a lateral region, a medial region, an instep region and a heel region of the upper." As discussed previously, Glidden teaches knitting a tubular sock to final form on a circular knitting machine. Glidden does not teach that joined edges shape Glidden's tubular upper to form the regions recited in this claim.

133. With regard to substitute dependent claim 49, Glidden also does not teach the limitation requiring "a plurality of apertures in the flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces." While Figure 4 of Glidden indicates the textile upper includes openings for laces, Glidden contains no description or suggestion of forming such openings by omitting stitches in the textile upper. Thus, it appears such openings were created by an additional manufacturing step, e.g., punching out the openings.

134. Accordingly, because Glidden does not describe these additional requirements recited in substitute claims 48-50, these substitute claims are not anticipated by Glidden for these additional reasons.

2. Substitute Claims 47-50 Would Not Have Been Obvious In View of Glidden Alone or Combined With Whiting or McDonald

135. It is also my opinion that the substitute claims would not have been obvious based on Glidden alone. In its decision, the Board found as follows with respect to Glidden:

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> Petitioner contends that claims 16-18 are rendered obvious by Glidden, alone or in combination with McDonald or Whiting. Pet. 3, 43-44. Because anticipation is the epitome of obviousness, a disclosure that anticipates under § 102 also renders the claim unpatentable under § 103. … Therefore, for the reasons set forth above, we hold that Petitioner has demonstrated a reasonable likelihood that independent claim 16, as well as dependent claims 17 and 18, are rendered obvious by Glidden.

(Decision, p. 36).

136. The obviousness rationale that the Board applied to issued claim 16 does not apply to substitute claim 47 because the Board's obviousness finding is based solely on a finding that there was a reasonable likelihood that Glidden anticipates issued claim 16. As explained above, however, the claim that has been substituted for original claim 16 (*i.e.*, substitute claim 47) includes additional limitations that are not disclosed in Glidden. Therefore, Glidden does not anticipate substitute claim 47, and anticipation cannot form the basis for a finding of obviousness with respect to substitute claim 47 or the substitute claims dependent on claim 47.

137. It is also my opinion that substitute claims 47-50 would not have been obvious to a person of ordinary skill in the art based on Glidden alone for the additional reason that there was no reason that would have prompted a person of ordinary skill in the art at the time of the invention to modify Glidden to arrive at the inventions claimed in the substitute claims. While Glidden generally relates to an upper, attempting to modify a structure like Glidden to arrive at the claimed

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inventions would require a substantial reconstruction of the elements shown in Glidden and would change the basic principle under which Glidden was designed to operate. In particular, Glidden teaches the formation of a sock-like upper using a circular knitting machine. The upper is formed as a narrow tubular structure on the circular knitting machine. The circular knitting machine knits an opening at the top of the tubular structure that serves as an opening for receiving a foot. No edges of the tubular structure are joined, either during or after the knitting process, in order to form an opening that receives the foot.

138. In contrast, the substitute claims are directed to a flat knit textile element that is initially not shaped as an upper. Because it is initially not shaped as an upper, it does not have an ankle opening for receiving a foot. In order to shape the flat textile element into an upper, flat knit edges of the textile element must be joined together. The joined edges form an ankle opening for receiving a foot. In light of these substantial differences, one of skill in the art would have had no reason and would not have been motivated to modify Glidden to arrive at the inventions claimed in the substitute claims. Indeed, modifying Glidden with the aid of hindsight so as to arrive at the invention of the substitute claims would seem to have required circular knitting a tube structure, making a lengthwise incision in that tubular structure to obtain a flat structure, then rejoining edges of that incision to return the flat structure to a tubular form. Clearly, there would be no motivation

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or other reason that would have prompted one of ordinary skill in the art at the time of the invention to have carried out such a procedure.

139. As discussed above, dependent substitute claims 48-50 include additional limitations that further distinguish over Glidden alone. There was no reason or motivation that would have prompted one of ordinary skill in the art at the time of the invention to modify Glidden to include any of the additional features that have been added to substitute dependent claims 48-50. Consequently, the additional features added to these dependent substitute claims provide further grounds for concluding that those claims would not have been obvious.

140. It is also my opinion that the substitute claims 47-50 would not have been obvious based on Glidden in combination with Whiting or McDonald. Petitioner's expert stated the following with respect to issued claim 16:

> The skilled person would know from Glidden's description of fabricating the upper as a shaped, "sock-like" article, as well as the knit patterns in the drawings, that Glidden is describing and showing a weft-knitted textile element. In addition, the skilled person would know that knitting the unitary upper in a "sock-like" fabrication process would have utilized circular knitting, which has been used for making socks for many decades.
>
> For example, Whiting dates to 1953 and describes a method for producing knitted shoe uppers of shrinkable yarn, including knitting the sock-like structure that forms the upper on "flat or circular knitting machines." (Whiting, 2:39-56)
>
> As another example, McDonald dates to 1943 and describes a method of making shoes including use of a "conventional type of circular

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knitting machine" to form a "weft knit fabric" used to make the upper of a shoe, (McDonald, p. 1 at 2:26-39)

(Ex. 1001, Frederick Dec. at 92-93).

141. Even if Glidden is combined with Whiting or McDonald, the combinations would still not include all of the elements in substitute claims 47-50.

142. With regard to Whiting, as discussed above Whiting explains that, similar to Glidden, his upper is a "sock" that is "knitted on a sock-knitting machine in the conventional manner for such items." (Ex. 1009 at 2:39-42). As also explained above, Whiting does not disclose a flat knit textile element having flat knit edges, and it does not disclose a textile element having flat knit edges joined together to form an ankle opening in the upper for receiving a foot. As I described, the technique Whiting describes for forming an opening to receive a foot is significantly different than the teachings in the '011 Patent.

143. With regard to McDonald, as explained above McDonald teaches a sock-like structure similar to the sock-like structures of Glidden and Whiting. According to McDonald, his "invention is a shoe comprising a circular-knit fabric sock having a stretchable elastic welt and a reinforced sole devoid of ridge-forming seams permitting intimate attachment of inner and outer soles adhesively throughout the area of the sock sole." (Ex. 1008 at p. 1, ll. 1-6).

144. In sum, Whiting and McDonald do not teach or suggest a flat knit textile element having flat knit edges free of surrounding textile structure such that

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the flat knit edges are not surrounded by a textile structure from which the textile element must be removed, nor do they teach or suggest forming a flat knit textile element having flat knit edges that are joined together to form an ankle opening in an upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges.

145. Accordingly, it is my opinion that the substitute claims would not have been obvious in view of Glidden in combination with Whiting or McDonald because even if Glidden is combined with these references, the combinations still do not include limitations in the substitute claims, including the following limitations: "flat knit textile element (1) having 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, some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges" (substitute claim 47 and the claims dependent thereon, i.e., substitute dependent claims 48-50); "the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper" (dependent substitute claims 48 and 50); "a plurality of apertures in the flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces" (dependent substitute claim 49).

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C. Substitute Claims 47-50 Would Not Have Been Obvious In View of Osamu Alone Or Combined With McDonald, Whiting, Nishida, Glidden or Curley

146. According to Osamu, his alleged invention

> relates to uppers material for shoes and more particularly for sports shoes. In particular, the shoe uppers material of the present invention is uppers material comprising one sheet of woven fabric.

(Ex. 1006 p. 3, ¶0001).

147. Osamu describes the problems his invention sought to solve as follows:

> [Problem the Invention Seeks to Solve] As mentioned above, with the conventional shoe manufacturing methods based on parts, a variety of materials come to be assembled into the shoe for one foot. To do this, there is the difficulty of procuring each material and losses of each material are large, with the loss having to be borne by the shoe factory. In addition, because the structure is complicated, effort is required for cutting and stitching together and skill-training is required. The actual labor cost, domestically, for cutting and sewing/stitching work has increased by 10 to 100% or more. The trend toward a "arts approach" results in an increase in the component of specialized fabrication work and a steep rise in personnel cost, coupled with the fact that domestic sewing/stitching factories are unprofitable. Thus shoe manufacturing that involves a large number of individual parts has become difficult in practice. Further, in respect to economies of manufacturing, because a process where each part of a shoe is designed and cut and a process where these parts of complicated shapes are stitched together accurately and with uniform elasticity are involved, for mass production, there were the issues that high-level techniques were required and simplification/reduction of the number of process steps was difficult.

(Ex. 1006 p. 3-4, ¶0004).

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148. Thus, one problem Osamu identifies with the prior art is that "simplification/reduction of the number of process steps was difficult." (*Id.*). Osamu explains his solution to this and other problems as follows:

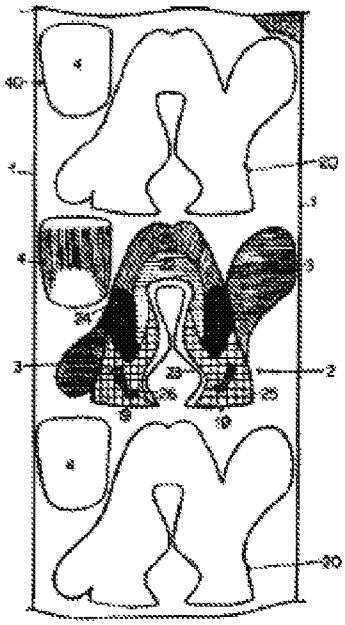
> [Means of solving the problem] The present invention solves these problems. It develops material for shoes indispensable to manufacturing methods that increase economic efficiency of production by reducing the quantity of shoe uppers materials as much as possible, thus enabling smooth provision of materials and reducing labor cost through simplification of the sewing/stitching process. The present invention, by setting up the conventional parts as a single sheet of main uppers materials as much as possible, reduces the number of parts and the number of sewing/stitching operations, thus improving overall efficiency. To sum up, uppers material is provided which, on a single sheet of Jacquard weave cloth, forms an integration of almost all the uppers material for a shoe. The present invention is uppers material configured of one sheet of cloth wherein all the outlines of the main uppers materials for the shoe of one foot are continuous and the interiors therein are woven in a variety of weave structures, designs and/or patterns. …
>
> [0006] Furthermore, the present invention forms the uppers material on one sheet of Jacquard weave cloth, and on top of them other elements can be sewn on, water-proofing material can be applied, decorative elements can be sewn on, and of course water-proofing can be done as a secondary production step.

(Ex. 1006 p. 4, ¶¶0005-0006).

149. The "single sheet of main uppers materials" described in the preceding excerpt is illustrated in Figure 1 of Osamu's patent, which is reproduced below.

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Fig. 1



(Ex. 1006 p. 8).

150. Osamu describes the embodiment shown in Figure 1 as follows:

[Embodiments] Figure 1 shows an embodiment of uppers material for shoes according to the present invention. The uppers material for shoes is configured of one sheet of cloth wherein, the main uppers material 2 for the shoe of one foot are woven on elongated foundation cloth 1, all the outlines thereof are connected, and within those outlines at each appropriate location 2] through 26 are many kinds of weave structures, designs and patterns. The weave structure is a comparatively heavy Jacquard weave, the weave structure being changed for each part corresponding to each location on the shoe or being woven in a pattern that changes the design/pattern. On foundation cloth 1, all of the main uppers material 2 for the shoe of one foot are woven, and continuous thereto middle sheet 3 and, and separated a little therefrom, shoe tongue flap shaped cover 4, are woven in. Middle sheet 3 is a sole-shape divided in half, roughly diagonally, formed continuous with the edge of the outline of main uppers material 2, to the right and left thereof. Middle sheet 3, formed divided, will become the shape of the sole by being 3 dimensionally folded in and stitched together when main uppers material 2 is formed 3 dimensionally on the shoe mold. Also, the shoe tongue flap shaped

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> cover 4 is sown in on the inside of main uppers material 2. In this embodiment, main uppers material 2, middle sheet 3, and tongue flap shaped cover 4 are positioned appropriately on elongated foundation cloth 1, forming an elongated weaving with a continuous pattern. Main uppers material 2, middle sheet 3, and tongue flap shaped cover 4 are cut along the outline line of each 20 and 40, to form two parts. The above-mentioned main uppers material 2 is configured of a weave structure with a yarn count of 250 per inch or more, one pattern element being from 25cm^2 to 80cm^2 in size. …

(Ex. 1006 pp. 4-5, ¶¶0007).

151. Osamu further explains that, like Nishida, one of the processing steps required by his invention is cutting the textile elements out of a surrounding textile structure: "By 'punch-out' cutting of main uppers 2, middle sheet 3, and tongue flap shaped cover 4, parts are made in the least number possible." (*Id.* p. 5, ¶0008).

152. Petitioner acknowledges that while Osamu teaches a *woven* textile element, it does not teach a *knitted* textile element as required by the '011 patent claims. (*E.g.*, Petition p. 45, "… Osamu describes every element of independent claim 16, except that Osamu discloses using a woven textile element rather than a weft-knitted textile element."); (Ex. 1001 p. 100, Frederick Dec., "Osamu describes a woven textile element, rather than a weft-knitted textile element."). Consequently, Petitioner does not assert that issued claim 16 is anticipated by Osamu. (*E.g.*, Ex. 1001 pp. 99-152, Frederick Dec.).

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153. Instead, Petitioner asserts that issued claim 16 would have been obvious in view of Osamu alone, and also in view of Osamu combined with any one of the following prior art references: McDonald, or Whiting, or Curley, or Nishida or Glidden. (Ex. 1001 p. 153, Frederick Dec.).

154. With regard to Petitioner's argument that issued claim 16 is obvious in view of Osamu alone, substitute claim 47 adds limitations to issued claim 16 that are not described in Osamu, including: a "flat knit textile element (1) having 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, some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges."

155. It is my opinion that the substitute claims would not have been obvious to a person of ordinary skill in the art based on Osamu alone because there was no motivation or reason that would have prompted a person of ordinary skill in the art at the time of the invention to modify Osamu to arrive at the inventions described in substitute claims 47-50.

156. As I explained previously, Osamu's approach to making a shoe upper was to form weave patterns on a sheet of cloth and then cut the patterns out of the sheet. In addition, as discussed above in connection with Nishida, one drawback

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with this approach is that textile material in the area between the patterns is wasted. Another drawback with this approach is that it can be inefficient because it requires additional processing steps to remove the material from the sheet, and then to ensure that the edges are properly finished. The portion of the sheet not constituting an upper pattern is wasted, just as it was wasted in Nishida.

157. In contrast, the flat knit upper described in the substitute claims is made by an additive process. Such an additive process avoids the additional processing associated with cutting the material and then finishing the cut edges, as well as the wasting of textile material. The substitute claims accomplish these improvements by virtue of its textile element having flat knit edges – a different structure than produced by Osamu's cut edges that must be finished.

158. In addition, Petitioner admits that Osamu does not disclose a flat knit textile element. However, Petitioner contends that woven and knitted textiles are known by the skilled person to be interchangeable. According to the Petitioner's declarant, Mr. Frederick:

> Osamu describes a woven textile element, rather than a weft-knitted textile element. However, the use of a weft-knitted textile element would have been obvious to the skilled person. Woven and knitted textiles are both suitable for use in uppers and known by the skilled person to be interchangeable. Selection of one versus the other is an obvious design choice.
>
> Nishida, for example, recognizes the interchangeability of woven and knitted textiles for use in uppers, repeatedly referring to "woven and/or knitted" fabrics when describing the textile element and

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configurations in his patent. (Nishida, 1:61-62; 1:67-68; 2:42-45; 3:6-10; 3:45-52; 3:66-68; 5:63-6:2; 6:23-25)

Osamu itself recognized that the use of a knitted versus a woven textile in the upper was interchangeable and a matter of design choice Osamu, in describing the prior art in paragraph [0002], states "For example, when using woven fabric and/or knitted fabric as uppers materials for shoes, as shown in Figure 2, the material is made into many parts, such as the tip part A, upper surface part B, edge part C, side surface parts D, E, and F, ankle edge part G, heel parts H and I, and the material and shape of each is selected according to the function of that location. Parts of many types are provided, such as woven fabrics and/or knitted fabrics of various surface structure and design (A, B, I),..."

The '011 Patent also describes in the section entitled "Description of Background Art" that textile materials for uppers can be formed by mechanical manipulation of yarns, including weaving and knitting. ('011 Patent, 2:4-46) The '011 Patent makes no suggestion that knitted fabrics are somehow preferable to woven fabrics. In describing its invention, the '011 Patent describes that textile element 40 can be made using any number of processes that mechanically manipulate the yarns ('011 Patent, 6:51-65):

> "Textile element 40 is primarily formed from one or more yarns that are mechanically-manipulated through either an interweaving, intertwining and twisting, or interlooping process, for example. As discussed in the Background of the Invention section above, interweaving is the intersection of two yarns that cross and interweave at right angles to each other. The yarns utilized in interweaving are conventionally referred to as warp and weft. Intertwining and twisting encompasses procedures such as braiding and knotting where yarns intertwine with each other to form a textile. Interlooping involves the formation of a plurality of columns of intermeshed loops, with knitting being the most common methods of interloping. Textile element 40 may, therefore, be

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> formed from one of these processes for manufacturing a textile."
>
> While some in the past may have suggested that woven fabrics are less elastic or less breathable than knitted fabrics, this was not the case in March 2004. The ability to interweave elastic threads, loose weaving techniques, use of specially treated fibers, and selecting yarn with greater elasticity were known by March 2004 to be useful to address any such perceived concern. For example, Curley explains that either knitted fabrics or woven fabrics may be used for the textile layers of the three-layer upper Curley describes, Curley explains that focusing on yarn elasticity properties when utilizing woven fabrics compensates for lower stretch or elasticity that woven fabrics generally possess when compared with knitted fabrics.

(Ex. 1001 pp. 116-18).

159. In my opinion, one of skill in the art would not have considered Osamu's woven fabric interchangeable with the flat-knit textile element having a unitary construction described in substitute claim 47. Even if there may have been some overlap between the properties obtainable in Osamu's woven fabric and the properties obtainable in the flat knit textile element of substitute claim 47, such a woven fabric is by no means "interchangeable" with a knitted textile element. Woven textiles and knitted textiles are fundamentally different types of materials and have very different structures. For example, in his declaration Mr. Frederick refers to the elasticity of woven fabrics versus the elasticity of knitted fabrics. If one's only goal were to select or create a hypothetical woven fabric having an elasticity similar to that of a particular hypothetical knitted fabric, this might be achievable by appropriate selection of elastic yarns for use in the woven fabric.

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However, this would likely also mean that numerous other properties of these two hypothetical materials will diverge. For example, using stretchable yarn to make the hypothetical woven fabric more elastic may cause the surface texture of the hypothetical woven fabric to have a much different feel than the surface texture of the hypothetical knit fabric. It may also cause the hypothetical woven fabric to be much less breathable than the hypothetical knit fabric. Moreover, and as compared to yarns used in the hypothetical knit fabric, elastic yarns used to create the hypothetical woven fabric may react very differently to heat, moisture or chemicals. This could significantly affect the environments in which the two hypothetical fabrics might be used and/or how the two hypothetical fabrics might be processed. In short, just because it might be possible to select or create a woven fabric that is similar to a particular knit fabric with regard to one property, it does not follow that woven and knitted fabrics might be similar in connection with all properties that may be of importance. For this and other reasons, one of skill in the art would not have considered Osamu's woven fabric interchangeable with the flat-knit textile element having a unitary construction described in substitute claim 47.

160. In sum, there was no motivation or other reason that would have prompted one of ordinary skill in the art at the time of the invention to modify Osamu to arrive at the invention described in substitute claim 47 (or the claims dependent on substitute claim 47, i.e., substitute claims 48-50).

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161. With regard to substitute claim 49, Osamu does not teach the limitation requiring "a plurality of apertures in the flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces." Osamu contains no description or suggestion of forming such openings by omitting stitches in the upper. There was no motivation or other reason that would have prompted one of ordinary skill in the art at the time of the invention to modify Osamu to include the additional features that have been added to substitute dependent claim 49. Consequently, the additional features added to dependent substitute claim 49 provide further grounds for concluding that this claim would not have been obvious in view of Osamu alone.

162. It is also my opinion that substitute claims 47-50 would not have been obvious based on Osamu in combination with McDonald or Whiting or Nishida or Glidden or Curley. Petitioner's Declarant, Mr. Frederick, stated the following with respect to issued claim 16:

> The selection of a weft-knitted fabric instead of a woven fabric to form the textile element would have been obvious to the skilled person, as the '011 Patent and the prior art references show.
>
> Specifically, with respect to weft knitting, several prior art references disclose weft knitting for use in making shoe uppers.
>
> Nishida discloses forming the upper with a "conventional textile process... by weaving and/or knitting..." (Nishida, 3:6-12). At the time Nishida was filed in the U.S. (June 17, 1992) the skilled person would have known and understood that "conventional" knitting processes include both warp knitting and weft knitting (and further

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> including both circular and flat knitting), since these knitting processes existed for many decades before 1992 and had been used in the making of shoe uppers for many decades as well.
>
> Glidden describes an upper that is "fabricated as an integral, shaped, sock-like article although in some cases the insole portion may be omitted if that is desired." (p. 1, 2:45-48) The skilled person would know from Glidden's description of fabricating the upper as a shaped, "sock-like" article, as well as the knit patterns in the drawings (Figs. 1, 6, 8), that Glidden is describing and showing a weft-knitted textile element.
>
> As another example, McDonald dates to 1943 and describes a method of making shoes including use of a "conventional type of circular knitting machine" to form a "weft knit fabric" used to make the upper of a shoe. (McDonald, p. 1 at 2:26-39)
>
> As another example, Whiting dates to 1953 and describes a method for producing knitted shoe uppers of shrinkable yarn, including knitting the sock-like structure that forms the upper on "flat or circular knitting machines." (Whiting, 2:39-56)
>
> As another example, Curley, published in April 1990, describes shoes made with knitted layers in the upper, including both warp and weft knitting. (Curley, p. 7, line 32-p. 8, line 25)

(Ex. 1001, Frederick Dec. at 116-120).

163. Even if Osamu is combined with any one of McDonald or Whiting or Nishida or Glidden or Curley, the combinations would still not include all of the elements in the substitute claims.

164. I have described each of those references previously in this declaration. As those descriptions show, McDonald, Whiting, Nishida, Glidden and Curley do not teach or suggest a flat knit textile element having flat knit edges

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free of surrounding textile structure such that the flat knit edges are not surrounded by a textile structure from which the textile element must be removed, nor do they teach or suggest forming a flat knit textile element having flat knit edges that are joined together to form an ankle opening in an upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges.

165. Accordingly, it is my opinion that the substitute claims would not have been obvious in view of Osamu in combination with McDonald or Whiting or Nishida or Glidden or Curley because even if Osamu is combined with any one of these references, such combinations still do not include limitations in the substitute claims, including: "flat knit textile element (1) having 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, some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges" (substitute claim 47 and the claims dependent thereon, *i.e.*, substitute dependent claims 48-50); and "a plurality of apertures in the flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces" (dependent substitute claim 49).

166. It is also my opinion that the substitute claims would not have been obvious in view of Osamu in combination with McDonald, Glidden or the circular

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knit embodiment in Whiting for the additional reason that there was no motivation or other reason that would have prompted a person of ordinary skill in the art at the time of the invention to combine the references to arrive at the inventions claimed in the substitute claims. While the references generally relate to uppers, attempting to combine a structure like the woven web of Osamu with different knit structures like McDonald, Glidden or the circular knit embodiment in Whiting to arrive at the claimed inventions would require a substantial reconstruction of the elements shown in Osamu and would change the basic principle under which Osamu was designed to operate. Osamu's upper is a woven element that is formed as part of a sheet from which it must be removed. After Osamu's woven element is cut out of the sheet it is flat and is not shaped as an upper with an opening for receiving a foot. In order to shape the woven element into an upper with an opening for receiving a foot, edges of the woven element must be finished and joined together.

167. In contrast, McDonald, Glidden and the circular knit embodiment of Whiting teach the formation of sock-like uppers using a circular knitting machine. The structures are not flat and instead are formed as tubular structures on the circular knitting machine. The circular knitting process results in an opening at one end of the tubular structure that serves as an opening for receiving a foot. No edges of the tubular structure are joined to form the opening that receives the foot. In light of these substantial differences, there was no motivation or other reason

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that would have prompted one of skill in the art at the time of the invention to combine these references to achieve the inventions claimed in substitute claims 47-50.

168. Finally, an additional reference that Petitioner cites in its Petition is Shiomura. Shiomura is not discussed above because Petitioner did not argue that it renders issued claims 16, 19 or 20 unpatentable, either alone or in combination with another reference. Shiomura describes using a two-layered knit fabric having a crossing thread in a shoe upper. (Ex. 1011 at 1:38 – 2:3). The fabric is made using a tricot knitting machine, a Raschel knitting machine or a double Raschel knitting machine, each of which is based on a warp knitting procedure. (*E.g.*, *id.* at 3:4-15). Shiomura does not suggest making a flat knit structure. Aside from just a general reference to using the warp-knitted fabric in a shoe upper, Shiomura does not provide any description of how to integrate the fabric into the shoe upper. Nor does Shiomura describe the fabric as having a plurality of knit constructions, or as having a first and a second area having different properties to impart varying characteristics to the knit material. Accordingly, Shiomura does not render substitute claims 47-50 unpatentable, either alone or in combination with another reference.

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D. Substitute Dependent Claims 48 and 49 Are Patentably Distinct From One Another

169. I have been informed that when a patent owner proposes more than one substitute claim for any one challenged claim, the patent owner needs to show patentable distinction of the additional substitute claim over all other substitute claims for the same challenged claim. As explained above, I understand that NIKE is proposing two substitute dependent claims (*i.e.*, substitute dependent claims 48-49) for issued claim 19. For reasons that include the reasons set forth below, it is my opinion that substitute claims 48 and 49 are patentably distinct relative to one another.

170. It is my understanding that, when evaluating the patentable distinctiveness of two claims, I should consider whether the recitations of one claim anticipate or render obvious the recitations of the other claim. The recitations of a dependent claim include what is recited by that dependent claim, as well as what is recited in claims from which that dependent claim depends. Because substitute claim 48 and substitute claim 49 both depend from substitute claim 47, each of substitute claims 48 and 49 includes the recitations of substitute claim 47.

171. It is also my understanding that, when evaluating the obviousness of substitute claim 48 relative to substitute claim 49, I should (solely for purposes of this analysis) treat substitute claim 49 as prior art and consider the teachings of

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substitute claim 49 in view of the teachings of other prior art. It is my further understanding that, when evaluating the obviousness of substitute claim 49 relative to substitute claim 48, I should (solely for purposes of this analysis) treat substitute claim 48 as prior art and consider the teachings of substitute claim 48 in view of the teachings of other prior art.

172. I understand that, when evaluating the patentable distinctiveness of substitute claims 48 and 49 relative to one another, I should use the same claim constructions that I used in my previous analyses described above.

173. With regard to substitute dependent claim 48, this claim recites "[t]he article of footwear recited in claim 47, wherein . . . the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper."

174. Substitute claim 48 is not anticipated by substitute claim 49. Neither substitute claim 49 nor its parent substitute claim 47 recites "joined edges [that] shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper," and this feature is not inherent in claim 47 or claim 49. Moreover, substitute claim 48 is not obvious over substitute claim 49. Claim 49 does not recite additional features relating to joined edges of the textile element. Substitute claim 47, from which claim 49 depends, recites "some of the flat knit edges joined together to form an ankle opening in the upper

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for receiving a foot." However, a textile element having flat knit edges joined together to form an ankle opening does not teach an element in which joined edges shape the element in multiple regions as recited in substitute claim 48. This is true even when substitute claim 49 is considered in view of Nishida or Osamu. Nishida shows a "layout of a shoe upper" having edges that are sewn together to create an upper, but that layout is part of a surrounding textile structure from which it must be removed. Osamu shows a "main uppers material," but shows it as part of a "foundation cloth" from which it must be removed. A layout (or main uppers material) that that must be removed from a larger textile element does not suggest modifying a flat knit textile element to have the shape of that removed layout.

175. With regard to substitute dependent claim 49, this claim recites "[t]he article of footwear recited in claim 47, wherein at least one of the first stitch configuration and the second stitch configuration forms a plurality of apertures in the flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces."

176. Substitute claim 49 is not anticipated by substitute claim 48. Neither substitute claim 48 nor its parent substitute claim 47 recites "apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces," and this feature is not inherent in substitute claim 47 or substitute claim 48. Moreover, substitute claim 49 is not obvious over substitute claim 48.

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Substitute claim 48 recites "wherein at least one of the first stitch configuration and the second stitch configuration forms an aperture." Even in view of the Petitioner Prior Art and other prior art of record cited during prosecution of the '011 Patent, however, this fails to teach or suggest apertures that are "formed by omitting stitches" and that are also "positioned in the upper for receiving laces."

E. Secondary Considerations

177. I understand that objective or secondary consideration factors can be considered when assessing whether an invention would have been obvious. I understand that one of those factors supporting non-obviousness is a long felt need for the invention. It is my opinion that there was a long felt need for the invention described in substitute claim 47.

178. Nishida shows that reducing material waste during manufacture of textile footwear uppers was a long-felt need. Nishida asserted that "with the known material [as described in German Patent No. 627878] that has crosswise strips, the entire cutting waste . . . consists of an expensive tubular material, multilayer material or the like." (Ex. 1005, 2:22-25). Over thirty years after that German Patent, Nishida's response to this problem was to make the "cutting waste" a simpler, lighter or cheaper material. (*Id.* at 2:15-18). Even if one assumes that Nishida teaches flat knitting of his "web" with multiple "layouts", however, this underlying problem remained. In particular, manufacturing uppers

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from flat textile elements still resulted in material that must be wasted when a flat textile element is cut from a "web of material." Over ten years then elapsed between Nishida and the filing of the '011 patent application. Unlike Nishida, which simply tried to make "cutting waste" less expensive, the upper of substitute claim 47 solves the long-felt need to reduce flat textile footwear upper manufacturing waste by eliminating the need to cut a textile element from a textile structure, thereby eliminating "cutting waste" (and the associated cutting step) instead of simply making the cutting waste cheaper.

179. Therefore, for at least these reasons, the objective factor of long felt need for the invention supports the non-obviousness of the inventions described in substitute claim 47, and the claims dependent thereon, *i.e.*, substitute claims 48-50.

VII. THE PROPOSED SUBSTITUTE CLAIMS ARE PATENTABLY DISTINCT FROM THE OTHER PRIOR ART CITED DURING PROSECUTION OF THE '011 PATENT

180. During prosecution of the '011 Patent, the PTO cited numerous prior art references in connection with its consideration of the patentability of the issued claims. The references cited by the PTO are listed on the first and second pages of the '011 Patent in the section entitled "References Cited." (Ex. 1002 at 1-2).

181. In its Petition, the Petitioner relies on four of the prior art references cited on pages 1 and 2 of the '011 Patent; namely, Nishida, Glidden, Curley and Shiomura. I reviewed the other prior art references cited on pages 1 and 2 of the

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'011 Patent and it is my opinion that the substitute claims are not anticipated by any other cited prior art reference because no single reference contains every limitation recited in the substitute claims.

182. It is also my opinion that the substitute claims would not have been obvious in view of the cited prior art references because there is no motivation or other reason that would have prompted a person of ordinary skill in the art at the time of the invention to combine the references to arrive at the inventions claimed in the substitute claims. I reserve the right to respond to any new obviousness arguments or combinations that Petitioner may argue in response to NIKE's Motion to Amend.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 19, 2013



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Raymond F. Tonkel

71 Atkinson Lane Sudbury, Massachusetts 01776
Phone: (978) 761-5208 Fax: (978) 443-4103
Mail to: tonkdesign@aol.com or rtonkel@uturnsports.com

Professional Summary

Over thirty plus years of extensive design and development experience in the athletic and casual footwear industries. Outstanding record of creative problem solving, product creation and the delivery of superior products, strategic planning, departmental leadership and building organizational relationships. Considerable cross category global research and development experience with manufacturing sources throughout the Far East, Europe, Brazil and the USA. Successfully managed departments, projects, personally designed footwear and footwear technologies. Has most recently taken on an entrepreneurial role as a footwear consultant and inventor. Inventor on over 40 US design and utility patents with other patent pending inventions in process.

Employment History

From: 2001 To: Present
U-Turn Sports Co, LLC
Sudbury, MA
Position *Partner*

- Established to conceptualize and develop new proprietary interactive inventions for the footwear and related sports industries. Successfully licensed numerous inventions to a number of international brands with over 20 million plus pair of shoes sold globally incorporating U turn technologies. Included amongst these technologies would be Tongue Twisters, Stripe Shifters and Band Em as marketed globally by K Swiss.
- U Turn has also introduced their iTwist brand interactive reversible footwear to retail to market/test new concepts. Designed product, website, marketing materials, ads, etc.

From: 1998 To: Present
LEXZ9, Inc.
Sudbury, MA
Position *President*

- Provide creative footwear solutions through innovative product design and research and development.
- Product positioning, line building, international development, and sourcing.

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- Clients have included: Airwalk, And 1 Basketball, Bata International, Columbia Sportswear, Clarks, Dunham, Easton, Fila, J&M, Keds, K-Swiss, Reebok Intl, Rockport Company, Ryka, Tecnica, Teva, Timberland and XES Appeal amongst others.
- Worked with WSA Global Holdings as a Member of the advisory board and consultant to the Materials at WSA Expo and Conference.
- Consulted with various clients on matters of footwear intellectual property.

From: 1993 **Reebok International**
To: 1998 Stoughton, MA
Position: *Managing Director of Footwear Design*

- Supervised the design process for the complete range of Reebok International brand footwear.
- Managed a group of over 45 designers, color and trend specialists and well as design support groups.
- Structured and managed the organization, creative projects, systems and time lines.
- 1996 single recipient of the Reebok International Presidential Achievement Award.
- Revitalized a multi-faceted design operation. Motivated staff, set career paths and headed recruiting efforts. Spearheaded the establishing of Reebok Design as a leading influence in the Sports and Fitness industry.
- Led the design and implementation of numerous seasonal cross category product packages covering multiple sport and casual footwear categories. These include Mobius Collection, '96 Spin Vector Olympic Group, Vis Hex Collection and Light speed DMX amongst others.
- Personally designed Reeboks first DMX technology footwear which were the brands number one volume technology products in 1995 and 1996

From: 1991 **Rockport Corporation**
To: 1993 Malboro, MA

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Position: *Vice President, Design and Advanced Concepts*

- Responsible for managing line direction, design and development of the complete range of Rockport Footwear from conceptual design to final product.
- Supervised activities of designers, developers, modelists and biomechanists. Staff of 20.
- Maintained communications with multiple source countries in Asia, Europe and South America including traveling globally to ensure design integrity.
- Focused on long-range R&D of future projects with a concentration on the design of advanced technology that would best position Rockport with innovative, leading edge footwear.

From: 1988 **Adidas USA**
To: 1990 Warren, NJ
Position: *Vice President of Footwear Design and Development* (1990)
Vice President of Footwear Design (1988 to 1989)

- Managed a design and development staff of 15, responsible for the complete range of Adidas USA footwear. Also Global design and development responsibility for Adidas basketball, fitness, cross training, baseball/football and hard court tennis categories.
- Planned and managed the design process including approving creative, setting project goals, expenditures and timelines.
- Implemented the Adidas brand first ever industrial design group, providing design expertise for global product categories and contributing to a revitalization of Adidas image in both performance and casual footwear categories.
- Developed R&D partnerships with Adidas France and Germany

From: 1984 **Kangaroos USA**
To: 1987 St. Louis, MO
Position: *Vice President of Research and Design* (1986 to 1987)
Director of Research and Design (1984 to 1985)

- Directed the company's design and product development group for performance athletic footwear lines.
- Responsible for all design of performance athletic products and technology including the patented and acclaimed

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Dynacoil technology.
- Directed the design and styling of children's and non-technical fashion footwear line
- Worked on product with athlete endorsers, manufacturing, merchandising, and marketing. Presented product sales presentations globally.

From: 1980 **Nike, Inc.**
To: 1984 Exeter, NH
Position: *Advanced Concepts Product Manager* (1984)
Product Manager/Designer (1980 to 1983)

- Hired as one of Nikes first ever industrial designers.
- Designed and developed advance concept performance and style components, systems and processes for differing casual, court and cleated shoe lines.
- Directed the development and handled upper and sole design for various categories. Designed some of the first casual and early AIR running footwear product for the Nike brand.

Litigation Support Experience

Date: 2005-2006 **Sterne Kessler Goldstein Fox LLP (Washington DC)**
Case Project: Reebok International vs. Wal Mart Stores
Patent Infringement matter. Provided footwear design/development expert witness reports.
Status: Settled

Date: 2008-2009 **Borden, Ladner, Gervais LLP (Toronto Canada)**
Case Project: Bauer Hockey vs. Easton Sports
Patent Infringement matter. Provided consulting on footwear & skate design and construction, expert witness reports, deposition, testified.
Status: Settled

Date: 2010 **Mark Sumbulian, Attorney at Law (Montreal Canada)**
Case: Converse vs. 7276478 Canada Inc
Project: Retained as an expert by Sumbulian. Wrote three expert reports on the authenticity of Converse products in question.
Status: TBD

Date: 2012 **Cantor Colburn LLP (Hartford CT)**
Case Vibram *S.p.A. and Vibram USA vs Fila*

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Project: Patent Infringement matter. Retained to provide consulting on footwear design & construction matters, expert witness reports, etc.
Status: Settled

Date: 2012-2013 **Klemchuk Kubasta LLP (Dallas TX)**
Case Piggy Pushers LLC vs. Skidders Footwear
Project: Patent Infringement matter. To provide consulting on footwear design & construction matters, expert witness reports, etc.
Status: In appeal process

Date: 2013 **Estey & Bomberger (San Diego CA)**
Case: Product liability suit vs. Skechers USA
Project: Retained as a footwear design & product expert by Estey & Bomberger
Status: In process

US Patents Issued

Patent Number	Issue Date
D643,1888	08/16/2011
D642,772	08/09/2011
D642,771	08/09/2011
7,757,414	07/20/2010
7,748,145	07/06/2010
7,600,334	10/13/2009
7,464,488	12/16/2008
7,318,290	01/15/2008
7,117,614	10/10/2006
7,028,420	04/18/2006
6,904,706	06/14/2005
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D375,191	11/05/1996
D351,715	10/25/1994
D343,279	01/18/1994
D343,278	01/18/1994
D343,054	01/11/1994
D343,047	1/11/1994
D342,153	12/14/1993
D338,097	08/10/1993
D338,096	08/10/1993
D338,094	08/10/1993

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D337,874	08/03/1993
D337,427	07/20/1993
D333,379	02/23/1993
D331,494	12/08/1992
D331,492	12/08/1992
D328,814	08/25/1992
D328,667	08/18/1992
4,894,933	01/23/1990
D305,178	12/26/1989
D301,799	06/27/1989
D300,083	03/07/1989
4,805,321	02/21/1989
4,805,319	02/21/1989
D292,142	10/06/1987
4,656,760	04/14/1987
D288,027	02/03/1987
D287,662	01/13/1987
D287,661	01/13/1987
D273,245	04/03/1984
D273,246	04/03/1982

Education

Year	College/University	Degree
1978	Rochester Institute of Technology, Rochester, NY	B.F.A., Environmental Design with honors

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011
Inter Partes Review No. 2013-00067

VIDEO DEPOSITION OF EDWARD C. FREDERICK

July 23, 2013
8:16 a.m.
Kilpatrick Townsend & Stockton
1100 Peachtree Street, NE
Suite 2800
Atlanta, Georgia
Valerie N. Almand, RPR, CRR, CCR-B-531
Deidre Thomas, Legal Video Specialist

INDEX OF EXHIBITS

NIKE

EXHIBIT	DESCRIPTION	PAGE
#2001	Patent Owner Nike, Inc.'s Notice of Cross-Examination of Edward C. Frederick	6
#2002	Declaration of Dr. Edward C. Frederick in re K-Swiss patent	17
#2003	U.S. Patent 4,354,318	22
#2004	excerpt from "Textiles in sport" article	29
#2005	Decision in re Patent 7,347,011 B2	86
#2006	Glidden patent, #2,147,197	157
#2007	U.S. Patent 7,347,011 B2 with handwritten notes made by the witness during the deposition	159
#2008	Decision on Appeal in re K-Swiss Patent, #7,181,866 B2	180

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THOMAS K. PRATT, Esquire
Banner & Witcoff, Ltd.
Ten South Wacker Drive
Suite 3000
Chicago, Illinois 60606-7407
312.463.5000

Also Present: Allan Schrock
Ray Tonkel

Legal Video Specialist: Deidre Thomas

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THE VIDEOGRAPHER: My name is Deidre Thomas of Veritext. Today's date is July 23rd, 2013 and the time is approximately 8:16 a.m. This deposition is being held in the office of Kilpatrick Townsend & Stockton located at 1100 Peachtree Street, Suite 2800, Atlanta, Georgia, 30309.

The caption of this case is adidas AG versus Nike, Inc. in the United States Patent and Trademark Office. The name of the witness is Edward C. Frederick.

At this time will the attorneys please identify themselves and who they represent, after which the court reporter, Valerie Almand of Veritext, will swear in the witness.

MR. VAN ES: So my name is Pieter van Es. I'm here for Nike, and let me speak on behalf of the other folks who are with me because they don't have a microphone.

With me also is Tom Pratt also with my firm. Allan Schrock is with me as well, he's with Nike, as is Ray Tonkel, and he is with us as well.

MR. KADABA: I am Wab Kadaba. I'm with the firm Kilpatrick Townsend. I'm here on behalf of adidas, and with me is my colleague Tiffany Williams, also with the firm of Kilpatrick Townsend,

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also with adidas.

EDWARD C. FREDERICK,

having been duly sworn, was examined and testified as follows:

EXAMINATION

By MR. VAN ES:

Q. Good morning. Do you prefer Mr. Frederick or Dr. Frederick?

A. Mr. Frederick is fine.

Q. Good morning, Mr. Frederick.

Good morning, Mr. Frederick.

A. Good morning.

(Nike Exhibit 2001 marked)

BY MR. VAN ES:

Q. Okay. I am going to first present you with a document that I've marked as Nike Exhibit 2001 and ask whether you understand that you are testifying this morning on behalf of adidas pursuant to this notice of cross-examination.

A. Yes, I do.

Q. Okay. Mr. Frederick, have you been deposed before?

A. Yes, I have.

Q. So let me just go over a few ground rules that I'm sure you're familiar with, but let me

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discuss them in any event. We'll need to speak today one at a time so that the court reporter can get down my question and your answer. You'll need to answer my questions orally and not by nodding your head or saying uh-huh or words like that.

If you don't understand a question, please let me know, and I'll do my best to rephrase the question. If you answer a question I'll assume that you understood my question. Is that okay?

A. Yes.

Q. If you need a break at any time, that should not be an issue for us to take a break. Obviously if there's a question pending we'll ask that you answer the question. And I should tell you that when you come back from a break I may ask you what you discussed with adidas' counsel.

Do you understand everything I just said?

A. Yes, I do.

Q. So let's start off by how many times have you been deposed before?

A. Eight to twelve times, something like that. I don't remember the exact number.

Q. And how many of those other cases involved patent issues?

A. More than half.

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Q. So six or more of those other?
A. Six or more, yes.
Q. A few more background questions, Mr. Frederick. Have you ever been convicted of a crime?
A. No.
Q. Are you taking any medicine today that would preclude your ability to testify truthfully?
A. No.
Q. Okay. I'm going to put in front of you what's previously been marked as Exhibit 1001, it's adidas Exhibit 1001. Do you recognize this document?
A. Yes, this is a -- I do recognize it.
Q. This is a declaration you submitted as part of this inter partes review?
A. That's correct.
Q. And at the end of this declaration it includes a CV; is that right?
A. That's right.
Q. I'd like to direct your attention to the CV at the end of the declaration.
A. Okay.
Q. And first ask you whether this CV accurately reflects your work and professional

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history.

A. Let me take a look at it here just to make sure. Yes, yep, yes, it does.

Q. Now, you mentioned you have been deposed six or more times in patent cases. Are all of those patent cases listed on the last two pages of your CV, which are pages 177 and 178?

A. I have to answer I think so. I mean, I have to go back and double-check, but, yeah.

Q. Okay. You're finished with your answer?

A. Yeah, I am.

Q. In any of the work that you did previously in patent cases did you prepare expert reports?

A. Yes.

Q. And approximately how many cases did you prepare expert reports?

A. In almost every case. I don't remember the exact number.

Q. More than 10?

A. I suppose. You know, I don't know. I really don't know the exact number, but, yeah. Somewhere more than eight, say, yeah.

Q. And in any of those other cases were you asked to prepare expert reports on the issue of patent infringement?

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A. Yes.

Q. Were you asked to prepare reports on patent validity or invalidity?

A. Yes.

Q. Can you give me a breakdown of, in terms of the number of reports you prepared, how many of them dealt with infringement questions and how many of them dealt with validity questions?

A. I'd have to go back and review exactly to give you an exact answer.

Q. Have you prepared more than five reports regarding patent validity?

A. What do you mean by patent validity?

Q. Is the term patent validity a term that you've used in the context of your previous professional work?

A. Yes.

Q. What did you mean by the term patent validity when you used that term?

A. That -- well, that the patent was valid as it was published, issued.

Q. Excuse me. Have you prepared any reports where you concluded that a patent was valid?

A. I don't honestly recall. I may have, but I don't honestly recall.

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Q. Do you recall if you've prepared my reports where you concluded that the patent was invalid?

A. I don't recall.

Q. So you don't recall if you prepared any reports as to whether or not a patent was valid or invalid.

A. I certainly have, but I don't remember specifically which ones, yes.

Q. Well, let me be clear. I'm not asking specifics at this point. Have you prepared any reports before your declaration in this case where you concluded that a patent was invalid?

A. I'm really having a hard time with the question.

Q. What's your trouble with the question?

A. Well, you know, questions of validity or invalidity are part of every expert report on a patent or infringement or the validity of the patent. So I'm a little -- you know, I'm stumped by that question.

I mean, it just seems obvious to me that all these ones that deal with patent -- that have patents in them, I've made statements that said that something I thought was valid or invalid, so that's why I'm a little stumped by it.

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I think that most -- I mean, I did some work with a law firm on a reexamination of a patent, for example, that was a K-Swiss patent where I do recall now that I was arguing for the validity of the patent. And, of course, in this case that's an issue as well.

Q. So besides the K-Swiss case that you just mentioned and the present case involving adidas and Nike, do you recall any other instances where you prepared a report where you commented on whether a patent was valid or invalid?

MR. KADABA: Objection as to form.

BY MR. VAN ES:

Q. Do you understand my question?

A. Yes, I do, yeah. I can remember two cases specifically off the top of my head. I'd rather go back and review these details, but the Akeva matter was something where patent validity was a major issue.

Q. What was the other one?

A. The other one would have been -- let me take a look here, Cushion Technology.

Q. Do you recall any others?

A. No, not at this time.

Q. In the Akeva case you were retained by New

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Balance?

A. That's correct.

Q. New Balance was accused of patent infringement in this case?

A. That's right.

Q. Do you recall, was it your conclusion that the patent was invalid?

A. That was part of my report, yes.

Q. And in the Cushion Technologies case versus adidas, you were also retained by New Balance?

A. That's right.

Q. Did you conclude in that case as well that the patent was invalid?

A. Yes.

Q. Incidentally, in the Cushion v. -- let me start the question over again.

In the Cushion matter that you mentioned were you also doing work for adidas?

A. I don't think so. Indirectly, possibly, but I was mainly working with the New Balance lawyers that were representing New Balance.

Q. Okay. And in the K-Swiss matter that you mentioned, was it your conclusion that the patent was invalid?

MR. KADABA: Objection as to form.

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A. No.

BY MR. VAN ES:

Q. What is your memory of what your conclusion was in the K-Swiss matter?

A. That the patent was valid.

Q. In the K-Swiss matter you were retained by whom?

A. K-Swiss.

Q. And we're referring now on page 177 to the third listed item, request for reexamination by K-Swiss, Inc. of --

A. Yes.

Q. -- excuse me, let me just -- just so the record's clear, request for reexamination of K-Swiss, Inc. of United States patent number 718186.

A. That's right.

Q. And it was your opinion in that case that the patent was valid.

A. That's what I remember, yes. Again, I'd have to review that report to be 100 percent sure what my opinion was, but that's my recollection right now.

Q. And as you sit here right now you don't recall any other situations where you made a determination as to whether -- let me start the

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question over again.

As you sit here today you don't recall any other situations where you reached a conclusion as to whether a patent was valid or invalid other than the four that we just discussed?

A. I'm now recalling, you know, that Dananberg versus Payless, there were many issues, but one of the issues was the validity of Dananberg.

Q. So you were retained by Payless in that case?

A. That's correct.

Q. Payless was accused of patent infringement?

A. That's correct.

Q. Did you conclude in that case the patent was invalid?

A. I did.

Q. Have you ever testified at a trial?

A. Yes, I have.

Q. In which cases have you testified at a trial?

A. Let's see. Kalachen [phonetic] versus Nike, Danielson versus Puma. That's it.

Q. Going back to your opinions regarding -- going back to the opinions that you've reached regarding validity or invalidity of a patent, do you

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recall whether any judge has ever agreed with your opinions about patent invalidity or validity?

MR. KADABA: Objection as to form.

A. Could you ask it again, please?

BY MR. VAN ES:

Q. Are you aware of whether any judge has ever agreed with any conclusion you've reached regarding the invalidity or validity of a patent?

MR. KADABA: Same objection.

A. Yes.

BY MR. VAN ES:

Q. Which instances has that occurred?

A. Well, in the case of Akeva, in the case of Cushion, I believe, in the case of Payless versus -- Dananberg versus Payless, and then in the reexamination, K-Swiss reexamination.

Q. So in the Akeva versus New Balance case the judge agreed with you the patent was invalid?

A. That's my recollection, yes.

Q. And in the Dananberg versus Payless case it's your recollection that the judge agreed that the patent in that case was invalid?

A. That's right. That's correct.

Q. And in the Cushion versus Adidas case, it's your recollection that the judge agreed with you the

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patent was invalid?

A. I'm less certain about that one. I'd have to go back and review that.

Q. And in the K-Swiss matter, what is your memory of what occurred in that case?

A. My memory in that case is that the judge agreed that the patent was valid.

Q. I'm going to show you what I'm going to mark as Nike Exhibit 2002 and ask whether you recognize this document.

(Nike 2002 marked)

BY MR. VAN ES:

Q. And I'll note for the record that this document is 23 pages long and it says it's the declaration of Dr. Edward C. Frederick in the inter partes, I-N-T-E-R, space, P-A-R-T-E-S, reexamination of United States patent number 7,181,866.

THE VIDEOGRAPHER: Someone's phone is ringing.

A. Yes, I recognize this now.

Q. Is this the declaration that you prepared in the K-Swiss reexamination that you testified earlier about?

A. Yes, it is.

Q. And in this declaration I believe you

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testified earlier that you concluded in the K-Swiss matter that you thought the patent was valid?

A. That was my recollection, yes.

Q. Is your recollection correct?

A. Apparently not.

Q. What did you conclude in the K-Swiss matter?

A. I'm going to have to take some time to read this through.

Q. Well, let me ask you this: Does this declaration reflect that you concluded that the patent in the K-Swiss reexamination was, in fact, invalid?

A. I'm going to have to read through it.

Q. Do you need to read the entire document to determine that?

A. I don't know.

Okay.

Q. So you've now had a chance to take a look at this?

A. Yes.

Q. So it's true, is it not, Mr. Frederick, that in the K-Swiss reexamination you concluded that the claims in the patent were invalid?

A. That's what this says, yes.

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Q. Well, is this your declaration?
A. Yes, it is my declaration.
Q. So would it be fair to say, Mr. Frederick, that in all five instances that you have previously been retained to offer an opinion on whether a patent was valid or invalid you concluded that the patent was invalid?
A. Again, I would need to review those documents to agree with that statement.
Q. But as you sit here today, to the best of your recollection as far as you can recall in every instance where you've been retained to comment on whether a patent is valid or invalid, you have concluded that a patent is invalid?
A. I'm not prepared to agree with that right now.
Q. Well, what is your best recollection?
A. My best recollection would be that in most cases I would have argued that the patent was invalid.
Q. As you sit here today can you recall any instances where you concluded that a patent was valid?
A. I can't recall anything right now.
Q. Let me direct your attention to paragraph

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10 of this declaration, which is Exhibit 2002.

A. Sorry?

Q. Actually, let me come back to that.

Prior to this particular project for adidas have you previously done work for adidas?

A. Yes.

Q. Can you identify for me which projects you previously handled for adidas?

A. Adidas versus Minor.

Q. And that's -- you're pointing now to page 177 of your --

A. Page 177, that's right.

Q. I'm sorry, where is it? That's the --

A. The bottom of page 177.

Q. -- bottom one listed.

A. And Cipolloni versus adidas, Cipolloni versus adidas.

Q. And that's spelled, for the court reporter, C-I-P-O-L-L-O-N-I.

Do you recall any other instances where you've been retained by adidas?

A. I don't.

Q. I'm going to direct your attention to page 176 of your declaration.

MR. VAN ES: Can we go off the record for

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just a second?

THE VIDEOGRAPHER: The time is 8:46 a.m. and we are now off the record.

(Off-the-record discussion)

THE VIDEOGRAPHER: The time is 8:46 a.m. and we are now back on the record.

BY MR. VAN ES:

Q. So I'm directing your attention to page 176 of your declaration, and this is a page of your CV where you list your patents.

A. That's right.

Q. Does this list accurately reflect your patents?

A. As -- yes, as far as I recall.

Q. Are any of these patents directed to uppers?

A. I would say the first one, the heel stabilizer involves supporting the heel counter, which is part of the upper.

Q. Do any of the -- in your view are any of these other patents directed to uppers?

A. No.

Q. Are any of your patents directed to knitting?

A. No.

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Q. I'm going to mark as Exhibit 2003 the first patent that you identified which you, I believe, indicated was the only patent on the list that was directed to uppers. Is this the patent you're referring to?

(Nike Exhibit 2003 marked)

A. Yes.

BY MR. VAN ES:

Q. Is this patent directed to the textile material used in an upper?

A. No.

Q. Mr. Frederick, have you designed an upper?

A. Yes.

Q. Can you describe the circumstances of you designing an upper?

A. I don't really understand the question.

Q. What was the name of the shoe for which you designed an upper?

A. I don't remember.

Q. For whom did you design an upper, what company?

A. Nike, adidas, Lotto, Asolo, Nordica, Li Ning.

Q. Could you spell that, please?

A. L-I capital N-I-N-G. There are more, but I

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don't remember all of them. Maybe 20 different brands.

Q. Do you recall the names of any of those shoes that were actually commercially sold?

A. Not off the top of my head, no.

Q. What was your role in those projects that you just testified about?

A. Each project was different. I had various roles in the process.

Q. Okay. Well, let's talk about -- you've designed an upper for a Nike shoe?

A. Yes.

Q. What was your role in designing that upper?

A. Establishing the specifications for the product, working with the pattern makers to refine the pattern, and working with a team of people on the basic design of the upper, the location of the reinforcements, the dimensions of various components and various -- components and the various parts of the final product, selecting materials for -- to use in creating the pattern, and creating the final product, testing the materials that were involved in the construction, testing the final products.

Q. Are you finished with your answer?

A. Yes.

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Q. And what were your -- did you have the same responsibilities for the other projects that you described for adidas and Asolo and Lotto and Nordica and Li Ning?

A. Not always. It would depend on the product. Sometimes I would be involved in just coming up with a conceptual drawing for the upper, sometimes I would be involved in every step in the process, so it would depend on the product.

Q. Did any of the uppers that you designed have a unitary construction?

MR. KADABA: Objection as to form.

A. What do you mean by unitary construction?

BY MR. VAN ES:

Q. Is unitary construction a term that you're familiar with?

A. Yes, I am familiar with the term unitary construction.

Q. What does the term unitary construction mean to you?

A. I think it's defined in the patent that we're talking about today.

Q. The Nike '011 patent?

A. Yes.

Q. Is that the definition of unitary

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construction that you would use?

A. I was asking what you were referring to as unitary construction when you asked me the question.

Q. I understand. And I'm asking what term -- when you use -- have you used the term unitary construction before your deposition today?

A. Yes, before my -- before the deposition, yeah.

Q. Okay. And what does the term unitary construction mean to you?

A. It means a single piece.

Q. Did any of the uppers that you designed that you testified about involve a unitary construction?

A. Yes.

Q. Tell me about that.

A. It was a shoe that was designed for wakeboarding, and the upper was a single piece of stretch Spandex type material.

Q. Do you recall the name of the shoe?

A. I don't.

Q. Do you recall the name of the company for which you designed the shoe?

A. It was for Asolo, uh-huh, A-S-O-L-O.

Q. Do you know if the shoe was ever

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commercially sold?

A. I don't think so.

Q. Do you recall what the upper material in that shoe was made of?

A. It was a woven nylon material with Spandex -- not Spandex, Lycra, with Lycra.

Q. So, was it knitted?

A. It was woven.

Q. Did the shoe have a sole?

A. Yes, it did.

Q. How was the sole attached to the upper?

A. It was direct attached, polyurethane.

Q. So have you ever created -- start the question over again.

Have you ever designed an upper with a unitary construction that was knitted?

A. Not to my recollection.

Q. Can you describe to me your familiarity with knitting technology?

A. Yes.

Q. Please do so.

A. I'm familiar with knitting technology in the context of developing or specifying materials for uppers in footwear.

Q. So going back to the shoe that you

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mentioned with a -- strike that.

Going back to the shoe that you mentioned that you worked on for Asolo, were there different type of materials woven into the upper?

A. What do you mean by materials?

Q. So the upper in the Asolo shoe, you said it was woven, right?

A. That's right.

Q. It wasn't knitted.

A. Correct.

Q. Were there different pieces in the upper or was it -- start the question over again. Were there different pieces in the upper?

MR. KADABA: Objection as to form.

A. No.

BY MR. VAN ES:

Q. What type of -- I believe -- can you tell me -- start the question over again.

What type material was used in that woven upper?

A. Nylon and Lycra.

Q. Was it a single type of thread?

A. No.

Q. What type of thread was it?

A. The Lycra and the nylon.

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Q. Were woven together.
A. Yes.
Q. Were there different portions of the upper that had different properties with respect to the threads?
MR. KADABA: Objection as to form.
A. Yeah, could you rephrase that?
BY MR. VAN ES:
Q. Was the --
So can you describe for me in your work the situations where you would use one type of knitting versus another type of knitting in designing an upper?
A. Yeah, in the process of developing new materials for the upper, for example, you would work with a supplier to modify the knitted material that you were working with. You would request different yarns, different characteristics for the yarn to produce a different result. For example, a mesh material or something like that.
On the other side, you would be sitting in a room with books of samples of material and specifications for those samples and choosing from a variety of different knitted materials the appropriate material for the product that you're

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working with, and so on. So in that context you have to deal with different types of knitting and different applications of knitting technology.

Q. Have you written any articles describing different types of knitting or knitting material used in uppers?

A. I would say it's possible a chapter I wrote in a book on fabric technology in sports, I may have mentioned knitting in there, but I don't recall exactly.

Q. Other than that chapter can you recall any other articles of that type?

A. I can't recall anything else, no.

Q. Excuse me one minute. I'm going to mark as Exhibit -- Nike Exhibit 2004 --

A. Uh-huh.

Q. -- it's a document the title of which says Woodhead Publishing in Textiles, Textiles in sport, and includes a photocopy of a chapter.

(Nike Exhibit 2004 marked)

BY MR. VAN ES:

Q. Do you see this article?

A. Yes, I do.

Q. Is that the article you were referring to?

A. Yes, it is.

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Q. When did you last look at this article?
A. I don't recall.
Q. Has it been several years since you last looked at it?
A. Yes, yes.
Q. Do you recall if this article says anything about unitary construction?
A. I don't recall.
Q. Do you recall if this article talks about different types of knitting?
A. I don't recall.
Q. Do you recall if it talks about knitting at all?
A. I don't recall.
Q. Do you consider yourself an expert in knitting?
MR. KADABA: Objection as to form.
A. No.
Q. Tell me about your experience with knitting machines.
A. I don't have any hands-on experience with knitting machines, but I've witnessed demonstrations of knitting technology and discussed the functional aspects of knitting technology with company representatives, and that's about it.

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Q. Do you recall when you witnessed those demonstrations?

A. It would have been in the 1990s, mid to late 1990s.

Q. Did you see any demos after the mid to late 1990s?

A. Yes, I would say in early 2000s.

Q. What was the context in which you saw these demos in -- excuse me, let me -- you've mentioned a couple of different demos that you saw, and my question is what were the circumstances surrounding these particular demonstrations that you saw.

A. One of them was -- two of them, actually, were at trade shows where the material -- where the knitting machines were set up and being demonstrated, and in one case I visited a manufacturer and got a demonstration there, some discussion.

Q. Anything else?

A. That's all I remember right now.

Q. Which manufacturer did you visit?

A. I don't remember.

Q. Do you remember when that was?

A. Yes, it would have been in fall of 1996 or the winter of -- early winter of 1997.

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Q. Was that visit in the United States?
A. No, it was in Italy.
Q. So I take it you've never designed a piece of equipment that does knitting.
MR. KADABA: Objection to form.
A. That's correct.
BY MR. VAN ES:
Q. Have you ever tested a piece of equipment that knits?
A. No.
Q. Have you ever used a piece of equipment that knits?
A. No.
Q. And I take it you've never programmed a piece of equipment that knits.
A. No.
Q. Do you know if any court has ever accepted you as an expert in any subject area?
A. Yes.
Q. Can you describe that for me, please?
A. Well, in the cases where I was acting as an expert witness.
Q. So let me try to be more specific in my question. Do you recall any instances where a court has ever said that Dr. Frederick is an expert in a

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particular subject area?

A. No.

Q. Have you ever given any testimony that you can recall regarding construction of patent claims?

A. Yes.

Q. What were the circumstances of that?

A. In the cases where we're discussing validity of patents.

Q. And separate and apart from those five instances you testified earlier about where you offered opinions on the invalidity of patents, do you recall any other instances where you've testified about the construction of patent claims?

MR. KADABA: Objection to form.

A. You know, I wouldn't limit myself to those five. I really don't know. Again, I would have to review those documents and refresh my memory on what happened. I'm not prepared to limit myself to those five at this point.

Q. What were the circumstances surrounding you being retained by adidas in this particular case?

A. I was contacted by Jeffrey Gavin and we discussed the case and he asked if I was available and interested.

Q. Do you know how Mr. Gavin got your phone

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number?

A. We've had contact in the past.

Q. Can you describe the general nature of that contact in the past?

A. I was engaged as an expert for this firm in the past.

Q. The Kilpatrick firm?

A. Yes.

Q. What other cases were you engaged with the Kilpatrick firm -- let me ask the question over again.

What were the other matters generally -- let me start over. I'm not interested in you disclosing confidential information, but can you tell me generally what was the nature of the other projects for which the Kilpatrick firm has retained you in the past?

A. There was a dispute over ownership of an invention with adidas versus Minor, and more recently there was a matter connected with cushioning technology that Nike and adidas were having a dispute over.

Q. So you worked with the Kilpatrick firm in the adidas versus Minor matter in the past?

A. That's right.

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Q. And adidas versus Minor, that's the last matter listed on page 177?

A. That's correct. That's correct.

Q. And you also mentioned I believe you said a cushioning dispute between Nike and adidas?

A. That's right.

Q. Okay. Any other instances where you've done work with the Kilpatrick firm in the past?

A. Not that I recall, no.

Q. Is the cushioning dispute that you referenced identified on your CV?

A. I don't think so, no.

Q. So again, I don't want to ask you anything confidential. Let me ask a question and then --

A. Uh-huh.

Q. -- give counsel an opportunity to comment on it.

A. Okay.

Q. Did this particular project involve you preparing any reports that were filed with any courts?

A. No.

Q. Did it involve you preparing any reports that were filed with any patent offices?

A. No.

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Q. Did it involve you testifying in any depositions?

A. No.

Q. Did it involve you testifying in any court proceedings?

A. No.

MR. KADABA: We've been going just about an hour, so whenever we can, can we take a break?

MR. VAN ES: Sure. Let me just ask a couple more questions and then we can take a break.

BY MR. VAN ES:

Q. So going back in time, Mr. Gavin called you on the phone and asked you if you wanted to be involved in this particular project?

A. That's correct.

Q. And how did he describe the nature of the project to you?

A. I don't remember. I don't remember.

Q. Do you remember when he contacted you?

A. Sometime in the fall of 2012 is the best I can recall.

MR. KADABA: I believe there's also a stipulation in place about circumstances of retaining experts, but I don't recall the details of it. It's the first paragraph of the stipulation we

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entered into.

MR. VAN ES: Right. Okay, why don't we take a break right now.

THE WITNESS: Okay.

THE VIDEOGRAPHER: The time is 9:17 a.m. and we are now off the record.

(Recess)

THE VIDEOGRAPHER: The time is 9:31 a.m. and we are now back on the record.

BY MR. VAN ES:

Q. Mr. Frederick, I want to direct your attention back to Exhibit 1001, which is your declaration in this case.

A. Okay.

Q. And in particular, take a look at paragraph 5. In the first sentence of paragraph 5 you say that you have been intimately involved with the creation of more than two dozen new products over the years and have supervised the design and development of hundreds of new products.

What was the -- you mentioned more than two dozen new products that you have intimately been involved in the creation of. What types of products are those?

A. Those were products for running,

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basketball, tennis, wakeboarding, snowboarding, hiking, rock climbing, and I'm sure there are some other categories too. Those would be the main categories.

Q. Were those products all footwear products?

A. Yes, I'm referring to footwear products in this case, yes.

Q. Did any of those products that you were intimately involved with the creation of include the design of the uppers in the footwear products?

A. Yes.

Q. Which of the products include your involvement in the design of the uppers?

A. All of them.

Q. And other than the Asolo upper that you testified about earlier, were any of those uppers unitary construction?

A. Hmm. You know, I don't recall the details of every one of those products, but there isn't another one that stands out right now as a unitary construction.

Q. How was the upper for the Asolo product made? Let me be more clear.

You indicated earlier that the upper for the Asolo product was woven, not knitted, correct?

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A. That's correct.
Q. How was it woven?
A. It was woven on a loom.
Q. So it wasn't woven by hand?
A. No.
Q. Was the upper cut out of a web?
A. Yes.
Q. So did that -- start over again.
After the upper was cut out of the web what was done with the web material that remained?
MR. KADABA: Objection to form.
A. I have no idea.
BY MR. VAN ES:
Q. The web material that remained after the upper was cut out of the web was just waste?
A. I don't know what was done with it.
Q. It wasn't used to make an upper, though.
A. I don't know.
Q. Was there waste involved at all in the weaving of this Asolo upper?
A. I don't know.
Q. What was the timeframe of when you worked on the upper for Asolo?
A. 1995, '96.
Q. Do you know if this upper was ever offered

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to the public?

A. I don't think so.

Q. And in any event, are you relying on -- strike that.

Let me direct your attention to paragraph 7 of your report, and there you list materials that you reviewed in forming your opinions. Do you see that?

A. I do.

Q. And in particular you identify patents -- let me take this one at a time.

You mentioned that you reviewed the '011 patent and its prosecution history, do you see that?

A. Yes.

Q. In your declaration do you make any statements or comments about your review of the prosecution history of the '011 patent?

A. The declaration speaks for itself.

Q. Does the declaration say anything about the prosecution history of the '011 patent?

A. I don't know. I'd have to review it.

Q. So as you sit here right now you don't know one way or the other whether your declaration includes any comments or statements about the prosecution history of the '011 patent?

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MR. KADABA: Objection to form.

A. That's right, I don't recall.

BY MR. VAN ES:

Q. Now, do you know whether or not the '011 patent is part of a family of patent applications?

A. Yes, I'm aware of that.

Q. And your declaration does not indicate that you reviewed the prosecution history for any of the other applications that are in that family of the '011 patent, correct?

A. That's correct.

Q. That's because you didn't look at those other prosecution histories?

MR. KADABA: Objection to form.

A. I don't recall.

BY MR. VAN ES:

Q. Would it be important for you to look at the prosecution histories of any of the other applications in the '011 patent family?

MR. KADABA: Objection to form.

A. I don't know.

BY MR. VAN ES:

Q. Your report -- your declaration, excuse me, identifies seven items that you identify as prior art, do you see that?

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A. Okay, yeah, I see that.
Q. Well, let me be more clear. The report identifies items A through H in paragraph 7 of your report. Do you see that?
A. That's right.
Q. Your report does not identify any other prior art that you reviewed in forming your opinions, right? Let me rephrase the --
A. Yeah, yeah, okay, go ahead.
Q. Your declaration does not identify any prior art that you reviewed other than the items listed in paragraph 7 as items A through H, correct?
A. Correct.
Q. Did you look at any other items of prior art?
MR. KADABA: Objection to form.
A. Yes, I did.
Q. But you did not identify them in your declaration.
A. That's right.
Q. Because you're not relying on them.
A. That's correct.
Q. How did you go about selecting the items listed in paragraph 7 of your report?
A. Could you ask that again?

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Q. Sure. Your report in paragraph -- excuse me, your declaration in paragraph 7 identifies a number of items that you reviewed in forming your opinions, right?

A. That's correct.

Q. How did you go about deciding to rely on items identified in paragraph 7?

A. By reading the patents and analyzing their relevance to the case.

Q. Did you do a search to identify prior art?

A. I did.

Q. And what were the results of that search?

A. The -- primarily what you see in front of you, particularly Nishida and Glidden set out to me as examples of prior art.

Q. And you found the Glidden and Nishida references?

A. I did.

MR. KADABA: Objection to form.

BY MR. VAN ES:

Q. How did you find them?

A. By doing -- I don't remember exactly how I found them.

Q. Do you remember how you found any of the other items that you identified in paragraph 7 of

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your declaration?

A. I recall Spencer, being familiar with Spencer from -- just for general background on knitting technology.

Q. So your declaration identifies the Spencer reference text, it does not identify any other reference text relating to knitting, right?

A. That's correct.

Q. You're not relying on any other reference texts directed to knitting other than the Spencer text?

A. That's correct.

Q. Did you speak with anyone about the subject of knitting to prepare -- strike that.

Did you speak with anyone about the subject of knitting in forming your opinions about the '011 patent?

A. Well, yes.

Q. With whom did you speak?

A. The attorneys I was working with on the case.

Q. Did you speak with anyone besides the attorneys you were working on about the subject of knitting?

A. No, I don't recall discussing it with

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anyone.

Q. Did you speak with any knitting experts?

A. No.

Q. Does your declaration say anything about the consideration of -- let me take a step back.

Have you heard the term secondary considerations?

A. I'm in general familiar with that concept, yeah.

Q. In the context of offering an opinion on the validity of a patent, have you heard the term secondary considerations or objective indicia of nonobviousness?

A. It doesn't come to mind at the moment.

Q. Your declaration doesn't include any discussion of secondary considerations, does it?

A. The declaration speaks for itself.

Q. Well, and I'm asking you: Does the declaration contain any --

A. I'd have to review it to answer that question.

Q. So as you sit here right now you don't know whether your declaration has any discussion of secondary considerations.

MR. KADABA: Objection to form.

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A. As I said, I'd have to review the declaration to be sure before I would make that statement.

BY MR. VAN ES:

Q. As far as you know, your declaration doesn't include any discussion of secondary considerations, correct?

MR. KADABA: Same objection.

BY MR. VAN ES:

A. Again, I'm saying I'd have to review.

Q. You have no idea one way or the other as you sit here today.

MR. KADABA: Objection to form.

A. The declaration speaks for itself.

BY MR. VAN ES:

Q. Mr. Frederick, we're here to learn about your opinions, and we have your declaration, and I'm now asking you about your declaration. And my question is: As you sit here today, as far as you know your declaration doesn't have any discussion of secondary considerations, does it?

MR. KADABA: Objection to form.

A. As far as I can recall right at this moment without having the ability to review the declaration, I would say that's correct.

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BY MR. VAN ES:

Q. Did you review your declaration in preparation for this deposition today?

A. Yes.

Q. When? When did you do that?

A. Yesterday.

Q. Did you read it?

A. I did.

Q. From beginning to end?

A. I did.

Q. Let me direct your attention to section 3 of your declaration, which is on page 3 under the heading "person of ordinary skill in the art of the '011 patent."

A. Okay.

Q. How did you go about determining the level of ordinary skill in the art?

A. I relied on my background and experience to come up with a list of criteria that I felt would be required to qualify someone as a person of ordinary skill in the art.

Q. And how do you define "the art"?

A. The art of shoemaking, shoe design, shoe evaluation.

Q. Did you rely on any kind of listing of

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information that should be considered to determine the level of ordinary skill in the art?

A. I have no idea what you're asking me.

Q. Have you ever determined the level of ordinary skill in the art prior to your involvement in this case?

MR. KADABA: Objection to form.

A. Yes.

Q. In previous cases?

A. That's correct, yes.

Q. Do you recall which other cases you made that determination of the level of ordinary skill in the art?

A. I don't specifically recall that. It was something that comes up all the time, I mean, basically in every case.

Q. And what's your understanding of the significance of defining the person of ordinary skill in the art?

A. My understanding is that it provides a context for interpreting the obviousness of application of prior art to the creation of a product, establishes a context for that.

Q. Did you come up with this definition of the level of ordinary skill in the art on your own?

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A. I'd like to review it here just a second.
Yes, I did.
Q. Do you know the inventors on the '011 patent?
A. No, I don't.
Q. Have you ever had any communications with them?
A. Not that I recall, no.
Q. Do you know anything about their backgrounds?
A. No.
Q. Do you think it's relevant to know anything about the backgrounds and experience of the inventors of the '011 patent in determining the level of ordinary skill in the art?
MR. KADABA: Objection to form.
A. No.
Q. Your definition of the level of ordinary skill in the art does not include any discussion of a degree, correct?
A. That's correct.
Q. Would a person of ordinary skill in the art have any sort of degree?
A. Not necessarily.
Q. Can you elaborate on that, please? You

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said not necessarily. What do you mean by that?

A. In our industry practical experience often, but not always, often eclipses any kind of book knowledge or academic training. So the presence of a degree might be a help to someone in pursuing their -- increasing their knowledge in shoemaking, but it wouldn't be a requirement, necessarily.

Q. Would -- excuse me, what experience would a person of ordinary skill in the art have in working with textiles?

A. I'd like to read from the declaration, if you don't mind. I think it summarizes it nicely.

A person would have experience in choosing upper materials and production processes. A person of ordinary skill would have been through many product cycles with projects representing a typical range of constructions, including upper, the upper construction as well as the construction of the whole shoe, and they would have a basic knowledge of the functional requirements of footwear and a comprehensive understanding of the range of material choices, as well as construction techniques and processes, used to create the various parts of a shoe, and to assemble them in a proper manner.

Q. Would a person of ordinary skill in the art

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have experience knitting an upper?

MR. KADABA: Objection to form.

A. It wouldn't be a requirement, no.

Q. So a person of ordinary skill would not necessarily have had to have had any experience with knitting an upper, right?

MR. KADABA: Objection to form.

A. That's what I said, yes.

Q. How would that person of ordinary skill gain any understanding or familiarity about knitting technology if they had no experience with knitting?

A. I think in the process of learning about materials, choosing materials, gaining the experience of developing new materials and working with suppliers, you gain a necessary knowledge of the technologies that are used to create these products, because it gives you an understanding of how -- of what things you can vary in the process of producing the materials in order to create a desired outcome, a particular functional benefit or a texture or -- and so on.

Q. Would a person of ordinary skill in the art have knowledge about the differences between different types of knitting processes?

A. I think they would have a general

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understanding of the difference, generally speaking, differences between knitted and woven materials, and would have an understanding of the general characteristics of different types of knitted materials.

Q. What would that person of ordinary skill in the art's understanding of knitted versus woven -- excuse me, let me start the question over again.

What would a person of ordinary skill's level of understanding be about the differences between knitted and woven fabrics?

A. They'd be aware of the physical characteristic differences, cost differences.

Q. Any other differences?

A. The functional characteristics of the fabrics.

Q. Any other differences?

A. I suppose the availability of customized versions of the fabrics, that kind of thing.

Q. So what would a person of ordinary skill in the art's understanding be of the physical and functional differences between knit and woven materials?

A. Again, it's a generalization, and the understanding that there are exceptions and that

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there's overlap in the physical characteristics between these.

In general, knitted materials are stretchier and more conforming. They can be made more breathable than woven materials, although these days the things that are happening with weaving make that distinction, general distinction, less and less relevant.

A lot of woven materials now have very similar characteristics to knit materials, and would almost be indistinguishable in your hand unless you look carefully at how they were made, you'd have a hard time knowing whether one was knitted or woven.

Q. And you're talking about in 2013?

A. Well, certainly over the last 10 years, yeah.

Q. Okay. But I want to go back in time to 2004, and you testified about differences between -- physical and functional differences that a person of ordinary skill in the art would have of regarding knitted versus woven fabrics, and you identified that a knitted fabric would be stretchier --

A. Uh-huh.

Q. -- more conforming?

A. That's right.

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Q. And more breathable?

A. In general. But, you know, as I also said, let's not forget the qualifier, that the opposite can be true too. There's overlap between those two.

So you asked me to tell you about general characteristics. I'm not creating any kind of a limitation of the properties of knit versus woven materials, I'm giving you my characterization of a general opinion about woven versus knitted.

Q. What about differences in cost? Would a person of ordinary skill in the art have an understanding about differences in cost as between knitted and woven materials?

A. Again, a lot of overlap between the two, but the general opinion would be that the woven materials would be less expensive, generally speaking, and the opposite can be true.

Q. So again referring to a person of ordinary skill in the art and their understanding of the differences between knit -- knitted fabrics and woven fabrics in the 2004 timeframe, you mentioned the difference regarding woven -- excuse me, knitted being stretchier, more conforming, more breathable and the expense difference. Were there any other differences that a person of ordinary skill in the

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art would be aware of as between knitted and woven fabrics?

A. There may be, generally speaking again, some differences in durability, with the woven materials being slightly more durable than knitted materials.

Q. Any other differences that a person of ordinary skill in the art would know about?

A. Not that I can recall right at the moment.

MR. KADABA: Object to the form.

BY MR. VAN ES:

Q. In 2004 in your experience did footwear designers have knowledge about what type of products could be made -- strike that question.

Would a person of ordinary skill in the art have any understanding as to whether it might be advantageous to use a woven textile as opposed to a knitted textile in creating an upper?

MR. KADABA: Object to the form.

A. Yes, I think so.

Q. What would that understanding be?

A. The understanding would be of the general characteristics that I just described, but I think in most cases the -- whether it's woven or knitted is secondary to the functional characteristics that

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you're looking for, or the aesthetic characteristics or cost; the fact that it's knitted or woven is secondary to those requirements, when you're choosing a material to incorporate into an upper.

Q. But the different types of -- whether something is knitted or woven can affect those other functional and physical characteristics, right?

A. As I said, it's a generalization.

Q. Okay.

A. I just described before the product I worked on which was a woven material with Lycra, it was a very stretchable and breathable upper material from a woven product. Those are the characteristics generally you talk about with knit materials. So it could be woven or it could be knitted.

There's so much overlap in those characteristics that it's a very weak distinction to make for a designer or for somebody trying to specify fabric for an upper. They're more concerned with how it works, how it looks, how much it costs, than they are whether it was knitted or woven.

Q. Would you say that your experience with textiles is above average relative to a person of ordinary skill in the art?

MR. KADABA: Object to the form.

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A. I have no basis for making that kind of judgment.

BY MR. VAN ES:

Q. Sure, let me ask a different question. So you've defined in your declaration this person of ordinary skill in the art, and you understand that's a hypothetical person, right?

A. That's correct.

Q. And incidentally, can that person -- can that be more than one person or is it a single person?

A. A person of ordinary skill in the art could be one person or it could be multiple individuals, I suppose.

Q. A team of people working together?

A. I think in this case I'm describing a single person looking at the patent, looking at the claims and making some kind of a decision, not several people, but in a practical environment it might be several people discussing the choice of materials and so on.

Q. Right. So a person of ordinary skill in the art might look to someone with more knowledge about knitting and weaving to understand the differences between knit technology and woven

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technology?

MR. KADABA: Objection to the form.

A. I think a person of ordinary skill in the art would rely on all kinds of resources for making choices, but the relevance of that term here is that the ability of that person to understand how things might be combined or how they might use information that's in front of them to choose a product or to choose something for a way of making a product, for example. So again, it's a hypothetical person, it's not, you know, anything more than that, just what it says.

BY MR. VAN ES:

Q. So would a person of ordinary skill in the art care about whether a particular material under consideration for use in an upper was made by knitting versus it being woven?

MR. KADABA: Objection to form.

A. I think I've answered that before. I mean, they would care, but it would be secondary to the other requirements.

Q. The other requirements being what?

A. Function, aesthetics, cost, availability.

Q. And you testified earlier about some functional differences between knitted textiles and

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woven textiles, right?

A. What I said was that there was a lot of overlap between the characteristics, but if you forced a person to generalize, that's how they would generally view the two materials. I wasn't limiting the functional characteristics of those materials to those ranges, just stating the fact that people would tend to generalize them in that way.

Q. Understood. Understood that's a generalization. But the generalization would be that a knitted fabric is stretchier, more conforming, more breathable and more durable and woven fabric.

MR. KADABA: Objection to form.

BY MR. VAN ES:

Q. Right?

A. I would agree with that, yes.

Q. Okay. So you've defined this person of ordinary skill in the art, and I want you to compare that person's knowledge to your actual knowledge, Mr. Frederick. Do you have more knowledge than -- let me ask a different question.

Do you consider yourself to be a person of ordinary skill in the art in 2004 in the field of shoemaking?

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A. Yes.

Q. Do you consider that you have more knowledge than a person of ordinary skill in the art in 2004? Sorry, let me make the question more clear.

Take yourself in 2004. Did you have more or less knowledge than a person of ordinary skill as you've defined it in 2004?

MR. KADABA: Objection to form.

A. I would guess in some areas I'd have more knowledge.

BY MR. VAN ES:

Q. Were there areas where you would have had less knowledge than a person of ordinary skill?

A. No.

Q. And the same would be true today, as you sit here today your level of skill in this art is more than a person of ordinary skill in the art would have had in 2004, right?

MR. KADABA: Objection to form.

A. Well, as I just said, in some areas I would feel like I had more knowledge and experience and other areas I would feel like I had the same experience.

Q. So in terms of knowledge of the actual

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equipment and processes used to make textile materials, would a person of ordinary skill in the art in 2004 have knowledge about the advantages or disadvantages of using different types of knitting techniques?

A. I would think they would have -- my opinion would be that they would have a general understanding of the differences, functional, cost, aesthetic differences that would result from using different knitting technologies.

Q. What would -- and first of all, let's define what those different knitting technologies would be. There's warp knitting, right?

A. Right.

Q. You're familiar with that?

A. Yes.

Q. Weft knitting?

A. That's correct.

Q. And there are different types of weft knitting?

A. Right.

Q. Flat knitting, you're familiar with flat knitting?

A. Yes.

Q. Circular knitting, you're familiar with

circular knitting?

A. Yes.

Q. And is it your opinion that circular knitting and flat knitting are both forms of weft knitting?

A. Right.

Q. So going back to the question that I was asking before about a person of ordinary skill in the art's knowledge in 2004 of different types of knitting technology, what would be their general understanding of the advantages and disadvantages of those different types of knitting?

A. Their understanding would be that if they employed one type or the other they would get a different end result in terms of functional characteristics and cost and aesthetics and so on. But again, secondary to the requirements that they were looking for.

Q. And what would the person of ordinary skill in the art's understanding in 2004 be of the functional differences between the different types of knitting that we've just discussed?

MR. KADABA: Objection to form.

A. I've discussed some of this in the declaration, and I'd like to refer to that part of

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the declaration, if you don't mind.

Q. Okay.

A. Because I spent quite a bit of time on that trying to -- trying to articulate what the difference -- perceived differences would be.

The general weft knitted fabrics used in footwear create a more extensible and in some cases more breathable product used for creating meshes, spacer meshes, and some of the characteristics of the warp knitted product are they generally tend to be less elastic, sometimes used for Li Ning materials, or in the case of like for Tricot, for example, for a very flat, relatively nonextensible material. So those would be the general sort of understandings of weft versus warp knitting.

But again, I want to stress the importance of these are all conventional knitting processes, and people are choosing -- making their choices based on other considerations, not whether it's weft knitted or warp knitted. They really don't care. It's only a way of communicating requirement or request for a change in the material, or trying to understand how -- why the material functions or looks the way it does.

THE VIDEOGRAPHER: 10 minutes.

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BY MR. VAN ES:

Q. Okay. So you mentioned some aspects of the general understanding of a person of ordinary skill in the art in 2004 of the advantages and disadvantages of weft versus warp knitting. Can you think of any others, other than what you just testified about?

A. Again, limited to a person of ordinary skill in the art, they would be probably aware of circular knitting as a way of creating a product, something used in making socks, for example, and I can recall very vividly in 19 -- early 1990s when the circular knitted Thorlo socks and some other products came on the market, everybody was trying to find a way to make -- to take that circular knitted product and make an upper for a shoe out of it, basically put a bottom on it. These circular knitted products were very detailed and functionally very interesting.

So that technology would have been something a person of ordinary skill in the art in 2004 would have been very aware of and interested in, and perhaps, you know, trying to apply it to a particular product that they were working on.

Q. Okay. What about the advantages or

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disadvantages of using circular versus flat knitting? What would be the understanding of a person of ordinary skill in the art in 2004?

MR. KADABA: Objection to form.

A. I think the flat knitting versus circular knitting, they really wouldn't care, I mean as far as the -- you know, how it was made. Again, you know, really what we're interested in is the end product, it's the result of the process, not the process itself.

BY MR. VAN ES:

Q. Okay. So just to be clear, so it's your opinion that in 2004 a person of ordinary skill in the art as between flat knitting and circular knitting really wouldn't care which type of knitting technology was used.

MR. KADABA: Objection to form.

A. They would care about the end result more than they would care about that. The relevance of how it's made is secondary to the functional requirements that you're trying to fulfill.

Q. Would a person of ordinary skill in the art have an understanding as to any differences between the technology used to flat knit versus the technology used to circular knit a product?

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A. My feeling is they would have a vague understanding of it, general understanding of it, not a detailed technical understanding of the differences.

Q. And what would their general understanding be of the advantages or disadvantages of using flat knitting versus circular knitting?

A. Cost differences and perhaps differences in, in the case of circular knitting in the smaller formats, the potential to knit a complete upper or most of an upper using a circular knitting technology, and not having that option with flat knitting.

Q. So a person of ordinary skill in the art in 2004 would understand that flat knitting is not really an option to knit the complete upper.

MR. KADABA: Objection to form.

A. Yeah, that's not exactly what I said. I mean, I think of course it would be an option to knit the complete upper. That's basically what the Dua patent describes one way of doing that, but when I say circular knitting I'm talking about something that looks like a sock, it's a tube. So the ability in this case with a particular kind of circular knitting to knit a tube, it could very easily be

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used to create an upper. That's what I'm talking about, they would be aware of that difference and possibly interested in applying that to a particular project.

Q. So that might be an advantage that a person of ordinary skill in the art would think about circular knitting as opposed to flat knitting.

A. Circular types of circular knitting would be possibly applied to that end, yes.

THE VIDEOGRAPHER: Five minutes.

BY MR. VAN ES:

Q. And you also mentioned cost differences that a person of ordinary skill in the art would have -- excuse me, you also mentioned an awareness of cost differences that a person of ordinary skill in the art might have had as between flat knitting and circular knitting. What would be the understanding that that person of ordinary skill in the art would have about those cost differences?

A. The understanding generally would be that flat knitting was less expensive. You always have to deal with the minimum requirements for a product like that, setup charges and minimums. So they would be considering that in looking -- possibly asking for a material to be made using one

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technology or another.

Q. So the cost differences relate to the equipment used to make the product?

A. It can relate to the equipment, in the sense that it can relate to the minimum requirement, minimum buy for the material. It could apply to sample costs, it could apply to the actual costs of the final products. So it would be something to be aware of.

MR. VAN ES: Okay. I've got a note from the videographer that I think we're close to a point where we need to change the tape, so why don't we go off the record to do that.

THE VIDEOGRAPHER: Sure. This is the end of Tape 1 in the deposition of Edward C. Frederick. The time is 10:26 a.m., and we are now off the record.

(Recess)

THE VIDEOGRAPHER: This is the beginning of Tape 2 in the deposition of Edward C. Frederick. The time is 10:43 a.m. and we are now back on the record.

BY MR. VAN ES:

Q. Mr. Frederick, did you have any discussions with your lawyers during the break?

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A. Yes, we did.
Q. Did you talk about your testimony?
A. No, we talked about definitions of -- about some of the stuff that I had gone over before, just more or less -- nothing, yeah, that was it.
Q. What definitions did you discuss?
A. Well, not -- we didn't really discuss them, I just asked to look at the declaration again, some of the stuff that I had been reading from before.
Q. Which definitions did you look at?
A. The ones that I read to you before.
Q. Just tell me --
A. The warp and weft and the differences between them.
Q. And what did your lawyers have to say to you about those definitions?
A. Nothing, really. I just asked to look at them, just look at them.
Q. Did you discuss anything else with the lawyers besides the definitions?
A. No. They told me I was doing a good job, so... that's about it.
Q. Okay. All right.
Before the break we were talking about the understanding that a person of ordinary skill in the

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art would have had in 2014 as to reasons why flat knitting might be less expensive than circular knitting. Remember that?

A. In 2014?

Q. Excuse me, if that's what I said I misspoke. Let me rephrase the question. Before the break we were talking about the understanding that a person of ordinary skill in the art would have had in 2004 as to reasons why flat knitting would have been less expensive than circular knitting. Do you remember that?

A. I do.

Q. And you discussed the cost of the equipment, right?

A. No.

Q. Okay. Explain what those -- the understanding of that person of ordinary skill would be as to the differences in cost between flat and circular knitting.

A. They might have a general understanding of the difference in setup costs or minimum costs for materials and the different -- using the different technologies.

Q. Okay, what do you mean by setup costs?

A. Well, the cost of programming the machine

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to make a certain knit, to use different yarns, you know, availability of -- or cost of the component yarns, those kinds of costs. So basically every time, you know, you ask the supplier to change the material, they want to charge you for the costs, either by specifying a minimum number of yarns that you have to buy or minimum quantity of material, or by charging you for changing the setup of the machine.

Q. So the cost of the raw materials would be more for circular knitting than -- excuse me, the cost of the knitted materials would be more for circular knitting than for flat knitting?

A. I wasn't really saying that. I was saying that there may be differences that the person of ordinary skill in the art would have to be aware of. I wasn't trying to characterize one as being more costly than the other, just that they might differ.

Q. Would a person of ordinary skill in the art in 2004 have an understanding as to differences in cost between a circular knit upper as opposed to a flat knit upper?

A. I think they would be aware of, you know, just basically what I just said. They would be aware that there might be differences in cost and

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they would want to, you know, make themselves -- inform themselves about what those would be.

Q. And what would the general understanding be as to which generally would be more costly?

A. I don't know. I just know that they might differ.

Q. Can weft knitting be done by hand?

A. What do you mean, like knitting a sweater or something like that?

Q. Just in general, can a textile element be knitted by hand by weft knitting?

A. I suppose so, yeah.

Q. Can a textile element be knitted by hand using a flat knitting technique?

A. I don't know.

Q. Can a textile element be knitted by hand using a circular knitting technique?

A. You know, I'm not an expert on hand-knitting, so I don't know. I don't know. But I believe I have a sweater that was made by circular knitting by my wife, so we'll make that my answer, based on domestic experience.

Q. Do you know if warp knitting can be done by hand?

A. I don't know.

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Q. Now, we talked about -- you understand generally that there are flat knitting machines and circular knitting machines, right?

A. That's right.

Q. And have you personally ever seen a flat knitting machine in operation?

A. No.

Q. Have you personally ever seen a circular knitting machine in operation?

A. Yes.

Q. Was that the machine that you saw in Europe around 1996?

A. Yes, uh-huh.

Q. Have you ever seen a warp knitting machine?

A. Hmm, yes.

Q. Where?

A. In Pirmasens in the 1980s.

Q. Can you spell that?

A. P-I-R-M-A-S-E-N-S. It was a site of a manufacturing show. There are different kinds of equipment are demonstrated.

Q. So that was a trade show in the 1980s, you said?

A. Late 1980s, I don't remember exactly when.

Q. In the United States?

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A. Germany.

Q. So circular knitting means knitting something as a tube, right, generally?

MR. KADABA: Objection to form.

A. A big tube or a little tube, yeah.

BY MR. VAN ES:

Q. So just to be clear, counsel objected to my question. I want to make sure that there are no issues with it.

Generally circular knitting means knitting something in a tube shape, correct?

A. That's my understanding, yes.

Q. Is it possible to flat knit something on a circular knitting machine?

A. Well, my understanding of a flat knitting machine is that it's more or less actually a circular, it's a curved surface, it's not really technically flat. And so my understanding would be that large diameter circular knitting machines would produce a similar result because it's a large diameter. Basically you could produce a flat piece by cutting it out of the circular knit.

Q. Okay. You said that you can produce a flat piece by cutting it out of the circular knit. Can you explain what you mean by that? Are you

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referring to cutting a flat piece out of a circular knitting fabric -- circularly knitted fabric?

A. That's right.

Q. So it's your testimony that it would be possible to flat knit something on a circular knitting machine?

A. No.

Q. It would not be possible.

A. No.

Q. And can you explain to me your understanding of the difference between a circular knitting machine and a flat knitting machine?

A. I really don't -- I know that, you know, circular -- let me answer the question this way. Circular knitting machines can produce a large diameter tube, using the term you suggested, or smaller diameter tube. And in a larger diameter it's possible to cut enough material from that to be -- make it useful in making a shoe. In a smaller diameter it's possible to make something that would be like a sock, a tube, small tube, and might be functional as an upper itself.

So flat knitting machines, as I understand it, and I'm certainly not putting myself up as an expert on knitting machines, it's flat but it's

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still knitted on a curve. So in my simple understanding of this, you have to end up with two knitted structures. They're both from a curved machine, and they're eventually going to be cut out to be used in creating an upper.

Q. So if your understanding is that a flat knitting machine knits on a curve, can you just explain to me what is your understanding as to the difference between this flat knitting machine that knits on a curve and a circular knitting machine that knits in a tube?

A. I really don't know.

Q. Okay. Now, you mentioned that in both circular and flat knitting I believe you said that eventually the product is cut out to create an upper? Is that what you said?

A. I said if you're creating a large piece of material that you'll have to cut out -- cut a portion of it out in order to make it small enough to make it useful in making the upper of a shoe.

Q. Are there any other ways to use a circular or flat knitting machine to create an upper other than by cutting them out of a larger piece of material?

MR. KADABA: Objection to form.

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A. Yeah, as I stated before, it's possible to make a tubular knit that's like a sock and could be used to form an upper for a shoe.

Q. So a circular knitting machine can be used to make a sock-like structure that could be used as an upper, and that would not need to be cut out of a web?

A. That's right.

Q. Could a flat knitting machine be used to create an element that could be made into an upper without cutting that element from a web?

MR. KADABA: Objection to form.

A. I can't see how.

BY MR. VAN ES:

Q. So I want to ask you, you understand that you're being offered as an expert in this case?

A. Well, yeah.

Q. I want to ask you some hypothetical questions, okay? Can you explain to me if I cut out of fabric -- excuse me, let me start the question over again.

If I cut out material that was being knitted on a circular knitting machine and I also cut out material that's being knitted on a flat knitting machine and presented you with those two

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pieces of material that were both cut out from the two different types of machines, would you be able to tell any structural difference between material cut out of the circular knitting machine versus the material cut out of the flat knitting machine?

MR. KADABA: Objection to form.

A. Not necessarily.

BY MR. VAN ES:

Q. What would your answer -- first of all, you understood my question, right?

A. I did.

Q. What would your answer depend on? You said not necessarily. What do you mean by that?

A. Well, it's a hypothetical question, so I don't actually know what the two materials are.

Q. Well, I'm telling you, and I want you to assume, that you have material that's knitted on a flat knitting machine and you have material that's knitted on a circular knitting machine, and you cut out a one-inch by one-inch square of material from both material being made on the circular knitting machine and material being made on the flat knitting machine, would you be able to tell if those one-by-one squares had any structural differences?

MR. KADABA: Object to the form.

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A. No.

BY MR. VAN ES:

Q. And is that because you just don't know, or is that because there wouldn't be any structural differences?

MR. KADABA: Same objection.

A. I don't know.

BY MR. VAN ES:

Q. All right. Let me turn back to your declaration, paragraph 9, please. You indicate in the -- let me know when you're there, please.

A. Okay. I have 9 in front of me.

Q. Okay. You indicate in the second sentence of paragraph 9 that there are seven or more decision points during the cycle of design and development of a new footwear product.

A. That's correct.

Q. Can you briefly tell me what those seven or more decision points are?

A. Well, first one would be in the development of the product brief, which would be a description of what the objective would be for the product, who the target market would be, and so on.

There would be a design review based on initial conceptual concept reviews of the basic

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design.

There's -- would most likely be an initial review --

Q. Are you on the -- excuse me for interrupting you. Are you now on the third point?

A. I'm on number three, yes.

Q. Thank you.

A. There would be an initial design review after, possibly after pullovers or some kind of initial development took place to review the basic concept.

There would be a first round review of design, that would be the fourth time.

Probably a second -- most likely a second round review and then a final review, number six.

And then it's possible there would be another review of the design after some initial testing took place.

Q. And at what point in these various steps would the type of material be used in the upper be under consideration?

A. It could be in any of those decision points. Could be part of the product brief, it could be something that needed to be modified to make the shoe functional or achieve its objectives,

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any one of them.

Q. Do you have any understanding as to whether the actual inventors on the '011 patent meet your definition of a person of ordinary skill in the art?

A. I think you asked me that already, and no, I don't have any understanding.

Q. Okay. I want to direct your attention to paragraph 15 of your declaration. Do you see that paragraph?

A. Yes.

Q. And in that paragraph you are describing part of your analysis regarding obviousness?

A. Let me read it here just a second. Okay, that's right, discussing obviousness.

Q. Okay. Did you write this paragraph?

A. I did.

Q. And let me direct your attention to what previously I marked as Exhibit 2002, which is your declaration from the K-Swiss reexamination.

A. Right.

Q. And I'm going to direct your attention to paragraph 10 of that declaration.

A. Okay. Would you like me to read it?

Q. Well, why don't you read it to yourself, the paragraph, paragraph 10.

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A. Uh-huh.

Q. Did you write paragraph 10 in Exhibit 2002?

A. I did.

Q. And the first sentence of paragraph 15 of your declaration in this case says, I have also been informed that in order for a patent claim to have been obvious there should have been a reasoned explanation as to why collectively the prior art references would have rendered the claim obvious.

Do you see that?

A. Right.

Q. And in paragraph 10 of your declaration from the Exhibit 2002 of your declaration in the K-Swiss case you said, I have also been informed that in order for a patent claim to have been obvious there needs to be an articulated reason with some rational underpinning why collectively the prior art references would have rendered the claim invention obvious.

A. Uh-huh.

Q. Why the differences between those two statements?

MR. KADABA: Objection to form.

A. Why do you characterize them as differences?

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BY MR. VAN ES:

Q. Do you agree that the sentences are not the same?

A. They're not the same, no.

Q. Why are they not the same?

A. Well, obviously the wording is different.

Q. Is there a reason why you no longer refer to the language "articulated reason" which you previously referred to in your 2002 declaration -- or, excuse me, your declaration from the K-Swiss case, Exhibit 2002?

A. No specific reason, no.

Q. And you also changed the language about a "rational underpinning" in your -- do you see that?

A. Uh-huh.

Q. In your previous declaration you talked about a rational underpinning, but you no longer refer to a rational underpinning in your declaration in this case.

A. I think it's incorporated in the phrase, in my mind, in the statement that depending on the real world context of the invention described in the patent, various factors or reasons can suffice as a reason to modify. I don't see those as contradictory.

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Q. Okay. Well, both of your declarations have the exact same sentence that you just read about depending on a real world context, right?

A. Pretty close, yes.

Q. But you made other changes to the paragraph about the obviousness analysis that you applied.

A. That's right.

Q. Let me direct your attention to paragraph 13 of your declaration from the K-Swiss case, Exhibit 2002.

A. Did you say 13?

Q. Yes.

A. Okay.

Q. Do you agree with me that there's no statement in your declaration in this case that's similar to what you've said in paragraph 13 of Exhibit 2002?

A. I don't understand what you're asking me.

Q. So Mr. Frederick, will you agree with me that much of this section of your report in this case is identical to the declaration that you prepared a few years ago in the K-Swiss case?

MR. KADABA: Objection to form.

A. I would agree there are similarities, but it's not identical. I mean, there is -- there are

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some phrases and, you know, as anybody writing something, writing a similar kind of a thing would use similar phrasing and similar statements to describe the similar situations.

BY MR. VAN ES:

Q. Okay.

A. So are you saying I plagiarized myself? Is that what you're --

Q. I'm certainly not suggesting --

A. -- arguing?

Q. I'm trying to get an understanding as to why you changed some of the language in your reports.

A. I see. Okay.

Q. And for example, paragraph 17 of your report in this case appears to be the same as paragraph 12 of your declaration in the K-Swiss case.

A. That's right.

Q. And your declaration in the K-Swiss case included a paragraph 13 about motivations, suggestions or teachings for combining references. And I don't see a similar paragraph in your declaration in this case. Do you agree?

A. Give me those numbers again, the last two

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paragraphs.

Q. In your declaration in the K-Swiss case you included a paragraph 13. Do you see that?

A. That's right, okay.

Q. And there's not a corresponding paragraph in your declaration in this case, even though many of the other paragraphs in that same area of the report are the same.

A. Okay. You're asking me is 13 verbatim in -- from -- yeah, okay. Try it one more time.

Q. Is paragraph 13 of your report in the K-Swiss case contained in your report in this case?

A. I don't find that exact wording.

Q. Do you know why you didn't include this paragraph 13 from your K-Swiss case in the current case?

A. I don't. I don't have any recollection of that.

Q. I'm going to mark as Exhibit -- I'll mark this as Nike Exhibit 2005. It's paper 18 from this case. And my first question to you is going to be whether you recognize this document.

(Nike Exhibit 2005 marked)

A. I've seen this before. Yes, I recognize it.

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BY MR. VAN ES:

Q. Have you reviewed it before?

A. I did review it, yes.

Q. Is this something you looked at to prepare your deposition? Is this something you've looked at before your deposition?

A. Yes, before the deposition, yeah.

Q. Do you understand this decision?

A. I have an understanding of -- basic understanding of it. I can't say I understand every nuance and detail of it.

Q. Okay. Are there any aspects of this decision that you can recall disagreeing with?

A. Nothing that I recall disagreeing with, no.

Q. Okay. Let me direct your attention to page 4 of the decision.

A. Okay.

Q. And there it says in the third sentence, A textile element (40) is a single material element with a unitary (i.e. one-piece) construction.

Do you see that sentence.

A. I do.

Q. Do you agree with that definition of the term unitary?

A. Yes.

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Q. Okay. Can I direct your attention to page 12 of the decision. Do you see in the first full paragraph -- excuse me -- yeah, do you see in the first full paragraph the second sentence that says, Nevertheless, a pertinent definition of the term "textile" is "any cloth or goods produced by weaving, knitting or felting."

A. I see that.

Q. Do you agree with that definition of textile?

MR. KADABA: Objection to form.

A. Yes.

BY MR. VAN ES:

Q. And you see the next sentence has a further discussion of textile. Do you agree with that further discussion of the definition of textile?

A. Give me a minute to read it.

MR. KADABA: Same objection.

A. Yes.

BY MR. VAN ES:

Q. Okay. Let me direct your attention -- actually, let me ask you more generally. As you sit here right now do you have an understanding of the term weft knitting?

A. I do.

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Q. What's your understanding of what the term weft knitting means?

A. I have a general understanding of weft knitting as a -- I really -- are you asking me to define it, or what?

Q. I'm asking you for your definition of weft knitting.

A. Okay. Weft knitting describes a type of knitted fabric in which yarns are formed into stitches in a width-wise manner.

Q. Are you referring to your report now?

A. Yes, I am, I'm reading from the page.

Q. What page?

A. Page 27, paragraph 54.

Q. That page has your definition of weft knitting?

A. That's right.

Q. Do you have an understanding of the term circular knitting?

A. My understanding of circular knitting is that it's a type of weft knitting.

Q. Can you be more specific?

A. It's a type of weft knitting where the -- well, I can't be more specific. It's a type of weft knitting that involves a circular end result.

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Q. A circular end result, can you --

A. Well, in other words, the product is made in a circular -- the output of the machine is a large or small diameter circular object. That's my understanding of it.

Q. Okay. What's your definition of the term flat knitting?

A. Flat knitting would be another type of weft knitting that would involve an end result that was, you know, on a curved surface, but more or less flat.

Q. And what's your definition of the term warp knitting?

A. It's a type of knitting construction in which the yarns are formed into stitches in a lengthwise manner.

Q. Are you looking at your report?

A. Yes, I am, I'm reading from my report.

Q. What page?

A. Page 28.

Q. Can you turn back to the decision paper 18, Nike Exhibit 2005?

A. Okay.

Q. On page 13.

A. Okay.

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Q. And do you see about a little more than a third of the way down the page a sentence that begins, We construe such "knit constructions" to mean various kinds of stitching, which exhibit aesthetic or structural differences, such as those in different areas of textile element, depicted in Figure 11.

A. Yes, I see it.

Q. Do you agree with that definition -- excuse me, do you agree with that construction?

A. I don't know what you mean by construction.

Q. Well, do you see the sentence begins, We construe?

A. Yes.

Q. Do you agree, then, with this construction where I'm using the term construction as -- let me start the question over again.

Do you agree with this definition of knit constructions?

MR. KADABA: Objection to form.

A. I don't agree that it's a definition. I mean, they're construing it, which isn't equivalent in my mind to defining something. They're construing it for the purpose of this statement here, that knit construction means what it says

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there.

BY MR. VAN ES:

Q. Okay. Do you agree that the term knit construction should be construed as it was construed in this sentence?

MR. KADABA: Objection to form.

A. As it's limited in this context, I would agree with what -- with that statement within the limits of this context here.

Q. What do you mean by "within the limits of this context here"?

A. Just what I said.

Q. I don't understand what that means, the limits of this context. What does that mean?

A. Well, I feel like you're trying to get me to make a general statement about what the term knit constructions means, and I'm saying that I agree with the statement as it's written here, that's what I mean.

Q. Okay, thank you. So let me ask you to turn to page 14.

A. Uh-huh.

Q. And do you see the first -- excuse me, the second full sentence of that paragraph that says in part, A pertinent definition of "weft knitting" is

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"(a) knitting process in which a continuous yarn is carried in crosswise rows"?

MR. KADABA: Objection to form.

A. I see that.

Q. Do you agree with that definition?

A. It's consistent with -- yes -- what I think.

Q. And do you see the sentence continues -- excuse me, the next sentence says "A pertinent definition of the term "warp knitting" is "(a) knitting process in which a group of yarns form rows running lengthwise by an interlocking process."

Do you see that sentence?

A. I see that.

Q. Do you agree with that definition?

MR. KADABA: Objection to form.

A. I agree with that statement, yes.

BY MR. VAN ES:

Q. All right. Let me direct your attention to page 15. Look at the first full paragraph, second sentence, do you agree with that sentence?

A. Could you read it to me?

Q. Sure.

A. What do you mean by first full paragraph?

Q. Right. Let me read the sentence that I'm

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asking you about, this is page 15, first full paragraph, second sentence begins, The '011 patent states that "(a) as defined for purposes of the present invention, unitary construction is intended to express a configuration wherein portions of a textile element are not joined together by seams or other connections, as depicted with textile element (40) in Figure 8."

A. I see that.

MR. KADABA: Objection to form.

Q. Do you see that sentence?

BY MR. VAN ES:

A. I see that.

Q. Do you agree with that definition?

MR. KADABA: Same objection.

A. I agree with that statement, yes.

BY MR. VAN ES:

Q. And can you look at the last sentence of the paragraph that we were just reading where the board construes the phrase "the textile element having a first area and second area with unitary construction", do you see that?

A. Yes.

Q. And the board construes that to require a textile element having unitary construction and

having a first area and a second area?

A. I understand that.

Q. Do you agree with that construction?

MR. KADABA: Objection to form.

A. Yes.

BY MR. VAN ES:

Q. Okay. Turn to page 16, please. Last sentence of page 16, I'm not going to read it into the record.

A. Okay.

Q. I think it's pretty clear what the last sentence -- are you clear what the last sentence of page 16 is?

A. Yes.

Q. And there is an interpretation of a phrase that begins "the flat knitted textile element having a first area," and it continues? Do you see that?

A. Uh-huh. Right.

Q. Do you agree with that definition -- excuse me, do you agree with that interpretation?

MR. KADABA: Objection to form.

A. Yes, I understand that.

BY MR. VAN ES:

Q. Do you agree with it?

MR. KADABA: Same objection.

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A. Yes, uh-huh.

BY MR. VAN ES:

Q. Okay. Let me direct your attention to page 17. Do you see Roman numeral III, decision on petition?

A. I do.

Q. Do you see the second sentence there that says, We deny as redundant institution based on alleged unpatentability due to obviousness over Osamu, O-S-A-M-U, alone, or over Nishida, N-I-S-H-I-D-A, Glidden, G-L-I-D-D-E-N, or Osamu in combination with each other or with one or more of McDonald, Curley, C-U-R-L-E-Y, Whiting, W-H-I-T-I-N-G, and Shiomura, S-H-I-O-M-U-R-A?

A. I see that.

Q. And do you agree that it was -- it would have been redundant to institute an inter partes review based on the alleged unpatentability due to obviousness over these references?

MR. KADABA: Objection to form.

A. I don't agree with that.

BY MR. VAN ES:

Q. Why not?

A. I think McDonald has a relevance here, in particular, and I think Osamu has relevance also.

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Q. Any other reasons?

A. So my personal opinion is -- no, not that I can think of right at the moment.

Q. Okay. Have you ever heard the term "product by process"?

A. I have.

Q. Okay. Let me direct your attention to page 24 of the board decision. Do you see the discussion in the first full paragraph where the board comments that "claims 14, 15 and 33 include a product by process limitation"? Do you see that sentence?

MR. KADABA: I'm sorry, what -- page 24?

MR. VAN ES: Right. I'm on page 24, the first full paragraph.

BY MR. VAN ES:

Q. Do you see in that paragraph the board comments that, Certain claims, specifically 14, 15 and 33, include a product by process limitation? Do you see that?

A. I do.

Q. And did the board say that any other claims in the patent include a product by process limitation?

A. I don't know.

Q. Do you think that any of the other claims

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in the patent include product by process limitations?

MR. KADABA: Objection to form.

A. I don't have an opinion on that.

Q. In your declaration did you comment that any of the claims in the '011 patent include product by process limitations?

A. I don't -- I don't remember. I would have to look.

Q. Do you know what product by process limitation means?

A. I have a kind of a nonlawyer understanding of it.

Q. What's your nonlawyer understanding?

A. That you -- my understanding, again, you know, I'm not a lawyer, and this is a very nuanced phrase that I understand has to be applied very carefully in a legal context. So what I'm explaining to you is not my understanding as a lawyer or my definition as a lawyer, but just my layperson's understanding of this. I'm not a legal expert.

My understanding is that you can't simply invent something by combining -- by using -- by adding a process, a manufacturing process or other

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case -- you know, example something that gives you -- in other words, you know, using circular knitting, for example, to invent something by itself, or to create something by itself wouldn't be patentable. That's my understanding of it.

Q. Using circular knitting --

A. I just gave you an example.

Q. Okay. That was an example of a product by process claim?

MR. KADABA: Objection to form.

A. Yeah, again, that's my understanding of it.

BY MR. VAN ES:

Q. Okay. I want to direct your attention back to your declaration, paragraph 24. Do you have that paragraph in front of you?

A. No, I don't. I'm a little discombobulated here. What was the paragraph number again?

Q. Paragraph 24.

A. Okay.

Q. And in that paragraph are you identifying problems that the '011 patent identifies?

A. That's right.

Q. Are these the only problems identified in the '011 patent?

MR. KADABA: Objection to form.

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A. I don't know.

BY MR. VAN ES:

Q. Did you review the '011 patent before this deposition today?

A. I did.

Q. All right. I'm going to show you what's previously been marked as Exhibit 1002, it's a copy of the '011 patent. Do you recognize this document?

A. I do.

Q. Let me direct your attention to column 5 of the patent.

A. Okay.

Q. And take a look at around line 59, actually it's around line 57, the text that begins "textile element (40)." Do you see that?

A. Yes, I do.

Q. Could you please read, just read to yourself from column 5, line 57 through column 6, line 7?

A. Okay. Okay.

Q. And specifically at the column 6, line 4, it says, Referring to Figure 8, the positions of regions 31 through 35 and ankle opening 36 are identified to provide a frame of reference, and it continues. Do you see that?

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A. I do.

Q. Would you -- could you take a look at figure 8 for me and label regions -- I'm going to ask you to label a couple of regions. Region 31, which is the lateral region.

A. Figure 8?

Q. Yes.

A. Okay.

Q. So can you label the lateral region?

A. Label it how?

Q. Can you just write "lateral region" by item 31? You agree 31 is the lateral region?

A. It could be lateral, yes, uh-huh.

Q. You agree that the patent says that --

A. It's what the patent says, yeah.

Q. -- 31 is the lateral region.

A. Right.

Q. And can you label opposite medial region, 32?

A. Okay.

MR. KADABA: Just to clarify the record, 31 isn't indicated as the lateral region in that section of text you had him read, is it?

MR. VAN ES: Well, the record says -- excuse me, the patent says at column 6, line 4,

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referring to Figure 8, the positions of regions 31 through 35 and ankle opening 36 are identified, and then continues.

MR. KADABA: Yeah. It just doesn't say lateral region in that portion of the text. I just wanted to confirm.

MR. VAN ES: Well.

BY MR. VAN ES:

Q. Mr. Frederick, do you agree that the patent says that 31 is the lateral region?

A. Let's see.

Q. I can direct your attention to column 5, line 25.

A. Yeah. Okay.

Q. And --

A. Got you.

Q. So you agree that 31 is the lateral region, right?

A. As described in the patent, yes.

Q. And opposite medial region 32 is described in the patent, and you've labeled that?

A. I have.

Q. Can you also label instep region 33, and that's mentioned at least at column 5, line 19?

A. (Indicating.) Okay.

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Q. And it's also referred to in column 6 in the area we're talking about. And can you also label heel region 35, it's identified as column 5, line 20?

A. Uh-huh. (Indicating.) Okay.

Q. Now, the patent describing Figure 8 also talks about certain edges, right?

A. Lots of edges, yeah.

Q. So I'd like you to describe generally with reference to Figure 8 and the areas that you just labeled how the edges are joined together, if you could provide an explanation of that, please.

MR. KADABA: Objection to form.

A. Well, the bottom surface -- I mean the -- along the length of the shoe, seams 41 and 42 are joined together.

Q. Edges 41 and 42 are joined together to form a seam?

A. Right.

Q. And where else are edges joined together to form a seam, as described in the patent?

A. Seam 52 is formed by securing edge 42a and 42b. 53, seam 53 is formed by securing an edge 43a and 43b. Seam 54 is formed by securing an edge 44a and 44b, and a second portion of seam 54 is formed

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by securing an edge 44c with 44d.

Q. So the joining of those various edges forms seams?

A. That's right, uh-huh.

Q. And the forming of those edges -- excuse me, the joining of those edges forms an ankle opening for receiving the foot?

A. Which edges? All of them?

Q. Does the forming of at least some of those edges -- excuse me, does the joining of at least some of those edges form an ankle opening for receiving the foot?

A. The ankle opening is already defined in the flat upper.

Q. So as the upper is shown in Figure 8, is it laying flat?

A. It is.

Q. And is that -- does Figure 8 show as illustrated an opening that can receive an ankle?

A. It does. Yeah, it's labeled 45, but this area here is where the ankle would be, the foot and the ankle would be in it. That's the void that they would pass through.

Q. But before the edges are joined together there would be no way to put your foot in that upper

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shown in Figure 8, would there?

A. I could slip this over my ankle and -- I could slip this area 45 over the ankle and top of the instep.

Q. So just so I'm clear, is it your testimony that the upper shown in Figure 8 as illustrated includes a void for receiving an ankle?

MR. KADABA: Objection to form.

A. As I said, this area marked with 45 is intended to be the place where the ankle would be located, where the ankle would be secured by the upper.

Q. Okay. But the textile element shown in Figure 8 is laying flat, right?

A. That's right.

Q. The edges are not yet joined together, right?

A. That's correct.

Q. And it's your testimony that Figure 8 as illustrated shows a textile element with a formed ankle opening for receiving a foot.

MR. KADABA: Objection to form.

A. Well, what I said was there's an opening in the flat part of this in which the ankle would be inserted.

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BY MR. VAN ES:

Q. Right. But as shown in Figure 8, an ankle could not be inserted in that flat textile.

A. I could do it for you right now, if you want. Give me a pair of scissors, and just cut a hole here and slide it right over your ankle.

Q. And...

All right, let me direct your attention to Figure 9 of the '011 patent. What does that show?

A. It shows apparently -- apparently shows us a continuous piece of webbing that has two areas of where an upper -- the elements of an upper are provided, one on top of the other.

Q. Does Figure 9 show an example of a textile element that's made by circular knitting?

A. I'll have to look at the definition, but I think that's what it describes, yeah. Let's see what they say here, Figure 9. It just describes it as a perspective view of a textile structure that incorporates two of the textile elements. It doesn't really specify whether it's made by circular knitting or not.

Q. Does anything about the configuration of the textile element -- excuse me, the textile structure (60) and the textile elements (40) in

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Figure 9 tell you that this is made by circular knitting?

A. That would be a logical conclusion based on the context, but it's not stated explicitly in the patent.

Q. Okay. Let me direct your attention to column 7, line 41.

A. Okay.

Q. Do you see the first sentence there that says, An example of a textile structure (60) that may be formed with a wide tube circular knitting machine is depicted in Figure 9.

Do you see that?

A. Okay, yeah.

Q. So does that tell you whether the textile structure (60) is formed on a circular knitting machine?

A. It does, uh-huh.

Q. And did you need that sentence in the specification to tell you that?

MR. KADABA: Objection to form.

A. I was thrown by the figure caption, which defines figures as a perspective view of a textile structure that incorporates two of the textile elements.

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BY MR. VAN ES:

Q. Okay.

A. So...

Ordinarily I would rely on a figure caption to get my understanding of what I was looking at.

Q. Okay. How would the textile element (40) -- let me take a step back. So does Figure 9 show two textile elements (40)?

A. It's an example of a textile structure.

Q. So my question is: Does Figure 9 show two textile elements (40)?

A. It shows two upper configurations.

Q. Right. And the numeral (40) points to what you're calling the two upper configurations?

A. Right.

Q. Now, how would the upper configurations as you've used that term be removed from the textile structure shown in Figure 9?

MR. KADABA: Objection to form.

A. They could be removed by die cutting, laser cutting, hand cutting, water jet cutting. There are all kinds of possibilities.

Q. Can you think of any other examples besides die cutting, laser cutting, I think you said hand cutting and water jet cutting?

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A. Water jet cutting. Well, there may be other ways. What I was trying to convey is there are lots of different ways to cut pieces, to remove pieces from a webbing.

Q. Okay. And describe the edges on the textile element (40) that would be formed after the material was cut from the webbing.

MR. KADABA: Objection to form.

A. Well, the edges are the same as the edges described in Figure 8.

Q. So but referring to Figure 9, you see that there are two called upper configurations (40) shown, right?

A. That's right.

Q. And you described different ways that those could be cut from the textile structure (60), right?

A. I did.

Q. I'm asking you to describe what would be the physical characteristics of the edges after that cutting took place.

MR. KADABA: Objection to form.

A. It would depend on what method was used to cut the edges and -- it would depend on -- and how they were cut.

BY MR. VAN ES:

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Q. It would depend on what type of cutting technique was used?

A. That's my understanding of it, yeah.

Q. Well, you mentioned die cutting. If the edges were die cut what would be the physical characteristics of them at that point after they were cut from the structure (60)?

A. Well, I don't know. I would have to see the die. But generally speaking, it would be a nice clean cut without fraying or any --

Q. So it's your testimony that if the upper (40) -- textile element (40) were cut from the textile structure (60) with die cutting that the edge would not fray.

MR. KADABA: Objection to form.

A. Well, I said I'd have to see the die, is what I said. But I would think it would make for a nice clean cut.

Q. What do you mean by clean cut?

A. It would produce an edge without a lot of fraying or damage to the fabric.

Q. What about if the edge were cut by laser cutting? Would the edge be frayed or would there be damage to the fabric?

A. Well, sometimes with laser cutting,

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depending on the fabric and the settings of the laser, the edge can be seared or melted and creates a different edge than die cutting or water jet cutting.

Q. So if edges are cut from a web with a laser, that can create a physically different yarn structure on the end of the edge?

A. It's possible.

Q. Than can be created by die cutting?

A. It's possible.

Q. And explain why that would be, please.

A. Because the heat of the laser can melt certain fibers and can create a hardened area, slightly raised hardened area.

Q. And what if the edges were cut with a water jet? What would be the structure at the edges?

A. Well, with water jet cuttings sometimes, because you're cutting multiple layers of material, you can have some differences in the edge characteristics of those that are closer to the jet or further away from the jet, more or less fraying, for example, maybe some of the lower cuts aren't quite as precise along the edge. They might need to be cleaned up. But those are just differences that you might have to deal with if you're assembling a

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shoe.

Q. So would one skilled in the art understand that if the textile element (40) were cut out of this textile structure (60) that one of the results would be that the edges might be frayed?

MR. KADABA: Objection to form.

A. It's one result, possible result.

BY MR. VAN ES:

Q. And what is the -- what would be the impact of the edges being frayed in terms of then constructing an item of footwear?

A. Well, if you're butt-seaming these two edges, meaning you're putting them next to each other and stitching them together, you want to have a very clean edge all the way. And so if it's not clean, that's bad. So you would -- the consequence immediately would probably be you'd have to clean up the edge.

Q. Some additional processing steps?

A. Possibly, yeah, yeah. I would expect -- it's very unlikely, though, that, I mean, if people know what they're doing they're not going to have frayed edges and melted edges and things like that.

Q. If the edges are frayed is it possible that the upper can become unraveled?

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MR. KADABA: Objection to form.

A. I doubt it. Yeah, I doubt it very much. If they -- if 4 is made correctly and it's constructed in a way that it's reinforced along that edge, that shouldn't be a problem. It's a potential problem, but not a likely problem.

Q. And just to clarify your last testimony, you mentioned 4. Do you mean 40. You meant 40?

A. I meant 40, yeah.

Q. Have you ever seen an upper cut from a circularly knitted textile structure?

A. Well, I guess on video I have, yeah.

Q. You've not seen it in person.

A. No.

Q. When did you see this on video?

A. On -- on the Internet.

Q. When was this?

A. I think it was when the first Primeknit shoes were being introduced to the market right around the time of the Olympics in London, maybe after that, but I don't recall the exact date.

Q. And that's the Primeknit shoe, the adidas shoe?

A. That's correct.

Q. And when you saw this on the Internet this

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was on a publicly accessible website?

A. Yes, it was. It was advertising, basically.

Q. And you believe that showed -- let me take a step back. My understanding is that what you saw was an adidas upper being cut from a circularly knit textile structure?

A. It may have been from a flat knitting machine. It was either flat or circular knitting piece that was then cut out with what looked like a laser or -- that's my recollection.

Q. Were you able to see on the Internet image that you viewed exactly what the edge looked like?

A. No.

Q. Did you -- why did you view that video on the Internet of the adidas Primeknit shoe being created?

A. Because it was wicked cool. It was really amazing.

Q. What did you do after you looked at that video on the Internet?

A. I tried to order a pair of the shoes, but no luck. They weren't available in the U.S., I guess, at that time, so...

Q. Let me take a step back. What caused you

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to look at the video in the first place?

A. You know, I don't remember exactly. I think it was a friend of mine had sent me an e-mail, You've got to see this, sent me a link for it.

Q. Okay. Was it someone with adidas who sent that to you?

A. No, I don't think so.

Q. Okay. So other than that video -- and incidentally, forgive me if I already asked you this, when did you see that video?

A. Around the time of the London Olympics or just after, in that time period. So 2012 something.

Q. So within the last two years.

A. Yes.

Q. And prior to seeing that video on the Internet had you ever seen an upper cut from a circularly knit structure?

MR. KADABA: Objection to form.

A. No, I don't think so.

MR. KADABA: We've been going for about an hour and a half and it's about 12:15.

MR. VAN ES: Okay. Let me just ask counsel here one question.

MR. KADABA: Sure.

MR. VAN ES: Just a couple more questions,

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I'll wrap this up.
BY MR. VAN ES:
Q. Okay. So we've just been discussing Figure 9 in the '011 patent.
A. Right.
Q. And that shows an example of an upper made by circular knitting; is that right?
A. Hmm? That's right.
Q. Okay.
A. That's what the patent says, yeah.
MR. VAN ES: I think this is a good time for a break.
THE VIDEOGRAPHER: This is the end of Tape 2 in the deposition of Edward C. Frederick. The time is 12:14 p.m. and we are now off the record.
(Recess)
THE VIDEOGRAPHER: This is the beginning of Tape 3 in the deposition of Edward C. Frederick. The time is 1:06 p.m. and we are back on the record.
BY MR. VAN ES:
Q. Mr. Frederick, when we left off we were looking at the '011 patent, Figure 9.
A. Right.
Q. And we discussed that Figure 9 of the '011 patent shows the textile element (40), an upper that

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is knitted on a circular knit machine, right?

A. That's the way it's described, yes.

Q. And I want to direct your attention now to Figure 8. I'll ask you some questions about Figure 8.

Now, Figure 8 is an example of an upper made on a flat knitting machine, right?

A. I don't think it specifies that it has to be a flat knitting machine, but -- I don't think the patent limits it that way, does it?

Q. Well, I guess I'm not asking you what it's -- the patent teaches you that what's shown in Figure 8 could be made on a flat knitting machine, right?

A. It could be, yes.

Q. And if the structure shown in Figure 8 was made by a flat knitting machine, then the edges that are shown in Figure 8 would be flat knitted, correct?

A. That's right.

Q. And edges that are flat knitted, would they require further processing before the edges were joined to form various seams?

MR. KADABA: Objection to form.

A. I don't know.

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BY MR. VAN ES:

Q. Okay. Let me direct your attention back to your report, and I want to clarify and ask about the report. So in your report, you concluded that various claims of the '011 patent were invalid, right?

A. Yes.

Q. And you concluded that some of the claims were anticipated, right?

A. That's correct.

Q. But it's not your opinion that all of the claims are anticipated, correct?

MR. KADABA: Objection to form.

A. I think the report speaks for itself.

BY MR. VAN ES:

Q. Okay. Well, in your report you don't indicate that you believe that claims 35, 37 and 38 are anticipated; is that correct?

A. Once again, what were those numbers?

Q. 35, 37 and 38.

A. This is going to take me a little while here.

Q. Well, here, let me direct your attention to page 78 of your report.

A. Okay.

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Q. And on page 78 through 81, you include a summary of a claim chart?

A. That was page 78, did you say?

Q. Yes, pages 78 through 81. Do you have those pages?

A. Yeah.

Q. So starting on page 79, do you see the bullet point listings?

A. Okay.

Q. You know, maybe it would be easier, Counsel, if you want to stipulate that there's no position being taken here that claims 35, 37 and 38 are anticipated, but if you don't want to, we can continue the discussion with the witness. If you're not ready to do that, I can --

MR. KADABA: Can we go off the record for a minute?

MR. VAN ES: Sure.

THE VIDEOGRAPHER: The time is 1:12 p.m. and we are now off the record.

(Off-the-record discussion)

THE VIDEOGRAPHER: The time is 1:13 p.m. and we are now back on the record.

MR. VAN ES: So before we went off the record I asked if, in the effort of trying to move

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things along, if we could agree with adidas' counsel here that there's no argument being offered that claims 35, 37 and 38 are anticipated.

MR. KADABA: Yeah, that's correct, with respect to the declaration and the petition -- declaration of Dr. Frederick and the corresponding petition filed by adidas.

MR. VAN ES: Thank you.

BY MR. VAN ES:

Q. Okay, let me direct your attention to Exhibit 1005, which is the Nishida patent. Do you recognize that Nishida reference?

A. I do.

Q. Now, the patent examiner who handled the application that resulted in the '011 patent was aware of the Nishida reference, right?

MR. KADABA: Objection to form.

A. I can't speak for the examiner's awareness of the patent. I have no knowledge of that.

Q. You don't know one way or the other whether the patent examiner who handled the '011 patent already knew about the Nishida patent.

MR. KADABA: Objection to form.

A. I don't recall whether she knew about it or not.

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BY MR. VAN ES:

Q. Would that be relevant to your opinion?

A. No.

Q. Why is that?

A. Well, I was asked for my opinion about the relevance of Nishida, not for the examiner's opinion of Nishida.

Q. And in your review of the prosecution history and your review of the '011 patent, you don't recall learning whether or not the patent examiner already considered the Nishida reference.

A. I recall there was some discussion about that in the prosecution history, but I'm not really in a position to characterize her, whether she -- what she knew about it or anything, other than what was in that record.

Q. Okay. Let me direct your attention to the '011 patent. You see the second page of the patent, upper left-hand corner.

A. Right.

Q. It says 5345638.

A. Right.

Q. And a date and Nishida?

A. Right.

Q. Does that tell you that the patent examiner

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who's handling the '011 patent was aware of and considered the Nishida reference?

MR. KADABA: Objection to form.

A. Well, that tells me that she listed it, yeah, yeah.

BY MR. VAN ES:

Q. And the fact that she listed it indicates that she was aware of the patent, right?

MR. KADABA: Objection to form.

A. Yeah, she would have to be aware of it to list it, yes.

BY MR. VAN ES:

Q. And it's your view that the examiner was wrong in allowing claims over the Nishida patent?

A. That's what my declaration says, yeah.

Q. And in your declaration you didn't offer any comments about what the examiner did or did not do with respect to the Nishida reference when examining the '011 patent, right?

MR. KADABA: Objection to form.

A. I didn't make any specific comments that I remember about the patent examiner's treatment of the application, no.

BY MR. VAN ES:

Q. Directing your attention to Nishida, what

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problems was Nishida trying to solve?

A. My recollection of Nishida was that the main problems, although not all of the problems, but the main problems were efficient shoemaking, time saving and production efficiencies; that that was one of the main objectives.

Q. And what do you mean by efficient shoemaking?

A. Well, I think for as long as I can remember everyone has been trying to get rid of stitching, because it's a huge labor -- very labor intensive and wasteful part of the shoemaking process, so efficiency would be drastically improved by reducing waste and eliminating stitching a bunch of little pieces together. So I think Nishida's motivation was -- in part was to reduce or eliminate the amount of stitching and piecing of materials, different component materials.

Q. So Nishida -- actually, I want to take a step back. So there was a need in this field of design of shoe -- let me start over again.

So there was a need in this field of shoemaking design to waste less product when making uppers; is that right?

MR. KADABA: Objection to form.

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A. That would be part of -- part of that, right. That would be one of the motivations.

Q. To reduce the amount of textile waste when making an upper.

A. Textile waste, yes, and other things too.

Q. Other things being what?

A. Operational labor, operational issues, labor, storage of materials, material costs, all kinds of things are affected by -- by this particular invention.

Q. And more generally in the field of shoemaking there was this need to reduce waste and be more efficient in the manufacture of shoe products.

A. Yeah, I would say it's something that has been a motivating factor for many years. Many discussions about innovation end up touching on the efficiency issue and getting rid of stitching in particular.

Q. Can you think of any other problems that Nishida was directed to?

A. If you can give me a moment to review this background here.

I think there was also a motivation to make possible more -- to improve the aesthetics as well

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as the functionality of the upper by using these processes.

Q. Can you think of any other problems that Nishida was directed to?

A. Well, functional and aesthetics covers a lot. A lot of it comes down to reducing the number of operations and reducing waste and labor, eliminating stitching, and that would be, I think, a fair characterization of that motivation as it's listed here.

Q. And in terms of improving the functionality of the product, did Nishida identify that as a problem as well?

A. I think an opportunity more than a problem, that it might be possible to improve functionality as a result of this.

Q. And how did Nishida improve functionality of a product?

A. Well, by having these multiple areas where you can have different stitch configurations, different -- change the breathability, reinforcement, reduce the thickness of the material, for example, making the material softer in areas where you want softness and more abrasion resistant in areas where you want abrasion resistance, all

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those things were possible, as well as aesthetic issues too with this particular invention.

Q. Let me direct your attention in Nishida to column 1, line 19. Okay, do you see the sentence there that reads "a process according to this general type is known from German patent number 627878."

A. I see that.

Q. Did you review German patent number 627878?

A. I don't think so.

Q. Now, Nishida says that its invention is an improvement over this German patent number 627878, right?

A. I don't see where it says that.

Q. Well, do you disagree that Nishida is saying that it is an improvement over German patent number 627878?

MR. KADABA: Objection to form.

A. It doesn't actually say that. It just references the patent and describes it and then goes on to, you know, describe his invention.

BY MR. VAN ES:

Q. Did you think it was important to look at German patent number 627878 in forming your opinions in this case?

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MR. KADABA: Objection to form.

A. I don't have an opinion about that. I don't remember even asking myself that question.

THE VIDEOGRAPHER: Excuse me, is someone wearing their mic near their cell phone? It's okay, thank you.

BY MR. VAN ES:

Q. Okay. So generally -- let me start over again. What is the technique that Nishida generally describes for producing a shoe-shaped part from a web of material?

A. Yeah, Nishida is producing a web of material from knitted material, with a knitting process. But I also think Nishida -- I may be wrong about this -- but I think Nishida makes an allowance for also possibility of it being a woven material. I'd have to check that. Okay, mainly about knitting.

Q. Just so I'm clear, your opinion is that Nishida is mainly about knitting?

A. It's mainly about a web of material and knitting, yes, using a knitting process. But I'm not, you know, saying it doesn't say anything about a woven, I just haven't gone through enough of it to be able to say that at this point.

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Q. Okay. The web of material that you're referring to, is that what's described in Nishida as the backing?

A. Actually, it calls it a web of material.

Q. What are you referring to?

A. The abstract, for this purpose a web of material, 1, is used to produce layouts, 2.

Q. Okay. So referring to Figure 2 in Nishida, element 1 is a web of material?

A. That's right.

Q. And in Nishida Figure 2, element 4, is described as a backing; is that right?

A. Figure 2, element 4. Can you show me where it says that?

Q. If you look at column 3, line 13, it says, The web of material has a backing for --

A. Yes, okay, conventional used material, yeah, okay.

Q. So in Nishida the web of material, 1, has a backing, 4?

A. That's right. That's what it says.

Q. What is the backing in Nishida made of?

MR. KADABA: Objection to form.

A. It says it can be a conventionally used material formed, for example, of a web and filling

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or a knitted fabric.
BY MR. VAN ES:
Q. So the backing can be woven?
MR. KADABA: Objection to form.
A. Well, it says warp and filling, which sounds like woven, but it doesn't say woven, or a knitted fabric.
BY MR. VAN ES:
Q. Well, focusing on language warp and filling, you would understand that to mean a woven fabric, right?
A. Generally speaking, yes, that's what I would say that is.
Q. So is the backing, 4, in Nishida, in its entirety knit or woven?
MR. KADABA: Objection to form.
A. It could be a combination of the two or it could be all of one or the other, I suppose.
BY MR. VAN ES:
Q. So in Nishida you have a backing that's either knit or woven, and then does Nishida teach, then, you take that backing and knit various elements on the backing?
A. That's right.
Q. And how do you knit the elements onto the

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backing?

A. You know, that's not my problem. I don't know how.

Q. And how would the elements be woven onto the backing -- excuse me, how would elements be added to a woven backing?

A. I don't know.

Q. In Nishida would the backing then be put into a weft knitting machine?

A. As I say, I don't know. I don't know what the process is. It's not really described in that kind of detail here, and I don't know how you'd do it.

Q. So in Nishida the backing is created first and then the different elements are knit on top of it?

MR. KADABA: Objection to form.

A. You know, it doesn't really say that. It just says that there's a backing, so I suppose it could be done simultaneously or it could be done, you know, as you said with additional backing. I say it could be done meaning, you know, Nishida would allow for that, but I don't see why it wouldn't allow also to have the backing being knit or woven at the same time.

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Q. At the same time as what?
A. The whole thing was being made.
Q. Well, what does Nishida say about warp knitting or weft knitting or circular knitting or flat knitting?
MR. KADABA: Objection to form.
A. It mentions those as ways of achieving this, possible ways of achieving this invention.
BY MR. VAN ES:
Q. Nishida mentions that weft knitting is a way of achieving the invention?
A. I'm going to have to review that.
Certainly talks about knitting. Uh-huh, yeah, using one or -- of a different weaving and knitting type for the layouts of a shoe upper.
Q. Okay. Where are you reading from?
A. I'm reading from claim 1, column 6, about line 25 or so, weaving and knitting types.
Q. So does that teach one of ordinary skill in the art to do weft knitting?
MR. KADABA: Objection to form.
A. I think what it teaches is that the process isn't important; that what's important is the end result, and, you know, Nishida is not overly concerned about a particular type of knitting or

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method, but the general result of, you know, this web of material with different layouts on it achieved by different means.

BY MR. VAN ES:

Q. Okay. And the -- you'll agree with me that Nishida doesn't express any kind of preference for warp knitting versus weft knitting and circular knitting versus flat knitting?

MR. KADABA: Objection to form.

A. I think I would agree that the type of knitting that's chosen is -- would have an effect on the product, but that that's not the main thrust of the invention isn't that it has to be done with weft knitting or it has to be done with warp knitting in order to achieve the result. That's the way I would characterize it.

Q. So Nishida doesn't express any preference for using flat knitting versus circular knitting versus warp knitting, right?

A. A preference, that was your question, yeah. No.

Q. And just so the record's clear, your answer is no, Nishida doesn't express any preference.

A. No preference, no.

Q. And it doesn't describe any advantages or

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disadvantages of using those different types of knitting, right?

A. Well, again, I'd have to look -- I have to look at the patent to answer that question. That's a pretty -- you know, you're asking me to dismiss -- if there's ever a mention of that advantage, and I'd have to read it to be sure.

Q. Well, as you sit here right now do you know of any language or teaching in the patent that expresses an advantage or disadvantage of using any of the types of knitting we just talked about, circular, flat or warp?

A. As we sit here right now my recollection of that is no, but if I reviewed it I might have a different answer.

Q. You have reviewed Nishida, haven't you?

A. I have, yeah.

Q. And there's no mention of that in your declaration, is there, of the different advantages that I just asked you about?

A. Yes, that's right.

Q. Now, referring to Figure 2, does Nishida teach one of ordinary skill in the art how to make the backing and the upper layouts simultaneously?

MR. KADABA: Objection to form.

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A. I think there's a level of -- certain level of direction provided by the details in the description in the patent, but this isn't a process patent, it's not explaining how to do it in great detail. It's more showing options to create a certain result. The desired result is more of the objective of the patent. That's the way I would characterize it.

BY MR. VAN ES:

Q. So my question was: Does Nishida teach one of ordinary skill in the art how to make the backing and the upper layouts simultaneously?

MR. KADABA: Same objection.

A. I think it's teaching that you should do that, and it's teaching that there are ways -- possibly there are methods to do that, but it's not telling you specifically how to do it. It's not defining a certain method or process for doing that.

Q. And you as a person with more than an ordinary level of skill in the art, as you read Nishida, you wouldn't know how to simultaneously create a web and the upper layouts that are shown on Figure 2, will you?

MR. KADABA: Objection to form.

A. I'd sure like to try to figure out how to

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do it, but as I sit here I don't have an answer to that. It might be possible.

Q. Now, is it possible to embroider on the backing (4) in Nishida?

MR. KADABA: Objection to form.

A. I think Nishida mentions specifically one way to make part of this is to use embroidery. That's my recollection.

Q. Does Nishida teach that you can weave on the backing (4)?

A. That, I'm not sure.

Q. So Nishida's directed to producing a shoe upper by cutting out a layout in the form of the upper from a web of material, right?

A. Yeah, could you rephrase that?

Q. Sure. Nishida is directed to production of a shoe upper by cutting out a layout in the form of a shoe upper from a web of material.

MR. KADABA: Objection to form.

BY MR. VAN ES:

Q. Do you agree with that?

A. Yes.

Q. And you understood what I was asking you?

A. Yes, and I think you understood my answer to mean that as well, right?

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Q. Right, thank you. Where does Nishida describe cutting out a layout in the form of a shoe upper from a web of material?

A. So if you would give me a minute and I'll see what I can find here.

Well, it refers to it in several places, but just starting off with the top of column number 2, it talks about the layouts of the sole parts assigned to one another.

Q. And just so we're clear, you're referring to column 2, lines which?

A. Well, starting with line 1.

Q. Through line what?

A. Through line 5 or 6. Let's see here. Yeah. I mean, the whole objective of this is to be able to cut these uppers out and assemble them into an upper.

Q. Besides column 2, lines 1 through 6, does Nishida describe anywhere else producing a shoe upper by cutting a layout in the form of the upper from a web?

A. You know, I don't recall off the top of my head if there are explicit instructions to that effect in here, but it's obvious that anyone reading this would know that had to happen. You can't make

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a shoe from a web of material with four uppers on it. You have to cut it out somehow and assemble it. So there is explicit mention of it here and there may be other places, but it seems pretty obvious that that's what has to happen and what's expected to happen.

Q. So my question is: Where besides column 2, lines 1 through 6 does Nishida describe cutting out a layout in the form of a shoe upper from a web?

A. Okay, I'll read through it. In column 2, line 20 it says cutting waste accumulated with cutting out therefore represents a simple and lightweight, inexpensive material, referring to cutting the layouts out of that, the upper.

Column 3, line 30, 31, it says, After cutting out layout 2 from the web of material, 1, the edges 7 and 8 are stitched together and heel seam thus is formed, again referring to cutting the layout out from the webbing.

Is that explicit enough, or should I continue?

Q. Well, let me ask you this: Does Nishida describe anywhere how material is cut out of a web?

A. Again --

MR. KADABA: Objection to form.

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A. -- I'd have to review the patent to say that, but my initial recollection would be that it doesn't specify -- Nishida doesn't specify a particular cutting method.

Q. So after a layout is cut out of the web in Nishida, what happens to the remaining web materials?

A. The web materials that are not part of the layout, of a layout?

Q. Right. So after a layout is cut out from the web, is there a part that remains of the web?

A. Yes.

Q. And what happens to the part that remains from the web that's not cut out?

A. Well, part of it may have other layouts still integrated into it, may be used for other uppers.

Q. And I'm asking about the parts of the web that don't have any layouts on them. What happens to them after the layout -- let me ask the question again.

Referring to the web in Nishida, layouts are formed on the web, right?

A. Uh-huh, right.

Q. And then those layouts are cut out,

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correct?

A. Correct.

Q. What happens to the portion of the web that remains after the layouts are cut out?

A. I don't know.

Q. Are they waste?

A. I would assume so, but I -- as I said, I don't know.

Q. Referring to Figure 2 in Nishida, do you have that in front of you?

A. Yes, I do.

Q. Nishida describes edges 7, do you see edge 7?

A. I do.

Q. And edge 8?

A. I see that.

Q. And edges 11 and 12.

A. Okay.

Q. Can you describe the structure of those edges after the layout is cut from the web?

MR. KADABA: Objection to form.

A. They would be -- I don't understand the question.

Q. Would the -- after the layout in Figure 2 is cut from the web there are going to be certain

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edges formed, for example along the areas 7 and 8, right?

A. That's right.

Q. Are those edges going to be cut open?

MR. KADABA: Objection to form.

A. Yeah, it seems like a nonsense question. I don't know what you're asking me. The edges remain.

BY MR. VAN ES:

Q. The thread along the edges in the cutout, is that thread going to be cut open?

MR. KADABA: Objection to form.

A. I don't know.

Q. When the layout is cut out of the web, are stitches broken?

A. I don't know.

Q. Is thread cut when the layout is removed from the web?

A. There would have to be some cutting of the webbing material.

Q. Along the edges of the layout, correct?

A. That's right.

Q. And those edges are cut open, right?

MR. KADABA: Objection to form.

A. It would depend on how the layout was finished, what stitching -- stitch configuration was

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used in that area, whether or not it would be open.
BY MR. VAN ES:
Q. Can you take a look at column 1 of Nishida, line 16? Actually, line -- yeah. Do you see the reference there in Nishida to the cut open edges of the layout?
A. Yeah.
Q. Does that tell you that the edges of the layout in Nishida after they're removed from the web are cut open?
A. I see the words there, but cut open could mean a lot of things.
Q. What does cut open mean?
A. Could mean that it's revealed, that they just produce the outside edge of it, cut open away from the webbing material.
Q. If an edge is cut from a web, the thread along that cut line is going to be cut, right, until further processing takes place.
A. You know, as I said before, it depends on how that part of the -- what stitch configuration was used to make that part of the layout. Nishida talks about a lot of different ways of -- possible ways of stitch configurations to use for different regions. That could very well be an area that's

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embroidered, for example, and so cutting on the other side of it wouldn't produce a frayed edge or an open edge. So it completely depends on how that is applied.

Q. You'll agree when the layout in Figure 2 of Nishida is cut out of a web that the edges are broken, right?

MR. KADABA: Objection to form.

A. You still want me to say that, but I'm never going to say that. I really don't know. As I said, it depends on how that part of the layout was finished.

BY MR. VAN ES:

Q. Well, do you disagree with the statement in Nishida that we just referenced, column 1, line 16, where Nishida described the outside edge of the layout is cut open?

A. Cut open doesn't have any specific meaning, at least in shoemaking, that I'm aware of. It's a simple compound word that he's using to describe the edge.

My understanding of cut open would be that it could -- it just means it's open, it's opened, you know, it's no longer connected to the webbing, it's open to whatever other operation is coming. It

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doesn't tell me anything about loose threads or fraying or any kind of damage or anything.

Q. What would cut open mean to one of ordinary skill in the art reading the Nishida patent in 2004?

A. It would mean that it was -- you've opened up that edge to the next operation.

Q. The next operation being further processing that would need to be done on the edge?

MR. KADABA: Objection to form.

A. I don't think it implies any further processing necessarily. Certainly at that area the expectation is that those edges would be joined to form a heel in that pattern, but it doesn't really imply that at all.

Q. When you say the edges would be joined to form a heel, what are you referring to?

A. You were talking about edges 7 and 8 -- I'm still stuck on those two -- in Figure 2.

Q. Okay. With respect to all of the edges, Nishida, Figure 2, describes 30 as an outside contour, do you see that?

A. Okay.

Q. And when the layout shown in Figure 2 is cut from the web, that outside contour, 30, is going to involve cutting stitches, right?

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A. It's going to involve cutting the webbing, and if it's a woven material then it's not going to cut any stitching, it's going to be cutting the warp and the weft, I suppose.

Q. So if in Figure 2 of Nishida, if the layout is created by knitting, then cutting along the outside contour 30 is going to cut stitches, isn't it?

A. You keep saying that, but I'll keep saying the same thing I'm saying, which is it depends on how it's finished, it depends on how the webbing is made, whether or not there are going to be stitches cut.

Q. So you think it's possible that a layout could be cut from a webbing as shown in Figure 2 and there would be no cutting of stitching along the outside contour 30.

MR. KADABA: Objection to form.

A. I think that's possible.

Q. Do you think it's possible that the layout shown in Figure 2 could be cut from the web and there would be no cutting of any threads?

MR. KADABA: Objection to form.

A. No, I don't think -- I think there would have to be some cutting of the webbing threading.

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Q. And the webbing threading that would be cut, then, would involve loose or cut-open ends, right?

MR. KADABA: Objection to form.

A. Again, not necessarily. If edge 30, for example, were embroidered along its whole length, which is possible within the scope of this patent, and you cut on the outside edge, there wouldn't be any loose material.

Q. And that's --

A. You'd have the embroidered edge.

Q. And that's true of embroidery, right?

A. It is -- that's one option, yes.

Q. And with respect to knitting, if the layout in Figure 2 were knitted and it was cut along the outside contour 30, there would be cut-open thread and cut-open stitches, right?

A. I think it depends on what kind of knitting, what the stitch configuration is in that particular area. It wouldn't necessarily lead to an open edge.

Q. What type of knitting could result in cutting along outside contour 30, not result in -- let me ask the question again.

What kind of knitting could be used so that

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a cut along the outside contour 30 would not create cut stitches?

A. I'm not an expert on knitting. I don't know. But I know that one of the objectives of using different knit configurations is to reduce the fraying at edges.

Q. So when the layout shown in Figure 2 of Nishida is cut from the web material, it's further processed --

MR. KADABA: Objection to form.

BY MR. VAN ES:

Q. -- in an upper, right?

MR. KADABA: Sorry. I thought you were done.

BY MR. VAN ES:

Q. Let me ask the question again so the record is clear.

In Figure 2 after cutting the layout from the web material, the layout is then processed in an upper, right?

MR. KADABA: Objection to form.

A. That's right.

BY MR. VAN ES:

Q. Does Nishida describe how the cuts are processed after the cutting takes place?

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MR. KADABA: Objection to form.

A. I don't recall any specific language dealing with that. However, someone with ordinary skill in the art would know that those edges have to be treated somehow.

Q. Why would they have to be treated?

A. To prepare them for stitching, to clean them up. I mean, all kinds of -- there could be all kinds of possibilities. I'm not saying that it would necessarily need to be cleaned up, but they would know to look after that.

Q. Would they need to be treated to prevent fraying, for example?

MR. KADABA: Objection to form.

A. Yeah, wow. That's a possibility.

BY MR. VAN ES:

Q. Okay. But Nishida doesn't describe any of that processing that would need to take place on the edges, right?

MR. KADABA: Objection to form.

A. I don't recall every word in Nishida, but that doesn't stick out as part of what Nishida describes.

BY MR. VAN ES:

Q. So in Figure 2 of Nishida, if we look at

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the edges and the contour 30, those edges and outside contours are not free of other material until the layout is cut from the web, right?

A. I don't understand the question.

Q. Okay. Referring to Figure 2 of Nishida --

A. Right.

Q. -- you see a layout (2)?

A. Yeah.

Q. And that layout (2) is part of a web as shown in Figure 2, right?

A. Yes.

Q. And the edges of the layout 2 are formed when the layout is cut from the web, right?

A. I agree, yeah.

Q. So Nishida doesn't teach that the layout (2) shown in Figure 2 is knitted in its final form, right?

MR. KADABA: Objection to form.

A. Layout -- yeah, could you try it again?

Q. Sure. The layout in Figure 2 of Nishida can't be used to form an upper until it's cut out from the web, right?

A. That's correct.

Q. So when the layout is part of the web, it's not free of surrounding web material, correct?

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A. That would be my interpretation of that, yes.

Q. Does Nishida...

MR. KADABA: We've been going a little over an hour. I don't know if there's going to be a natural break point coming up.

MR. VAN ES: I think we're very close to a breaking point. Just give me another minute here.

MR. KADABA: Sure.

BY MR. VAN ES:

Q. If one of ordinary skill in the art looked at the layout of Nishida after it's cut from a web and compared that to a hypothetical layout that was knit in final form and not cut from a web, would one of ordinary skill in the art be able to tell any structural difference between the two elements?

MR. KADABA: Objection to form.

A. I don't know what the hypothetical upper would look like, so I can't really answer the question.

Q. So what information would you need to answer that question?

A. Well, it would be nice to see the part, or at least to understand how it was made and what materials were used and if there was any processing

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other than cutting it out.

Q. Okay. So you understand that it's possible to create an upper that is not cut from a web, right?

A. That's right.

Q. It's knitted in final form?

A. Not in final form. I would say that there always are strings to cut or there's always some processing that has to happen when it's removed from the machine.

Q. Well, I want you to -- okay. Describe those strings that would need to be cut in the instance where an upper is knit on a machine but not cut from a web.

A. Well, my understanding is that there would be filaments or fibers that were -- or yarn that was still attached as a consequence of the knitting process, and that some of those pieces of yarn and thread would have to be cut or trimmed to prepare it.

Q. Would -- in that scenario would the thread be all the way around the entire edge of the upper?

A. I don't know. Possibly. Again, you've given me a hypothetical, and so I really don't know.

Q. So if you considered an upper --

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MR. VAN ES: I retract that. I think this is a good time for a break.

MR. KADABA: Okay.

THE VIDEOGRAPHER: The time is 2:14 p.m. and we are now off the record.

(Recess)

THE VIDEOGRAPHER: The time is 2:27 p.m. and we are now back on the record.

BY MR. VAN ES:

Q. Mr. Frederick, I want to direct your attention back to Nishida and ask you, does Nishida teach anything about forming apertures in the layout?

A. Hmm. I don't recall anything specifically teaching apertures, but there's certainly a lot of mention of breathability and the need to improve breathability.

Q. Okay. Let me direct your attention to a new exhibit, it's Exhibit 1007, Glidden US patent 2,147,197.

A. Okay.

Q. First, do you know whether Glidden was considered by the examiner in the original examination of the '011 patent?

A. It's a reference cited. It's a reference

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cited by the examiner, so --

Q. So it was considered by --

A. So she looked at it.

Q. Okay. Now, your opinion is that Glidden rendered invalid various claims of the '011 patent, right?

A. That's correct.

Q. But not claim 44, correct?

A. That's correct.

Q. Claim 44 of the '011 patent specifies, among other things, an upper incorporating a flat knitted textile element. Do you see that?

A. Uh-huh.

Q. And you haven't said anywhere in your declaration that Glidden teaches a flat knitted textile element, correct?

A. That's my recollection, yes.

Q. Does Glidden describe that the article shown in any of the figures could be made by flat knitting?

MR. KADABA: Objection to form.

A. Any of what figures?

BY MR. VAN ES:

Q. So referring to Glidden, do you see Glidden, you have it in front of you?

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A. Yes.
Q. It refers to Figures 1 through 8.
A. Okay.
Q. Does Glidden describe that any of the articles shown in Figures 1 through 8 could be made by flat knitting?
MR. KADABA: Objection to form.
A. That's not one of the things I recall about Glidden.
BY MR. VAN ES:
Q. So to be clear, Glidden doesn't teach flat knitting, correct?
MR. KADABA: Object to form.
A. It doesn't specifically teach that.
BY MR. VAN ES:
Q. And, in fact, the articles shown in Figure 1 through 8 Glidden are all made by circular knitting, correct?
MR. KADABA: Objection to form.
A. I can only say that they -- rib knitting and the patterns appear to be circular knitted, but, I mean, it's possible that they could have been knitted on a flat knitted structure and stitched together, but that's just not apparent from these figures.

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BY MR. VAN ES:

Q. Well, certainly you didn't say anything in your declaration that anything in Glidden teaches flat knitting, right?

A. That's right.

Q. And as you sit here today, there's nothing in Glidden in the text or the figures that teaches flat knitting, right?

MR. KADABA: Objection to form.

A. Yeah, I don't recall anything specifically teaching flat knitting.

BY MR. VAN ES:

Q. Okay. Let me direct your attention to the first page of Glidden, column 2, line 19, and I'll read to you a portion of that first sentence.

A. Uh-huh.

Q. Quote in proceeding according to the method of this invention, a complete and integral, extensible and elastic unlined shoe upper (10) is formed, preferably by knitting, to final form and without waste, and then the sentence continues.

Do you see that?

A. Uh-huh.

Q. So Glidden teaches that the upper is fabricated to be complete and integral, right?

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A. It teaches, as it said, a complete and integral, extensible and elastic unlined shoe upper is formed. It doesn't say knitted, it says formed. So I think that would allow for the idea that something that was flat knitted could be stitched together and create a final form.

Q. Well, my question is whether this language in -- I want to focus on the language "complete and integral." Do you see that language?

A. Yes.

Q. What does complete and integral mean here?

A. To me it implies that the upper is complete, in other words, it's produced in its totality, and that the elements of the upper are integral, meaning connected to one another or continuously connected.

Q. And the sentence also includes the language "final form." What does that mean?

A. Final form meaning at that point no further construction would be required.

Q. No further construction such as cutting or processing or things of that sort?

MR. KADABA: Objection to form.

A. At that point, yeah.

BY MR. VAN ES:

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Q. And what does the language "without waste" mean?

A. I guess just what it says.

Q. That when --

A. Without waste.

Q. -- when the article described in Glidden is made there's no web material left over or anything of that sort.

A. It just says what it says, without waste.

Q. What does "without waste" mean?

A. It could mean that, you know, there's no material left over, could mean that everything was used and integrated into the upper process.

Q. So the Glidden article that's described, it's shaped like a sock, right?

A. It appears to be a sock, yes, right, looks like a sock and -- yeah, exactly.

Q. Does the article have edges?

MR. KADABA: Objection to form.

A. Well, yes, there's a top edge.

BY MR. VAN ES:

Q. A top edge. Are there any other edges?

A. In the drawings that I see there's an allowance made for an edge where the eye stay would be.

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Q. Are you referring to Figure 4?

A. I am. And let me look for a second at Figure 2. Uh-huh. Yeah, I think that would be it, those edges. They're clearly shown in Figure 4 and the top edge in Figure 3.

Q. Yeah, you probably mean Figure 1, right?

A. Figure 1, yeah.

Q. Okay. So there's a top edge shown --

A. That's right.

Q. -- there's a top edge shown in Figure 1.

A. Uh-huh.

Q. Can you circle that with the blue pen and label it "top edge"?

A. Yeah (indicating).

MR. VAN ES: I'm going to go ahead and mark as Nike Exhibit 2006 the copy of Glidden that you're marking up, so let me just go ahead and put this exhibit sticker on there.

(Nike Exhibit 2006 marked)

BY MR. VAN ES:

Q. Okay, so you've labeled the top edge that you mentioned in Figure 1, and also in Figure 4 I want to ask you about the edge that you describe there.

Now, the edge in Figure 4, that's actually

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formed after the article is knit, and when the article is then cut; is that right?

A. That's right.

Q. So the edge that's shown in Figure 4 in the tongue area, that's not formed as part of the knitting process; is it?

A. Not necessarily, no. Probably not.

Q. Are there any other edges of the articles shown in -- let me start the question over again.

Are there any other edges in the sock structure of Glidden that are not shown in the figures?

A. Well, there is the edge, there's also a top edge here in the quarter area that's Figure 4.

Q. So what you're referring to now, the top edge in the quarter area, is that -- that's the same edge that's shown at the ankle area of Figure 1, right?

A. That's right.

Q. Except in Figure 4 the article is proportioned differently so that it doesn't have as high of a --

A. That's right.

Q. -- ankle area. Are there any other edges in the garment -- excuse me, are there any other

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edges in the footwear article of Glidden not shown in the figures?

A. Well, in Figure 3 there's -- it's unclear whether there's an edge in this area here (indicating.) I'm referring to the front edge of the heel. Whether that's an interruption of the knitting or whether that's something that's overlaid on the knitting.

Q. Can you circle the area that you're testifying now about in Figure 3?

A. Yeah.

Q. Okay. You've just drawn a line and a circle. Can you hold that up for the camera, please?

(Nike Exhibit 2007 marked)

BY MR. VAN ES:

Q. So you're holding up for the camera your marked-up copy of the Glidden patent, which is Nike Exhibit 2006, and Figure 1 shows the top edge that you just talked about and in Figure 3 you've marked an area that possibly could be an edge but you're not sure.

A. I'm not sure, no.

Q. Thank you.

So after the article in Glidden is knitted,

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do any of the edges in the article need to be connected?

A. Well, clearly in 4 there needs to be some connection of these edges, whether, as you suggested, it's cut or -- and assembled, but that would have to be stitched, but generally it's finished, the sock part of it is finished as a unit.

Q. So generally in what's disclosed in Glidden, the sock part is finished as a unit. That's your testimony?

A. Yeah, it's finished as an upper, as described in the patent.

Q. And I just want to be clear about Figure 4. There aren't any edges in Figure 4 that need to be connected after the article is knit, are there?

A. Not -- no, not that need to be connected.

Q. So does Glidden teach that any edges are joined together to define an ankle opening?

MR. KADABA: Objection to form.

A. No, it doesn't explicitly teach that that is a necessary step to take in using this method.

BY MR. VAN ES:

Q. Can you think of any reasons why it might be advantageous to form an upper -- strike that.

Okay. With respect to Glidden and its

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Skechers EX1013-p. 7110
Skechers v Nike

teaching about circular knitting, is it your opinion that flat knitting could be used to make a complete and integral article as shown in figures of Glidden?

MR. KADABA: Objection to form.

A. I think there's an allowance here that -- in column 2, a description of the drawings it says "and proceeding according to -- line 189 -- "according to the method of this invention a complete and integral, extensible an elastic, unlined shoe upper is formed, preferably by knitting." It doesn't require that it be knitted. And "to final form and without waste of yarn," and so on.

So I think obviously, you know, he's showing here that a knitted -- knitted as a single piece, but he's also then allowing the possibility that it may not be knitted, it may be made with another process.

So logically circular knitting is one way to do this, but I think there's a little wiggle room here for possibly making it another way. Sometimes, you know, slipper socks and things like that are made by stitching pieces together and --

Q. Stitching pieces together, though, would not involve a complete and integral upper, right?

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 160
Skechers EX1013-p. 7111
Skechers v Nike

A. It would result in it. For example, if the piece -- if the pattern was knitted in a flat format and then just, you know, with one or two stitch lines to create a sock-like structure, I think it would still satisfy the requirement for a single integral upper.

Q. And under that scenario there would have to be different pieces knitted and then sewn together, right?

MR. KADABA: Objection to form.

A. It would be one piece.

BY MR. VAN ES:

Q. Under the scenario there would be one piece --

A. Knitted flat and then, you know, stitched to form a sock-like integral structure.

Q. And that piece that you're describing would not be knitted in final form, right?

MR. KADABA: Objection to form.

A. It would be knitted to final form in the sense that there's no waste, there would be no, you know, material thrown away or no requirement for die cutting or preparing it ahead of time.

BY MR. VAN ES:

Q. So is it your opinion, Mr. Frederick, that

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 161
Skechers EX1013-p. 7112
Skechers v Nike

Glidden describes flat knitting a complete and integral upper in final form?

A. No. I think that it allows for that, but it doesn't teach that specifically.

Q. When you say it allows for that, you mean it allows for flat knitting an element that would require subsequent joining of --

A. Edges.

Q. -- edges?

A. Uh-huh. That's right.

Q. Now, where does Glidden allow for that?

A. I think that in the language that says "is formed, preferably by knitting," but not specifically requiring knitting.

Q. So what would be an alternative to knitting, as you interpret this language?

A. Well, I don't have a specific recommendation for that, it just allows for it.

Q. It allows for an alternative to knitting.

A. Yeah, and it certainly allows for an alternative to circular knitting.

Q. So your opinion is that this language that the upper could be formed preferably by knitting means that the upper could be formed -- let me take a step back.

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 162
Skechers EX1013-p. 7113
Skechers v Nike

We already talked about circular knitting and the teachings of Glidden about circular knitting, right?

A. That's correct.

Q. And it's your testimony that this language that Glidden says an upper could be formed preferably by knitting means that Glidden teaches circular knitting or flat knitting?

MR. KADABA: Objection to form.

A. No, my assertion is simply that Glidden would not have said "preferably by knitting" if he didn't mean that means other than knitting were possible.

Q. Right. So in the language preferably by knitting, Glidden is referring to some alternative to knitting altogether.

MR. KADABA: Objection to form.

A. That's right.

BY MR. VAN ES:

Q. Does Glidden require the use of reinforcing or bracing structure?

A. Hmm. Good question. I think that in two ways, one is he's teaching about different regions where parts of the upper would be softer or rougher or more or less extensible, and then teaches for the

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 163
Skechers EX1013-p. 7114
Skechers v Nike

need for a bracing structure secured to the sole and extending over the inset portion, for example, in claim 1, that that's a desirable part of the invention.

Q. So you'll agree that all the figures of Glidden, to the extent they show the entire upper, show some sort of reinforcing or bracing structure?

A. That's -- that's true in all of the figures.

Q. And that's also what's discussed in the text of the specification?

A. That's right.

Q. Are there any claims of Glidden that don't require the bracing structure?

MR. KADABA: Objection to form.

A. That's -- would you ask the question again, please?

BY MR. VAN ES:

Q. Sure. Are there any claims of Glidden that don't require a bracing structure?

MR. KADABA: Same objection.

A. No.

BY MR. VAN ES:

Q. I want to direct your attention to page 2 of Glidden -- excuse me, column 2 of Glidden, line

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 164
Skechers EX1013-p. 7115
Skechers v Nike

39 -- I'm sorry, column 2 of Glidden, line 56.

A. Okay.

Q. All right. Let me start over again.

Glidden is sufficiently old that there are no column numbers.

A. Right.

Q. There are just page numbers.

A. That's right.

Q. So to be clear, let's look at page 2 of Glidden.

A. Yeah.

Q. Line 56.

A. In the left-most column?

Q. On the left-hand column.

A. Yeah.

Q. You see the language that says, Where the cutting of the textile upper to provide the slit 22 or for any other purpose leaves a raw textile edge which might ravel or fray, the edges may be protected.

A. Uh-huh.

Q. And then it goes on, do you see that?

A. Yep.

Q. So here Glidden is referring to Figure 4 where after the footwear article is knitted, a slit

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 165
Skechers EX1013-p. 7116
Skechers v Nike

is cut in the tongue region, correct?

A. That's the way I interpret that, yeah.

Q. And Glidden is explaining that when textile is cut from a web, there's a raw textile edge which may ravel or fray. Do you see that?

A. We're going back there again, hmm? Okay. Yep, I see that.

Q. Do you agree with that statement?

A. Yes, I do, yeah, there can be. It says "might ravel or fray."

Q. And one skilled in the art reading this would understand that when you cut a material, the raw textile edge might ravel or fray, right?

A. That's right.

Q. Okay. Does Glidden teach apertures in the knit upper?

MR. KADABA: Objection to form.

A. Certainly teaches that some of the other structures, the bracing structures in the upper should in some cases have ventilating or expansion-facilitating openings which expose the textile upper.

BY MR. VAN ES:

Q. But none of the expansion-facilitating openings that you just described are in the knitted

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 166
Skechers EX1013-p. 7117
Skechers v Nike

structure itself, correct?

MR. KADABA: Objection to form.

A. Just one second.

I think the nature of the upper that Glidden describes is almost invariably very important us, and so apertures would be provided in the openness of the weave and the porosity of the weave to promote breathability. So it's not taught specifically that there have to be apertures in a certain area, but there seems to be an overall expectation that that would be addressed by the upper design.

BY MR. VAN ES:

Q. Well, in fact, Glidden shows certain apertures in the bracing structure, correct?

A. That's right.

Q. But those apertures don't have a corresponding opening in the knit article itself, correct?

MR. KADABA: Objection to form.

A. Correct, but the knit article, you know, as I described, has apertures in it as a consequence of the open knitting structure.

BY MR. VAN ES:

Q. So is it your understanding of the term

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 167
Skechers EX1013-p. 7118
Skechers v Nike

"aperture" that that means any opening in any knit structure?

MR. KADABA: Objection to form.

A. No.

BY MR. VAN ES:

Q. Okay. What is your understanding of aperture in this context?

A. That it's an opening.

Q. Does Glidden show any openings, as you've just described, in the knit sock upper itself?

A. No, he doesn't show any specific openings in the sock upper.

Q. And he doesn't describe that in the text of the specification either, right?

MR. KADABA: Objection to form.

A. He describes an open weave, which would have, as a consequence of the weave, multiple openings to provide breathability.

BY MR. VAN ES:

Q. Right. In the same way that every knit structure is going to have some open weaves.

A. Not every knit structure, no.

Q. Does Glidden describe in the specification any openings in the knit structure for any particular purpose?

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 168
Skechers EX1013-p. 7119
Skechers v Nike

A. Well, there are openings described where the eye stay reinforcement is attached in Figure 4, there's, of course, an opening for the foot to enter and exit the upper, opening at the top.

Q. Okay. And my question is: Does Glidden describe any openings in the knit structure that accomplish any purpose along the lines of providing ventilation for the foot?

A. Again, I think the description of the material being provided, for example as in claim 2, of a knitted material providing elasticity and ventilating porosity by virtue of the knitted construction, covers the idea of apertures for breathability. It very clearly asks for a specifically -- structure that has a ventilating porosity, so that makes me think of multiple apertures.

Q. Does Glidden describe any apertures in the knit upper for receiving shoelaces?

A. It describes apertures in the knit upper corresponding to the apertures in the bracing structure used on the eye stay.

Q. Corresponding to --

A. If you look at Figure 4, and I indicate to you this area here in Figure 4 at the top of the eye

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 169
Skechers EX1013-p. 7120
Skechers v Nike

stay where you can clearly see that a knitted structure extends into the area where the eye stay is attached, and there's an aperture through that knitted structure in that area. So there has to be an aperture in the upper in that area in order to have the eye stay -- the lace pass through the eye stay.

Q. Are those apertures that you described created as the upper is knit?

MR. KADABA: Objection to form.

A. No. I would say they -- they're created after the fact.

BY MR. VAN ES:

Q. By punching them out or some other physical way?

A. Yeah, punching them out.

Q. Okay. Let me direct your attention to the '011 patent that I believe you have in front of you.

A. Okay.

Q. And I think you previously marked it. Can I see your copy of that, please? So this is -- I'm looking now at Exhibit 1002, which is a copy of the '011 patent that I'm going to mark as Nike Exhibit 2007, this copy of the patent that includes your hand-drawn notes on it, in particular on page --

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 170
Skechers EX1013-p. 7121
Skechers v Nike

excuse me, sheet 6 of 12 in the drawings, and ask you to confirm that that's the case.

A. Yes.

Q. Okay. Can you hold that up for the camera just for a minute, please? Okay. So you're now holding up your hand-drawn notes on Figure 8 of the '011 patent, which is Nike Exhibit 2007.

A. Okay.

Q. And earlier we talked about the different regions as described in the '011 patent.

A. I recall that.

Q. And we talked about how the edges in those different regions are joined together. Do you remember that?

A. I do.

Q. Does Glidden teach joining of the edges in a textile element to form a lateral region of an upper?

MR. KADABA: Objection to form.

A. Glidden doesn't specify lateral region specifically.

Q. And Glidden doesn't teach joining of edges to form a lateral region, correct?

MR. KADABA: Same objection.

A. That's my recollection.

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 171
Skechers EX1013-p. 7122
Skechers v Nike

Q. And Glidden doesn't teach joining of edges to form a medial region either, right?

A. That's right.

Q. Nor does Glidden teach joining of edges to form an instep region or a heel region, correct?

A. That's correct, but the sock-like structure of the upper that Glidden teaches by implication has lateral and medial regions and has an instep region integrated into the structure. So there would be no reason for Glidden to teach lateral and medial regions or instep regions.

Q. Okay. And my question was about -- I think you answered my question.

MR. VAN ES: Okay. I've gotten a note here that we're just about out of tape on the machine here, so why don't we take a break.

THE VIDEOGRAPHER: This is the end of Tape 3 in the deposition of Edward Frederick. The time is 3:15 p.m. and we are now off the record.

(Recess)

THE VIDEOGRAPHER: This is the beginning of Tape 4 in the deposition of Edward C. Frederick. The time is 3:28 p.m. and we are now back on the record.

BY MR. VAN ES:

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 172
Skechers EX1013-p. 7123
Skechers v Nike

Q. Okay. I want to direct your attention to page 97 of your declaration.

A. Okay.

Q. And on page 97 you state in paragraph 85 it's your opinion that Japanese patent publication Osamu -- and I've left out some words there -- but that Osamu publication anticipates and/or renders obvious claims 1 through 46 of the '011 patent.

Do you see that?

A. I see that.

Q. Now, I want to just clarify. It's not your opinion that the Osamu reference anticipates any claims of the '011 patent, is it?

MR. KADABA: Objection to form.

BY MR. VAN ES:

Q. Let me ask the question differently. Is it your opinion that the Osamu reference anticipates any claims of the '011 patent?

A. That's what it says right here, anticipates and/or renders obvious.

Q. Right. And in your analysis that you provided starting at page 97 going all the way to page 155, you don't include any discussion of Osamu anticipating the claims of the '011 patent, correct?

A. I'll have to review that.

Q. And if it helps I'll direct your attention to page 97 to the heading, Roman numeral IX.

A. Okay.

Q. Says claims 1 through 46 are obvious in view of Osamu.

A. That's right, uh-huh.

Q. So your analysis and your conclusion is that the claims are obvious in view of Osamu, correct?

A. Yeah, I'm just not willing to say there's nothing in here that I say that deals with anticipation.

Q. Okay. I will also offer and direct your attention to pages 152 to 155 where you provide what I believe to be a summary of your opinions regarding Osamu, and --

A. That's right.

Q. -- suggest you consider that also as you address the question. And again, the question is: Is it your opinion that any claims of the '011 patent are anticipated by Osamu?

A. Okay. I thought there was a place in here where I made that statement, but I can't really find it right now.

I feel like there may be some particular

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 174
Skechers EX1013-p. 7125
Skechers v Nike

claim that I felt may have anticipated it, but I can't recall right now. I mean, I could read through this, you know, these 60 pages or so, possibly find it. But I think the general statement that Osamu was mostly about obviousness is consistent with what I said in the report.

Q. Right. And there's nothing in your report in the summary on pages 152 through 154 that indicates that there's any discussion in your declaration that Osamu anticipates any claims of the '011 patent, right?

A. That's what that says, yeah. I did read through these.

Q. And referring on page 97 to the heading that says, Claims 1 through 46 are obvious in view of Osamu, do you see that?

A. Where are we on 97?

Q. So heading of Roman numeral IX.

A. Okay.

Q. You said the claims are obvious.

A. Okay, renders obvious, yep.

Q. So referring to this heading, is it your opinion that looking at the claims today that they're obvious?

A. Yeah, to someone practiced in the art,

ordinary skill in the art.

Q. Looking at the claims in 2013 concludes that the claims are obvious.

MR. KADABA: Objection to form.

A. In 2013, yes.

Q. So your analysis of Osamu and your conclusion that the claims are obvious in view of Osamu is based on your analysis today in 2013.

A. That was the question you asked me.

MR. KADABA: Objection to form.

A. Whether it was obvious in 2013.

BY MR. VAN ES:

Q. Right. And your conclusion is that in 2013 the claims are obvious.

A. In 2013 they are obvious.

MR. KADABA: Same objection.

BY MR. VAN ES:

Q. Okay. I want to direct your attention to what's previously been marked as Nike Exhibit 2002, and should be in front of you.

A. What is that?

Q. It's your declaration from the reexamination in the K-Swiss matter.

A. Oh, okay.

Q. Okay. Do you have that declaration now,

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 176
Skechers EX1013-p. 7127
Skechers v Nike

Exhibit 2002?

A. I do, I have it in front of me, yep.

Q. And in that declaration you concluded that claims of a patent -- actually, let me take a step back. I believe earlier you testified that there have been five instances you can recall where you were retained to opine on the validity of a patent; is that right?

A. That was what I said at the time, yeah.

Q. And has anything happened since then that's caused you to think that your answer then was not correct?

A. No.

Q. And in all five of those instances you concluded that the claims of the patent were invalid?

MR. KADABA: Objection to form.

A. I asserted that certain claims were invalid, yes.

Q. In this declaration you provided in the K-Swiss examination, Exhibit 2002, you concluded that claims were invalid for anticipation and obviousness; is that correct?

A. I have to look. I haven't read this in years.

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 177
Skechers EX1013-p. 7128
Skechers v Nike

Q. Okay. Well, let me direct your attention to page 10, there's a heading there -- actually, let me direct your attention to page -- let me withdraw the question.

In this declaration you concluded that claims of a patent were invalid as obvious; is that right?

A. I honestly don't remember.

Q. Okay. Well, directing your attention to page 14, you see the heading Roman numeral C. Does that tell you that you concluded the claims of the patent were invalid as obvious?

A. Let me take a look at that. Yep.

Q. And page 17, heading D, you concluded the claims of the patent were invalid as obvious based on a second combination?

A. That's right.

Q. And on page 20, Roman heading E, you concluded that the claims of the patent were invalid based on a third combination?

A. That's right.

Q. And do you know if your opinions that you offered in this proceeding were correct?

MR. KADABA: Objection to form.

A. Of course they were correct.

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Skechers EX1013-p. 7129
Skechers v Nike

BY MR. VAN ES:

Q. I'm going to show you what I'm marking as -- let me show you what I've marked as Nike Exhibit 2008.

(Nike Exhibit 2008 marked)

BY MR. VAN ES:

Q. And it is a 36-page document and includes a decision of the board of the patent trial and appeal board in this K-Swiss reexamination. Have you seen this decision before?

A. No.

Q. So you didn't know that the board issued a decision in this case?

A. No.

Q. Did you know that the board disagreed with your decision -- excuse me. Did you know that the board disagreed with your opinion?

MR. KADABA: Objection to form.

A. I had no feedback at all on the court's decision on -- in response to my declaration.

Q. Well, isn't it true that the board said that your analysis for each of the three obviousness combinations was based on impermissible hindsight?

MR. KADABA: Objection to form.

A. I have no idea that that's true.

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Skechers EX1013-p. 7130
Skechers v Nike

BY MR. VAN ES:

Q. Well, let me direct your attention to page 34 -- excuse me, 31, Exhibit 2008.

A. Okay. I'm on page 31.

Q. You see at the bottom of page 31 it says, Thus, in view of the above considerations, whereas the Examiner has articulated a reason for modifying the sole of Pagani, and in view of the preponderance of the evidence before us, our impression is the reason is based in impermissible hindsight.

Do you see that?

A. I can see that, yes.

Q. Does that tell you that your opinion about obviousness with respect to the first combination in the K-Swiss reexamination was wrong?

MR. KADABA: Objection to form.

A. I have no idea what that's talking about.

BY MR. VAN ES:

Q. I direct your attention to page 32. You see the heading there that identifies a second combination of references at the top of page 32?

A. Rejection of claims 11 -- 1 through 11, is that it?

Q. Yes, do you see that heading?

A. Yes.

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 180
Skechers EX1013-p. 7131
Skechers v Nike

Q. And directing your attention to page 33, you see the first full sentence that reads, Therefore, for substantively the same reasons already discussed with respect to the obviousness rejection based on the combination of Pagani and Szentes, S-Z-E-N-T-E-S, we likewise conclude that the Examiner's obviousness rejection of claims 1 through 11 based on the combination of Takahashi, T-A-K-A-H-A-S-H-I, and Szentes based on impermissible hindsight, and is not sustained.

Do you see that?

A. I do.

Q. So the board disagreed with you, didn't it?

MR. KADABA: Objection to form.

A. Apparently, reading this one sentence. Uh-huh.

Q. And on page 33 you see a heading there, rejection of claims 1 through 11 as obvious over Inohara and Szentes.

A. Right.

Q. And then the middle of page 34, second full paragraph, it against says that this obviousness rejection was based on impermissible hindsight?

Do you see that?

A. I don't. Where's that?

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 181
Skechers EX1013-p. 7132
Skechers v Nike

Q. Look at the second paragraph of page 34. Do you see that?

A. Okay.

Q. Do you see that sentence that begins "therefore"?

A. Right.

Q. And in that sentence the board concluded that your obviousness analysis was based on impermissible hindsight, right?

A. That's what it says.

MR. KADABA: Objection to form.

BY MR. VAN ES:

Q. Do you know what impermissible hindsight means?

A. No.

Q. And you didn't know about this decision from the board when you authored your opinion in this case involving the '011 patent, right?

A. No, I didn't know about it, that's correct.

Q. So you'll agree that your opinions on invalidity are not always correct, are they?

MR. KADABA: Objection to form.

A. I would agree that the judge or the group didn't agree with me on that, but the correctness of the opinion isn't something I would agree with.

BY MR. VAN ES:

Q. So you think the board was wrong in saying that your obviousness opinions are based on impermissible hindsight.

MR. KADABA: Objection to form.

A. Since I don't know what impermissible hindsight is, I can't answer that question.

Q. Okay.

MR. VAN ES: I think we're pretty close to being concluded, so what I'd like to do is take a break and see if I have any final questions, and then we may be finished.

MR. KADABA: Okay.

THE VIDEOGRAPHER: The time is 3:47 p.m. and we are now off the record.

(Recess)

THE VIDEOGRAPHER: The time is 3:55 p.m. and we are now back on the record.

BY MR. VAN ES:

Q. Mr. Frederick, were you -- let me start the question over again.

Mr. Frederick, did you form any opinions in this case on any issues other than the opinions set forth in your declaration?

A. No.

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Skechers v Nike

MR. VAN ES: I don't have any further questions of the witness at this time.

MR. KADABA: I'm going to talk to my colleague. I might have two or three questions for him.

MR. VAN ES: Okay.

THE VIDEOGRAPHER: The time is 3:56 p.m. and we are now off the record.

(Recess)

THE VIDEOGRAPHER: The time is 4:05 p.m. and we are now back on the record.

EXAMINATION

BY MR. KADABA:

Q. Dr. Frederick, I'm going to ask you just a few questions to clarify your earlier testimony.

Do you recall when Mr. van Es asked you some questions just a few minutes ago about your opinions in your declaration relating to the Osamu reference?

A. I do.

Q. And I believe he said looking at the claims in 2013 did you conclude that the claims are obvious.

A. Yes.

Q. And your answer was, "In 2013, yes."

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 184
Skechers EX1013-p. 7135
Skechers v Nike

A. That's what I remember, yeah.

Q. And when did you perform this analysis that's in your declaration?

A. In 2012.

Q. Okay. Would you mind looking at paragraph 14 of your declaration?

A. Okay. I have it in front of me.

Q. Could you read that, please?

A. Counsel for adidas has informed me that by law a patent may not be obtained through an invention though the invention is not identically disclosed or described as set forth in a prior art reference, if the differences between the subject matter south to be patented and the prior art are such that the subject matter as a whole would have been obvious (i.e. invalid under 35 USC squiggly thing 103) at the time of the invention -- at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

Q. So when you performed your analysis of the Osamu reference what timeframe were you considering when you concluded that the '011 patent claims were obvious?

A. I was looking at 2004, March 2004, that

Patent Owner NIKE, Inc. Exhibit No. 2009 - page 185
Skechers EX1013-p. 7136
Skechers v Nike

timeframe.

Q. Okay. Thank you.

MR. KADABA: No further questions.

MR. VAN ES: Okay. We don't have any further questions.

THE VIDEOGRAPHER: This is the end of Tape 4 and concludes the deposition of Edward C. Frederick. The time is 4:08 p.m. and we are now off the record.

(Deposition concluded at 4:08 p.m.)

(Signature reserved)

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Skechers v Nike

CERTIFICATE

STATE OF GEORGIA:

COUNTY OF FULTON:

I hereby certify that the foregoing transcript was taken down, as stated in the caption, and the colloquies, questions, and answers were reduced to typewriting under my direction; that the transcript is a true and correct record of the evidence given upon said proceeding.

I further certify that I am not a relative or employee or attorney of any party, nor am I financially interested in the outcome of this action.

This the 24th day of July 2013.

_____

VALERIE N. ALMAND, RPR, CRR, CSR-B-531

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Skechers EX1013-p. 7138
Skechers v Nike

Electronic Acknowledgement Receipt

EFS ID:	29874769
Application Number:	15610089
International Application Number:	
Confirmation Number:	4757
Title of Invention:	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER
First Named Inventor/Applicant Name:	BHUPESH DUA
Customer Number:	78342
Filer:	Elizabeth Ashley Lucas
Filer Authorized By:	
Attorney Docket Number:	NIKE.276100/081313US82CON
Receipt Date:	24-JUL-2017
Filing Date:	31-MAY-2017
Time Stamp:	23:14:32
Application Type:	Utility under 35 USC 111(a)

Payment information:

Submitted with Payment	no

File Listing:

Document Number	Document Description	File Name	File Size(Bytes)/ Message Digest	Multi Part /.zip	Pages (if appl.)
1	Non Patent Literature	276100_10_NPL_23_US_Patent_7347011_with_markings_IPR2013_00067.pdf	1258930 0b5323e5ed8dc58d83c5970db807a4ec7cd74f7f	no	22

Warnings:

Information:					
2	Non Patent Literature	276100_10_NPL_27_Excerpts_Man_Made_Fiber_and_Textile_Dictionary_IPR2013_00067.pdf	2692399 67baf21a745fe1fb9300867b0b399a1c55b18ea4	no	12
Warnings:					
Information:					
3	Non Patent Literature	276100_10_NPL_28_R_H_Websters_Dictionary_Excerpt_IPR2013_00067.pdf	364533 6768f462e85baf8f160b00bec52c98922fa28e1b	no	3
Warnings:					
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4	Non Patent Literature	276100_10_NPL_29_Edward_Frederick_Deposition_Errata_Sheet_IPR2013_00067.pdf	54803 3f5aab1f01acc9b2c5082040146fde45da7158c1	no	1
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5	Non Patent Literature	276100_10_NPL_30_Exhibit_2015_IPR2013_00067.pdf	536987 43c75a7c6f19cb3d482745d175015d036ac00be0	no	5
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9	Non Patent Literature	276100_10_NPL_34_Exhibit_2020_IPR2013_00067.pdf	821127 e3b60e02f0ef5e834d00137e049245b1f07cf0a8	no	11
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15	Non Patent Literature	276100_10_NPL_21_Chapter_21_Textiles_in_Sport_IPR2013_00067.pdf	5126260 3efce3806e56ad66dcb9fcc1693c166a870cc92e	no	22
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17	Non Patent Literature	276100_10_NPL_24_Decision_on_Appeal_IPR2013_00067.pdf	3873030 68e4bd90686a07c3589ba062c634c53223698e2a	no	37
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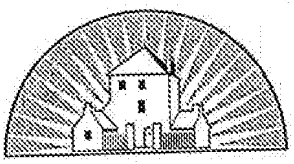
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RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY

RANDOM HOUSE
NEW YORK

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of a song or the like. 7. a textbook. 8. a short passage of Scripture, esp. one chosen in proof of a doctrine or as the subject of a sermon. 9. a. BLACK LETTER. b. type, as distinguished from illustrations, margins, etc. 10. *Ling.* a unit of connected speech or writing that forms a cohesive whole. 11. anything considered to be a subject for analysis by or as if by methods of literary criticism. [1300–50; ME < ML *textus* text, terms; L: weaving pattern, structure]

text•book (tekst′bo͝ok′), *n.* 1. a book used by students as a standard work for a particular branch of study. —*adj.* 2. pertaining to, characteristic of, or seemingly suitable for inclusion in a textbook; typical; classic: *a textbook example of administrative competence.* [1770–80]

text′ edi′tion, *n.* a special edition of a book for distribution to schools or colleges. [1890–95]

text′ ed′itor, *n.* a computer program for writing and modifying documents or program code on-screen, usu. having little or no formatting ability. [1970–75] —**text′-ed′it•ing,** *adj.*

tex•tile (teks′til, -tīl), *n.* 1. any cloth or goods produced by weaving, knitting, or felting. 2. a material, as a fiber or yarn, used in or suitable for weaving. —*adj.* 3. woven or capable of being woven: *textile fabrics.* 4. of or pertaining to weaving. 5. of or pertaining to textiles or their production: *the textile industry.* [1520–30; < L *textilis* woven, *textile* woven fabric = *text(ere)* to weave + *-ilis, -ile* -ILE]

tex•tu•al (teks′cho͞o əl), *adj.* 1. of or pertaining to a text. 2. based on or conforming to a text, as of the Scriptures. [1350–1400; ME *textuel* (< MF) < ML *textu(s)* (see TEXT) + *-el* -AL1] —**tex′tu•al•ly,** *adv.*

tex′tual crit′icism, *n.* LOWER CRITICISM. [1870–75]

tex•tu•al•ist (teks′cho͞o ə list), *n.* a person versed in the Scriptures.

tex•tu•ar•y (teks′cho͞o er′ē), *adj., n., pl.* **-ar•ies.** —*adj.* 1. of or pertaining to a text; textual. —*n.* 2. TEXTUALIST. [1600–10; < ML *textuāri(us)*]

tex•ture (teks′chər), *n., v.,* **-tured, -tur•ing.** —*n.* 1. the characteristic physical structure given to a material, an object, etc., by the size, shape, and arrangement of its parts: *soil of a sandy texture.* 2. the characteristic structure of the threads, fibers, etc., that make up a textile fabric: *coarse texture.* 3. essential or characteristic quality; essence. 4. the visual and tactile quality of the surface of a work of art resulting from the way in which the materials are used. 5. the quality given, as to a musical work, by the combination or interrelation of parts or elements. 6. a rough or grainy surface quality. 7. anything produced by weaving; woven fabric. —*v.t.* 8. to give texture or a particular texture to. 9. to make by or as if by weaving. [1400–50; late ME < L *textūra* web = *text(us)*, ptp. of *texere* to weave + *-ūra* -URE] —**tex′tur•al,** *adj.* —**tex′tur•al•ly,** *adv.*

tex•tur•ize (teks′chə rīz′), *v.t.,* **-ized, -iz•ing.** TEXTURE. [1945–50]

tex•tus re•cep•tus (tek′stəs ri sep′təs), *n.* a text of a work that is generally accepted as being genuine or original. [1855–60; < NL: received text]

Tey•de (tā′dā), *n.* **Pi•co de** (pē′kō dā). TEIDE, Pico de.

Te•zel (tet′səl), *n.* **Johann,** TETZEL, Johann.

T formation, *n.* an offensive football formation with the quarterback and fullback lined up behind the center and a halfback on each side of the fullback. [1925–30, *Amer.*]

TG, 1. transformational grammar. 2. transgender.

TGIF or **T.G.I.F.,** thank God it's Friday.

Th *Chem. Symbol.* thorium.

-th1, a suffix forming nouns of action (*birth*) or abstract nouns denoting quality or condition (*depth; length; warmth*). [ME *-th(e),* OE *-thu, -tho, -th* (var. *-t* after a velar, *f,* or *s*), c. Go *-itha,* L *-tus,* Gk *-tos*]

-th2, a suffix used in the formation of ordinal numbers: *fourth; tenth.* [ME *-the, -te,* OE *-tha, -the* (var. *-ta* after *f* or *s*), c. ON *-thi, -di,* L *-tus,* Gk *-tos*; cf. *-ETH*2]

-th3, var. of *-ETH*1: *doth.*

Th., Thursday.

Thack•er•ay (thak′ə rē), *n.* **William Makepeace,** 1811–63, English novelist, born in India.

Thai (tī), *n., pl.* **Thais.** 1. Also called **Thai′land′er** (-lan′dər, -lən-). a native or inhabitant of Thailand. 2. a. a member of the dominant ethnic group of Thailand, living mainly in the S and E parts of the country. b. the Tai language of this group. 3. TAI (def. 1). Also, **Tai** (for defs. 1, 2).

Thai•land (tī′land′, -lənd), *n.* 1. Formerly, **Siam.** a kingdom in SE Asia. 59,450,618; 198,115 sq. mi. (513,115 sq. km). *Cap.:* Bangkok. 2. **Gulf of.** Also called **Gulf of Siam.** an arm of the South China Sea, S of Thailand.

thal•a•mus (thal′ə məs), *n., pl.* **-mi** (-mī′). 1. the middle part of the diencephalon of the brain, serving to transmit and integrate sensory impulses. 2. *Bot.* a receptacle or torus. [1695–1705; < NL; L: bedroom, < Gk *thálamos*] —**tha•lam•ic** (thə lam′ik), *adj.*

thal•as•se•mi•a (thal′ə sē′mē ə), *n.* a hereditary anemia marked by the abnormal production of hemoglobin, occurring chiefly in people of Mediterranean origin. [1932; < Gk *thálass(a)* sea (alluding to the Mediterranean Sea) + *-EMIA*]

tha•las•sic (thə las′ik), *adj.* 1. of or pertaining to seas and oceans. 2. of or pertaining to smaller bodies of water, as seas and gulfs, as distinguished from oceans. 3. growing, living, or found in the sea; marine. [1855–60; < Gk *thálass(a)* sea + *-IC*]

thal•as•soc•ra•cy (thal′ə sok′rə sē), *n., pl.* **-cies.** dominion over the seas, as in trade. [1840–50; < Gk *thálass(a)* sea + *-o-* + *-CRACY*]

tha•ler or **ta•ler** (tä′lər), *n., pl.* **-ler, -lers.** any of various former large coins of various German states. [1780–90; < G; see DOLLAR]

Tha•les (thā′lēz), *n.* c640–546? B.C., Greek philosopher, born in Miletus.

Tha•li•a (thə lī′ə, thā′lē ə, thāl′yə), *n.* 1. the Muse of comedy and idyllic poetry. 2. one of the Graces. [< L < Gk *Tháleia*]

tha•lid•o•mide (thə lid′ə mīd′), *n.* a crystalline, slightly water-soluble solid, $C_{13}H_{10}N_2O_4$, formerly used as a sedative: if taken during pregnancy, it may cause severe abnormalities in the limbs of the fetus. [1955–60; *(ph)thal(im)id(glutar)imide* = *phthalimide* (PHTHAL(IC) + IMIDE) + *-o-* + *glutarimide* (GLUT(EN) + (TAR)AX(IC) + IMIDE)]

thal•lic (thal′ik), *adj.* of or containing thallium, esp. in the trivalent state. [1865–70]

thal•li•um (thal′ē əm), *n.* a soft, malleable, rare, bluish white metallic element used in the manufacture of alloys and, in the form of its salts, in rodenticides. *Symbol:* Tl; *at. wt.:* 204.37; *at. no.:* 81; *sp. gr.:* 11.85 at 20°C. [1861; < Gk *thall(ós)* green stalk + *-ium*; after the green line in its spectrum]

thal•loid (thal′oid), *adj.* pertaining to, resembling, or consisting of a thallus. [1855–60]

thal•lo•phyte (thal′ə fīt′), *n.* any of the Thallophyta, a plant division in some older classification schemes, comprising algae, fungi, and lichens. [1850–55; < NL *Thallophyta.* See THALLUS, *-O-, -PHYTE*] —**thal′lo•phyt′ic** (-fit′ik), *adj.*

thal•lous (thal′əs) also **thal•li•ous** (-ē əs), *adj.* containing univalent thallium. [1865–90]

thal•lus (thal′əs), *n., pl.* **thal•li** (thal′ī), **thal•lus•es.** a simple vegetative body undifferentiated into true leaves, stem, and root, ranging from an aggregation of filaments to a complex plantlike form. [1820–30; < NL < Gk *thallós* young shoot, twig]

Thames (temz; *for 3 also* thāmz, tāmz), *n.* 1. a river in S England, flowing E through London to the North Sea. 209 mi. (336 km) long. 2. a river in SE Canada, in Ontario province, flowing SW to Lake St. Clair. 160 mi. (260 km) long. 3. an estuary in SE Connecticut, flowing S past New London to Long Island Sound. 15 mi. (24 km) long.

than (*unstressed* thən, *unstressed before a vowel* thən; *stressed* than), *conj.* 1. (used after comparative adjectives and adverbs and certain other words, such as *other, otherwise, else,* etc., to introduce the second member of a comparison): *She's taller than I am.* 2. (used after some adverbs and adjectives expressing choice or diversity, such as *other, otherwise, else, anywhere, different,* etc., to introduce an alternative or denote a difference in kind, place, style, identity, etc.): *I had no choice other than that.* 3. when: *We barely arrived than it was time to leave.* —*prep.* 4. in relation to; by comparison with: *He is taller than his father.* [bef. 900; ME, OE *thanne(ne)* than, then, when, orig. var. of *thonne* THEN] —**Usage.** Whether THAN is to be followed by the objective or subjective case of a pronoun is much discussed in usage guides. When, as a conjunction, THAN introduces a subordinate clause, the case of any pronouns following THAN is determined by their function in that clause: *He is younger than I am. I like her better than I like him.* When THAN is followed only by a pronoun or pronouns, with no verb expressed, the usual advice for determining the case is to form a clause mentally after THAN to see whether the pronoun would be a subject or an object. Thus, the sentences *He was more upset than I* and *She gave him more sympathy than I* are to be understood, respectively, as *He was more upset than I was* and *She gave him more sympathy than I gave him.* This method is generally employed in formal speech and writing. In informal speech and writing THAN is usu. treated like a preposition and followed by the objective case of the pronoun: *He is younger than me.* See also BUT, INFERIORITY, ME.

thanato-, a combining form meaning "death": *thanatology.* [comb. form repr. Gk *thánatos*]

than•a•tol•o•gy (than′ə tol′ə jē), *n.* 1. the study of death and its circumstances, as in forensic medicine. 2. the branches of medicine and psychiatry concerned with the terminally ill and their survivors. [1835–45] —**than′a•to•log′i•cal** (-l oj′i kəl), *adj.* —**than′a•tol′o•gist,** *n.*

Than•a•tos (than′ə tos′, -təs), *n.* 1. (among the ancient Greeks) a personification of death. 2. *Psychoanal.* (*usu. l.c.*) the death instinct, esp. as expressed in violent aggression. —**Than′a•tot′ic** (-tot′ik), *adj.*

thane (thān), *n.* 1. (in Anglo-Saxon England) a person ranking between an earl and an ordinary freeman, holding land of the king or a lord in return for services. 2. (in medieval Scotland) a person holding land of the king; a baron. [bef. 900; late ME, Scots var. of ME *thain, thein,* OE *thegn,* c. OS *thegan* man, OHG *degan* servant, warrior, ON *thegn* subject; akin to Gk *téknon* child]

Than•ja•vur (tän′jə vo͝or′), *n.* a city in E Tamil Nadu, in SE India. 183,464. Formerly, **Tanjore.**

thank (thangk), *v.t.* 1. to express gratitude or appreciation to. 2. to hold personally responsible; blame: *We have him to thank for this lawsuit.* —*n.* 3. **thanks,** a grateful feeling or acknowledgment of a kindness, favor, or the like, expressed by words or otherwise. —*interj.* 4. **thanks,** I thank you. —*Idiom.* 5. **thanks to,** because of; owing to. 6. **thank you,** (a common elliptical expression used to express gratitude or appreciation, as for a gift or favor.) [bef. 900; (n.) ME: goodwill, gratitude, expression of thanks, OE *thanc* expression of thanks, c. OFris, OS *thank,* OHG *danc,* ON *thakk.* Go *thagks;* (v.) ME *thanken,* OE *thancian;* akin to THINK1]

thank•ful (thangk′fəl), *adj.* feeling or expressing gratitude or appreciation. [bef. 900] —**thank′ful•ly,** *adv.* —**thank′ful•ness,** *n.*

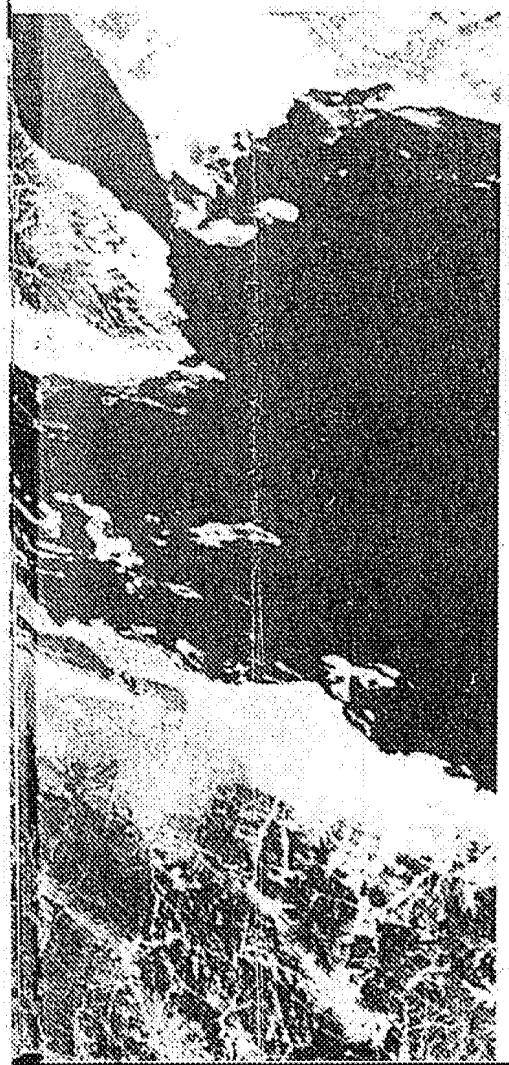
thank•less (thangk′lis), *adj.* 1. not likely to be appreciated or rewarded: *a thankless job.* 2. not feeling or expressing gratitude; ungrateful: *a thankless child.* [1530–40] —**thank′less•ly,** *adv.* —**thank′less•ness,** *n.*

thanks•giv•ing (thangks′giv′ing), *n.* 1. the act of giving thanks. 2.

T U V
W-Z
Sketch

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Fourth Edition



Sybil P. Parker
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erythrocytes; characterized by fever, hemoglobinuria, and splenomegaly. { ˌtek·səs ˌfē·vər }

Texas tower [ENG] A radar tower built in the sea offshore, to serve as part of an early-warning radar network. { 'tek·səs ˌtau·ər }

text [COMMUN] The part of a message that conveys information, excluding bits or characters needed to facilitate transmission of the message. { tekst }

text-editing system [COMPUT SCI] A computer program, together with associated hardware, for the on-line creation and modification of computer programs and ordinary text. { 'tekst ˌed·əd·iŋ ˌsis·təm }

textile [MATER] A material made of natural or artificial fibers and used for the manufacture of items such as clothing and furniture fittings. { 'tek·stəl }

textile microbiology [MICROBIO] That branch of microbiology concerned with textile materials; deals with microorganisms that are harmful either to the fibers or to the consumer, and microorganisms that are useful, as in the retting process. { 'tek·stəl ˌmī·krō·bī'ä·ə·jē }

textile oil [MATER] A specially compounded oil used to condition raw textile fibers, yarn, and fabric for manufacturing and finishing operations. { 'teks·təl ˌȯil }

textile printing [TEXT] The specialized dyeing of restricted areas on fabrics; involves the preparation of printing paste, the development and fixing of color, and the addition of a thickening agent to confine paste applications to desired areas on the goods. { 'tek·stəl ˌprin·tiŋ }

textile softener [MATER] A chemical that attaches molecularly to textile fibers with the polar (charged) end of the cation oriented toward the fiber and the fatty tail exposed to give a feeling of softness to the fabric. { 'tek·stəl ˌsȯf·nər }

text-to-speech synthesizer [ENG ACOUS] A voice response system that provides an automatic means to take a specification of any English text at the input and generate a natural and intelligible acoustic speech signal at the output by using complex sets of rules for predicting the needed phonemic states directly from the input message and dictionary pronunciations. { ˌtekst tə ˌspēch 'sin·thəˌsiz·ər }

Textulariina [INV ZOO] A suborder of foraminiferan protozoans characterized by an agglutinated wall. { ˌtek·styə·lə'ri·ən·ə }

texture [GEOL] The physical nature of the soil according to composition and particle size. [PETR] The physical appearance or character of a rock; applied to the megascopic or microscopic surface features of a homogeneous rock or mineral aggregate, such as grain size, shape, and arrangement. { 'teks·chər }

textured yarn [TEXT] A generic designation for continuous-filament manufactured yarns which are processed to give them a hand and appearance distinct from untreated yarn. { 'teks·chərd ˌyärn }

TFE *See* tetrafluoroethylene.

th *See* thermie.

Th *See* thorium.

thalamus [ANAT] Either one of two masses of gray matter located on the sides of the third ventricle and forming part of the lateral wall of that cavity. { 'thal·ə·məs }

thalassemia [MED] A hereditary form of hemolytic anemia resulting from a defective synthesis of hemoglobin; thalassemia major is the homozygous state accompanied by clinical illness, and thalassemia minor is the heterozygous state and may not have evident clinical manifestations. Also known as Mediterranean anemia. { ˌthal·ə'sē·mē·ə }

thalassic [OCEANOGR] Of or pertaining to the smaller seas. { thə'las·ik }

Thalassinidea [INV ZOO] The mud shrimps, a group of thin-shelled, burrowing decapod crustaceans belonging to the Macrura; individuals have large chelate or subchelate first pereiopods, and no chelae on the third pereiopods. { thəˌlas·ə'nid·ē·ə }

thalassocratic [GEOL] **1.** Pertaining to a thalassocracton. **2.** Referring to a period of high sea level in the geologic past. { thəˌlas·əˌkrad·ik }

thalassocraton [GEOL] A craton that is part of the oceanic crust. { ˌthal·ə'sak·rəˌtän }

thalassophile element [GEOCHEM] An element that is relatively more abundant in sea water than in normal continental waters, such as sodium and chlorine. { thə'las·əˌfīl ˌel·ə·mənt }

thalassophobia [PSYCH] An abnormal fear of the sea. { thəˌlas·ə'fō·bē·ə }

Thalattosauria [PALEON] A suborder of extinct reptiles in the order Eosuchia from the Middle Triassic. { thəˌlad·ə'sȯr·ē·ə }

Thaliacea [INV ZOO] A small class of pelagic Tunicata in which oral and atrial apertures occur at opposite ends of the body. { ˌthā·lē'ā·shē·ə }

thalidomide [PHARM] $C_{13}H_{10}N_2O_4$ A drug used as a sedative and hypnotic; may produce teratogenic effects when administered during pregnancy. { thə'lid·əˌmid }

thalline [ORG CHEM] $C_9H_9N(OCH_3)H_4$ Colorless rhomboids soluble in water and melting at 40°C. { 'thaˌlēn }

thallium [CHEM] A metallic element in group III, symbol Tl, atomic number 81, atomic weight 204.37; insoluble in water, soluble in nitric and sulfuric acids, melts at 302°C, boils at 1457°C. [MET] Bluish-white metal with tinlike malleability, but a little softer; used in alloys. { 'thal·ē·əm }

thallium acetate [ORG CHEM] $TlOCOCH_3$ Toxic, white, deliquescent crystals, soluble in water and alcohol, melts at 131°C; used as an ore-flotation solvent and in medicine. { 'thal·ē·əm 'as·əˌtāt }

thallium-beam clock [HOROL] A device similar to a cesium-beam clock, but using a beam of thallium atoms instead of cesium; advantages over cesium are reduced sensitivity to magnetic fields and a higher frequency; the beam, however, is much harder to detect and deflect. { 'thal·ē·əm ˌbēm 'kläk }

thallium bromide [INORG CHEM] TlBr A toxic, yellowish powder soluble in alcohol, slightly soluble in water, melts at 460°C; used in infrared radiation transmitters and detectors. Also known as thallous bromide. { 'thal·ē·əm 'brōˌmīd }

thallium carbonate [INORG CHEM] Tl_2CO_3 Toxic, shiny, colorless needles soluble in water, insoluble in alcohol, melts at 272°C; used as an analytical reagent and in artificial gems. Also known as thallous carbonate. { 'thal·ē·əm 'kär·bəˌnāt }

thallium chloride [INORG CHEM] TlCl A white, toxic, light-sensitive powder, slightly soluble in water, insoluble in alcohol, melts at 430°C; used as a chlorination catalyst and in medicine and suntan lamps. Also known as thallous chloride. { 'thal·ē·əm 'klōrˌīd }

thallium hydroxide [INORG CHEM] $TlOH·H_2O$ Toxic yellow, water- and alcohol-soluble needles, decomposes at 139°C; used as an analytical reagent. Also known as thallous hydroxide. { 'thal·ē·əm hī'dräkˌsīd }

thallium iodide [INORG CHEM] TlI A toxic, yellow powder, insoluble in alcohol, slightly soluble in water, melts at 440°C; used in infrared radiation transmitters and in medicine. Also known as thallous iodide. { 'thal·ē·əm 'īəˌdīd }

thallium monoxide [INORG CHEM] Tl_2O A black, toxic, water- and alcohol-soluble powder, melts at 300°C; used as an analytical reagent and in artificial gems and optical glass. Also known as thallium oxide; thallous oxide. { 'thal·ē·əm mə'näkˌsīd }

thallium nitrate [INORG CHEM] $TlNO_3$ Colorless, toxic, fire-hazardous crystals soluble in hot water, insoluble in alcohol, melts at 206°C, decomposes at 450°C; used as an analytical reagent and in pyrotechnics. Also known as thallous nitrate. { 'thal·ē·əm 'nīˌtrāt }

thallium oxide *See* thallium monoxide. { 'thal·ē·əm 'äkˌsīd }

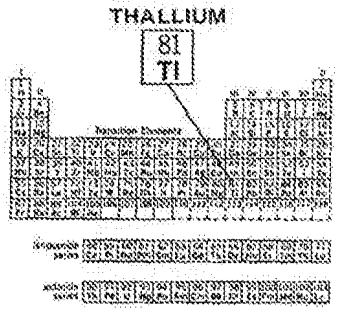
thallium sulfate [INORG CHEM] Tl_2SO_4 Toxic, water-soluble, colorless crystals melting at 632°C; used as an analytical reagent and in medicine, rodenticides, and pesticides. Also known as thallous sulfate. { 'thal·ē·əm 'səlˌfāt }

thallium sulfide [INORG CHEM] Tl_2S Lustrous, toxic, blue-black crystals insoluble in water, alcohol, and ether, soluble in mineral acids, melts at 448°C; used in infrared-sensitive devices. Also known as thallous sulfide. { 'thal·ē·əm 'səlˌfīd }

Thallobionta [BOT] One of the two subkingdoms of plants, characterized by the absence of specialized tissues or organs and multicellular sex organs. { ˌthal·ō·bī'ənt·ə }

thallofide cell [ELECTR] A photoconductive cell in which the active light-sensitive material is thallium oxysulfide in a vacuum; it has maximum response at the red end of the visible spectrum and in the near infrared. { 'thal·əˌfīd ˌsel }

Thallophyta [BOT] The equivalent name for Thallobionta. { thə'läf·əd·ə }



Periodic table of the chemical elements showing the position of thallium.

Weber-Christian disease [MED] Febrile, relapsing, nodular nonsuppurative panniculitis. { 'vā·bər 'kris·chən di,zēz }

Weber differential equation [MATH] A special case of the confluent hypergeometric equation that has as solution a confluent hypergeometric series. Also known as Weber-Hermite equation. { 'vā·bər ˌdif·ə'ren·chəl i'kwā·zhən }

Weber-Hermite equation *See* Weber differential equation. { 'vā·bər er'mīt i,kwā·zhən }

Weberian apparatus [VERT ZOO] A series of bony ossicles which form a chain connecting the swim bladder with the inner ear in fishes of the superorder Ostariophysi. { vā'bir·ē·ən ˌap·ə,rad·əs }

Weberian ossicle [VERT ZOO] One of a chain of three or four small bones that make up the Weberian apparatus. { vā'bir·ē·ən 'äs·ə·kəl }

weberite [MINERAL] Na_2MgAlF_7 A light gray, orthorhombic mineral consisting of an aluminofluoride of sodium and magnesium; occurs as grains and masses. { 'vā·bəˌrīt }

Weber number 1 [FL MECH] A dimensionless number used in the study of surface tension waves and bubble formation, equal to the product of the square of the velocity of the wave or the fluid velocity, the density of the fluid, and a characteristic length, divided by the surface tension. Symbolized N_{We_1}, We. { 'vā·bər ˌnəm·bər 'wən }

Weber number 2 [FL MECH] A dimensionless number, equal to the square root of Weber number 1. Symbolized N_{We_2}. { 'vā·bər ˌnəm·bər 'tü }

Weber number 3 [CHEM ENG] A dimensionless number used in interfacial area determination in distillation equipment, equal to the surface tension divided by the product of the liquid density, the acceleration of gravity, and the depth of liquid on the tray under consideration. Symbolized N_{We_3}. { 'vā·bər ˌnəm·bər 'thrē }

Weber's law [PHYSIO] The law that the stimulus increment which can barely be detected (the just noticeable difference) is a constant fraction of the initial magnitude of the stimulus; this is only an approximate rule of thumb. { 'vā·bərz ˌlȯ }

web-fed press [GRAPHICS] Printing press designed to accept paper from rolls instead of sheets; large web presses offer great speed and economy for long press runs, but high makeready and plate costs make them too costly for short runs. { 'web ˌfed 'pres }

web frame [NAV ARCH] A built-up member consisting of a web plate with single or double bars riveted or welded to its edges; web frames are placed several frame spaces apart with smaller frames in between. { 'web ˌfrām }

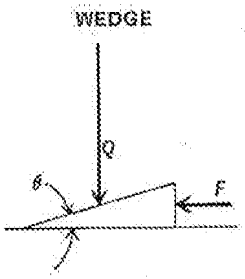
websterite *See* sluminite. { 'web·stəˌrīt }

Weddell Current [OCEANOGR] A surface current which flows in an easterly direction from the Weddell Sea outside the limit of the West Wind Drift. { we'del 'kə·rənt }

weddellite [MINERAL] $CaC_2O_4 \cdot 2H_2O$ A colorless to white or yellowish-brown to brown, tetragonal mineral consisting of calcium oxalate dihydrate. { wə'deˌlīt }

Wedener-Bergeron process *See* Bergeron-Findeisen theory. { 'vād·ən·ər ˌbər·zhə'rōn ˌprä·səs }

wedge [COMMUN] A convergent pattern of equally spaced black and white lines, used in a television test pattern to indicate resolution. [DES ENG] A piece of resistant material whose two major surfaces make an acute angle. [ELECTROMAG] A waveguide termination consisting of a tapered length of dissipative material introduced into the guide, such as carbon. [ENG] In ultrasonic testing, a device which directs waves of ultrasonic energy into the test piece at an angle. [METEOROL] *See* ridge. [OPTICS] **1.** An optical filter in which the transmission decreases continuously or in steps from one end to the other. **2.** A refracting prism of very small angle, inserted in an optical train to introduce a bend in the ray path. { wej }



The shape of a wedge and a diagram of forces acting on it. F is smaller applied force, Q is larger force to be exerted, θ is angle between surfaces of wedge.

wedge-base lamp [ELEC] A small indicator lamp that has wire leads folded back on opposite sides of a flat glass base. { 'wej ˌbās 'lamp }

wedge bit [DES ENG] A tapered-nose noncoring bit, used to ream out the borehole alongside the steel deflecting wedge in hole-deflection operations. Also known as bull-nose bit; wedge reaming bit; wedging bit. { 'wej ˌbit }

wedge bonding [ENG] A type of thermocompression bonding in which a wedge-shaped tool is used to press a small section of the lead wire onto the bonding pad of an integrated circuit. { 'wej ˌbänd·iŋ }

wedge core lifter [MECH ENG] A core-gripping device consisting of a series of three or more serrated-face, tapered wedges contained in slotted and tapered recesses cut into the inner surface of a lifter case or sleeve; the case is threaded to the inner tube of a core barrel, and as the core enters the inner tube, it lifts the wedges up along the case taper; when the barrel is raised, the wedges are pulled tight, gripping the core. { 'wej ˌkȯr ˌlif·tər }

wedge filter [NUCLEO] A radiation filter so constructed that its thickness or transmission characteristics vary continuously or in steps from one edge to the other; used to increase the uniformity of radiation in certain types of treatment. { 'wej ˌfil·tər }

wedge photometer [ENG] A photometer in which the luminous flux density of light from two sources is made equal by pushing into the beam from the brighter source a wedge of absorbing material; the wedge has a scale indicating how much it reduces the flux density, so that the luminous intensities of the sources may be compared. { 'wej fō'täm·əd·ər }

wedge reaming bit *See* wedge bit. { 'wej 'rēm·iŋ ˌbit }

wedge spectrograph [SPECT] A spectrograph in which the intensity of the radiation passing through the entrance slit is varied by moving an optical wedge. { 'wej 'spek·trəˌgraf }

wedging [ENG] **1.** A method used in quarrying to obtain large, regular blocks of building stones; a row of holes is drilled, either by hand or by pneumatic drills, close to each other so that a longitudinal crevice is formed into which a gently sloping steel wedge is driven, and the block of stone can be detached without shattering. **2.** The act of changing the course of a borehole by using a deflecting wedge. **3.** The lodging of two or more wedge-shaped pieces of core inside a core barrel, and therefore blocking it. **4.** The material, moss, or wood used to render the shaft lining tight. { 'wej·iŋ }

wedging bit *See* wedge bit. { 'wej·iŋ ˌbit }

weed [BOT] A plant that is useless or of low economic value, especially one growing on cultivated land to the detriment of the crop. { wēd }

week [ASTRON] A time period of 7 days which has been accepted from ancient Babylon; the 7 days of the week were first given names of the seven celestial bodies: the sun, moon, and five visible planets. { wēk }

weep hole [CIV ENG] A hole in a wood sill, retaining wall, or other structure to allow accumulated water to escape. { 'wēp ˌhōl }

weeping core [PETRO ENG] A core cut that is covered with tearlike drops of fluid when it is brought to the surface; usually indicative of a deposit that will produce little oil. { 'wēp·iŋ 'kȯr }

weeping spring *See* spring seepage. { 'wēp·iŋ 'spriŋ }

weevil [INV ZOO] Any of various snout beetles whose larvae destroy crops by eating the interior of the fruit or grain, or bore through the bark into the pith of many trees. { 'wē·vəl }

weft *See* filling. { weft }

weft knitting [TEXT] A knitting process in which a continuous yarn is carried in crosswise rows. { 'weft ˌnid·iŋ }

Wegener's granulomatosis [MED] A rare disease of unknown causation characterized by necrotizing granulomas in the air passages, necrotizing vasculitis, and glomerulitis. { 'vā·gə·nərz ˌgran·yə·lə·mə'tō·səs }

Wehnelt cathode *See* oxide-coated cathode. { 'vān,elt ˌkath,ōd }

wehrlite [MINERAL] BiTe A mineral that is a native alloy of bismuth and tellurium. Also known as mirror glance. [PETR] A peridotite composed principally of olivine and clinopyroxene with accessory opaque oxides. { 'wer,līt }

weibullite [MINERAL] $Pb_6Bi_4S_{13}Se_1$ A steel gray mineral consisting of lead bismuth sulfide with selenium replacing the sulfide; occurs in indistinct prismatic crystals in massive form. { 'wī,bu̇,līt }

Weierstrass' approximation theorem [MATH] A continuous real-valued function on a closed interval can be uniformly approximated by polynomials. { 'vī·ərˌshträs ə,präk·sə'mā·shən ˌthir·əm }

Weierstrass functions [MATH] Used in the calculus of variations, these determine functions satisfying the Euler-Lagrange equation and Jacobi's condition while maximizing a given definite integral. { 'vīrˌshträs ˌfəŋk·shənz }

Weierstrassian elliptic function [MATH] A function that

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37 CFR 1.501 INFORMATION DISCLOSURE CITATION IN A PATENT

(Sheet 1 of 1)

Docket Number (Optional)	Patent Number
A0224-855419	7,347,011
Applicant: Bhupesh Dua	
Issue Date: March 25, 2008	Art Unit:

U.S. PATENT DOCUMENTS

EXAMINER INITIAL	DOCUMENT NUMBER	DATE	NAME	CLASS	SUBCLASS	FILING DATE IF APPROPRIATE
	5345638	09/94	MAMORU NISHIDA	12	146C	06/23/1993
	2147197	02/39	ALFRED GLIDDEN	36	9R	11/25/1936
	2314098	03/43	RAYMOND MCDONALD	12	142	04/26/1941
	2641004	06/53	DAVID V. WHITING	12	142G	12/26/1950
	4785558	11/88	KAZUHIKO SHIOMURA	36	114	07/22/1987

FOREIGN PATENT DOCUMENTS

	DOCUMENT NUMBER	DATE	COUNTRY	CLASS	SUBCLASS	TRANSLATION YES	TRANSLATION NO
	H6-113905	04/94	JP			✓	
	90-03744	04/90	WO				✓

OTHER DOCUMENTS (Including Author, Title, Date, Pertinent Pages, Etc.)

		David J. Spencer, "Knitting Technology", 1989 and 2001, Woodhead Publishing Limited, pp. 1-413
		Hannelor Eberle, et al., "Clothing Technology" 2002, pp. 1-3

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7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.
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Applicant: Bhupesh Dua	
Issue Date: March 25, 2008	Art Unit: 3728

U.S. PATENT DOCUMENTS

EXAMINER INITIAL	DOCUMENT NUMBER	DATE	NAME	CLASS	SUBCLASS	FILING DATE IF APPROPRIATE
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	2150730	03/39	Carl F. Schuessler	66	77	01/29/1937
	6984596	01/06	Phillip Dickerson	442	316	10/17/2002

FOREIGN PATENT DOCUMENTS

	DOCUMENT NUMBER	DATE	COUNTRY	CLASS	SUBCLASS	TRANSLATION YES	TRANSLATION NO

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6. A record in this system of records may be disclosed, as a routine use, to another federal agency for purposes of National Security review (35 U.S.C. 181) and for review pursuant to the Atomic Energy Act (42 U.S.C. 218(c)).
7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.
8. A record from this system of records may be disclosed, as a routine use, to the public after either publication of the application pursuant to 35 U.S.C. 122(b) or issuance of a patent pursuant to 35 U.S.C. 151. Further, a record may be disclosed, subject to the limitations of 37 CFR 1.14, as a routine use, to the public if the record was filed in an application which became abandoned or in which the proceedings were terminated and which application is referenced by either a published application, an application open to public inspection or an issued patent.
9. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local law enforcement agency, if the USPTO becomes aware of a violation or potential violation of law or regulation.

Electronic Acknowledgement Receipt

EFS ID:	29874848
Application Number:	15610089
International Application Number:	
Confirmation Number:	4757
Title of Invention:	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER
First Named Inventor/Applicant Name:	BHUPESH DUA
Customer Number:	78342
Filer:	Elizabeth Ashley Lucas
Filer Authorized By:	
Attorney Docket Number:	NIKE.276100/081313US82CON
Receipt Date:	24-JUL-2017
Filing Date:	31-MAY-2017
Time Stamp:	23:15:50
Application Type:	Utility under 35 USC 111(a)

Payment information:

Submitted with Payment	no

File Listing:

Document Number	Document Description	File Name	File Size(Bytes)/ Message Digest	Multi Part /.zip	Pages (if appl.)
1	Non Patent Literature	276100_10_NPL_38_Exhibit_3001_IPR2013_00067.pdf	793841 0e14bba78150f635f762fcc72ed480973774fd70	no	3

Warnings:

Information:					
2	Non Patent Literature	276100_10_NPL_39_Exhibit_3002_IPR2013_00067.pdf	1152537 27f72f6d7319abb260bfe0fb2ff7f822c2bff858	no	4
Warnings:					
Information:					
3	Non Patent Literature	276100_10_NPL_40_Form_PTO_SB_42_dated_11282012_IPR2013_00067.pdf	134601 2e382af6f746ea2c9682ba08c10c474084dd3466	no	2
Warnings:					
Information:					
4	Non Patent Literature	276100_10_NPL_41_Form_PTO_SB_42_dated_11122013_IPR2013_00067.pdf	138760 398388b3ee3fbf25f4746844018c1630478cd84f	no	2
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PTO/SB/08a (03-15)
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INFORMATION DISCLOSURE STATEMENT BY APPLICANT

(Not for submission under 37 CFR 1.99)

Application Number	15610089
Filing Date	2017-05-31
First Named Inventor	BHUPESH DUA
Art Unit	3765
Examiner Name	MARIE D. BAYS
Attorney Docket Number	NIKE.276100/081313US82CON

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INFORMATION DISCLOSURE STATEMENT BY APPLICANT (Not for submission under 37 CFR 1.99)		
	Application Number	15610089
	Filing Date	2017-05-31
	First Named Inventor	BHUPESH DUA
	Art Unit	3765
	Examiner Name	MARIE D. BAYS
	Attorney Docket Number	NIKE.276100/081313US82CON

	1	Order - Conduct of the Proceeding - 37 CFR 42.5 dated August 2, 2013, in IPR2013-00067.	
	2	Order - Case Transfer to Administrative Patent Judge Josiah C. Cocks dated August 12, 2013, in IPR2013-00067.	
	3	Motion to Amend dated August 19, 2013, in IPR2013-00067.	
	4	Patent Owner Exhibit List dated August 19, 2013, in IPR2013-00067.	
	5	Corrected Certificate of Service dated August 19, 2013, in IPR2013-00067.	
	6	NIKE 29Aug13 Ex List dated August 29, 2013, in IPR2013-00067.	
	7	Decision Motion to Withdraw § 42.10(e) dated October 30, 2013, in IPR2013-00067.	
	8	Petitioner adidas AG's Amended Notice of Cross Examination of Raymond Tonkel dated November 1, 2013, in IPR2013-00067.	
	9	Petitioner Opposition to Patent Owner Motion to Amend dated November 12, 2013, in IPR2013-00067.	
	10	Petitioner Exhibit List dated November 12, 2013, in IPR2013-00067.	
	11	Patent Owner NIKE, Inc.'s Notice of Cross-Examination of Sabit Adanur dated November 26, 2013, in IPR2013-00067.	

INFORMATION DISCLOSURE STATEMENT BY APPLICANT (Not for submission under 37 CFR 1.99)		
	Application Number	15610089
	Filing Date	2017-05-31
	First Named Inventor	BHUPESH DUA
	Art Unit	3765
	Examiner Name	MARIE D. BAYS
	Attorney Docket Number	NIKE.276100/081313US82CON

	12	Patent Owner NIKE, Inc.'s Notice of Second Cross Examination of Edward Frederick dated November 26, 2013, in IPR2013-00067.	
	13	Submission of Power of Attorney dated November 26, 2013, in IPR2013-00067.	
	14	Petitioner's Power of Attorney dated November 26, 2013, in IPR2013-00067.	
	15	Mandatory Notice Information (Addition of Back-Up Counsel) dated November 26, 2013, in IPR2013-00067.	
	16	Patent Owner's Reply to Petitioner's Opposition to Motion to Amend dated December 11, 2013, in IPR2013-00067.	
	17	Patent Owner Exhibit List (December 11, 2013) dated December 11, 2013, in IPR2013-00067.	
	18	Patent Owner Exhibit List (as of 1-7-14) dated January 7, 2014, in IPR2013-00067.	
	19	Patent Owner Request for Oral Argument dated January 7, 2014, in IPR2013-00067.	
	20	Petitioner's Request for Oral Argument dated January 7, 2014, in IPR2013-00067.	
	21	Petitioner's Motion to Exclude Evidence dated January 7, 2014, in IPR2013-00067.	

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INFORMATION DISCLOSURE STATEMENT BY APPLICANT (Not for submission under 37 CFR 1.99)		
	Application Number	15610089
	Filing Date	2017-05-31
	First Named Inventor	BHUPESH DUA
	Art Unit	3765
	Examiner Name	MARIE D. BAYS
	Attorney Docket Number	NIKE.276100/081313US82CON

EXAMINER SIGNATURE			
Examiner Signature		Date Considered	

*EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609. Draw line through a citation if not in conformance and not considered. Include copy of this form with next communication to applicant.

[1] See Kind Codes of USPTO Patent Documents at www.USPTO.GOV or MPEP 901.04. [2] Enter office that issued the document, by the two-letter code (WIPO Standard ST.3). [3] For Japanese patent documents, the indication of the year of the reign of the Emperor must precede the serial number of the patent document. [4] Kind of document by the appropriate symbols as indicated on the document under WIPO Standard ST.16 if possible. [5] Applicant is to place a check mark here if English language translation is attached.

INFORMATION DISCLOSURE STATEMENT BY APPLICANT

(Not for submission under 37 CFR 1.99)

Application Number	15610089
Filing Date	2017-05-31
First Named Inventor	BHUPESH DUA
Art Unit	3765
Examiner Name	MARIE D. BAYS
Attorney Docket Number	NIKE.276100/081313US82CON

CERTIFICATION STATEMENT

Please see 37 CFR 1.97 and 1.98 to make the appropriate selection(s):

That each item of information contained in the information disclosure statement was first cited in any communication from a foreign patent office in a counterpart foreign application not more than three months prior to the filing of the information disclosure statement. See 37 CFR 1.97(e)(1).

OR

☐ That no item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application, and, to the knowledge of the person signing the certification after making reasonable inquiry, no item of information contained in the information disclosure statement was known to any individual designated in 37 CFR 1.56(c) more than three months prior to the filing of the information disclosure statement. See 37 CFR 1.97(e)(2).

See attached certification statement.

☒ The fee set forth in 37 CFR 1.17 (p) has been submitted herewith.

☒ A certification statement is not submitted herewith.

SIGNATURE

A signature of the applicant or representative is required in accordance with CFR 1.33, 10.18. Please see CFR 1.4(d) for the form of the signature.

Signature	/ELIZABETH A. LUCAS/	Date (YYYY-MM-DD)	2017-07-24
Name/Print	Elizabeth A. Lucas	Registration Number	74247

This collection of information is required by 37 CFR 1.97 and 1.98. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 1 hour to complete, including gathering, preparing and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

Privacy Act Statement

The Privacy Act of 1974 (P.L. 93-579) requires that you be given certain information in connection with your submission of the attached form related to a patent application or patent. Accordingly, pursuant to the requirements of the Act, please be advised that: (1) the general authority for the collection of this information is 35 U.S.C. 2(b)(2); (2) furnishing of the information solicited is voluntary; and (3) the principal purpose for which the information is used by the U.S. Patent and Trademark Office is to process and/or examine your submission related to a patent application or patent. If you do not furnish the requested information, the U.S. Patent and Trademark Office may not be able to process and/or examine your submission, which may result in termination of proceedings or abandonment of the application or expiration of the patent.

The information provided by you in this form will be subject to the following routine uses:

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2. A record from this system of records may be disclosed, as a routine use, in the course of presenting evidence to a court, magistrate, or administrative tribunal, including disclosures to opposing counsel in the course of settlement negotiations.

3. A record in this system of records may be disclosed, as a routine use, to a Member of Congress submitting a request involving an individual, to whom the record pertains, when the individual has requested assistance from the Member with respect to the subject matter of the record.

4. A record in this system of records may be disclosed, as a routine use, to a contractor of the Agency having need for the information in order to perform a contract. Recipients of information shall be required to comply with the requirements of the Privacy Act of 1974, as amended, pursuant to 5 U.S.C. 552a(m).

5. A record related to an International Application filed under the Patent Cooperation Treaty in this system of records may be disclosed, as a routine use, to the International Bureau of the World Intellectual Property Organization, pursuant to the Patent Cooperation Treaty.

6. A record in this system of records may be disclosed, as a routine use, to another federal agency for purposes of National Security review (35 U.S.C. 181) and for review pursuant to the Atomic Energy Act (42 U.S.C. 218(c)).

7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.

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9. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local law enforcement agency, if the USPTO becomes aware of a violation or potential violation of law or regulation.

Trials@uspto.gov
571-272-7822

Paper 29
Date: August 2, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG
Petitioner

v.

NIKE, Inc.
Patent Owner

Case IPR2013-00067
Patent 7,347,011 B2

Before MICHAEL P. TIERNEY, MICHAEL J. FITZPATRICK, and JAMES B. ARPIN, *Administrative Patent Judges.*

FITZPATRICK, *Administrative Patent Judge.*

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

INTRODUCTION

On July 31, 2013, a conference call was held among Judges Tierney, Fitzpatrick, and Arpin; counsel for Patent Owner, Nike, Inc. ("Nike"); and counsel for Petitioner, adidas AG ("adidas"). Counsel for Nike requested the call to confer with the Board regarding a proposed motion to amend claims. *See* 37 C.F.R. § 42.121(a). The Board had instituted this review on all of the challenged claims of Patent No. US 7,347,011 B2 (the "'011 Patent"). Five of those challenged claims are independent claims.

During the call, counsel for Nike explained that the proposed motion would:

(1) cancel all of the challenged claims (*i.e.*, claims 1-46);

(2) propose one, substitute, independent claim for one of the cancelled independent claims; and

(3) propose "about" four to five, substitute, dependent claims for one of the cancelled dependent claims.

During the call, counsel for adidas did not object to the reduction in the number of claims resulting from Nike's proposed motion to amend.

Pursuant to 35 U.S.C. § 316(d), a motion to amend may propose a reasonable number of substitute claims for each challenged claim. "The presumption is that only one substitute claim would be needed to replace each challenged claim[.]" 37 C.F.R. § 42.121(a)(3). Thus, typically, a challenged claim may be replaced by only one substitute claim. *See* Case IPR2012-00027, Paper 26, dated June 11, 2013 (expanded panel)("*Idle Free*") at 5.

Counsel for Nike inquired whether proposing about four to five, substitute, dependent claims for one cancelled dependent claim is reasonable.

DISCUSSION

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In *Idle Free* (*id.* at 6), the Board noted that, if more than one substitute claim is proposed for a challenged claim; for each proposed substitute claim, the patent owner is expected to make a showing of patentable distinction over all other proposed substitute claims for the same challenged claim. The Board further explained in *Idle Free* (*id.* at 8-9) that:

> In the event a patent owner proposes more than one substitute claim for any one challenged claim, the patent owner may additionally label each one after the first as a proposed new claim, to signal its special status, but also identify the challenged claim which it is intended to replace. As explained above, *a patent owner has to show a special need to justify more than one substitute claim for each challenged claim*. In such situations, the patent owner needs to show patentable distinction of the additional substitute claim over all other substitute claims for the same challenged claim. If the patent owner shows no such patentable distinction or any other special circumstance, then at the Board's discretion, the proposed additional claim may be denied entry, or it may be grouped with, or deemed as standing and falling with, another substitute claim for the same challenged claim, *e.g.*, the first substitute claim, for purposes of considering patentability over prior art. *Each substitute claim for the same challenged claim should be proposed for a meaningful reason. Submission of multiple patentably non-distinct substitute claims is redundant and not meaningful in the context of an inter partes review.* (Emphasis added.)

Under the guidance provided in *Idle Free*, if the about four or five substitute claims proposed for the same challenged claim are shown in the motion to be patentably distinct from each other, then they are likely not unreasonable in number. If, however, no such patentable distinction is shown in the motion, then as is noted in *Idle Free* (*id.* at 8), the Board in its discretion may deny entry of the excess claims or group the multiple substitute claims together for common treatment over the prior art.

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Additional guidance is provided in the *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48756, 48765-66 (Aug. 14, 2012) and Case IPR2012-00005, Paper 27, dated June 3, 2013.

CONCLUSION

The submission of about four or five, substitute, dependent claims to replace one cancelled dependent claim under the proposed circumstances appears reasonable, so long as the claims are patentably distinct from each other.

It is:

ORDERED that Nike has complied with the requirement of 37 C.F.R. § 42.121(a) to confer with the Board prior to filing a motion to amend.

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Skechers EX1013-p. 7166
Skechers v Nike

Trials@uspto.gov
571-272-7822

Paper 30
Date: August 12, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG
Petitioner

v.

NIKE, Inc.
Patent Owner

Case IPR2013-00067
Patent 7,347,011 B2

Before JOSIAH C. COCKS, *Administrative Patent Judge.*

ORDER

Management of this proceeding has been transferred from Administrative Patent Judge Michael P. Tierney to Administrative Patent Judge Josiah C. Cocks. All orders and time for taking action remain in effect unless changed by Judge Cocks. All communications with the Board should be adapted as necessary to reflect this change.

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Skechers EX1013-p. 7168
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011

Inter Partes Review No. 2013-00067

NIKE, INC.'S MOTION TO AMEND
U.S. PATENT 7,347,011

I. PRECISE RELIEF REQUESTED

Patent Owner (NIKE) moves, pursuant to 37 C.F.R 42.121, to amend U.S. Patent 7,347,011 ("the '011 patent") by cancelling issued claims 1 through 46, substituting claim 47 for issued claim 16, substituting claims 48 and 49 for issued claim 19 and substituting claim 50 for issued claim 20. Appendix 1 lists exhibits cited in this motion.

II. CLAIM LISTING

Issued claims 1-46 are cancelled. Substitute claims 47–50 are shown in marked-up form relative to the issued claims for which they are substituted.

Claim 47. (Substitute for independent claim 16) An article of footwear comprising an upper incorporating a [weft-knitted] flat knit textile element, the flat knit textile element (1) having 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, some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot, the ankle opening having an edge comprised of one of the flat knit edges; and (2) having a first area and a second area with a unitary construction, the first area being formed of a first stitch configuration, and the second area being formed of a second stitch configuration that is different from the first stitch configuration to impart varying properties to the textile element; and

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a sole structure secured to the upper.

Claim 48. (Substitute for dependent claim 19) The article of footwear recited in claim [16] 47, wherein at least one of the first stitch configuration and the second stitch configuration forms an aperture in the [weft-knitted] flat knit textile element and the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper.

Claim 49. (Second substitute for dependent claim 19) The article of footwear recited in claim [16] 47, wherein at least one of the first stitch configuration and the second stitch configuration forms [an aperture] a plurality of apertures in the [weft-knitted] flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces.

Claim 50. (Substitute for dependent claim 20) The article of footwear recited in claim [16] 47, wherein the [weft-knitted] flat knit textile element is one of an exterior layer, an intermediate layer, and an interior layer of the upper, and the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper.

III. DISCUSSION OF SUBSTITUTE CLAIMS

As explained below and in the accompanying testimony of Ray Tonkel, Exhibit 2010, this amendment and the substitute claims comply with 35 U.S.C. §

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316(d)(3), 37 CFR § 42.121, the Board's August 2, 2013 Order (Paper 29) and the Board's August 16, 103 Email. The amendment proposes a reasonable number of substitute claims, does not enlarge the scope of the claims and does not introduce new matter. The proposed claims are patentable over the prior art, including prior art identified by the Board in its Decision on whether to institute a trial and other prior art known to NIKE. Dependent claims 48 and 49 are also patentably distinct from each other. The proposed substitute claim language uses commonly understood terms that should be given their ordinary and customary meaning. (Tonkel Dec. (Ex. 2010), ¶¶ 60, 68, 71, 74, 78, 83, 87).

a. **Compliance with 35 U.S.C. § 316(d)(3) and 37 C.F.R. §§ 42.121(a)(2)(ii) and (b)(1)**

Substitute claims 47 - 50 do not enlarge the scope of issued claims 16, 19 or 20, do not introduce new matter and are supported by the original application that issued as the '011 patent ("'011 application").

Substitute claim 47 narrows the scope of issued claim 16 by changing "weft-knitted textile element" to "flat knit textile element." (*See* '011 application, Ex 1003, p. 168, ¶[42] ("weft knitting… include[s] circular knitting and flat knitting")). The '011 application supports this "flat knit" textile element limitation. Originally-filed claim 65 recites "an upper incorporating a textile element formed through a flat knitting process." (Ex. 1003 at 184; s*ee also* Ex. 1003 at pp. 179, 181 (originally-filed claims 19 and 38 reciting "flat knitting."); pp.

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168-69, ¶¶ [42] - [43] (describing element 40 as being a flat knit element), p. 173, ¶[54]; pp. 175-76,¶[59]; Tonkel Dec. (Ex. 2010), ¶¶ 38-39, 58-59).

Claim 47 further narrows the scope of claim 16 by requiring that the textile element have "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." Support for this limitation is provided by the support cited in the previous paragraph for "flat knit" textile element, by Figures 8, 10 and 11 and by the portions of the specification associated with those figures. (E.g., Ex 1003, pp. 192-95, p. 166, ¶[35], pp. 179-84 (originally filed claims 19, 38 and 65); s*ee also* Tonkel Dec. (Ex 2010), ¶¶40, 62-67). Figures 8, 10 and 11 illustrate configurations for the claimed textile element that, in contrast to the illustration in Figure 9 (Ex 1003, p. 193) and the accompanying description noted above, have flat knit edges without any surrounding textile structure. Contrary to the embodiment shown in Figure 9 and claimed in issued independent claim 36, a textile element flat knit to a configuration like that shown in the examples of Figs. 8, 10 and 11 need not be removed from a larger textile structure and already has a knit structure in a desired configuration. (Tonkel Dec. (Ex. 2010), ¶¶36-37, 40-41, 62-67).

The scope of issued claim 16 is further reduced by the added claim 47 limitation that recites "some of the flat knit edges joined together to form an ankle

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opening in the upper for receiving a foot." The '011 application supports this limitation. For example, when edges 42a and 42b in Figure 8 (Ex. 1003, p. 192) are joined to form heal seam 52, one of the other edges 45 of the textile element, constituting a u-shaped area of the textile element, becomes an opening in the upper forming ankle opening 36 shown in Figures 1-4 and 6. (*See* Tonkel Dec. (Ex. 2010), ¶¶ 69-70; Ex 1003, pp. 187-191 and p.167, ¶[38])). The scope of issued claim 16 is further narrowed by the claim 47 limitation "the ankle opening having an edge comprised of one of the flat knit edges," which limitation is also disclosed by the '011 application. (Tonkel Dec. (Ex. 2010), ¶¶72-73). As just described, the edge 45 shown in Figure 8, which can be flat knit as discussed above, forms part of the ankle opening 36 shown in Figures 1-4 and 6. The remaining limitations of claim 47, regarding unitary construction, stitch configuration and sole structure, are part of originally-filed claim 20 and additional support may be found, for example, at Ex 1003 at p. 162, ¶[11]; and at p. 168, ¶[40]. (*See* Tonkel Dec. (Ex. 2010), ¶¶ 33, 35, 58). As is evident from Figures 1-8 and other portions discussed above, the '011 application discloses all the features of claim 47 in combination. (*Id.* at ¶75).

Substitute dependent claims 48-50 change "weft knitted textile element" of issued dependent claim 19 to "flat knit textile element" for consistency with claim 47. Claims 48 and 50 further narrow the scope of claims 19 and 20, respectively, by requiring that "the joined edges shape the flat knit textile element to form a

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lateral region, a medial region, an instep region and a heel region of the upper." This limitation and its combination with other features of claim 48 and of claim 50 are supported in the '011 application, such as in originally-filed claim 1 (Ex 1003, p. 177), and in Figures 1-8 and the accompanying description. (Ex 1003, p. 165 ¶[31]; p. 166, ¶[35]; p. 167, ¶[37]; Tonkel Dec. (Ex. 2010), ¶¶77- 79, 86- 88). The '011 application discloses that following the joining of edges, the textile element exhibits the shape of upper 30 depicted in Figures 2-7 (Ex 1003, p. 167, ¶[36]), which has a lateral region, a medial region, an instep region and a heel region. (Ex1003, p. 166, ¶[34]; Tonkel Dec. (Ex. 2010), ¶77).

Claim 49 further narrows claim 19 to require that there are "a plurality of apertures in the flat knit textile element . . . formed by omitting stitches in the flat knit textile element and that are positioned in the upper for receiving laces." This limitation and its combination with other features of claim 49 are also described in the '011 application. (Ex 1003 at p. 174, continuation of ¶[54]; Tonkel Dec. (Ex. 2010), ¶¶ 81-84).

b. **Compliance with 37 C.F.R. 42.121(a)(2)(i)**

Substitute claim 47 patentably distinguishes over Nishida, Ex.1005. (*See* Tonkel Dec. (Ex. 2010), ¶¶93-106, 108-112, 114-124). Nishida only refers to knitting in a general and nonspecific way. Nishida does not specify either warp knitting or weft knitting and does not refer to flat knitting. (Tonkel Dec. (Ex.

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2010), ¶101). Nishida's "layout" is surrounded by a textile structure from which it must be removed. Even if that layout is assumed to be knit, textile yarns forming the edges of the layout must be individually broken as the layout is cut out of the web that completely surrounds the layout. (*Id.*)

Nishida does not explain how the cut edges of the layout are processed prior to shaping the as-cut layout into the form of a shoe upper by connecting certain edges to form seams. However, in the absence of any processing, the prior art, such as Glidden (Ex. 1007) and Whiting (Ex. 1009), recognizes that such edges would be prone to fraying and, in a weft knit structure, would even be susceptible to unraveling. (Ex. 1007, p. 2, ll. 43-63; Ex. 1009 at 3:68-4:16; Tonkel Dec. (Ex. 2010), ¶¶102-104).

As the Board decision acknowledges, "Nishida is directed to the production of a shoe upper by (1) cutting out a layout in the form of the shoe upper from a web of material. . . ." (Paper 18 at pp. 17-18). As a result, and regardless of how Nishida's overall web and associated layouts are constructed, edges of a layout that are cut, as required by Nishida, have a structure substantially different from that of a flat knit edge such as is claimed in substitute claim 47. (Tonkel Dec. (Ex. 2010), ¶¶104, 105). Removal of Nishida's layout from a larger web of material requires that stitches at the layout edges be broken (such as by a knife, die cutter, or other cutting technique such as a laser) in order to separate the layout from a surrounding

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textile structure. (Tonkel Dec. (Ex. 2010), ¶101). As discussed above, if untreated, the so-cut edges are subject to raveling and fraying. (*Id.* at ¶¶102-104). Conversely, the claimed "flat knit" edges in claim 47 inherently have a stable configuration where the yarn of stitches at the edges of the textile element are unbroken and joined from one row to the next row. (*Id.* at ¶105). Examples of this structure are shown in the Spencer textbooks relied on by the Petitioner as Exhibit 1012. (*Id.*) Yarn and fibers forming edges of the claimed textile element retain their integrity. (*Id.*) As a result, the footwear article defined by claim 47 is novel over Nishida. (*Id.* at ¶106).

Nishida also does not disclose the limitation of claim 49 regarding apertures. While figure 3 of Nishida indicates the upper includes openings for laces, Nishida contains no description or suggestion of forming such openings by omitting stitches in the layout. Thus, it appears such openings were created by an additional manufacturing step, e.g., punching out the openings. (*Id.* at ¶107).

Nor would Nishida have rendered obvious the article of claims 47-50. (*Id.* at ¶¶108-113). Nishida touted his approach to making an upper as an improvement over German Patent No. 627,878, which Nishida explained resulted in waste of textile material between patterns cut from a web. (Ex 1005 at 1:19-47). Nishida attempts to avoid this waste by using "simple, lightweight and inexpensive material" to form those portions of the web not constituting the layouts for the

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uppers. (*Id.* at 2:20-22). However, Nishida does nothing to eliminate the added processing also required by the German patent that results from cutting the layout from a web of material. (Tonkel Dec. (Ex. 2010), ¶¶110-111). Also, just as the German patent, Nishida's article is made by a subtractive process and the portion of the textile web not constituting a layout is wasted. (*Id.* at ¶111).

In contrast, the claimed flat knit upper is made by an additive process that avoids the added processing associated with cutting and finishing the cut edges and reduces the wasting of textile material. (*Id.* at ¶112). The claimed article accomplishes these improvements by virtue of its textile element having flat knit edges – an entirely different structure than the cut edges produced by Nishida that must be finished and that result in wasted material. (*Id.*) In sum, there is no teaching, suggestion, motivation or other reason in Nishida, or in the knowledge generally available to one of ordinary skill in the art, establishing that it would have been obvious to modify Nishida to achieve any of the inventions described in the substitute claims.

In addition, Nishida fails to render obvious a structure where omitted stitches are used to form apertures, as recited in claim 49, that are positioned in the upper for receiving laces. Nishida contains no description of forming such openings by omitting stitches, and there was no motivation or reason that would have prompted a person of ordinary skill in the art ("POSITA") to modify Nishida.

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(*Id.* at ¶113).

Claim 47 is also patentable over Glidden, Ex. 1007. (*See* Tonkel Dec. (Ex. 2010), ¶¶125-131). Glidden discloses knitting a "sock-like" tubular structure using circular knitting. (Ex. 1007 at p. 3, 2:45-47; Tonkel Dec. (Ex. 2010), ¶125). Glidden does not describe a "flat knit" textile element having "flat knit edges" or a textile element in which flat knit edges are joined to form an ankle opening. The claimed element is flat knitted as a generally planar element that does not have an ankle opening. The element has flat knit edges that are joined together to form an ankle opening for receiving a foot, as described in the substitute claims. In contrast, the ankle opening in Glidden is knitted directly as Glidden's sock is circular knitted. Knit edges are not joined to define an ankle opening for receiving a foot. (Tonkel Dec. (Ex. 2010), ¶¶125-131).

Glidden also does not anticipate the claimed structure where flat knit edges are joined to shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper as in claims 48 and 50 (*id.* at ¶132), or a structure where omitted stitches are used to form apertures, as in claim 49. (*Id.* at ¶133).

Furthermore, none of the substitute claims would have been obvious in view of Glidden because there was no motivation or other reason that would have prompted a POSITA to modify Glidden to arrive at the claimed inventions. Such

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modification would require a substantial reconstruction of the elements shown in Glidden and would change the basic principle under which Glidden was designed to operate. (*Id.* at ¶¶135-39). Glidden teaches using a circular knitting machine that knits an opening at the top of a sock-like tubular structure that serves as an opening for receiving a foot. No edges of the tubular structure are joined, either during or after the knitting process, to form an ankle opening for receiving a foot. In contrast, the substitute claims are directed to a flat knit textile element that is initially not shaped as an upper and thus does not have an ankle opening for receiving a foot. The claimed flat knit edges of the textile element must be joined together to form the upper and an ankle opening for receiving a foot. Hindsight modification of Glidden to arrive at the invention of the substitute claims would seem to have required circular knitting a tube structure, making a lengthwise incision in that tubular structure to obtain a flat structure, then rejoining edges of that incision to return the flat structure to a tubular form. A POSITA would have had no reason to have carried out such a procedure. (*Id.* at ¶¶137-138).

Dependent substitute claims 48-50 include additional limitations that further distinguish over Glidden alone, as discussed above. There was no reason or motivation that would have prompted one of ordinary skill in the art at the time of the invention to modify Glidden to include any of the additional features that have been added to substitute dependent claims 48-50. (*Id.* at ¶139).

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Nor do any of the remaining combinations with secondary references originally cited by adidas in its Petition, *i.e.*, McDonald (Ex. 1008), Whiting (Ex. 1009), Curley (Ex. 1010), Shiomura (Ex. 1011) or Osamu (Ex. 1006), remedy any of the deficiencies of either Nishida or Glidden with respect to claims 47-50. (*See* Tonkel Dec. (Ex. 2010), ¶¶114-124, 140-168, 180-182). Even if the references were combined, the result would not include all of the elements in claims 47-50. Moreover, there would have been no reason to make the combinations. *See Heart Failure Technologies, LLC v. Cardiokinetix,* PTAB Case IPR2013-00183, Paper 12 (July 31, 2013) (there must be "some *reason* why a person of ordinary skill in the art would have thought to combine *particular* available elements of knowledge, as evidenced by the prior art, to reach the claimed invention") (emphasis in original) (citing *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 418 (2007)).

Like Glidden, McDonald and Whiting form a circular knit sock-like structure. (Ex. 1008 at p. 1, ll. 1-6; Ex. 1009 at 2:39-42; Tonkel Dec. (Ex. 2010), ¶¶116-119, 142, 143). Even if McDonald or Whiting was combined with Nishida or Glidden, the combination would not result in the claimed invention. Neither McDonald nor Whiting suggests a structure of a flat knit textile element having flat knit edges free of surrounding textile structure from which the textile element should be removed, nor does either suggest flat knit edges joined to form an ankle opening in an upper for receiving a foot, the ankle opening having an edge

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comprised of one of the flat knit edges. (Tonkel Dec. (Ex. 2010), ¶¶114-119, 121, 122, 141-145).

Additionally, a POSITA would not combine Nishida with the circular knit sock structures of McDonald or Whiting because that would require a substantial reconstruction of Nishida and would change the basic principle under which Nishida was designed to operate. (Tonkel Dec. (Ex. 2010), ¶¶123-124). Nishida's layout is cut from a web. To shape it into an upper with an opening for receiving a foot, the edges of the textile element must be finished and then joined together. McDonald and the circular knit embodiment in Whiting teach the direct formation of sock-like uppers using a circular knitting machine. The structures are not flat and instead are formed as tubular structures on the circular knitting machine. The circular knitting process results in an opening at one end of the tubular structure that serves as an opening for receiving a foot. No edges of the tubular structure are joined to form the opening that receives the foot. In light of these substantial differences, there was no motivation or other reason that would have prompted one of skill in the art at the time of the invention to combine these references to achieve the inventions claimed in the substitute claims. (*Id.*)

Curley describes a one piece shoe upper made of resilient foam material sandwiched between inner and outer layers and embossed on the upper layer to melt and depress regions of the foam. (*Id.* at ¶120). Accordingly, Curley fails to

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teach or suggest a "flat knit" textile element or such an element having flat knit edges that are joined together to form an ankle opening in an upper, or edges free of surrounding textile structure such that the flat knit edges are not surrounded by a textile structure from which the textile element must be removed. Rather, Curley relies on the embossing procedure to seal the three-layered structure at its edges. Curley also does not describe a knit fabric having a plurality of knit constructions, or as having a first and a second area having different properties to impart varying characteristics to the knit material. (*Id.* at ¶¶120-122).

Osamu, like Nishida, discloses cutting textile elements from a surrounding textile structure. Osamu teaches a woven textile, not a knitted textile. For at least the same reasons that Nishida does not anticipate or render obvious, either alone or in combination with other references, neither does Osamu. (*Id.* at ¶¶146-167).

Shiomura, a seventh reference asserted in the Petition, was not applied to issued claims 16, 19 or 20. NIKE agrees that Shiomura is not relevant to those claims or to any of substitute claims 47-50. (*See id.* at ¶168).

Moreover, solving a long-felt need is an indicia of non-obviousness. *Transocean Offshore Deepwater Drilling v. Maersk Drilling USA*, 699 F.3d 1340, 1353-54 (Fed. Cir. 2012). As discussed, Nishida shows that reducing material waste during manufacture of textile footwear elements was a long-felt need. Nishida asserted that the prior art resulted in waste, but Nishida's only response to

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this problem was to make the "cutting waste" a simpler, lighter or cheaper material. (Ex 1005, 2:15-18). Even assuming Nishida teaches flat knitting a "web" with multiple "layouts," the underlying problem – wasted materials – remained. Unlike Nishida, which tried to make "cutting waste" less expensive, the invention of substitute claim 47 solves the long-felt need to reduce textile footwear upper manufacturing waste by eliminating the need to cut a flat-knit upper from a web, thereby eliminating "cutting waste." (Tonkel Dec. (Ex. 2010), ¶¶177-179).

Finally, dependent claims 48 and 49 are patentably distinct from each other. (*Id.* at ¶¶169-176). Claim 49 does not teach or suggest "joined edges [that] shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper." (*Id.* at ¶174). Claim 48 does not teach or suggest "apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces." (*Id.* at ¶176).

IV. CONCLUSION

NIKE respectfully requests that the Board grant this Motion to Amend and substitute claim 47 for issued claim 16, substitute claims 48 and 49 for issued claim 19 and substitute claim 50 for issued claim 20.

Respectfully submitted,

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Appendix 1

Exhibit 1003	File History of U.S. Patent 7,347,011
Exhibit 1005	U.S. Patent No. 5,345,638 to Nishida
Exhibit 1006	JP Pub. No. H6-113905 to Osamu, including a certified English translation thereof
Exhibit 1007	U.S. Patent No. 2,147,197 to Glidden
Exhibit 1008	U.S. Patent No. 2,314,098 to McDonald
Exhibit 1009	U.S. Patent No. 2,641,004 to Whiting et al.
Exhibit 1010	International App. Pub. No. WO 90/03744 to Gurley
Exhibit 1011	U.S. Patent No. 4,785,558 to Shiomura
Exhibit 1012	David J. Spencer, Knitting Technology: A Comprehensive Handbook and Practical Guide (Third ed., Woodhead Publishing Ltd. 2001)
Exhibit 2010	Declaration of Raymond F. Tonkel

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 17, 2013, a copy of the **NIKE, INC.'S MOTION TO AMEND U.S. PATENT 7,347,011** was served on the Petitioner by emailing a copy to mstockwell@kilpatricktownsend.com and wkadaba@kilpatricktownsend.com.

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Skechers EX1013-p. 7187
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011

Inter Partes Review No. 2013-00067

NIKE, INC.'S EXHIBIT LIST
(AS OF AUGUST 19, 2013)

Pursuant to 37 CFR §42.63(e), Patent Owner NIKE, Inc. submits the following current exhibit list identifying the exhibit number and providing a brief description for exhibits filed by NIKE in IPR2013-00067.

Exhibit 2001 Patent Owner Nike, Inc.'s Notice of Cross-Examination of Edward C. Frederick

NOTE: This exhibit is identical to paper 28 filed on July 17, 2013. Because this document was marked as an exhibit to the July 23, 2013, cross-examination deposition of Mr. Frederick (which transcript is identified below as exhibit 2009), it is identified here as exhibit no. 2001. Pursuant to 37 CFR §42.6(d), however, another copy is not being filed. A copy of exhibit 2001, as marked during the Frederick deposition, is being served on Petitioner with this exhibit list.

Exhibit 2002 Declaration of Dr. Edward C. Frederick from reexamination no. 95/001,320

Exhibit 2003 U.S. Patent 4,354,318 (Frederick et al.)

Exhibit 2004 Chapter 16 from book titled "Textiles in Sport"

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Exhibit 2005 May 17, 2013, Decision (Institution of Inter Partes Review 37 CFR §42.108) in IPR2013-00067

NOTE: This exhibit is identical to paper 18 filed on May 17, 2013. Because this document was marked as an exhibit to the July 23, 2013, cross-examination deposition of Mr. Frederick (which transcript is identified below as exhibit 2009), it is identified here as exhibit no. 2005. Pursuant to 37 CFR §42.6(d), however, another copy is not being filed. A copy of exhibit 2005, as marked during the Frederick deposition, is being served on Petitioner with this exhibit list.

Exhibit 2006 U.S. Patent 2,147,197 (Glidden), with markings made during July 23, 2013, cross-examination deposition

Exhibit 2007 U.S. Patent 7,347,011 (Dua et al.), with markings made during July 23, 2013, cross-examination deposition

Exhibit 2008 December 28, 2012, Decision on Appeal in reexamination no. 95/001,320

Exhibit 2009 Copy of transcript of July 23, 2013, cross-examination

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deposition of Edward C. Frederick

NOTE: NIKE is still awaiting a copy of the deponent signature page. Upon receipt of that signature page NIKE will file same as a separate exhibit.

Exhibit 2010 Declaration of Raymond F. Tonkel

Exhibit 2011 Excerpts from "Man-Made Fiber and Textile Dictionary" (4th Ed. 1985)

Exhibit 2012 Excerpt from Random House Webster's Unabridged Dictionary (2nd Ed. 2001)

Respectfully submitted,

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Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on August 19, 2013, a copy of the **NIKE, INC.'S EXHIBIT LIST (AS OF AUGUST 19, 2013)** was served, with copies of the listed exhibits, on the Petitioner by emailing same to the following email addresses:

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Skechers EX1013-p. 7193
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011

Inter Partes Review No. 2013-00067

CORRECTED CERTIFICATE OF SERVICE

The Certificate of Service attached to Patent Owner NIKE, Inc.'s Motion to Amend U.S. Patent 7,347,011 (paper 31) contains a typographic error and indicates that a copy of the Motion was served on Petitioner's counsel on "July 17, 2013." The undersigned confirms that a copy of the Motion was served on August 19, 2013, by emailing same to mstockwell@kilpatricktownsend.com and to wkadaba@kilpatricktownsend.com.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 19, 2013, a copy of this **CORRECTED CERTIFICATE OF SERVICE** was served on the Petitioner by emailing same to the following email addresses:

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Skechers EX1013-p. 7196
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011

Inter Partes Review No. 2013-00067

NIKE, INC.'S EXHIBIT LIST
(AS OF AUGUST 29, 2013)

Pursuant to 37 CFR §42.63(e), Patent Owner NIKE, Inc. submits the following current exhibit list identifying the exhibit number and providing a brief description for exhibits filed by NIKE in IPR2013-00067. This exhibit list updates the exhibit list filed August 19, 2013 to add Exhibit 2013.

Exhibit 2001 Patent Owner Nike, Inc.'s Notice of Cross-Examination of Edward C. Frederick

NOTE: This exhibit is identical to paper 28 filed on July 17, 2013. Because this document was marked as an exhibit to the July 23, 2013, cross-examination deposition of Mr. Frederick (which transcript is identified below as exhibit 2009), it is identified here as exhibit no. 2001. Pursuant to 37 CFR §42.6(d), however, another copy is not being filed. A copy of exhibit 2001, as marked during the Frederick deposition, was served on Petitioner with NIKE's August 19, 2013, exhibit list.

Exhibit 2002 Declaration of Dr. Edward C. Frederick from reexamination no. 95/001,320

Exhibit 2003 U.S. Patent 4,354,318 (Frederick et al.)

Skechers EX1013-p. 7198
Skechers v Nike

Exhibit 2004 Chapter 16 from book titled "Textiles in Sport"

Exhibit 2005 May 17, 2013, Decision (Institution of Inter Partes Review 37 CFR §42.108) in IPR2013-00067

NOTE: This exhibit is identical to paper 18 filed on May 17, 2013. Because this document was marked as an exhibit to the July 23, 2013, cross-examination deposition of Mr. Frederick (which transcript is identified below as exhibit 2009), it is identified here as exhibit no. 2005. Pursuant to 37 CFR §42.6(d), however, another copy is not being filed. A copy of exhibit 2005, as marked during the Frederick deposition, was served on Petitioner with NIKE's August 19, 2013, exhibit list.

Exhibit 2006 U.S. Patent 2,147,197 (Glidden), with markings made during July 23, 2013, cross-examination deposition

Exhibit 2007 U.S. Patent 7,347,011 (Dua et al.), with markings made during July 23, 2013, cross-examination deposition

Exhibit 2008 December 28, 2012, Decision on Appeal in reexamination no. 95/001,320

Skechers EX1013-p. 7199
Skechers v Nike

Exhibit 2009 Copy of transcript of July 23, 2013, cross-examination deposition of Edward C. Frederick

NOTE: Copy of signed errata sheet filed separately as exhibit 2013.

Exhibit 2010 Declaration of Raymond F. Tonkel

Exhibit 2011 Excerpts from "Man-Made Fiber and Textile Dictionary" (4th Ed. 1985)

Exhibit 2012 Excerpt from Random House Webster's Unabridged Dictionary (2nd Ed. 2001)

Exhibit 2013 Copy of Signed Errata Sheet for Transcript of July 23, 2013, Frederick Deposition (Ex. 2009)

NOTE: The signed errata sheet was not available as of August 19, 2013, the date on which NIKE filed exhibit 2009.

Skechers EX1013-p. 7200
Skechers v Nike

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Skechers EX1013-p. 7201
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on August 29, 2013, a copy of **NIKE, INC.'S EXHIBIT LIST (AS OF AUGUST 29, 2013)** was served, with a copy of Exhibit 2013, on the Petitioner by emailing same to the following email addresses:

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Skechers EX1013-p. 7202
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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adidas AG
Petitioner

v.
Nike, Inc.
Patent Owner

Case IPR2013-00067
Patent No. 7,347,011

PETITIONER ADIDAS AG's AMENDED NOTICE OF CROSS EXAMINATION OF RAYMOND F. TONKEL

Pursuant to 37 C.F.R. 42.53, Petitioner adidas AG ("adidas") hereby provides notice that, as previously agreed by the parties, it will cross-examine Raymond F. Tonkel on November 5, 2013. The cross-examination will begin at 8:30 a.m. or at a time mutually agreed by the parties and will be held at the office of Banner & Witcoff, 10 South Wacker Drive, Suite 3000, Chicago, Illinois, 60606. The cross-examination will take place before a Notary Public or other official authorized by law to administer oaths, to be arranged by counsel for adidas. The cross-examination will be recorded by using, audio, video and/or stenographic means.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served on Patent Owner Nike, Inc. by emailing a copy to counsel at the email addresses listed below:

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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adidas AG
Petitioner

v.

Nike, Inc.
Patent Owner

Patent No. 7,347,011
Filing Date: March 3, 2004
Issue Date: March 25, 2008
Title: ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER

Inter Partes Review No. 2013-00067

PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO AMEND

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I. The Proposed Substitute Claims Improperly Enlarge the Scope of the Original Claims.

Nike's proposed amendments include the substitution of the term "flat knit textile element" in claim 47 in place of "weft-knitted textile element" in original claim 16, and Nike asserts that the use of "flat knit" is a narrowing amendment because the specification describes flat knitting as a sub-type of weft knitting. (Paper 31, pp. 3-4; Ex. 2010, ¶¶ 38-39, 58-59.) However, Nike fails to provide a specific claim construction for this term.

Petitioner submits, for the purposes of the IPR only, that the claim terms are presumed to take on their broadest reasonable interpretation in view of the specification of the '011 patent.[1] While the specification describes flat-knitting as a sub-type of weft knitting, the specification does not define "flat knit," "flat knit textile," or "flat knitting," or otherwise state that flat knitting is *exclusively* a sub-type of weft knitting. (Ex. 1015, pp. 34-36.) Indeed, a person of ordinary skill in the art ("POSITA") at the time of the priority date of the '011 patent would understand that, under the broadest reasonable interpretation, a flat knit textile element refers to a knitted textile that is knit in flat form, which necessarily covers other

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[1] Other forums, such as U.S. district courts, required different standards of proof and claim interpretation that are not applied by the PTO for *inter partes* review. Accordingly, any interpretation or construction of the challenged claims in this IPR, either implicitly or explicitly, is not binding on Petitioner in any future litigation related to the '011 patent. *See In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989).

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types of knitted textiles, in addition to *weft knitted textiles*, that are knit in flat form. (Ex. 1016, ¶¶ 36-37.) The Board has yet to provide a construction of "flat knitting," and the Board's construction of "weft knitting" and "warp knitting" does not indicate that "flat knit" is exclusively a sub-type of "weft knitting." As such, a broadest reasonable interpretation of "flat knit" encompasses "a knitted textile that is knit in flat form," which is entirely consistent with Nike's own statement that "[t]he proposed substitute claim language uses commonly understood terms that should be given their ordinary and customary meaning." (Paper 31, p. 3; Ex. 2010, ¶¶ 60, 68, 71, 74, 78, 83, 87; Ex. 1016, ¶¶ 36-37.)

Because claim 47, if allowed, would cover other types of knitted textiles, in addition to *weft knitted textiles*, that are knit in flat form under the broadest reasonable interpretation of "flat knit textile element," claim 47 would cover an article of footwear that is not covered by claim 16. Therefore, Nike's substitute claim 47 improperly enlarges the scope of the original claim. *See* 37 C.F.R. § 42.221(a)(2)(ii); 35 U.S.C. § 132(a); *Quantum Corp. v. Rodime, PLC*, 65 F.3d 1577, 1580 (Fed. Cir. 1995) (amended or new claim is enlarged if it includes any subject matter that would not have infringed original patent; claim is broader than original claims if it is broader in *any* respect, even if narrower in other respects). The Board recently provided the following guidance:

> Specifically, with regard to 37 C.F.R. § 42.121(a)(2)(i), a proposed substitute claim is not responsive to an alleged ground of unpatentability of a challenged claim if it does not either include or narrow each feature of the challenged claim being replaced. A patent owner may not seek to broaden a challenged

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> claim in any respect, in the name of responding to an alleged ground of unpatentability. A proper substitute claim under 37 C.F.R. § 42.121(a)(2)(i) must only narrow the scope of the challenged claim it replaces. Similarly, under 37 C.F.R. § 42.121(a)(2)(ii), a substitute claim may not enlarge the scope of the challenged claim it replaces by eliminating any feature.

Idle Free Systems, Inc. v. Bergstrom, Inc., Case IPR2012-00027, at 5 (P.T.A.B. June 11, 2013). Because the proposed substitute claims 47-50 impermissibly broaden the scope of the original claims, and Nike has not addressed the construction of the new, proposed claims to argue otherwise, the Board should reject the substituted claims.

II. The Proposed Substitute Claims Introduce New Matter.

Nike's proposed substitute claim 47 recites that the textile element has "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." (Paper 31, p. 1.) Nike's argument to show that this limitation is sufficiently described in the '011 patent hinges on a single phrase that the textile element 40 "may be formed as a part of a larger textile element," from which Nike argues must necessarily mean that the textile element 40 may also not be formed as part of a larger textile structure. (Paper 31, p. 4; Ex. 2010, ¶ 63.)

In support of this proposed claim term, Nike assembles (1) a few original claims in the application that do not positively recite removing a flat knitted textile element from a larger textile structure, (2) Figures 8, 10, and 11 showing the textile element 40, 40', 40" in a final form, and (3) a statement that flat knitting generally could be used to form the textile

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element in an attempt to show that the "inventors thus contemplated such footwear as part of their invention." (Paper 31, p. 4; Ex. 2010, ¶¶ 62-67.)

For a proposed claim to have sufficient written description support, the disclosure must reasonably convey to skilled artisans that an applicant possessed the claimed invention as of the filing date. *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc). "Negative claim limitations are adequately supported when the specification describes a *reason* to exclude the relevant limitation." *Santarus, Inc. v. Par Pharm., Inc.*, 694 F.3d 1344, 1351 (Fed. Cir. 2012) (emphasis added). However, "*the mere absence of a positive recitation* in the original disclosure is not [a] basis to exclude the limitation." *Ex parte Lazaridis*, No. 2010-005137, at 5 (P.T.A.B. Mar. 1, 2013) (emphasis added); *see also Ex parte Miyashita*, No. 2010-010626, at 6 (P.T.A.B. Apr. 2, 2013) (holding that a specification that neither explicitly describes the negative limitation of excluding a feature, nor indicates possession of the feature by describing any advantage of excluding the feature or any disadvantage of including the feature lacks sufficient written description).

First, Nike's reliance on the as-filed claims 19, 38, and 65 in the original '011 application is misplaced because the mere absence of a positive recitation that the textile element is removed from a larger textile structure is not adequate to conclude that the specification teaches that this feature should be excluded. (Ex. 2010, ¶ 65.)

Second, the '011 patent explains that each of Figures 8, 10, and 11 represents a "*general shape*" of textile element 40, 40', 40" following its formation with "a wide-tube

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circular knitting machine" or "other types of knitting machines" as part of a larger textile structure 60, as shown in Figure 9. (Ex. 1002, 5:58-60, 6:66-8:14, 9:7-14, 9:35-48, 11:19-41 (emphasis added).) During his deposition, Nike's expert, Mr. Tonkel, admitted that the textile element 40 shown in Figures 8, 10, and 11 could just as easily represent a textile element 40 formed by the process taught in Figure 9. (Ex. 1015, p. 90.)

The '011 patent fails to describe any *disadvantages* associated with removing the textile element from the larger textile structure, nor any *advantages* of not having to do so. The only reference to the '011 specification (other than Figures 8, 10, and 11) that Mr. Tonkel provided in support of the proposed claim element describes the advantage of using a single textile element, rather than numerous joined elements, to form an article of footwear. (Ex. 1015, pp. 91-92; Ex. 1002, 11:12-18.)

Third, the mere fact that these textile elements could be formed from flat knitting in no way indicates that the inventors of the '011 patent intended the textile element to be formed directly on a flat knitting machine *without being cut from a larger textile structure*. Rather, textile elements are typically flat knit as part of a larger textile structure and removed therefrom to form the final textile element. (Ex. 1005, 1:10-18.) Thus, the bare recitation of a textile element that is flat knitted – without a more specific description of how it was knit – does not rise to the level of providing sufficient written description for proposed substitute claims 47-50. Because claims 47-50 constitute new matter, the Board should reject these claims.

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III. The Proposed Substitute Claims are Indefinite.

During prosecution of a patent application, a claim is properly rejected as indefinite if it is "amenable to two or more plausible claim constructions." *Ex parte Miyazaki*, 89 U.S.P.Q.2d 1207, 1211, 2008 WL 5105055, at *5 (B.P.A.I. Nov. 19, 2008) (precedential opinion). Proposed claims 47-50 are indefinite because the phrases "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," as well as "flat knit edge," are each amenable to at least two plausible claim constructions.

A first plausible construction for the phrase "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" – and one that is entirely consistent with the specification of the '011 patent – is "edges of a knitted textile that are knit in flat form, which have been removed from a surrounding textile structure so that the edges are free of surrounding textile structure." In fact, as described above, this is the only construction that has sufficient written description within the '011 patent. (*See* Ex. 1002, 5:58-60, 6:66-8:14, 9:7-14, 9:35-48, 11:19-41.)

Mr. Tonkel insists that the claim language is limited to textile elements that are not removed from a surrounding textile structure, which he generally refers to as a "knit to shape" textile. (Ex. 1015, pp. 68-98.) During his deposition, Mr. Tonkel repeatedly stated that "flat knit edges" means that the claim language is limited to textile elements that are

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"knit to shape." (Ex. 1015, pp. 68-98.) However, when asked to provide support for his understanding of "flat knit edges," Mr. Tonkel stated that his understanding was limited to his own industry knowledge, and he acknowledged that he does not qualify as a textile expert. (Ex. 1015, pp. 9, 11, 94-95.) Nevertheless, Mr. Tonkel offers a second plausible construction of this term, despite its lack of written description support.

Nike's proposed construction of this term as "requiring that edges of the textile element have flat knit edges without surrounding textile structure such that the flat knit edges are not surrounded by textile structure from which the textile element must be removed" does not clarify or otherwise state that the term is limited to flat "knit to shape" textiles. (Ex. 2010, ¶ 68.) For example, once a flat knit textile element is removed from a surrounding textile structure, it thereafter meets this construction. Thus, there is nothing in the language of claim 47 (or Nike's proposed construction) that would suggest to a POSITA at the time of the priority date of the '011 patent that the claim scope is limited to "knit to shape" textiles.

The phrase "flat knit edges" is also indefinite because it is amenable to at least two plausible claim constructions. As described above, although Nike did not propose a construction of this term at all, Mr. Tonkel suggested that the phrase refers to edges of "knit to shape" textiles. (Ex. 1015, pp. 89, 94-96.) In contrast, Dr. Adanur, a knitting professor from Auburn University, explains that a POSITA at the time of the priority date of the '011 patent would understand that, under the broadest reasonable interpretation, "flat knit edges"

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means "edges of a knitted textile that are knit in flat form," whether knit to shape or not. (Ex. 1016, ¶ 38.) Because claims 47-50 are indefinite, the Board should reject these claims.

IV. The Proposed Substitute Claims are Anticipated by Nishida.

Assuming *arguendo* that the Board determines that claims 47-50 are not invalid for any of the reasons stated above, the Board should adopt the broadest reasonable interpretation of the phrase "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" to mean "edges of a knitted textile that are knit in flat form, which has been removed from a surrounding textile structure so that the edges are free of surrounding textile structure," which is consistent with the '011 patent specification and the ordinary meaning of the claimed phrase.

Under this construction, there is no distinction between claims 47-50 and the disclosure of Nishida because the only distinction that Mr. Tonkel identified between claim 47 and Nishida is that "Nishida's 'layout' is made as part of a larger textile structure or web and must be cut out of the web." (Ex. 2010, ¶ 101; Ex. 1015, p. 87.) As described in the claim charts below, claims 47-50 are anticipated under 35 U.S.C. § 102(b) by Nishida.

V. The Proposed Substitute Claims are Obvious Over Nishida Alone.

Assuming *arguendo* that the Board determines that claims 47-50 are not invalid for any of the reasons stated above and determines that Nike's proposed construction is in fact limited to "knit to shape" textiles, claims 47-50 are nevertheless obvious over Nishida.

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For example, as Mr. Tonkel acknowledges, Nishida is directed to improving efficiency of manufacturing flat knitted, unitary uppers by reducing the costs of materials needed to produce the uppers. (Ex. 2010, ¶¶ 177-179; Ex. 1015, pp. 79-80; Ex. 1023, ¶ 11.) However, Nishida also recognizes that there are advantages to reducing the amount of cutting waste, such as by having "individual patterns or partial patterns already [] produced directly in the production of the web of material in the desired shoe size, *by which the cutting waste can be still further limited*, since the individual patterns or partial patterns in the provided size can directly adjoin one another." (Ex. 1023, ¶ 11.)

To the extent that a POSITA would find that the statements in the '011 patent regarding the advantages of manufacturing an upper as a single textile element (Ex. 1002, 11:12-18) to suggest forming a "knit to shape" textile element, a POSITA would find the statements in Nishida regarding the advantages of reducing cutting and material waste to be equally, if not more, suggestive of forming a "knit to shape" textile element. (Ex. 1023, ¶ 12-13.)

Furthermore, as to Mr. Tonkel's statements regarding a long-felt need for a "knit to shape" flat knit textile upper, in many cases, the stated efficiencies of (1) eliminating separate cutting and finishing steps, and (2) eliminating material wastes are more than offset by losses in production speed, increased machine set-up time to accommodate different shoe sizes, amortization of the expensive machinery, and the need for expensive labor to program and maintain the number of machines needed to keep up with demand.

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(Ex. 1023, ¶¶ 17-20, 23-26, 28-29, 31-34, 36-45.) Mr. Tonkel admitted that he had no knowledge of any of these additional cost considerations that could undercut any purported gains in efficiency by eliminating additional processing steps and material waste. (Ex. 1015, pp. 101-109.) Therefore, Nike has failed to produce sufficient evidence to demonstrate that claim 47 is not obvious over Nishida. As described in the claim charts below, claims 47-50 are obvious under 35 U.S.C. § 103(a) in view of Nishida alone.

VI. The Proposed Substitute Claims are Obvious Over Nishida in View of Schuessler I and Schuessler II.

Claims 47-50 are also obvious over Nishida in view of Schuessler I and Schuessler II. It would have been obvious at the time of the priority date of the '011 patent to modify Nishida to incorporate a "knit to shape" textile element – as disclosed by Schuessler I and Schuessler II – into Nishida's upper. The opponent of a motion to amend "may respond to new issues arising from proposed substitute claims including evidence responsive to the amendment." Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48767 (Aug. 14, 2012). Schuessler I and Schuessler II are both prior art under 35 U.S.C. § 102(b).

For example, Schuessler I dates to 1938 and describes a method of producing a knitted helmet (i.e., cap) on a flat knitting machine "in accordance with the disclosure in U.S. Patent No. 2,150,730 issued to Carl F. Schuessler on March 14, 1939 for Knitting machine" (Ex. 1021), wherein the helmets are "completed from the swatches as knitted without requiring cutting, and requiring the joining of only a few edges." (Ex. 1020, 1:22-27, 1:48-2:2.) Schuessler I teaches that the two-dimensional swatch is formed with selvage edges,

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so that the swatch is converted to a three dimensional helmet solely by joining some of the edges. (Ex. 1020, 2:41-45.)

Schuessler I and Nishida are in similar fields: the use of knitted two-dimensional textile elements having edges that are stitched together to form three-dimensional wearable items, and Schuessler II confirms that a flat knitting machine may be used to produce the two-dimensional textile elements of Schuessler I, which would be equally applicable to Nishida. (Ex. 1023, ¶ 14.) Because the textile elements of Schuessler I serve the same purpose when combined with Nishida's textile elements, namely to form a three-dimensional wearable item in an efficient and economical way from a knitted two-dimensional textile element, a POSITA would have been motivated to combine Schuessler I's flat knitted textile elements having selvage edges that are sewn together with Nishida's knitted textile elements also having edges that are sewn together to create a wearable item. (Ex. 1023, ¶ 15.) As described in the claim charts below, claims 47-50 are obvious under 35 U.S.C. § 103(a) in view of Nishida in combination with Schuessler I and Schuessler II.

VII. Element-by-Element Comparison of the Proposed Substitute Claims to Nishida Alone and/or Nishida in view of Schuessler I and Schuessler II.

The claim charts below set forth an element-by-element comparison of proposed substitute claims 47-50 to the disclosure of Nishida alone and/or in combination with Schuessler I and Schuessler II. The proposed substitute claims 47-50 are shown in marked-up form relative to the issued claims for which they are substituted.

With respect to claim 47, a POSITA at the time of the priority date of the '011 patent

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would have known and understood that "conventional" knitting processes include both warp and weft knitting (and further include both circular and flat knitting), since these knitting processes existed for many decades before 1992 and had been used in the making of shoe uppers for many decades as well. This understanding is not rebutted by Nike, as the Board acknowledges. (Paper 18, p. 19.)

Likewise, once the layout 2 has been cut out of the web of material 1, the edges of the layout 2 are not surrounded by textile structure from which the textile element must be removed. Nishida fully discloses this element based on a broadest reasonable construction of this limitation as "edges of a knitted textile that are knit in flat form, which has been removed from a surrounding textile structure so that the edges are free of surrounding textile structure." In addition, the understanding that some of Nishida's edges of the flat knit textile are joined together to form an ankle opening in the upper for receiving a foot is supported by Dr. Frederick's deposition testimony. (Ex. 1005, 3:31-42, Fig. 3; Ex. 2009, 103:18-105:6.) It is inherent that such a flat knit textile element would also have flat knit edges based on a broadest reasonable construction of "flat knit edges" to mean "edges of a knitted textile that are knit in flat form." (Ex. 1016, ¶ 38.)

Furthermore, a POSITA at the time of the priority date of the '011 patent would have understood that varying stitch configurations to impart different properties to two different areas is an obvious design choice or a selection from among a finite number of techniques to do so. (Ex. 1001, ¶ 72.)

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With respect to claim 48, the '011 Patent describes that "apertures" are formed by omitting stitches to provide air permeability in the knitted textile element. (Ex. 1002, 9:57-62.) The "net-like" knitted structure described by Nishida has apertures for the same reason, air permeability. (Ex. 1001, ¶ 72.)

With respect to claim 49, Nishida further describes that during or after "the production of web of material 1," the "layout(s) 2 can be provided with an embroidery by which a hole pattern is welded." (Ex. 1005, 4:31-38.) In order to create a hole pattern, stitches must necessarily be omitted in the area in which the hole is formed. In addition, Nishida illustrates the presence of such "hole patterns" positioned in the shoe upper 3 in a location for receiving laces. (Ex. 1005, 3:43-52, 6:25-31, Fig. 3.)

With respect to claim 50, a POSITA at the time of the priority date of the '011 patent would have understood Nishida's use of two or more layers to include three layers, and that the knit textile element and/or knitted backing layer of the textile element forms a portion of the interior layer. (Ex. 1001, ¶ 72.)

'011 Patent Claims	Description of Prior Art
47. An article of footwear comprising:	**Nishida** discloses an article of footwear. (Ex. 1001, ¶ 72 (same element in claim 16); Ex. 1005, Abstract, Fig. 3.)
an upper incorporating a [weft-knitted] flat-knit textile element,	**Nishida** discloses an upper incorporating a flat knit textile element. (Ex. 1001, ¶ 72 (similar element in claim 16); Ex. 1005, Abstract, 3:6-12.)
the flat knit textile element (1) having 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	**Nishida** discloses that the textile element has 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. Specifically, Nishida states that "[a]fter cutting out layout 2 from the web of material 1, the edges 7 and 8 are

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'011 Patent Claims	Description of Prior Art
must be removed,	stitched together and a heel seam thus is formed." (Ex. 1005, 3:31-33.) **Nishida + Schuessler I and Schuessler II** Textile elements that are "knit to shape" so that the textile element has 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 were well-known in the art at the time of the priority date of the '011 patent. *See* Ex. 1020, 1:22-27, 1:48-2:2, 2:41-45; Ex. 1021 generally.)
some of the flat knit edges joined together to form an ankle opening in the upper for receiving a foot,	**Nishida** discloses that some of the flat knit edges are joined together to form an ankle opening in the upper for receiving a foot. (Ex. 1001, ¶ 72 (a similar element in claim 1); Ex. 1005, Abstract, 3:6-12, 3:31-42, Fig. 3.)
the ankle opening having an edge comprised of one of the flat knit edges; and	**Nishida** discloses the ankle opening having an edge comprised of one of the flat knit edges. (Ex. 1001, ¶ 72 (a similar element in claim 1); Ex. 1005, Abstract, 3:6-12, 3:31-42, Figs. 2-3.)
(2) having a first area and a second area with a unitary construction,	**Nishida** discloses an upper incorporating a knit textile element having first and second areas with a unitary construction. (Ex. 1001, ¶ 72 (same element in claim 16); Ex. 1005, Abstract, 3:6-12, 3:15-26, 4:12-18, Figs. 2-3.)
the first area being formed of a first stitch configuration, and the second area being formed of a second stitch configuration that is different from the first stitch configuration to impart varying properties to the textile element; and	**Nishida** discloses that the first and second areas may be formed of different stitch configurations to impart varying properties to the textile element. (Ex. 1001, ¶ 72 (same element in claim 16); Ex. 1005, 3:15-4:18, 4:47-60, 5:41-45, 5:63-6:2, 6:4-41.)
a sole structure secured to the upper.	**Nishida** discloses that a sole structure may be secured to the upper. (Ex. 1001, ¶ 72 (same element in claim 16); Ex. 1005, Abstract, 4:39-46, Fig. 3.)
48. The article of footwear recited in claim [16] 47, wherein at least one of the first stitch configuration and the second stitch configuration forms an	**Nishida** discloses that at one stitch configuration may form a net-like structure (i.e. having apertures) in the knit textile element. (Ex. 1001, ¶ 72 (a similar element in claim 19); Ex. 1005, 3:43-52, 6:25-31.)

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'011 Patent Claims	Description of Prior Art
aperture in the [weft-knitted] flat knit textile element and	
the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper.	**Nishida** discloses that joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper. (Ex. 1005, Abstract, 3:15-4:46, Figs. 1-5.)
49. The article of footwear recited in claim [16] 47, wherein at least one of the first stitch configuration and the second stitch configuration form [an aperture] a plurality of apertures in the [weft-knitted] flat knit textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces.	**Nishida** discloses that at least one of the first stitch configuration and the second stitch configuration form a plurality of apertures in the textile element, the apertures formed by omitting stitches in the flat knit textile element and positioned in the upper for receiving laces. (Ex. 1001, ¶ 72 (a similar element in claim 19); Ex. 1005, 3:43-52, 6:25-31, Fig. 3.)
50. The article of footwear recited in claim [16] 47, wherein the [weft-knitted] flat knit textile element is one of an exterior layer, an intermediate layer, and an interior layer of the upper, and	**Nishida** discloses that the upper may include two or more layers, and the knit textile element may form at least a portion of the interior layer. (Ex. 1001, ¶ 72 (a similar element in claim 20); Ex. 1005, 3:6-9, 3:62-4:1.)
the joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper.	**Nishida** discloses that joined edges shape the flat knit textile element to form a lateral region, a medial region, an instep region and a heel region of the upper. (Ex. 1001, ¶ 72 (a similar element in claim 2); Ex. 1005, Abstract, 3:15-4:46, Figs. 1-5.)

VIII. Conclusion

In view of the above, adidas requests that the Board reject proposed substitute claims 47-50 and find them unpatentable.

Respectfully submitted,

Dated: November 12, 2013

By: 

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Appendix I

Exhibit 1001 Declaration of Edward C. (Ned) Frederick, Ph.D. ("Frederick Dec.")

Exhibit 1002 U.S. Patent No. 7,347,011 to Dua et al. ("'011 patent")

Exhibit 1005 U.S. Patent No. 5,345,638 to Nishida ("Nishida")

Exhibit 1015 Copy of transcript of November 5, 2013, cross-examination deposition of Raymond F. Tonkel

NOTE: adidas is still awaiting a copy of the deponent signature page. Upon receipt of that signature page adidas will file same as a separate exhibit.

Exhibit 1016 Declaration of Sabut Adanur, Ph.D. ("Adanur Dec.")

Exhibit 1020 U.S. Patent No. 2,178,941 to Schuessler ("Schuessler I")

Exhibit 1021 U.S. Patent No. 2,150,730 to Schuessler ("Schuessler II")

Exhibit 1023 Supplemental Declaration of Edward C. (Ned) Frederick, Ph.D. ("Frederick Dec. II")

Exhibit 2009 Copy of transcript of July 23, 2013, cross-examination deposition of Edward C. Frederick

Exhibit 2010 Declaration of Raymond F. Tonkel

Exhibit 2011 Excerpts from "Man-Made Fiber and Textile Dictionary" (4th Ed. 1985)

Skechers EX1013-p. 7224
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on November 12, 2013, a complete and entire copy of this PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO AMEND was served on Patent Owner Nike, Inc. by emailing a copy to counsel at the email addresses listed below:

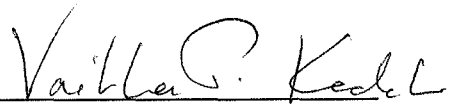
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Dated: November 12, 2013

By: 
Vaibhav P. Kadaba
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Back-Up Counsel for Petitioner

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG
Petitioner

v.

Nike, Inc.
Patent Owner

Patent No. 7,347,011
Filing Date: March 3, 2004
Issue Date: March 25, 2008
Title: ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER

Inter Partes Review No. 2013-00067

PETITIONER'S EXHIBIT LIST
(AS OF NOVEMBER 12, 2013)

EXHIBITS

Exhibit 1001	Declaration of Edward C. (Ned) Frederick, Ph.D. ("Frederick Dec.")
Exhibit 1002	U.S. Patent No. 7,347,011 to Dua et al. ("'011 patent")
Exhibit 1003	The '011 patent file history
Exhibit 1004	Form PTO-SB/42
Exhibit 1005	U.S. Patent No. 5,345,638 to Nishida ("Nishida")
Exhibit 1006	JP Pub. No. H6-113905 to Osamu ("Osamu"), including a certified English translation thereof
Exhibit 1007	U.S. Patent No. 2,147,197 to Glidden ("Glidden")
Exhibit 1008	U.S. Patent No. 2,314,098 to McDonald ("McDonald")
Exhibit 1009	U.S. Patent No. 2,641,004 to Whiting et al. ("Whiting")
Exhibit 1010	International App. Pub. No. WO 90/03744 to Curley ("Curley")
Exhibit 1011	U.S. Patent No. 4,785,558 to Shiomura ("Shiomura")
Exhibit 1012	David J. Spencer, Knitting Technology: A Comprehensive Handbook and Practical Guide (Third ed., Woodhead Publishing Ltd. 2001)
Exhibit 1013	Excerpt of Hannelore Eberle et al., Clothing Technology (Third English ed., Beuth-Verlag GmbH 2002)
Exhibit 1014	U.S. Patent No. 7,347,011 to Dua et al., with markings made during November 5, 2013, cross-examination deposition

Exhibit 1015 Copy of transcript of November 5, 2013, cross-examination deposition of Raymond F. Tonkel

NOTE: adidas is still awaiting a copy of the deponent signature page. Upon receipt of that signature page adidas will file same as a separate exhibit.

Exhibit 1016 Declaration of Sabut Adanur, Ph.D. ("Adanur Dec.")

Exhibit 1017 Excerpt of Knitted Fabrics (Ciba-Geigy 1976)

Exhibit 1018 Excerpt of Bharat J. Gajjar, Warp Knit Fabrics Technologies (Emerald Ink Publishing 2007)

Exhibit 1019 J. Watel, *The Milanese Machine: Little Progress Made in the Development of the Milanese Fabric*, 19(6) Textiles: A Monthly Technical Journal 43, 48 (December, 1921)

Exhibit 1020 U.S. Patent No. 2,178,941 to Schuessler ("Schuessler I")

Exhibit 1021 U.S. Patent No. 2,150,730 to Schuessler ("Schuessler II")

Exhibit 1022 U.S. Patent No. 6,984,596 to Dickerson ("Dickerson")

Exhibit 1023 Supplemental Declaration of Edward C. (Ned) Frederick, Ph.D. ("Frederick Dec. II")

Exhibit 1024 Billy Hunter, editor, *Editor's Viewpoint: Nike Flyknit: Quantum leap for flat knitting*, http://www.knittingindustry.com/nike-flyknit-quantum-leap-for-flat-knitting/ (last visited November 11, 2013)

Exhibit 1025 Billy Hunter, editor, *Nike Flyknit: Ready, Steady, Go!,* http://www.knittingindustry.com/nike-flyknit-ready-steady-go/ (last visited November 11, 2013)

Exhibit 1026 Form PTO-SB/42

Respectfully submitted,

Dated: November 12, 2013

By: Vaibhav P. Kadaba

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Lead Counsel	Back-Up Counsel
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CERTIFICATE OF SERVICE

The undersigned certifies that on November 12, 2013, a complete and entire copy of this PETITIONER'S EXHIBIT LIST (AS OF NOVEMBER 12, 2013) was served, with copies of the newly added exhibits, on Patent Owner Nike, Inc. by emailing a copy to counsel at the email addresses listed below:

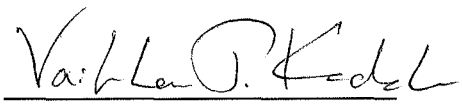
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011

Inter Partes Review No. 2013-00067

PATENT OWNER NIKE, INC.'S
NOTICE OF CROSS-EXAMINATION OF SABIT ADANUR

Skechers EX1013-p. 7231
Skechers v Nike

Pursuant to 37 C.F.R. 42.53, Patent Owner NIKE, Inc. ("NIKE") hereby provides notice that, as previously agreed by the parties, it will cross-examine Sabit Adanur on December 3, 2013. The cross-examination will begin at 8:30 a.m. or at a time mutually agreed by the parties and will be held at the offices of adidas' counsel, Kilpatrick Townsend and Stockton, 1100 Peachtree Street NE, Suite 2800, Atlanta, Georgia. The cross-examination will take place before a Notary Public or other official authorized by law to administer oaths, to be arranged by counsel for NIKE. The cross-examination will be recorded by using audio, video and/or stenographic means.

Respectfully submitted,

Dated: Nov. 26, 2013

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Skechers EX1013-p. 7233
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on November 26, 2013, a copy of the **PATENT OWNER NIKE, INC.'S NOTICE OF CROSS-EXAMINATION OF SABIT ADANUR** was served on the Petitioner by emailing a copy to mstockwell@kilpatricktownsend.com and wkadaba@kilpatricktownsend.com.

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Skechers EX1013-p. 7234
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011

Inter Partes Review No. 2013-00067

PATENT OWNER NIKE, INC.'S NOTICE OF SECOND CROSS-EXAMINATION OF EDWARD C. FREDERICK

Skechers EX1013-p. 7235
Skechers v Nike

Pursuant to 37 C.F.R. 42.53, Patent Owner NIKE, Inc. ("NIKE") hereby provides notice that, as previously agreed by the parties, it will cross-examine Edward C. Frederick on December 3, 2013. The cross-examination will begin after the completion of a deposition of Dr. Sabit Adanur or at a time mutually agreed by the parties and will be held at the offices of adidas' counsel, Kilpatrick Townsend and Stockton, 1100 Peachtree Street NE, Suite 2800, Atlanta, Georgia. The cross-examination will take place before a Notary Public or other official authorized by law to administer oaths, to be arranged by counsel for NIKE. The cross-examination will be recorded by using audio, video and/or stenographic means.

Respectfully submitted,

Dated: Nov. 26, 2013

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Skechers EX1013-p. 7236
Skechers v Nike

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Skechers EX1013-p. 7237
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on November 26, 2013, a copy of the **PATENT OWNER NIKE, INC.'S NOTICE OF SECOND CROSS-EXAMINATION OF EDWARD C. FREDERICK** was served on the Petitioner by emailing a copy to mstockwell@kilpatricktownsend.com and wkadaba@kilpatricktownsend.com.

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Back-Up Counsel for Patent Owner

Skechers EX1013-p. 7238
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG
Petitioner

v.

Nike, Inc.

Patent Owner

Case IPR2013-00067

Patent No. 7,347,011

SUBMISSION OF POWER OF ATTORNEY

Petitioner, adidas AG, submits herewith a power of attorney appointing practitioners at customer number 23370. Mitchell G. Stockwell, Vaibhav P. Kadaba, and Tiffany L. Williams are associated with customer number 23370.

Petitioner is submitting a copy of this power of attorney so that Ms. Williams may be added as back-up counsel for the above-captioned *inter partes* review. Per a discussion with a representative of the Board on November 18,

2013, the representative confirmed it was not necesssary to seek prior Board authorization to add Ms. Williams as back-up counsel because Ms. Williams has a Registration Number with the United States Patent and Trademark Office. Should Board authorization in fact be required, Petitioner requests that this submission be treated as a request for Board authorization to add Ms. Williams as back-up counsel.

Respectfully submitted,

Dated: November 26, 2013

By: /Mitchell G. Stockwell/

Mitchell G. Stockwell
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Lead Counsel for Petitioner

Lead Counsel	Back-Up Counsel
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Skechers EX1013-p. 7240
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on November 26, 2013, a complete and entire copy of this SUBMISSION OF POWER OF ATTORNEY was served on Patent Owner Nike, Inc. by emailing a copy to counsel at the email addresses listed below:

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Thomas Pratt
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Dated: November 26, 2013

By: /Mitchell G. Stockwell/

Mitchell G. Stockwell
Reg. No. 39,389
Lead Counsel for Petitioner

Skechers EX1013-p. 7241
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG
Petitioner

v.

Nike, Inc.

Patent Owner

Case IPR2013-00067

Patent No. 7,347,011

MANDATORY NOTICE INFORMATION
(ADDITION OF BACK-UP COUNSEL)

Pursuant to 37 CFR § 42.8(b), Petitioner adidas AG submits the following information.

Real Party-In-Interest under 37 C.F.R. § 42.8(b)(1)

Petitioner, adidas AG, is the real party-in-interest for the instant petition.

Related Matters under 37 C.F.R. § 42.8(b)(2)

No related matters are currently known to the Petitioner.

Lead and Back-Up Counsel under 37 C.F.R. § 42.8(b)(3)

Lead: Mitchell G. Stockwell, Registration No. 39,389

Back-up: Vaibhav P. Kadaba, Registration No. 45,865

Back-up: Tiffany L. Williams, Registration No. 59,549

Service Information under 37 C.F.R. § 42.8(b)(4)

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(ii)-(iii)	Postal and hand delivery:	Kilpatrick Townsend and Stockton, LLP 1100 Peachtree Street, N.E., Suite 2800 Atlanta, GA 30309

Skechers EX1013-p. 7243
Skechers v Nike

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(v) Facsimile numbers: (404) 541-3403 (Stockwell)

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Respectfully submitted,

Dated: November 26, 2013

By: /Mitchell G. Stockwell/

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Reg. No. 39,389
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Postal and Hand-Delivery Address: Kilpatrick Townsend & Stockton LLP 1100 Peachtree Street, Suite 2800 Atlanta, GA 30309-4528	Postal and Hand-Delivery Address: Kilpatrick Townsend & Stockton LLP 1100 Peachtree Street, Suite 2800 Atlanta, GA 30309-4528

Skechers EX1013-p. 7244
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on November 26, 2013, a complete and entire copy of this MANDATORY NOTICE INFORMATION (ADDITION OF BACK-UP COUNSEL) was served on Patent Owner Nike, Inc. by emailing a copy to counsel at the email addresses listed below:

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Dated: November 26, 2013

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Skechers EX1013-p. 7245
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011

Inter Partes Review No. 2013-00067

NIKE'S REPLY TO PETITIONER'S OPPOSITION TO NIKE'S MOTION TO AMEND U.S. PATENT 7,347,011

I. Claim Construction

A "flat knit textile element" is a weft knit textile element. Petitioner's newly contrived construction that would include warp knit fabrics is inconsistent with the '011 specification, the Petition, the original testimony of Petitioner's expert, an authoritative dictionary definition, and a knitting text submitted by Petitioner.

The '011 specification states that flat knitting is a "specific sub-type[]" of weft knitting and does not state it is a sub-type of warp knitting. (Ex 1002, 7:2-8). Petitioner and its expert originally agreed. (*See* Petition, p. 11, l. 8-9, p. 19, l. 4-8, p. 22, l. 4-8, p. 55, l. 1-4; Ex 1001, ¶54 ("Common examples of weft knits are circular knits and flat knits."), ¶56, ¶72 at p. 37)). A textile dictionary unequivocally states that "the trade uses the term flat knit fabric to refer to weft-knit fabrics made on a flat machine, rather than warp-knit fabrics." (Ex. 2011, p. 6; Ex 2017, p. 5; Ex. 2018, p. 6). The Spencer knitting book that Petitioner submitted with its Petition includes a chapter titled "Flat knitting, basic principles and structures," the entirety of which is directed to weft knitting. (Ex. 1012, pp. 234-250). Warp knitting is covered in separate chapters. (*Id.* at pp. 313 *et seq.*) On cross-examination, Petitioner's expert Dr. Frederick defined flat knitting as a sub-type of weft knitting:

Q. Okay. What's your definition of the term flat knitting?

A. Flat knitting would be another type of weft knitting that would involve an end result that was, you know, on a curved surface, but more or less flat.

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Skechers v Nike

(Ex 2009, p. 89, l. 6-11; *see also* p. 61, l. 3-6) (emphasis added). He also admitted that he knew of no dictionaries, books or publications that would support his newly created construction of "flat knit textile element" as including a warp knit article. (Ex. 2020, p. 28, l. 10-24). Moreover, Petitioner incorrectly asserts that NIKE failed to propose a construction of "flat knit textile element." (*See* NIKE's proposed construction at Ex 2010, ¶60).

Equally untenable is Petitioner's construction that "flat knit edges" simply mean any edges of a textile so long as the textile was flat while knit. (Opp., pp. 7 – 8; Ex. 2020, p. 24, l. 14-19). This construction of "flat knit edges" includes edges not even formed by knitting at all but instead formed by cutting. (Ex. 2020, p. 24, l. 20 – p. 25, l. 23). This makes no sense. The word "knit" modifies the word "edge," so the claimed edge must be a knit edge—not a cut edge as in Nishida and as now proposed by Petitioner. "Flat" modifies "knit," not "edge." The edge must be knit and the knitting must be by flat knitting, which is weft knitting. This construction is also consistent with the context of the phrase in which this term appears, i.e., "…having 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…"

Petitioner impermissibly relies on Dr. Adanur for its constructions. (Ex 1016, ¶38). Although he purports to be a POSITA (Ex. 2021, p. 25, l. 9-19), he

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Skechers v Nike

unquestionably is not. For example, he has never even been involved in the conception and design of a shoe. (*Id.*, p. 28, l. 6-8; *see also* p. 20, l. 20-p. 21, l. 17; p. 22, l. 8-11; p. 29, l. 10-12; p. 30, l. 20-23; p. 39, l. 9-15). He never has even talked to a POSITA other than one, brief telephone call with Dr. Frederick. (*Id.,* p. 131, l. 16-19). Even if Dr. Adanur's comments are considered, the only dictionary definitions of "flat knit fabric" he knows of define the term as weft knit, not warp knit. (*Id,.* p. 134, l. 14 – p. 135, l. 2; Ex. 2011, p. 6; Ex 2017, p. 5; Ex. 2018, p. 6). Significantly, Dr. Frederick admitted it was not even necessary to speak to a knitting expert. (Ex. 2020, p. 19, l. 21-p. 20, l. 12). Indeed, Dr. Frederick knew little about Dr. Adanur and his supposed expertise – never saw his CV, never discussed his background, had no idea if he was a POSTIA and never saw his declaration. (*Id.* p. 11, l. 4-18; p. 31, l. 11-15).

II. Adequate Written Description

Glaringly absent from Petitioner's written description challenge is citation to any testimony from its experts. Whether the specification supports a claim is a fact issue assessed from the perspective of a POSITA. *Ariad Pharms., Inc. v. Eli Lilly & Co.,* 598 F.3d 1336, 1351-52 (Fed. Cir. 2010) (en banc). Here, Petitioner relies only on attorney argument, which is not evidence. *Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009).

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The specification of a patent need not have *ipsis verbis* support for a claim to provide an adequate written description. *Martin v. Johnson,* 454 F.2d 746, 751 (CCPA 1972). Figures alone can support the written description requirement. *Cooper Cameron Corp. v. Kvaerner Oilfields Products, Inc.,* 291 F.3d 1317, 1322 (Fed. Cir. 2002). As explained by Mr. Tonkel, to a POSITA, Figures 8, 10 and 11, along with original claims and the specification convey that the '011 application describes a textile element knit to the shape of Figures 8, 10 and 11 using flat knitting. (Ex 1003, p. 166, ¶[35], p. 168-69 ¶¶[42]-[43], p. 173 ¶[54], pp. 175-76, ¶[59], pp. 179-84, pp. 192-95; Ex 2010, ¶¶36-37, 40-42, 62-67). That structure is what is claimed in substitute claim 47. Indeed, Dr. Frederick admitted that the '011 patent teaches flat knitting an element with flat knitted edges (Ex. 2009, p. 116, l. 12-20) and flat knitting an upper to shape. (Ex. 1023, ¶31 (describing uppers "made according to . . . '011 Patent"); Ex. 2020, p. 48, l. 10-23).

III. The Claims Are Definite

Relying on the same flawed construction addressed above, Petitioner challenges the definiteness of certain phrases in the proposed claims. (Opp., pp. 6-8). When the claims are properly construed, Petitioner's argument evaporates.

IV. The Claims Are Patentable Over the Prior Art

Petitioner's anticipation argument relies on a claim construction that is shown above to be incorrect. Accordingly, claim 47 is not anticipated by Nishida.

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Claim 47 also is not obvious over Nishida, either alone or in view of Schuessler I (which describes a "knitted helmet") and Schuessler II (which describes a knitting machine). Petitioner illogically argues that Nishida teaches reducing cutting waste by placing patterns closer together within a web, and that this somehow suggests knitting individual patterns to shape. Petitioner also argues that a POSITA would have been motivated to combine references because, *after* they are combined, the elements of each reference serve the same purpose. Petitioner's argument is legally flawed because it wrongly combines the references and uses the resulting combination as a motivation for making the combination in the first place.

Relying on Dr. Frederick, Petitioner also argues that a "knit to shape" upper would be too costly. (Opp., pp. 9-10; Ex. 1023, ¶¶16-45). Yet, Dr. Frederick admitted that has no personal experience with knitting machine line speed, line set up and maintenance, or amortization calculations. (Ex. 2020, p. 45, l. 3 – p. 46, l. 10). Moreover, Petitioner does not dispute that a "knit to shape" upper reduces undesirable waste (see Ex. 2010, ¶46; Ex, 2020, p.43, l. 15-20) or that Nishida did not think of it. In fact, Petitioner's arguments regarding alleged economic non-feasibility of "knit to shape" uppers actually counsel against obviousness.

V. Conclusion

NIKE respectfully requests that the Board grant the Motion to Amend.

Respectfully submitted,

Skechers EX1013-p. 7251
Skechers v Nike

Dated: December 11, 2013 By: /J. Pieter van Es/

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Attorneys for Patent Owner
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Skechers EX1013-p. 7252
Skechers v Nike

Appendix 1

The following exhibits are cited in this Reply:

Exhibit 1001	Declaration of Edward C. Frederick
Exhibit 1002	U.S. Patent No. 7,347,011
Exhibit 1003	File History of U.S. Patent 7,347,011
Exhibit 1012	David J. Spencer, Knitting Technology: A Comprehensive Handbook and Practical Guide (Third ed., Woodhead Publishing Ltd. 2001)
Exhibit 1016	Declaration of Sabit Adanur
Exhibit 1023	Supplemental Declaration of Edward C. Frederick
Exhibit 2009	Transcript of July 23, 2013, cross-examination deposition of Edward C. Frederick
Exhibit 2010	Declaration of Raymond F. Tonkel
Exhibit 2011	Excerpts from "Man-Made Fiber and Textile Dictionary" (4th Ed. 1985)
Exhibit 2017	Excerpts from Celanese Corporation "Man-Made Fiber and Textile Dictionary"
Exhibit 2018	Excerpts from Hoechst Celanese "Dictionary of Fiber & Textile Technology"
Exhibit 2020	Transcript of December 3, 2013, cross-examination deposition of Edward C. Frederick
Exhibit 2021	Transcript of December 3, 2013, cross-examination deposition of Sabit Adanur

Skechers EX1013-p. 7253
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on December 11, 2013, a copy of **NIKE'S REPLY TO PETITIONER'S OPPOSITION TO NIKE'S MOTION TO AMEND U.S. PATENT 7,347,011** was served on the Petitioner by emailing a copy to mstockwell@kilpatricktownsend.com, wkadaba@kilpatricktownsend.com and tiwilliams@kilpatricktownsend.com.

/H. Wayne Porter/
H. Wayne Porter
Reg. No. 42,084
Back-Up Counsel for
Patent Owner

Skechers EX1013-p. 7254
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011

Inter Partes Review No. 2013-00067

NIKE, INC.'S EXHIBIT LIST
(AS OF DECEMBER 11, 2013)

Pursuant to 37 CFR §42.63(e), Patent Owner NIKE, Inc. submits the following current exhibit list identifying the exhibit number and providing a brief description for exhibits filed by NIKE in IPR2013-00067. This exhibit list updates the exhibit list filed August 29, 2013.

Exhibit 2001 Patent Owner Nike, Inc.'s Notice of Cross-Examination of Edward C. Frederick

NOTE: This exhibit is identical to paper 28 filed on July 17, 2013. Because this document was marked as an exhibit to the July 23, 2013, cross-examination deposition of Mr. Frederick (which transcript is identified below as exhibit 2009), it is identified here as exhibit no. 2001. Pursuant to 37 CFR §42.6(d), however, another copy is not being filed. A copy of exhibit 2001, as marked during the Frederick deposition, was served on Petitioner with NIKE's August 19, 2013, exhibit list.

Exhibit 2002 Declaration of Dr. Edward C. Frederick from reexamination no. 95/001,320

Exhibit 2003 U.S. Patent 4,354,318 (Frederick et al.)

Skechers EX1013-p. 7256
Skechers v Nike

Exhibit 2004 Chapter 16 from book titled "Textiles in Sport"

Exhibit 2005 May 17, 2013, Decision (Institution of Inter Partes Review 37 CFR §42.108) in IPR2013-00067

NOTE: This exhibit is identical to paper 18 filed on May 17, 2013. Because this document was marked as an exhibit to the July 23, 2013, cross-examination deposition of Mr. Frederick (which transcript is identified below as exhibit 2009), it is identified here as exhibit no. 2005. Pursuant to 37 CFR §42.6(d), however, another copy is not being filed. A copy of exhibit 2005, as marked during the Frederick deposition, was served on Petitioner with NIKE's August 19, 2013, exhibit list.

Exhibit 2006 U.S. Patent 2,147,197 (Glidden), with markings made during July 23, 2013, cross-examination deposition

Exhibit 2007 U.S. Patent 7,347,011 (Dua et al.), with markings made during July 23, 2013, cross-examination deposition

Exhibit 2008 December 28, 2012, Decision on Appeal in reexamination no. 95/001,320

Skechers EX1013-p. 7257
Skechers v Nike

Exhibit 2009 Copy of transcript of July 23, 2013, cross-examination deposition of Edward C. Frederick

NOTE: Copy of signed errata sheet filed separately as exhibit 2013.

Exhibit 2010 Declaration of Raymond F. Tonkel

Exhibit 2011 Excerpts from "Man-Made Fiber and Textile Dictionary" (4th Ed. 1985)

Exhibit 2012 Excerpt from Random House Webster's Unabridged Dictionary (2nd Ed. 2001)

Exhibit 2013 Copy of Signed Errata Sheet for Transcript of July 23, 2013, Frederick Deposition (Ex. 2009)

Exhibit 2014 Patent Owner Nike, Inc.'s Notice of Cross-Examination of Sabit Adanur

NOTE: This exhibit is identical to paper 39 filed on November 26, 2013. Because this document was marked as an exhibit to the December 3, 2013, cross-examination deposition of Mr. Adanur (which transcript is identified below as exhibit 2021), it is identified here as exhibit no.

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Skechers v Nike

2014. Pursuant to 37 CFR §42.6(d), however, another copy is not being filed. A copy of exhibit 2014, as marked during the Adanur deposition, will be served on Petitioner with NIKE's December 11, 2013, exhibit list.

Exhibit 2015 Excerpts from Celanese Corporation "Man-Made Fiber and Textile Dictionary"

Exhibit 2016 Excerpts from Hoechst Celanese "Dictionary of Fiber & Textile Technology"

Exhibit 2017 Excerpts from Celanese Corporation "Man-Made Fiber and Textile Dictionary"

Exhibit 2018 Excerpts from Hoechst Celanese "Dictionary of Fiber & Textile Technology"

Exhibit 2019 Patent Owner Nike, Inc.'s Notice of Second Cross-Examination of Edward C. Frederick

NOTE: This exhibit is identical to paper 40 filed on November 26, 2013. Because this document was marked as an exhibit to the December 3, 2013, cross-examination deposition of Mr. Frederick (which transcript is identified

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Skechers v Nike

below as exhibit 2020), it is identified here as exhibit no. 2019. Pursuant to 37 CFR §42.6(d), however, another copy is not being filed. A copy of exhibit 2019, as marked during the Frederick deposition, will be served on Petitioner with NIKE's December 11, 2013, exhibit list.

Exhibit 2020 Copy of transcript of December 3, 2013, second cross-examination deposition of Edward C. Frederick

NOTE: NIKE is still awaiting a copy of the deponent signature page. Upon receipt of that signature page NIKE will file same as a separate exhibit.

Exhibit 2021 Copy of transcript of December 3, 2013, cross-examination deposition of Sabit Adanur

NOTE: NIKE is still awaiting a copy of the deponent signature page. Upon receipt of that signature page NIKE will file same as a separate exhibit.

Skechers EX1013-p. 7260
Skechers v Nike

Respectfully submitted,

Dated: December 11, 2013

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Attorneys for Patent Owner
NIKE, Inc.

Skechers EX1013-p. 7261
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on December 11, 2013, a copy of **NIKE, INC.'S EXHIBIT LIST (AS OF DECEMBER 11, 2013)** was served, with copies of Exhibits 2014 through 2021, on the Petitioner by emailing same to the following email addresses:

mstockwell@kilpatricktownsend.com
wkadaba@kilpatricktownsend.com
tiwilliams@kilpatricktownsend.com

/H. Wayne Porter/

H. Wayne Porter
Reg. No. 42,084
Back-Up Counsel for
Patent Owner

Skechers EX1013-p. 7262
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011

Inter Partes Review No. 2013-00067

NIKE, INC.'S EXHIBIT LIST
(AS OF JANUARY 7, 2014)

Pursuant to 37 CFR §42.63(e), Patent Owner NIKE, Inc. submits the following current exhibit list identifying the exhibit number and providing a brief description for exhibits filed by NIKE in IPR2013-00067. This exhibit list updates the exhibit list filed December 11, 2013.

Exhibit 2001 Patent Owner Nike, Inc.'s Notice of Cross-Examination of Edward C. Frederick

NOTE: This exhibit is identical to paper 28 filed on July 17, 2013. Because this document was marked as an exhibit to the July 23, 2013, cross-examination deposition of Mr. Frederick (which transcript is identified below as exhibit 2009), it is identified here as exhibit no. 2001. Pursuant to 37 CFR §42.6(d), however, another copy is not being filed. A copy of exhibit 2001, as marked during the Frederick deposition, was served on Petitioner with NIKE's August 19, 2013, exhibit list.

Exhibit 2002 Declaration of Dr. Edward C. Frederick from reexamination no. 95/001,320

Exhibit 2003 U.S. Patent 4,354,318 (Frederick et al.)

Skechers EX1013-p. 7264
Skechers v Nike

Exhibit 2004 Chapter 16 from book titled "Textiles in Sport"

Exhibit 2005 May 17, 2013, Decision (Institution of Inter Partes Review 37 CFR §42.108) in IPR2013-00067

NOTE: This exhibit is identical to paper 18 filed on May 17, 2013. Because this document was marked as an exhibit to the July 23, 2013, cross-examination deposition of Mr. Frederick (which transcript is identified below as exhibit 2009), it is identified here as exhibit no. 2005. Pursuant to 37 CFR §42.6(d), however, another copy is not being filed. A copy of exhibit 2005, as marked during the Frederick deposition, was served on Petitioner with NIKE's August 19, 2013, exhibit list.

Exhibit 2006 U.S. Patent 2,147,197 (Glidden), with markings made during July 23, 2013, cross-examination deposition

Exhibit 2007 U.S. Patent 7,347,011 (Dua et al.), with markings made during July 23, 2013, cross-examination deposition

Exhibit 2008 December 28, 2012, Decision on Appeal in reexamination no. 95/001,320

Skechers EX1013-p. 7265
Skechers v Nike

Exhibit 2009 Copy of transcript of July 23, 2013, cross-examination deposition of Edward C. Frederick

NOTE: Copy of signed errata sheet filed separately as exhibit 2013.

Exhibit 2010 Declaration of Raymond F. Tonkel

Exhibit 2011 Excerpts from "Man-Made Fiber and Textile Dictionary" (4th Ed. 1985)

Exhibit 2012 Excerpt from Random House Webster's Unabridged Dictionary (2nd Ed. 2001)

Exhibit 2013 Copy of Signed Errata Sheet for Transcript of July 23, 2013, Frederick Deposition (Ex. 2009)

Exhibit 2014 Patent Owner Nike, Inc.'s Notice of Cross-Examination of Sabit Adanur

NOTE: This exhibit is identical to paper 39 filed on November 26, 2013. Because this document was marked as an exhibit to the December 3, 2013, cross-examination deposition of Mr. Adanur (which transcript is identified below as exhibit 2021), it is identified here as exhibit no.

Skechers EX1013-p. 7266
Skechers v Nike

2014. Pursuant to 37 CFR §42.6(d), however, another copy was not filed. A copy of exhibit 2014, as marked during the Adanur deposition, was served on Petitioner with NIKE's December 11, 2013, exhibit list.

Exhibit 2015 Excerpts from Celanese Corporation "Man-Made Fiber and Textile Dictionary"

Exhibit 2016 Excerpts from Hoechst Celanese "Dictionary of Fiber & Textile Technology"

Exhibit 2017 Excerpts from Celanese Corporation "Man-Made Fiber and Textile Dictionary"

Exhibit 2018 Excerpts from Hoechst Celanese "Dictionary of Fiber & Textile Technology"

Exhibit 2019 Patent Owner Nike, Inc.'s Notice of Second Cross-Examination of Edward C. Frederick

NOTE: This exhibit is identical to paper 40 filed on November 26, 2013. Because this document was marked as an exhibit to the December 3, 2013, cross-examination deposition of Mr. Frederick (which transcript is identified

Skechers EX1013-p. 7267
Skechers v Nike

below as exhibit 2020), it is identified here as exhibit no. 2019. Pursuant to 37 CFR §42.6(d), however, another copy was not filed. A copy of exhibit 2019, as marked during the Frederick deposition, was served on Petitioner with NIKE's December 11, 2013, exhibit list.

Exhibit 2020 Copy of transcript of December 3, 2013, second cross-examination deposition of Edward C. Frederick

NOTE: Copy of signature page filed separately as exhibit 2022.

Exhibit 2021 Copy of transcript of December 3, 2013, cross-examination deposition of Sabit Adanur

NOTE: Copy of signature page filed separately as exhibit 2022.

Exhibit 2022 Copy of signature page for transcript of December 3, 2013, Frederick deposition (Ex. 2020)

Exhibit 2023 Copy of signature page for transcript of December 3, 2013, Adanur deposition (Ex. 2021)

Skechers EX1013-p. 7268
Skechers v Nike

Respectfully submitted,

Dated: January 7, 2014

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Attorneys for Patent Owner
NIKE, Inc.

Skechers EX1013-p. 7269
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on January 7, 2014, a copy of **NIKE, INC.'S EXHIBIT LIST (AS OF JANUARY 7, 2014)** was served, with copies of Exhibits 2022 and 2023, on the Petitioner by emailing same to the following email addresses:

mstockwell@kilpatricktownsend.com
wkadaba@kilpatricktownsend.com
tiwilliams@kilpatricktownsend.com

/H. Wayne Porter/

H. Wayne Porter
Reg. No. 42,084
Back-Up Counsel for
Patent Owner

Skechers EX1013-p. 7270
Skechers v Nike

Trials@uspto.gov
571-272-7822

Paper 35
Date: October 30, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG
Petitioner

v.

NIKE, Inc.
Patent Owner

Case IPR2013-00067
Patent 7,347,011 B2

Before JOSIAH C. COCKS, MICHAEL J. FITZPATRICK, and JAMES B. ARPIN, *Administrative Patent Judges.*

ARPIN, *Administrative Patent Judge.*

DECISION
Motion to Withdraw
37 C.F.R. § 42.10(e)

On July 11, 2013, Petitioner filed a motion to authorize withdrawal of its current lead counsel, Geoffrey K. Gavin, and the appointment of a new lead counsel. Motion (Paper 26) 2. Further, Petitioner contemporaneously filed a new power of attorney (Paper 27) appointing Mitchell G. Stockwell (Reg. No. 39, 389)

as the new lead counsel and maintaining Wab P. Kadaba (Reg. No. 45,865) as back-up counsel. No opposition has been filed, and Petitioner indicates that Patent Owner does not oppose the appointment of Mr. Stockwell as new lead counsel. Motion 3. For the following reasons, the motion is granted.

DISCUSSION

Counsel may withdraw from an *inter partes* review proceeding only with authorization from the Board. 37 C.F.R. § 42.10(e). Normally, this is accomplished by filing a motion to withdraw, which requires Board authorization *before* filing. *See* 37 C.F.R. § 42.20(b). Once authorization is granted, the motion then is made by the attorney(s) seeking to withdraw. *See, e.g.,* IPR2013-00010, Paper 30.

Here, Petitioner filed a motion to *authorize* withdrawal of counsel. The motion was not authorized in advance by the Board. It was accompanied by a new power of attorney that revoked the previous power of attorney and appointed new lead counsel. The motion was signed by back-up counsel, rather than by the withdrawing counsel.

Petitioner has not followed the correct procedure. Nevertheless, because there is no prejudice shown, the Board waives the requirement for authorization and treats the motion as if it were properly authorized and filed by the withdrawing counsel. Petitioner is instructed to seek Board authorization, where required, for any further motions filed in this proceeding.

Turning to the merits, the motion designates new lead counsel, who is a registered practitioner, and does not seek any time extensions. Under the circumstances, we see no reason to deny the motion.

It is therefore

ORDERED that Petitioner's Motion is granted;

Skechers EX1013-p. 7272
Skechers v Nike

FURTHER ORDERED that Geoffrey K. Gavin is permitted to withdraw as counsel in this proceeding;

FURTHER ORDERED that Mitchell G. Stockwell is recognized as Petitioner's lead counsel in these proceedings; and

FURTHER ORDERED that Petitioner shall update the Board's electronic filing system to reflect the change in lead counsel.

PETITIONER:

Mitchell G. Stockwell
Vaibhav P. Kadaba
Kilpatrick Townsend & Stockton LLP
mstockwell@kilpatricktownsend.com
wkabada@kilpatricktownsend.com

PATENT OWNER:

Jonathan van Es
Thomas Pratt
Joseph M. Skerpon
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Skechers EX1013-p. 7273
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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adidas AG
Petitioner

v.

Nike, Inc.

Patent Owner

Case IPR2013-00067

Patent No. 7,347,011

Before MICHAEL P. TIERNEY, MICHAEL J. FITZPATRICK, and JAMES B. ARPIN, *Administrative Patent Judges.*

US2008 5132216 2

Skechers EX1013-p. 7274
Skechers v Nike

PETITIONER POWER OF ATTORNEY

The undersigned, representing Petitioner, adidas AG, hereby appoints Practitioners associated with Customer Number 23370 as my attorneys, and to transact all business in the United States Patent and Trademark Office herewith for the above-captioned *inter partes* review, and revokes all previous powers of attorney given with respect thereto. The individual signing below has the authority to execute this document on behalf of adidas AG.

Dated: 26th November 2013

By: Sarah Talbot
Name: Sarah Talbot
Title: Head of Legal IP

Skechers EX1013-p. 7275
Skechers v Nike

Electronic Acknowledgement Receipt

EFS ID:	29875283
Application Number:	15610089
International Application Number:	
Confirmation Number:	4757
Title of Invention:	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER
First Named Inventor/Applicant Name:	BHUPESH DUA
Customer Number:	78342
Filer:	Elizabeth Ashley Lucas
Filer Authorized By:	
Attorney Docket Number:	NIKE.276100/081313US82CON
Receipt Date:	24-JUL-2017
Filing Date:	31-MAY-2017
Time Stamp:	23:17:23
Application Type:	Utility under 35 USC 111(a)

Payment information:

Submitted with Payment	no

File Listing:

Document Number	Document Description	File Name	File Size(Bytes)/ Message Digest	Multi Part /.zip	Pages (if appl.)
1	Transmittal Letter	276100_IDS_Cover_Letter.pdf	15812 b1b889159707e0f36ef66f09e808db56fdc05f99	no	1

Warnings:

Information:					
2	Information Disclosure Statement (IDS) Form (SB08)	276100_IDS_11.PDF	1035798 d46698309d168f6d7822bc44803981d4c5f2dd3a	no	6
Warnings:					
Information:					
A U.S. Patent Number Citation or a U.S. Publication Number Citation is required in the Information Disclosure Statement (IDS) form for autoloading of data into USPTO systems. You may remove the form to add the required data in order to correct the Informational Message if you are citing U.S. References. If you chose not to include U.S. References, the image of the form will be processed and be made available within the Image File Wrapper (IFW) system. However, no data will be extracted from this form. Any additional data such as Foreign Patent Documents or Non Patent Literature will be manually reviewed and keyed into USPTO systems.					
3	Non Patent Literature	276100_11_NPL_01_Order_Conduct_of_the_Proceeding_IPR2013_0067.pdf	41401 aa0ced76ca0417586e4ae88e07089100988e4e495	no	5
Warnings:					
Information:					
4	Non Patent Literature	276100_11_NPL_02_Order_Case_Transfer_to_Administrationve_Patent_Judge_IPR2013_00067.pdf	25138 e37132a6852e58ea5679dccd3fb61c506d1135ae	no	2
Warnings:					
Information:					
5	Non Patent Literature	276100_11_NPL_03_Motion_to_Amend_IPR2013_00067.pdf	225468 be69be8d0b14a9cd9ba5d047e4397c9cab4a8a05	no	19
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Information:					
6	Non Patent Literature	276100_11_NPL_04_Patent_Owners_Exhibit_List_IPR2013_00067.pdf	146855 90c3b941a1efb106f967b2d4dc4e013bf6327db2	no	6
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Information:					
7	Non Patent Literature	276100_11_NPL_05_Corrected_Certificate_of_Service_IPR2013_00067.pdf	142028 4308d520dc6b6df00bb26633aee793f2c34dfac8	no	3
Warnings:					
Information:					

8	Non Patent Literature	276100_11_NPL_06_NIKE_29Aug13_Ex_List_IPR2013_00067.pdf	146976 3418fae899983ef870226a779d33e61519154503	no	6
Warnings:					
Information:					
9	Non Patent Literature	276100_11_NPL_08_Petitioner_AGs_Amended_Notice_of_Cross_Examination_IPR2013_00067.pdf	90690 febaaca664a4d173f956c89534e6a96f67f4be68	no	3
Warnings:					
Information:					
10	Non Patent Literature	276100_11_NPL_09_Petitioner_Opposition_Motion_to_Amdend_IPR2013_00067.pdf	1029658 8fc59472aff4b692fafd073f93233e182c6e09f8	no	20
Warnings:					
Information:					
11	Non Patent Literature	276100_11_NPL_10_Petitioner_Exhibit_List_IPR2013_00067.pdf	199382 7b79d64f2ca3e89efb9295076cfbd482a5bf4cbe	no	5
Warnings:					
Information:					
12	Non Patent Literature	276100_11_NPL_11_Patent_Owner_Nike_Cross_Exam_IPR2013_00067.pdf	114387 aac3ec88b01883646ffba7f332fa5512e62d037	no	4
Warnings:					
Information:					
13	Non Patent Literature	276100_11_NPL_12_Patent_Owner_Nike_Secon_Cross_Exam_IPR2013_00067.pdf	114512 c2fef100fc25fcbad9fc58126926fce3a9c61070	no	4
Warnings:					
Information:					
14	Non Patent Literature	276100_11_NPL_13_Submission_of_POA_IPR2013_00067.pdf	126941 2c9a6aa92eb3c94a17eb7cd8d0da0aa0982b9e1a	no	3
Warnings:					
Information:					

15	Non Patent Literature	276100_11_NPL_15_Mandatory_Notice_Information_IPR2013_00067.pdf	110092 5a8677fc768f7d4e1eef32f80a0d2276544bdd97	no	4
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Information:					
16	Non Patent Literature	276100_11_NPL_16_Patent_Owners_Reply_to_Petitioners_Opposition_IPR2013_00067.pdf	187475 34f44d91cf2a68102005d4ecf088fe21b051247c	no	9
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Information:					
17	Non Patent Literature	276100_11_NPL_17_Patent_Owner_Exhibit_List_IPR2013_00067.pdf	150202 f7e20887f9a753c4dd08c4d6e2e36e9087b7e739	no	8
Warnings:					
Information:					
18	Non Patent Literature	276100_11_NPL_18_Patent_Owner_Exhibit_List_IPR2013_00067.pdf	150271 3857845bc7d26122267a3cd3d4e98b4806656f75	no	8
Warnings:					
Information:					
19	Non Patent Literature	276100_11_NPL_07_Decision_Motion_to_Withdraw_IPR2013_00067.pdf	957811 a0715f0d765e5597c35d34c216351c2163b06b6a	no	3
Warnings:					
Information:					
20	Non Patent Literature	276100_11_NPL_14_Petitioner_POA_IPR2013_00067.pdf	102204 c3505584f00be4c63db0771a9d891f615255e6d9	no	2
Warnings:					
Information:					
		Total Files Size (in bytes):	5113101		

This Acknowledgement Receipt evidences receipt on the noted date by the USPTO of the indicated documents, characterized by the applicant, and including page counts, where applicable. It serves as evidence of receipt similar to a Post Card, as described in MPEP 503.

New Applications Under 35 U.S.C. 111

If a new application is being filed and the application includes the necessary components for a filing date (see 37 CFR 1.53(b)-(d) and MPEP 506), a Filing Receipt (37 CFR 1.54) will be issued in due course and the date shown on this Acknowledgement Receipt will establish the filing date of the application.

National Stage of an International Application under 35 U.S.C. 371

If a timely submission to enter the national stage of an international application is compliant with the conditions of 35 U.S.C. 371 and other applicable requirements a Form PCT/DO/EO/903 indicating acceptance of the application as a national stage submission under 35 U.S.C. 371 will be issued in addition to the Filing Receipt, in due course.

New International Application Filed with the USPTO as a Receiving Office

If a new international application is being filed and the international application includes the necessary components for an international filing date (see PCT Article 11 and MPEP 1810), a Notification of the International Application Number and of the International Filing Date (Form PCT/RO/105) will be issued in due course, subject to prescriptions concerning national security, and the date shown on this Acknowledgement Receipt will establish the international filing date of the application.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No.	:	15/610,089	Confirmation No. 4757
Inventor	:	Bhupesh Dua	
Applicants	:	NIKE, Inc.	
Filed	:	5/31/2017	
Title	:	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER	
Group Art Unit	:	3765	
Examiner	:	Marie D. Bays	
Matter No.	:	NIKE.276100/08-1313US82CON	
Customer No.	:	78342	

VIA EFS – 7/24/2017

Mail Stop Amendment
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

IDS SUBMISSION

This correspondence is being submitted with an Information Disclosure Statement pursuant to 37 C.F.R. § 1.97. Due to the number of references, the IDS is separated into multiple forms. Accordingly, Applicant hereby submits IDS forms 1-11 as this IDS submission. Each IDS form corresponds to an IDS form filed in the Application No. 14/503,514 from which this pending application depends. Pursuant to 37 C.F.R. § 1.97(c)(2), Applicant submits herewith the fee set forth in § 1.17(g) for the IDS submission.

Respectfully submitted,

/ELIZABETH A. LUCAS/

Elizabeth A. Lucas
Reg. No. 74,247

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8298658
8298658 v1

Skechers EX1013-p. 7281
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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adidas AG,
Petitioner

v.

NIKE, Inc.
Patent Owner

Patent No. 7,347,011

Inter Partes Review No. 2013-00067

NIKE, INC.'S REQUEST FOR ORAL ARGUMENT

Patent Owner NIKE, Inc. hereby requests oral argument pursuant to 37 CFR §42.70(a). Pursuant to the Scheduling Order (paper no. 19) entered May 17, 2013, oral argument is currently scheduled for February 10, 2014. Oral argument will focus primarily on Patent Owner's Motion to Amend and the principal issues to be argued are as follows:

1. The proper construction of certain terms in proposed claim 47, including "flat knit textile element" and "flat knit edges."
2. Patent Owner's satisfaction of the written description requirement under 35 U.S.C. §112, first paragraph, for proposed claims 47-50.
3. Patent Owner's satisfaction of the definiteness requirement under 35 U.S.C. §112, second paragraph, for proposed claims 47-50.
4. Patent Owner's compliance with 35 U.S.C. § 316(d)(3) and 37 C.F.R. §§ 42.121(a)(2)(ii) and (b)(1) by proposed claims 47-50, including the non-introduction of new matter and the non-enlargement of claim scope relative to the issued claims of Patent No. 7,347,011 (" '011 patent").
5. The patentability of proposed claims 47-50 over the prior art under 35 U.S.C. §§102 and 103, including
    a. patentability over Nishida (Exhibit 1005) alone,
    b. patentability over Nishida in view of Schuessler I (Exhibit

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Skechers v Nike

1020) and/or Schuessler II (Exhibit 1021), and

c. patentability over Nishida in view of other art of record.

6. The weight, if any, to be given to the testimony of Sabit Adanur.

7. The weight, if any, to be given to the testimony of Edward C. Frederick.

8. Any issues raised by Petitioner in a request for oral argument, in a motion to exclude (if any) or in any other motion or paper filed by Petitioner concurrently with or subsequent to this Request.

Patent Owner requests the ability to use audio-visual equipment to display demonstrative exhibits, including the use of a projector and screen for PowerPoint display.

Because Patent Owner requests cancellation of claims 1-46 of the '011 patent, so that the only issues remaining in this IPR pertain to Patent Owner's Motion to Amend to add proposed new claims 47-50, and pursuant to section II.M. of the Board's Trial Practice Guide (77 Fed. Reg. 48768), Patent Owner requests that the order of argument be reversed. In particular, Patent Owner requests that it be permitted to argue first, followed by Petitioner, followed by Patent Owner's rebuttal.

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Respectfully submitted,

Dated: January 7, 2014

By: /J. Pieter van Es/

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Attorneys for Patent Owner
NIKE, Inc.

Skechers EX1013-p. 7285
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on January 7, 2014, a copy of **NIKE, INC.'S REQUEST FOR ORAL ARGUMENT** was served on the Petitioner by emailing same to the following email addresses:

mstockwell@kilpatricktownsend.com
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Back-Up Counsel for
Patent Owner

Skechers EX1013-p. 7286
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG
Petitioner

v.

Nike, Inc.
Patent Owner

Patent No. 7,347,011
Filing Date: March 3, 2004
Issue Date: March 25, 2008
Title: ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER

Inter Partes Review No. 2013-00067

PETITIONER'S REQUEST FOR ORAL ARGUMENT

Pursuant to the Board's Scheduling Order (Paper 19) dated May 17, 2013, as modified by the parties' joint Notice of Stipulation to modify DUE DATES 2 and 3 of the Scheduling Order (Paper 20), Petitioner adidas AG ("Petitioner") respectfully requests oral argument for the trial currently scheduled to be held February 10, 2014 (DUE DATE 7). In accordance with 37 C.F.R. § 42.70, Petitioner specifies the following issues as among those to be argued:

(1) Whether original claims 1-46, if not canceled, are unpatentable based on the instituted rejections because Nike, Inc. ("Owner") has not defended the validity of any challenged original claim;

(2) Whether Nike, Inc.'s Motion To Amend U.S. Patent No. 7,347,011 ("Owner's Motion to Amend") (Paper 31) should be denied because Owner has enlarged the scope of original claim 16 with proposed substitute claim 47;

(3) Whether Owner's Motion To Amend should be denied because Owner has introduced new subject matter in proposed substitute claims 47-50;

(4) Whether Owner's Motion To Amend should be denied because Owner has failed to meet its burden of proof to demonstrate patentability of the proposed substitute claims 47-50;

(5) Whether Owner's Motion To Amend should be denied because proposed subsitute claims 47-50 are unpatentable over Nishida alone;

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(6) Whether Owner's Motion To Amend should be denied because proposed subsitute claims 47-50 are unpatentable over Nishida in view of Schuessler I and Schuessler II;

(7) Whether Petitioner's Motion to Exclude Evidence should be granted because Owner relied on improper cross-examination testimony of Dr. Edward C. Frederick to support Owner's Motion To Amend;

(8) The weight, if any, that should be given to the testimony of Raymond F. Tonkel; and

(9) Rebuttal to Owner's presentation on all matters, including: i) issues (1)-(8) above; ii) Nike's Reply to Petitioner's Opposition to Nike's Motion to Amend U.S. Patent 7,347,011; iii) any issues raised by Owner in a motion to exclude (if any) or in any other motion or paper filed by Owner concurrently with or subsequent to this Request; and iv) Owner's responses to Petitioner's Motion to Exclude Evidence.

Petitioner requests the ability to use audio-visual equipment to display demonstrative exhibits, including the use of a projector and screen for PowerPoint display.

Skechers EX1013-p. 7289
Skechers v Nike

Respectfully submitted,

Dated: January 7, 2014

By: _/Vaibhav P. Kadaba/_____
Vaibhav P. Kadaba
Reg. No. 45,865
Back-Up Counsel for Petitioner

Lead Counsel	Back-Up Counsel
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Skechers EX1013-p. 7290
Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on January 7, 2014, a complete and entire copy of this PETITIONER'S REQUEST FOR ORAL ARGUMENT was served on Patent Owner Nike, Inc. by emailing a copy to counsel at the email addresses listed below:

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Dated: January 7, 2014

By: /Vaibhav P. Kadaba/
Vaibhav P. Kadaba
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Back-Up Counsel for Petitioner

Skechers EX1013-p. 7291
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

adidas AG
Petitioner

v.

Nike, Inc.
Patent Owner

Patent No. 7,347,011
Filing Date: March 3, 2004
Issue Date: March 25, 2008
Title: ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER

Inter Partes Review No. 2013-00067

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

Nike, Inc. ("Owner") has relied upon deposition testimony from Dr. Edward C. Frederick ("Dr. Frederick"), an expert witness retained by adidas AG ("Petitioner"). Pursuant to 37 C.F.R. § 42.64(c), Petitioner moves to exclude certain portions of that testimony, because it was elicited by Owner during improper cross-examination.

Specifically, Dr. Frederick submitted direct testimony in the form of a declaration (Ex. 1001). His direct testimony was focused on the invalidity of issued claims 1-46 of U.S. Patent No. 7,347,011 ("the '011 patent"). Therefore, the scope of Dr. Frederick's direct testimony was premised upon and limited to the claim terms that were recited in the issued claims 1-46 of the '011 patent.

37 C.F.R. § 42.53(d)(5)(ii) clearly states: "For cross-examination testimony, the scope of the examination is limited to the scope of the direct testimony." Therefore, the scope of Owner's cross-examination of Dr. Frederick was limited to his opinion regarding the invalidity of claims 1-46, and the appropriate construction of those claims, that were present in the issued '011 patent.

However, at his deposition, Owner repeatedly questioned Dr. Frederick about matters outside the scope of his direct testimony in violation of 37 C.F.R. § 42.53(d)(5)(ii) by asking Dr. Frederick a series of questions related to "flat knit edges" -- a term that does not appear in claims 1-46 of the '011 patent and was only introduced by Owner in its subsequent Motion to Amend -- and how the physical properties of the edges of a textile element formed by flat knitting may differ from the physical properties of edges of a textile

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element formed by removing the textile element from a larger textile element. (Ex. 2009, pp. 107-116.)

Petitioner timely objected to these improper questions during the deposition in accordance with 37 C.F.R. §§ 41.155(a) and 42.64(a). (Ex. 2009, 107:19, 108:8, 108:21, 109:15, 111:6, 112:1, 114:18, 116:24.)

Owner's expert, Mr. Raymond Tonkel, in his declaration relied on a portion of this improper cross-examination testimony regarding flat knit edges as the only support for his opinion that "flat knit edges . . . rather than being formed by cutting from a larger textile structure, are formed directly by the flat knitting machine. (*E.g.*, Ex. 2009 at 116)." (Ex. 2010, ¶ 65 (emphasis added).) Owner also relied on this improper cross-examination testimony by citing to paragraph 65 of Mr. Tonkel's declaration in its Motion to Amend for support of its assertion that the phrase "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" in proposed substitute claim 47 is supported by the '011 patent disclosure. (Paper 31, p. 4.) The relevant section of Owner's Motion to Amend is provided below:

> Support for this limitation is provided by the support cited in the previous paragraph for "flat knit" textile element, by Figures 8, 10, and 11 and by the portions of the specification associated with those figures. (*E.g.*, Ex. 1003, pp.

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192-95, p. 166, ¶[35], pp. 179-84 (originally filed claims 19, 38 and 65); *see also* Tonkel Dec. (Ex 2010), ¶¶ 40, 62-67).

(Paper 31, p. 4 (emphasis added).)

Petitioner now moves to exclude the portion of Dr. Frederick's improper cross-examination testimony upon which Owner relies, in accordance with 37 C.F.R. § 42.64(c).

In particular, Petitioner moves to exclude the following portions of Exhibit 2009 (cited by transcript page and line numbers): **Ex. 2009, 116:3-25.** The contents of Ex. 2009, 116:3-25 is provided below.

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Q. And I want to direct your attention now to Figure 8. I'll ask you some questions about Figure 8.

Now, Figure 8 is an example of an upper made on a flat knitting machine, right?

A. I don't think it specifies that it has to be a flat knitting machine, but -- I don't think the patent limits it that way, does it?

Q. Well, I guess I'm not asking you what it's -- the patent teaches you that what's shown in Figure 8 could be made on a flat knitting machine, right?

A. It could be, yes.

Q. And if the structure shown in Figure 8 was made by a flat knitting machine, then the edges that are shown in Figure 8 would be flat knitted, correct?

A. That's right.

Q. And edges that are flat knitted, would they require further processing before the edges were joined to form various seams?

MR. KADABA: Objection to form.

A. I don't know.

Counsel for Petitioner properly objected on the record at 116:24. As described above, Petitioner objected on the record to this question, and the numerous questions related to the processing of the edges of the knitted material, because neither the term "flat knit edges" nor the concept of processing the edges of a knitted material are present in any of the issued claims 1-46 or the specification of the '011 patent and, therefore, embody a subject that is outside the scope of Dr. Frederick's direct testimony.

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In accordance with Rule § 42.53(d)(5)(ii), Dr. Frederick's cross-examination testimony at 116:3-25, to which Petitioner properly and timely objected, should be excluded because it is outside the scope of Dr. Frederick's direct testimony.

CONCLUSION

The Board should exclude evidence secured through improper cross-examination, which includes Dr. Frederick's answers to questions that were outside the scope of his direct testimony.

Respectfully submitted,

Dated: January 7, 2014

By: _/Vaibhav P. Kadaba/_____
Vaibhav P. Kadaba
Reg. No. 45,865
Back-Up Counsel for Petitioner

Lead Counsel	Back-Up Counsel
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APPENDIX I

Exhibit 1001	Declaration of Edward C. Frederick
Exhibit 2009	Transcript of July 23, 2013, cross-examination deposition of Edward C. Frederick
Exhibit 2010	Declaration of Raymond F. Tonkel

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Skechers v Nike

CERTIFICATE OF SERVICE

The undersigned certifies that on January 7, 2014, a complete and entire copy of this PETITIONER'S MOTION TO EXCLUDE EVIDENCE was served on Patent Owner Nike, Inc. by emailing a copy to counsel at the email addresses listed below:

Joseph M. Skerpon
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Dated: January 7, 2014

By: /Vaibhav P. Kadaba/
Vaibhav P. Kadaba
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Back-Up Counsel for Petitioner

Electronic Acknowledgement Receipt

EFS ID:	29875306
Application Number:	15610089
International Application Number:	
Confirmation Number:	4757
Title of Invention:	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER
First Named Inventor/Applicant Name:	BHUPESH DUA
Customer Number:	78342
Filer:	Elizabeth Ashley Lucas
Filer Authorized By:	
Attorney Docket Number:	NIKE.276100/081313US82CON
Receipt Date:	24-JUL-2017
Filing Date:	31-MAY-2017
Time Stamp:	23:18:20
Application Type:	Utility under 35 USC 111(a)

Payment information:

Submitted with Payment	no

File Listing:

Document Number	Document Description	File Name	File Size(Bytes)/ Message Digest	Multi Part /.zip	Pages (if appl.)
1	Non Patent Literature	276100_11_NPL_19_Patent_Owner_Request_for_Oral_Argument_IPR2013_00067.pdf	145736 409f45a99968a037dc67e248ca39df0dc36de185	no	5

Warnings:

Information:					
2	Non Patent Literature	276100_11_NPL_20_Petitioners_Request_for_Oral_Argument_IPR2013_00067.pdf	65856 5d5c282405c113674a3803684ed34338227043cc	no	5
Warnings:					
Information:					
3	Non Patent Literature	276100_11_NPL_21_Petitioners_Motion_to_Exclude_Evidence_IPR2013_00067.pdf	314559 f55ef612c1ca8cfd991cd55fa3b49eed8ff36346	no	8
Warnings:					
Information:					
			Total Files Size (in bytes):	526151	

This Acknowledgement Receipt evidences receipt on the noted date by the USPTO of the indicated documents, characterized by the applicant, and including page counts, where applicable. It serves as evidence of receipt similar to a Post Card, as described in MPEP 503.

New Applications Under 35 U.S.C. 111

If a new application is being filed and the application includes the necessary components for a filing date (see 37 CFR 1.53(b)-(d) and MPEP 506), a Filing Receipt (37 CFR 1.54) will be issued in due course and the date shown on this Acknowledgement Receipt will establish the filing date of the application.

National Stage of an International Application under 35 U.S.C. 371

If a timely submission to enter the national stage of an international application is compliant with the conditions of 35 U.S.C. 371 and other applicable requirements a Form PCT/DO/EO/903 indicating acceptance of the application as a national stage submission under 35 U.S.C. 371 will be issued in addition to the Filing Receipt, in due course.

New International Application Filed with the USPTO as a Receiving Office

If a new international application is being filed and the international application includes the necessary components for an international filing date (see PCT Article 11 and MPEP 1810), a Notification of the International Application Number and of the International Filing Date (Form PCT/RO/105) will be issued in due course, subject to prescriptions concerning national security, and the date shown on this Acknowledgement Receipt will establish the international filing date of the application.

SUPPLEMENTAL

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it contains a valid OMB control number.

Application Data Sheet 37 CFR 1.76	Attorney Docket Number	NIKE.276100/081313US82CON
	Application Number	15/610,089
Title of Invention	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER	

The application data sheet is part of the provisional or nonprovisional application for which it is being submitted. The following form contains the bibliographic data arranged in a format specified by the United States Patent and Trademark Office as outlined in 37 CFR 1.76.
This document may be completed electronically and submitted to the Office in electronic format using the Electronic Filing System (EFS) or the document may be printed and included in a paper filed application.

Secrecy Order 37 CFR 5.2:

☐ Portions or all of the application associated with this Application Data Sheet may fall under a Secrecy Order pursuant to 37 CFR 5.2 (Paper filers only. Applications that fall under Secrecy Order may not be filed electronically.)

Inventor Information:

Inventor 1 Remove

Legal Name

Prefix	Given Name	Middle Name	Family Name	Suffix
	BHUPESH		DUA	

Residence Information (Select One) ◉ US Residency ○ Non US Residency ○ Active US Military Service

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Mailing Address of Inventor:

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City	Beaverton	State/Province	OR
Postal Code	97005-6453	Country	US

Inventor 2 Remove

Legal Name

Prefix	Given Name	Middle Name	Family Name	Suffix
	EDWARD	~~NATHANIAL~~ NATHANIEL	THOMAS	

Residence Information (Select One) ◉ US Residency ○ Non US Residency ○ Active US Military Service

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City	Beaverton	State/Province	OR
Postal Code	97005-6453	Country	US

All Inventors Must Be Listed - Additional Inventor Information blocks may be generated within this form by selecting the **Add** button. Add

Correspondence Information:

Enter either Customer Number or complete the Correspondence Information section below.
For further information see 37 CFR 1.33(a).

SUPPLEMENTAL

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it contains a valid OMB control number.

Application Data Sheet 37 CFR 1.76	Attorney Docket Number	NIKE.276100/081313US82CON
	Application Number	15/610,089
Title of Invention	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER	

☐ **An Address is being provided for the correspondence Information of this application.**

Customer Number	78342		
Email Address	ipdocket@shb.com	Add Email	Remove Email
Email Address	elucas@shb.com	Add Email	Remove Email

Application Information:

Title of the Invention	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER		
Attorney Docket Number	NIKE.276100/081313US82CON	**Small Entity Status Claimed**	☐
Application Type	Nonprovisional		
Subject Matter	Utility		
Total Number of Drawing Sheets (if any)	12	**Suggested Figure for Publication (if any)**	10

Filing By Reference:

Only complete this section when filing an application by reference under 35 U.S.C. 111(c) and 37 CFR 1.57(a). Do not complete this section if application papers including a specification and any drawings are being filed. Any domestic benefit or foreign priority information must be provided in the appropriate section(s) below (i.e., "Domestic Benefit/National Stage Information" and "Foreign Priority Information").

For the purposes of a filing date under 37 CFR 1.53(b), the description and any drawings of the present application are replaced by this reference to the previously filed application, subject to conditions and requirements of 37 CFR 1.57(a).

Application number of the previously filed application	Filing date (YYYY-MM-DD)	Intellectual Property Authority or Country

Publication Information:

☐ Request Early Publication (Fee required at time of Request 37 CFR 1.219)

☐ **Request Not to Publish.** I hereby request that the attached application not be published under 35 U.S.C. 122(b) and certify that the invention disclosed in the attached application **has not and will not** be the subject of an application filed in another country, or under a multilateral international agreement, that requires publication at eighteen months after filing.

Representative Information:

Representative information should be provided for all practitioners having a power of attorney in the application. Providing this information in the Application Data Sheet does not constitute a power of attorney in the application (see 37 CFR 1.32).
Either enter Customer Number or complete the Representative Name section below. If both sections are completed the customer Number will be used for the Representative Information during processing.

Please Select One:	◉ Customer Number	○ US Patent Practitioner	○ Limited Recognition (37 CFR 11.9)
Customer Number	78342		

SUPPLEMENTAL

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it contains a valid OMB control number.

Application Data Sheet 37 CFR 1.76	Attorney Docket Number	NIKE.276100/081313US82CON
	Application Number	15/610,089
Title of Invention	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER	

Domestic Benefit/National Stage Information:

This section allows for the applicant to either claim benefit under 35 U.S.C. 119(e), 120, 121, 365(c), or 386(c) or indicate National Stage entry from a PCT application. Providing benefit claim information in the Application Data Sheet constitutes the specific reference required by 35 U.S.C. 119(e) or 120, and 37 CFR 1.78.
When referring to the current application, please leave the "Application Number" field blank.

Prior Application Status	Pending		Remove
Application Number	Continuity Type	Prior Application Number	Filing or 371(c) Date (YYYY-MM-DD)
	Continuation of	14/503514	2014-10-01
Prior Application Status	Abandoned		Remove
Application Number	Continuity Type	Prior Application Number	Filing or 371(c) Date (YYYY-MM-DD)
14/503514	Division of	14/079748	2013-11-14
Prior Application Status	Abandoned		Remove
Application Number	Continuity Type	Prior Application Number	Filing or 371(c) Date (YYYY-MM-DD)
14/079748	Continuation of	13/413233	2012-03-06
Prior Application Status	Patented		Remove

Application Number	Continuity Type	Prior Application Number	Filing Date (YYYY-MM-DD)	Patent Number	Issue Date (YYYY-MM-DD)
13/413233	Continuation of	13/236742	2011-09-20	8266749	2012-09-18
Prior Application Status	Patented				Remove
Application Number	Continuity Type	Prior Application Number	Filing Date (YYYY-MM-DD)	Patent Number	Issue Date (YYYY-MM-DD)
13/236742	Continuation of	12/879517	2010-09-10	8042288	2011-10-25
Prior Application Status	Patented				Remove
Application Number	Continuity Type	Prior Application Number	Filing Date (YYYY-MM-DD)	Patent Number	Issue Date (YYYY-MM-DD)
12/879517	Continuation of	12/032995	2008-02-18	7814598	2010-10-19
Prior Application Status	Patented				Remove
Application Number	Continuity Type	Prior Application Number	Filing Date (YYYY-MM-DD)	Patent Number	Issue Date (YYYY-MM-DD)
12/032995	Division of	10/791289	2004-03-03	7347011	2008-03-25

Additional Domestic Benefit/National Stage Data may be generated within this form by selecting the **Add** button.

Foreign Priority Information:

SUPPLEMENTAL

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it contains a valid OMB control number.

Application Data Sheet 37 CFR 1.76	Attorney Docket Number	NIKE.276100/081313US82CON
	Application Number	15/610,089
Title of Invention	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER	

This section allows for the applicant to claim priority to a foreign application. Providing this information in the application data sheet constitutes the claim for priority as required by 35 U.S.C. 119(b) and 37 CFR 1.55. When priority is claimed to a foreign application that is eligible for retrieval under the priority document exchange program (PDX)[i] the information will be used by the Office to automatically attempt retrieval pursuant to 37 CFR 1.55(i)(1) and (2). Under the PDX program, applicant bears the ultimate responsibility for ensuring that a copy of the foreign application is received by the Office from the participating foreign intellectual property office, or a certified copy of the foreign priority application is filed, within the time period specified in 37 CFR 1.55(g)(1).

Remove

Application Number	Country[i]	Filing Date (YYYY-MM-DD)	Access Code[i] (if applicable)

Additional Foreign Priority Data may be generated within this form by selecting the **Add** button.

Statement under 37 CFR 1.55 or 1.78 for AIA (First Inventor to File) Transition Applications

☐ This application (1) claims priority to or the benefit of an application filed before March 16, 2013 and (2) also contains, or contained at any time, a claim to a claimed invention that has an effective filing date on or after March 16, 2013.
NOTE: By providing this statement under 37 CFR 1.55 or 1.78, this application, with a filing date on or after March 16, 2013, will be examined under the first inventor to file provisions of the AIA.

SUPPLEMENTAL

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it contains a valid OMB control number.

Application Data Sheet 37 CFR 1.76	Attorney Docket Number	NIKE.276100/081313US82CON
	Application Number	15/610,089
Title of Invention	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER	

Authorization or Opt-Out of Authorization to Permit Access:

When this Application Data Sheet is properly signed and filed with the application, applicant has provided written authority to permit a participating foreign intellectual property (IP) office access to the instant application-as-filed (see paragraph A in subsection 1 below) and the European Patent Office (EPO) access to any search results from the instant application (see paragraph B in subsection 1 below).

Should applicant choose not to provide an authorization identified in subsection 1 below, applicant **must opt-out** of the authorization by checking the corresponding box A or B or both in subsection 2 below.

NOTE: This section of the Application Data Sheet is **ONLY** reviewed and processed with the **INITIAL** filing of an application. After the initial filing of an application, an Application Data Sheet cannot be used to provide or rescind authorization for access by a foreign IP office(s). Instead, Form PTO/SB/39 or PTO/SB/69 must be used as appropriate.

1. Authorization to Permit Access by a Foreign Intellectual Property Office(s)

A. Priority Document Exchange (PDX) - Unless box A in subsection 2 (opt-out of authorization) is checked, the undersigned hereby **grants the USPTO authority** to provide the European Patent Office (EPO), the Japan Patent Office (JPO), the Korean Intellectual Property Office (KIPO), the State Intellectual Property Office of the People's Republic of China (SIPO), the World Intellectual Property Organization (WIPO), and any other foreign intellectual property office participating with the USPTO in a bilateral or multilateral priority document exchange agreement in which a foreign application claiming priority to the instant patent application is filed, access to: (1) the instant patent application-as-filed and its related bibliographic data, (2) any foreign or domestic application to which priority or benefit is claimed by the instant application and its related bibliographic data, and (3) the date of filing of this Authorization. See 37 CFR 1.14(h)(1).

B. Search Results from U.S. Application to EPO - Unless box B in subsection 2 (opt-out of authorization) is checked, the undersigned hereby **grants the USPTO authority** to provide the EPO access to the bibliographic data and search results from the instant patent application when a European patent application claiming priority to the instant patent application is filed. See 37 CFR 1.14(h)(2).

The applicant is reminded that the EPO's Rule 141(1) EPC (European Patent Convention) requires applicants to submit a copy of search results from the instant application without delay in a European patent application that claims priority to the instant application.

2. Opt-Out of Authorizations to Permit Access by a Foreign Intellectual Property Office(s)

☐ A. Applicant **DOES NOT** authorize the USPTO to permit a participating foreign IP office access to the instant application-as-filed. If this box is checked, the USPTO will not be providing a participating foreign IP office with any documents and information identified in subsection 1A above.

☐ B. Applicant **DOES NOT** authorize the USPTO to transmit to the EPO any search results from the instant patent application. If this box is checked, the USPTO will not be providing the EPO with search results from the instant application.

NOTE: Once the application has published or is otherwise publicly available, the USPTO may provide access to the application in accordance with 37 CFR 1.14.

PTO/AIA/14 (11-15)
Approved for use through 04/30/2017. OMB 0651-0032
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it contains a valid OMB control number.

Application Data Sheet 37 CFR 1.76	Attorney Docket Number	NIKE.276100/081313US82CON
	Application Number	15/610,089
Title of Invention	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER	

Applicant Information:

Providing assignment information in this section does not substitute for compliance with any requirement of part 3 of Title 37 of CFR to have an assignment recorded by the Office.

Applicant 1

If the applicant is the inventor (or the remaining joint inventor or inventors under 37 CFR 1.45), this section should not be completed. The information to be provided in this section is the name and address of the legal representative who is the applicant under 37 CFR 1.43; or the name and address of the assignee, person to whom the inventor is under an obligation to assign the invention, or person who otherwise shows sufficient proprietary interest in the matter who is the applicant under 37 CFR 1.46. If the applicant is an applicant under 37 CFR 1.46 (assignee, person to whom the inventor is obligated to assign, or person who otherwise shows sufficient proprietary interest) together with one or more joint inventors, then the joint inventor or inventors who are also the applicant should be identified in this section.

Clear

◉ Assignee	○ Legal Representative under 35 U.S.C. 117	○ Joint Inventor
○ Person to whom the inventor is obligated to assign.	○ Person who shows sufficient proprietary interest	

If applicant is the legal representative, indicate the authority to file the patent application, the inventor is:

Name of the Deceased or Legally Incapacitated Inventor:

If the Applicant is an Organization check here. ☒

Organization Name	NIKE, Inc.		
Mailing Address Information For Applicant:			
Address 1	One Bowerman Drive		
Address 2			
City	Beaverton	**State/Province**	OR
Country	US	Postal Code	97005-6453
Phone Number		Fax Number	
Email Address			

Additional Applicant Data may be generated within this form by selecting the Add button.

Assignee Information including Non-Applicant Assignee Information:

Providing assignment information in this section does not substitute for compliance with any requirement of part 3 of Title 37 of CFR to have an assignment recorded by the Office.

SUPPLEMENTAL

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it contains a valid OMB control number.

Application Data Sheet 37 CFR 1.76	Attorney Docket Number	NIKE.276100/081313US82CON
	Application Number	15/610,089
Title of Invention	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER	

Assignee 1

Complete this section if assignee information, including non-applicant assignee information, is desired to be included on the patent application publication. An assignee-applicant identified in the "Applicant Information" section will appear on the patent application publication as an applicant. For an assignee-applicant, complete this section only if identification as an assignee is also desired on the patent application publication.

If the Assignee or Non-Applicant Assignee is an Organization check here. ☐

Prefix	**Given Name**	Middle Name	**Family Name**	Suffix

Mailing Address Information For Assignee including Non-Applicant Assignee:

Address 1			
Address 2			
City		**State/Province**	
Country		Postal Code	
Phone Number		Fax Number	
Email Address			

Additional Assignee or Non-Applicant Assignee Data may be generated within this form by selecting the Add button.

Signature:

NOTE: This Application Data Sheet must be signed in accordance with 37 CFR 1.33(b). **However, if this Application Data Sheet is submitted with the INITIAL filing of the application and either box A or B is not checked in subsection 2 of the "Authorization or Opt-Out of Authorization to Permit Access" section, then this form must also be signed in accordance with 37 CFR 1.14(c).**

This Application Data Sheet **must** be signed by a patent practitioner if one or more of the applicants is a **juristic entity** (e.g., corporation or association). If the applicant is two or more joint inventors, this form must be signed by a patent practitioner, **all** joint inventors who are the applicant, or one or more joint inventor-applicants who have been given power of attorney (e.g., see USPTO Form PTO/AIA/81) on behalf of **all** joint inventor-applicants.

See 37 CFR 1.4(d) for the manner of making signatures and certifications.

Signature	/ELIZABETH A. LUCAS/			Date (YYYY-MM-DD)	2017-07-28 ~~2017-05-31~~
First Name	Elizabeth	Last Name	Lucas	Registration Number	74,247

Additional Signature may be generated within this form by selecting the Add button.

PTO/AIA/14 (11-15)
Approved for use through 04/30/2017. OMB 0651-0032
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

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Application Data Sheet 37 CFR 1.76	Attorney Docket Number	NIKE.276100/081313US82CON
	Application Number	15/610,089
Title of Invention	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER	

This collection of information is required by 37 CFR 1.76. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 23 minutes to complete, including gathering, preparing, and submitting the completed application data sheet form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

Privacy Act Statement

The Privacy Act of 1974 (P.L. 93-579) requires that you be given certain information in connection with your submission of the attached form related to a patent application or patent. Accordingly, pursuant to the requirements of the Act, please be advised that: (1) the general authority for the collection of this information is 35 U.S.C. 2(b)(2); (2) furnishing of the information solicited is voluntary; and (3) the principal purpose for which the information is used by the U.S. Patent and Trademark Office is to process and/or examine your submission related to a patent application or patent. If you do not furnish the requested information, the U.S. Patent and Trademark Office may not be able to process and/or examine your submission, which may result in termination of proceedings or abandonment of the application or expiration of the patent.

The information provided by you in this form will be subject to the following routine uses:

1 The information on this form will be treated confidentially to the extent allowed under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a). Records from this system of records may be disclosed to the Department of Justice to determine whether the Freedom of Information Act requires disclosure of these records.

2. A record from this system of records may be disclosed, as a routine use, in the course of presenting evidence to a court, magistrate, or administrative tribunal, including disclosures to opposing counsel in the course of settlement negotiations.

3 A record in this system of records may be disclosed, as a routine use, to a Member of Congress submitting a request involving an individual, to whom the record pertains, when the individual has requested assistance from the Member with respect to the subject matter of the record.

4. A record in this system of records may be disclosed, as a routine use, to a contractor of the Agency having need for the information in order to perform a contract. Recipients of information shall be required to comply with the requirements of the Privacy Act of 1974, as amended, pursuant to 5 U.S.C. 552a(m).

5. A record related to an International Application filed under the Patent Cooperation Treaty in this system of records may be disclosed, as a routine use, to the International Bureau of the World Intellectual Property Organization, pursuant to the Patent CooperationTreaty.

6. A record in this system of records may be disclosed, as a routine use, to another federal agency for purposes of National Security review (35 U.S.C. 181) and for review pursuant to the Atomic Energy Act (42 U.S.C. 218(c)).

7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.

8. A record from this system of records may be disclosed, as a routine use, to the public after either publication of the application pursuant to 35 U.S.C. 122(b) or issuance of a patent pursuant to 35 U.S.C. 151. Further, a record may be disclosed, subject to the limitations of 37 CFR 1.14, as a routine use, to the public if the record was filed in an application which became abandoned or in which the proceedings were terminated and which application is referenced by either a published application, an application open to public inspections or an issued patent.

9. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local law enforcement agency, if the USPTO becomes aware of a violation or potential violation of law or regulation.

Electronic Patent Application Fee Transmittal

Application Number:	15610089
Filing Date:	31-May-2017
Title of Invention:	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER
First Named Inventor/Applicant Name:	BHUPESH DUA
Filer:	Elizabeth Ashley Lucas/Cheryl Neeley
Attorney Docket Number:	NIKE.276100/081313US82CON

Filed as Large Entity

Filing Fees for Utility under 35 USC 111(a)

Description	Fee Code	Quantity	Amount	Sub-Total in USD($)
Basic Filing:				
Pages:				
Claims:				
Miscellaneous-Filing:				
PROCESSING FEE, EXCEPT PROV. APPLS.	1830	1	140	140
Petition:				
Patent-Appeals-and-Interference:				
Post-Allowance-and-Post-Issuance:				

Description	Fee Code	Quantity	Amount	Sub-Total in USD($)
Extension-of-Time:				
Miscellaneous:				
			Total in USD ($)	**140**

Electronic Acknowledgement Receipt

EFS ID:	29920618
Application Number:	15610089
International Application Number:	
Confirmation Number:	4757
Title of Invention:	ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER
First Named Inventor/Applicant Name:	BHUPESH DUA
Customer Number:	78342
Filer:	Elizabeth Ashley Lucas
Filer Authorized By:	
Attorney Docket Number:	NIKE.276100/081313US82CON
Receipt Date:	28-JUL-2017
Filing Date:	31-MAY-2017
Time Stamp:	15:48:13
Application Type:	Utility under 35 USC 111(a)

Payment information:

Submitted with Payment	yes
Payment Type	CARD
Payment was successfully received in RAM	$140
RAM confirmation Number	073117INTEFSW15493100
Deposit Account	
Authorized User	
The Director of the USPTO is hereby authorized to charge indicated fees and credit any overpayment as follows:	

File Listing:

Document Number	Document Description	File Name	File Size(Bytes)/ Message Digest	Multi Part /.zip	Pages (if appl.)
1	Application Data Sheet	276100_Supplemental_ADS.PDF	673599 9c0d9c941b2027948933e34499162dd6b46f916b	no	9
Warnings:					
Information:					
This is not an USPTO supplied ADS fillable form					
2	Fee Worksheet (SB06)	fee-info.pdf	30729 5a90194b001f3eb0beb939a8712253d48a42c2c7	no	2
Warnings:					
Information:					
		Total Files Size (in bytes):	704328		

This Acknowledgement Receipt evidences receipt on the noted date by the USPTO of the indicated documents, characterized by the applicant, and including page counts, where applicable. It serves as evidence of receipt similar to a Post Card, as described in MPEP 503.

New Applications Under 35 U.S.C. 111

If a new application is being filed and the application includes the necessary components for a filing date (see 37 CFR 1.53(b)-(d) and MPEP 506), a Filing Receipt (37 CFR 1.54) will be issued in due course and the date shown on this Acknowledgement Receipt will establish the filing date of the application.

National Stage of an International Application under 35 U.S.C. 371

If a timely submission to enter the national stage of an international application is compliant with the conditions of 35 U.S.C. 371 and other applicable requirements a Form PCT/DO/EO/903 indicating acceptance of the application as a national stage submission under 35 U.S.C. 371 will be issued in addition to the Filing Receipt, in due course.

New International Application Filed with the USPTO as a Receiving Office

If a new international application is being filed and the international application includes the necessary components for an international filing date (see PCT Article 11 and MPEP 1810), a Notification of the International Application Number and of the International Filing Date (Form PCT/RO/105) will be issued in due course, subject to prescriptions concerning national security, and the date shown on this Acknowledgement Receipt will establish the international filing date of the application.

UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

NOTICE OF ALLOWANCE AND FEE(S) DUE

78342 7590 08/08/2017

SHOOK, HARDY & BACON L.L.P.
(NIKE, INC.)
INTELLECTUAL PROPERTY DEPARTMENT
2555 GRAND BLVD.
KANSAS CITY, MO 64108-2613

EXAMINER
BAYS, MARIE D

ART UNIT	PAPER NUMBER
3765	

DATE MAILED: 08/08/2017

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/610,089	05/31/2017	BHUPESH DUA	NIKE.276100/081313US82CON	4757

TITLE OF INVENTION: ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER

APPLN. TYPE	ENTITY STATUS	ISSUE FEE DUE	PUBLICATION FEE DUE	PREV. PAID ISSUE FEE	TOTAL FEE(S) DUE	DATE DUE
nonprovisional	UNDISCOUNTED	$960	$0	$0	$960	11/08/2017

THE APPLICATION IDENTIFIED ABOVE HAS BEEN EXAMINED AND IS ALLOWED FOR ISSUANCE AS A PATENT. PROSECUTION ON THE MERITS IS CLOSED. THIS NOTICE OF ALLOWANCE IS NOT A GRANT OF PATENT RIGHTS. THIS APPLICATION IS SUBJECT TO WITHDRAWAL FROM ISSUE AT THE INITIATIVE OF THE OFFICE OR UPON PETITION BY THE APPLICANT. SEE 37 CFR 1.313 AND MPEP 1308.

THE ISSUE FEE AND PUBLICATION FEE (IF REQUIRED) MUST BE PAID WITHIN THREE MONTHS FROM THE MAILING DATE OF THIS NOTICE OR THIS APPLICATION SHALL BE REGARDED AS ABANDONED. THIS STATUTORY PERIOD CANNOT BE EXTENDED. SEE 35 U.S.C. 151. THE ISSUE FEE DUE INDICATED ABOVE DOES NOT REFLECT A CREDIT FOR ANY PREVIOUSLY PAID ISSUE FEE IN THIS APPLICATION. IF AN ISSUE FEE HAS PREVIOUSLY BEEN PAID IN THIS APPLICATION (AS SHOWN ABOVE), THE RETURN OF PART B OF THIS FORM WILL BE CONSIDERED A REQUEST TO REAPPLY THE PREVIOUSLY PAID ISSUE FEE TOWARD THE ISSUE FEE NOW DUE.

HOW TO REPLY TO THIS NOTICE:

I. Review the ENTITY STATUS shown above. If the ENTITY STATUS is shown as SMALL or MICRO, verify whether entitlement to that entity status still applies.

If the ENTITY STATUS is the same as shown above, pay the TOTAL FEE(S) DUE shown above.

If the ENTITY STATUS is changed from that shown above, on PART B - FEE(S) TRANSMITTAL, complete section number 5 titled "Change in Entity Status (from status indicated above)".

For purposes of this notice, small entity fees are 1/2 the amount of undiscounted fees, and micro entity fees are 1/2 the amount of small entity fees.

II. PART B - FEE(S) TRANSMITTAL, or its equivalent, must be completed and returned to the United States Patent and Trademark Office (USPTO) with your ISSUE FEE and PUBLICATION FEE (if required). If you are charging the fee(s) to your deposit account, section "4b" of Part B - Fee(s) Transmittal should be completed and an extra copy of the form should be submitted. If an equivalent of Part B is filed, a request to reapply a previously paid issue fee must be clearly made, and delays in processing may occur due to the difficulty in recognizing the paper as an equivalent of Part B.

III. All communications regarding this application must give the application number. Please direct all communications prior to issuance to Mail Stop ISSUE FEE unless advised to the contrary.

IMPORTANT REMINDER: Utility patents issuing on applications filed on or after Dec. 12, 1980 may require payment of maintenance fees. It is patentee's responsibility to ensure timely payment of maintenance fees when due.

Skechers EX1013-p. 7315
Skechers v Nike

PART B - FEE(S) TRANSMITTAL

Complete and send this form, together with applicable fee(s), to: Mail **Mail Stop ISSUE FEE**
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450
or Fax (571)-273-2885

INSTRUCTIONS: This form should be used for transmitting the ISSUE FEE and PUBLICATION FEE (if required). Blocks 1 through 5 should be completed where appropriate. All further correspondence including the Patent, advance orders and notification of maintenance fees will be mailed to the current correspondence address as indicated unless corrected below or directed otherwise in Block 1, by (a) specifying a new correspondence address; and/or (b) indicating a separate "FEE ADDRESS" for maintenance fee notifications.

CURRENT CORRESPONDENCE ADDRESS (Note: Use Block 1 for any change of address)

78342 7590 08/08/2017
SHOOK, HARDY & BACON L.L.P.
(NIKE, INC.)
INTELLECTUAL PROPERTY DEPARTMENT
2555 GRAND BLVD.
KANSAS CITY, MO 64108-2613

Note: A certificate of mailing can only be used for domestic mailings of the Fee(s) Transmittal. This certificate cannot be used for any other accompanying papers. Each additional paper, such as an assignment or formal drawing, must have its own certificate of mailing or transmission.

Certificate of Mailing or Transmission
I hereby certify that this Fee(s) Transmittal is being deposited with the United States Postal Service with sufficient postage for first class mail in an envelope addressed to the Mail Stop ISSUE FEE address above, or being facsimile transmitted to the USPTO (571) 273-2885, on the date indicated below.

(Depositor's name)
(Signature)
(Date)

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/610,089	05/31/2017	BHUPESH DUA	NIKE.276100/081313US82CON	4757

TITLE OF INVENTION: ARTICLE OF FOOTWEAR HAVING A TEXTILE UPPER

APPLN. TYPE	ENTITY STATUS	ISSUE FEE DUE	PUBLICATION FEE DUE	PREV. PAID ISSUE FEE	TOTAL FEE(S) DUE	DATE DUE
nonprovisional	UNDISCOUNTED	$960	$0	$0	$960	11/08/2017

EXAMINER	ART UNIT	CLASS-SUBCLASS
BAYS, MARIE D	3765	012-14600C

1. Change of correspondence address or indication of "Fee Address" (37 CFR 1.363).
- ❑ Change of correspondence address (or Change of Correspondence Address form PTO/SB/122) attached.
- ❑ "Fee Address" indication (or "Fee Address" Indication form PTO/SB/47; Rev 03-02 or more recent) attached. **Use of a Customer Number is required.**

2. For printing on the patent front page, list
(1) The names of up to 3 registered patent attorneys or agents OR, alternatively,
(2) The name of a single firm (having as a member a registered attorney or agent) and the names of up to 2 registered patent attorneys or agents. If no name is listed, no name will be printed.
1 _____
2 _____
3 _____

3. ASSIGNEE NAME AND RESIDENCE DATA TO BE PRINTED ON THE PATENT (print or type)

PLEASE NOTE: Unless an assignee is identified below, no assignee data will appear on the patent. If an assignee is identified below, the document has been filed for recordation as set forth in 37 CFR 3.11. Completion of this form is NOT a substitute for filing an assignment.

(A) NAME OF ASSIGNEE (B) RESIDENCE: (CITY and STATE OR COUNTRY)

Please check the appropriate assignee category or categories (will not be printed on the patent) : ❑ Individual ❑ Corporation or other private group entity ❑ Government

4a. The following fee(s) are submitted:
- ❑ Issue Fee
- ❑ Publication Fee (No small entity discount permitted)
- ❑ Advance Order - # of Copies _____

4b. Payment of Fee(s): **(Please first reapply any previously paid issue fee shown above)**
- ❑ A check is enclosed.
- ❑ Payment by credit card. Form PTO-2038 is attached.
- ❑ The director is hereby authorized to charge the required fee(s), any deficiency, or credits any overpayment, to Deposit Account Number _____ (enclose an extra copy of this form).

5. **Change in Entity Status** (from status indicated above)
- ❑ Applicant certifying micro entity status. See 37 CFR 1.29 — NOTE: Absent a valid certification of Micro Entity Status (see forms PTO/SB/15A and 15B), issue fee payment in the micro entity amount will not be accepted at the risk of application abandonment.
- ❑ Applicant asserting small entity status. See 37 CFR 1.27 — NOTE: If the application was previously under micro entity status, checking this box will be taken to be a notification of loss of entitlement to micro entity status.
- ❑ Applicant changing to regular undiscounted fee status. — NOTE: Checking this box will be taken to be a notification of loss of entitlement to small or micro entity status, as applicable.

NOTE: This form must be signed in accordance with 37 CFR 1.31 and 1.33. See 37 CFR 1.4 for signature requirements and certifications.

Authorized Signature _____ Date _____

Typed or printed name _____ Registration No. _____

PTOL-85 Part B (10-13) Approved for use through 10/31/2013. OMB 0651-0033 U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Skechers EX1013 p. 7316
Skechers v Nike

UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/610,089	05/31/2017	BHUPESH DUA	NIKE.276100/081313US82CON	4757

78342 7590 08/08/2017

SHOOK, HARDY & BACON L.L.P.
(NIKE, INC.)
INTELLECTUAL PROPERTY DEPARTMENT
2555 GRAND BLVD.
KANSAS CITY, MO 64108-2613

EXAMINER	
BAYS, MARIE D	

ART UNIT	PAPER NUMBER
3765	

DATE MAILED: 08/08/2017

Determination of Patent Term Adjustment under 35 U.S.C. 154 (b)
(Applications filed on or after May 29, 2000)

The Office has discontinued providing a Patent Term Adjustment (PTA) calculation with the Notice of Allowance.

Section 1(h)(2) of the AIA Technical Corrections Act amended 35 U.S.C. 154(b)(3)(B)(i) to eliminate the requirement that the Office provide a patent term adjustment determination with the notice of allowance. See Revisions to Patent Term Adjustment, 78 Fed. Reg. 19416, 19417 (Apr. 1, 2013). Therefore, the Office is no longer providing an initial patent term adjustment determination with the notice of allowance. The Office will continue to provide a patent term adjustment determination with the Issue Notification Letter that is mailed to applicant approximately three weeks prior to the issue date of the patent, and will include the patent term adjustment on the patent. Any request for reconsideration of the patent term adjustment determination (or reinstatement of patent term adjustment) should follow the process outlined in 37 CFR 1.705.

Any questions regarding the Patent Term Extension or Adjustment determination should be directed to the Office of Patent Legal Administration at (571)-272-7702. Questions relating to issue and publication fee payments should be directed to the Customer Service Center of the Office of Patent Publication at 1-(888)-786-0101 or (571)-272-4200.

Skechers EX1013-p. 7317
Skechers v Nike

OMB Clearance and PRA Burden Statement for PTOL-85 Part B

The Paperwork Reduction Act (PRA) of 1995 requires Federal agencies to obtain Office of Management and Budget approval before requesting most types of information from the public. When OMB approves an agency request to collect information from the public, OMB (i) provides a valid OMB Control Number and expiration date for the agency to display on the instrument that will be used to collect the information and (ii) requires the agency to inform the public about the OMB Control Number's legal significance in accordance with 5 CFR 1320.5(b).

The information collected by PTOL-85 Part B is required by 37 CFR 1.311. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, Virginia 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450. Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

Privacy Act Statement

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The information provided by you in this form will be subject to the following routine uses:

1. The information on this form will be treated confidentially to the extent allowed under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C 552a). Records from this system of records may be disclosed to the Department of Justice to determine whether disclosure of these records is required by the Freedom of Information Act.
2. A record from this system of records may be disclosed, as a routine use, in the course of presenting evidence to a court, magistrate, or administrative tribunal, including disclosures to opposing counsel in the course of settlement negotiations.
3. A record in this system of records may be disclosed, as a routine use, to a Member of Congress submitting a request involving an individual, to whom the record pertains, when the individual has requested assistance from the Member with respect to the subject matter of the record.
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6. A record in this system of records may be disclosed, as a routine use, to another federal agency for purposes of National Security review (35 U.S.C. 181) and for review pursuant to the Atomic Energy Act (42 U.S.C. 218(c)).
7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.
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9. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local law enforcement agency, if the USPTO becomes aware of a violation or potential violation of law or regulation.

Notice of Allowability	Application No. 15/610,089	Applicant(s) DUA ET AL.	
	Examiner MARIE BAYS	Art Unit 3765	AIA (First Inventor to File) Status No

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--

All claims being allowable, PROSECUTION ON THE MERITS IS (OR REMAINS) CLOSED in this application. If not included herewith (or previously mailed), a Notice of Allowance (PTOL-85) or other appropriate communication will be mailed in due course. **THIS NOTICE OF ALLOWABILITY IS NOT A GRANT OF PATENT RIGHTS.** This application is subject to withdrawal from issue at the initiative of the Office or upon petition by the applicant. See 37 CFR 1.313 and MPEP 1308.

1. ☒ This communication is responsive to *claims filed 6/1/17 and interview of 7/20/17*.
   ☐ A declaration(s)/affidavit(s) under **37 CFR 1.130(b)** was/were filed on_____.
2. ☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on _____; the restriction requirement and election have been incorporated into this action.
3. ☒ The allowed claim(s) is/are *21-40*. As a result of the allowed claim(s), you may be eligible to benefit from the **Patent Prosecution Highway** program at a participating intellectual property office for the corresponding application. For more information, please see http://www.uspto.gov/patents/init_events/pph/index.jsp or send an inquiry to PPHfeedback@uspto.gov.
4. ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

   Certified copies:

   a) ☐ All b) ☐ Some *c) ☐ None of the:
   1. ☐ Certified copies of the priority documents have been received.
   2. ☐ Certified copies of the priority documents have been received in Application No. _____ .
   3. ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

   * Certified copies not received: _____.

Applicant has THREE MONTHS FROM THE "MAILING DATE" of this communication to file a reply complying with the requirements noted below. Failure to timely comply will result in ABANDONMENT of this application.
THIS THREE-MONTH PERIOD IS NOT EXTENDABLE.

5. ☐ CORRECTED DRAWINGS (as "replacement sheets") must be submitted.
   ☐ including changes required by the attached Examiner's Amendment / Comment or in the Office action of Paper No./Mail Date _____.

   Identifying indicia such as the application number (see 37 CFR 1.84(c)) should be written on the drawings in the front (not the back) of each sheet. Replacement sheet(s) should be labeled as such in the header according to 37 CFR 1.121(d).
6. ☐ DEPOSIT OF and/or INFORMATION about the deposit of BIOLOGICAL MATERIAL must be submitted. Note the attached Examiner's comment regarding REQUIREMENT FOR THE DEPOSIT OF BIOLOGICAL MATERIAL.

Attachment(s)

1. ☒ Notice of References Cited (PTO-892)
2. ☒ Information Disclosure Statements (PTO/SB/08), Paper No./Mail Date _____
3. ☐ Examiner's Comment Regarding Requirement for Deposit of Biological Material
4. ☐ Interview Summary (PTO-413), Paper No./Mail Date _____ .
5. ☐ Examiner's Amendment/Comment
6. ☒ Examiner's Statement of Reasons for Allowance
7. ☐ Other _____.

1. The present application is being examined under the pre-AIA first to invent provisions.

2. The following is an examiner's statement of reasons for allowance: It is noted that applicant has argued and stated that the phrase "flat knit edges" does require structure and is not merely a statement of how the textile element is made. "Flat knit edges" have a finished edge that would be present in a finished article and therefore this phrase has been treated as requiring such. Also, the phrase "ribs integrally knitted" has a definition in the art of knitting (as applicant has informed the Examiner) of a "structure made of face wales and back wales" and the lengthwise ridges are formed on both sides of the fabric by pulling stitches first to the face and next to the back of the fabric in adjacent stitches or groups of stitches and therefore the Examiner has treated the claims including this phrase to require such structure.

Any comments considered necessary by applicant must be submitted no later than the payment of the issue fee and, to avoid processing delays, should preferably accompany the issue fee. Such submissions should be clearly labeled "Comments on Statement of Reasons for Allowance."

3. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see **http://pair-direct.uspto.gov**. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). Other useful information can be obtained at the PTO Home Page at www.uspto.gov.

In order to avoid potential delays, Technology Center 3700 is encouraging FAXing of responses to Office Actions directly into the Center at *(571)273-8300* **(FORMAL FAXES ONLY)**. Please identify Examiner Marie Bays of Art Unit 3765 at the top of your cover sheet.

Any inquiry concerning the MERITS of this examination from the examiner should be directed to Marie Bays whose telephone number is (571) 272-4559. The examiner can normally be reached from 6AM - 4PM Mon-Wed.

/Marie Bays/
Primary Examiner
Art Unit 3765

PTO/SB/08a (03-15)
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Application Number	15610089
Filing Date	2017-05-31
First Named Inventor	BHUPESH DUA
Art Unit	3765
Examiner Name	MARIE D. BAYS
Attorney Docket Number	NIKE.276100/081313US82CON

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Examiner Initials*	Cite No	Include name of the author (in CAPITAL LETTERS), title of the article (when appropriate), title of the item (book, magazine, journal, serial, symposium, catalog, etc), date, pages(s), volume-issue number(s), publisher, city and/or country where published.	T[5]

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	1	Petitioner's Reply to Patent Owner's Response for Inter Partes Review IPR2016-00921 dated April 21, 2017, 32 pages.	
	2	Petitioner's Updated Mandatory Notices Pursuant to 37 C.F.R. § 42.8 for Inter Partes Review IPR2016-00921, dated April 21, 2017, 5 pages.	
	3	Koester, A.W., "Analyzing the Color, Design and Texture of Fabric", Oregon State University Extension Service, 1993, 8 pages, and submitted to the US Patent and Trademark Office on April 21, 2017 as Exhibit 1013 to the Petitioner's Reply to Patent Owner's Response for Inter Partes Review IPR2016-00921 dated April 21, 2017 and for Inter Partes Review IPR2016-00922.	
	4	'Definition of 'Impart'", Merriam-Webster, printed on April 10, 2017 from the internet: hltgs://vvwvv.rnerriarn-webster.corn/diciionary/imQarl, 11 pages, and submitted to the US Patent and Trademark Office on April 21, 2017 as Exhibit 1014 to the Petitioner's Reply to Patent Owner's Response for Inter Partes Review IPR2016-00921 dated April 21, 2017 and for Inter Partes Review IPR2016-00922.	
	5	Patent Owner's Objections to Admissibility of Evidence Served With Petitioner's Reply to Patent Owner's Response Pursuant to 37 C.F.R. § 42.64(b) for Inter Partes Review IPR2016-00921 dated April28, 2017, 4 pages.	
	6	Petitioner's Reply to Patent Owner's Response for Inter Partes Review IPR2016-00922 dated April 21, 2017, 34 pages.	
	7	Petitioner's Updated Mandatory Notices Pursuant to 37 C.F.R. § 42.8 for Inter Partes Review IPR2016-00922, dated April 21, 2017, 5 pages.	
	8	Patent Owner's Objections to Admissibility of Evidence Served With Petitioner's Reply to Patent Owner's Response Pursuant to 37 C.F.R. § 42.64(b) for Inter Partes Review IPR2016-00922 dated April 28, 2017, 4 pages.	

If you wish to add additional non-patent literature document citation information please click the Add button [Add]

EXAMINER SIGNATURE

Examiner Signature	/MARIE D BAYS/	Date Considered	08/01/2017

*EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609. Draw line through a citation if not in conformance and not considered. Include copy of this form with next communication to applicant.

[1] See Kind Codes of USPTO Patent Documents at www.USPTO.GOV or MPEP 901.04. [2] Enter office that issued the document, by the two-letter code (WIPO Standard ST.3). [3] For Japanese patent documents, the indication of the year of the reign of the Emperor must precede the serial number of the patent document. [4] Kind of document by the appropriate symbols as indicated on the document under WIPO Standard ST.16 if possible. [5] Applicant is to place a check mark here if English language translation is attached.

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OR

☐ That no item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application, and, to the knowledge of the person signing the certification after making reasonable inquiry, no item of information contained in the information disclosure statement was known to any individual designated in 37 CFR 1.56(c) more than three months prior to the filing of the information disclosure statement. See 37 CFR 1.97(e)(2).

See attached certification statement.

☒ The fee set forth in 37 CFR 1.17 (p) has been submitted herewith.

☒ A certification statement is not submitted herewith.

SIGNATURE

A signature of the applicant or representative is required in accordance with CFR 1.33, 10.18. Please see CFR 1.4(d) for the form of the signature.

Signature	/ELIZABETH A. LUCAS/	Date (YYYY-MM-DD)	2017-07-24
Name/Print	Elizabeth A. Lucas	Registration Number	74247

This collection of information is required by 37 CFR 1.97 and 1.98. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 1 hour to complete, including gathering, preparing and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

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Privacy Act Statement

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The information provided by you in this form will be subject to the following routine uses:

1. The information on this form will be treated confidentially to the extent allowed under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a). Records from this system of records may be disclosed to the Department of Justice to determine whether the Freedom of Information Act requires disclosure of these record s.

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Doc code: IDS
Doc description: Information Disclosure Statement (IDS) Filed

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First Named Inventor	BHUPESH DUA
Art Unit	3765
Examiner Name	MARIE D. BAYS
Attorney Docket Number	NIKE.276100/081313US82CON

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	1	Petitioner Adidas AG's Notice of Supplemental Evidence in Response to Patent Owner's Objections to Evidence Under 37 C.F.R. § 42.64(8)(1) for Inter Partes Review IPR2016-00921 dated May 12, 2017, 4 pages.	
	2	Petitioner's Exhibit List (as of May 12, 2017) for Inter Partes Review IPR2016-00921, dated May 12, 2017, 4 pages.	
	3	Declaration of Tiffany L. Williams, and submitted to the US Patent and Trademark Office on May 12, 2017 as Exhibit 1015 to the Petitioner Adidas AG's Notice of Supplemental Evidence in Response to Patent Owner's Objections to Evidence Under 37 C.F.R. § 42.64(8)(1) for Inter Partes Review IPR2016-00921 dated May 12, 2017 and for Inter Partes Review IPR2016-00922.	
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Signature	/ELIZABETH A. LUCAS/	Date (YYYY-MM-DD)	2017-07-24
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Examiner Name	MARIE D. BAYS
Attorney Docket Number	NIKE.276100/081313US82CON

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INFORMATION DISCLOSURE STATEMENT BY APPLICANT (Not for submission under 37 CFR 1.99)		
	Application Number	15610089
	Filing Date	2017-05-31
	First Named Inventor	BHUPESH DUA
	Art Unit	3765
	Examiner Name	MARIE D. BAYS
	Attorney Docket Number	NIKE.276100/081313US82CON

	1	Decision Denying Institution of Inter Partes Review Under 37 C.F.R. § 42.108 for Inter Partes Review IPR2017-00263 dated June 7, 2017, 11 pages.	
	2	Decision Denying Institution of Inter Partes Review Under 37 C.F.R. § 42.108 for Inter Partes Review IPR2017-00264 dated June 7, 2017, 12 pages.	
	3	Patent Owner Nike Inc.'s Request for Oral Argument for Inter Partes Review IPR2016-00921 dated June 12, 2017, 4 pages.	
	4	Petitioner's Request for Oral Argument for Inter Partes Review IPR2016-00921 dated June 12, 2017, 4 pages.	
	5	Patent Owner Nike Inc.'s Request for Oral Argument for Inter Partes Review IPR2016-00922 dated June 12, 2017, 4 pages.	
	6	Petitioner's Request for Oral Argument for Inter Partes Review IPR2016-00922 dated June 12, 2017, 4 pages.	
	7	ORDER Oral Hearing Under 37 C.F.R. § 42.70 for Inter Partes Review IPR2016-00921 and for Inter Partes Review IPR2016-00922 dated June 14, 2017, 6 pages.	

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☐ That no item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application, and, to the knowledge of the person signing the certification after making reasonable inquiry, no item of information contained in the information disclosure statement was known to any individual designated in 37 CFR 1.56(c) more than three months prior to the filing of the information disclosure statement. See 37 CFR 1.97(e)(2).

See attached certification statement.

☒ The fee set forth in 37 CFR 1.17 (p) has been submitted herewith.

☒ A certification statement is not submitted herewith.

SIGNATURE

A signature of the applicant or representative is required in accordance with CFR 1.33, 10.18. Please see CFR 1.4(d) for the form of the signature.

Signature	/ELIZABETH A. LUCAS/	Date (YYYY-MM-DD)	2017-07-24
Name/Print	Elizabeth A. Lucas	Registration Number	74247

This collection of information is required by 37 CFR 1.97 and 1.98. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 1 hour to complete, including gathering, preparing and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

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7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.

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Examiner Name	MARIE D. BAYS
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	1	Petitioner Adidas AG's Request for Rehearing Under 37 C.F.R. § 42.71 On The Decision Not to Institute Inter Partes Review for Inter Partes Review IPR2017-00263, dated July 7, 2017, 17 pages.	
	2	Petitioner Adidas AG's Request for Rehearing Under 37 C.F.R. § 42.71 On The Decision Not to Institute Inter Partes Review for Inter Partes Review IPR2017-00264, dated July 7, 2017, 17 pages.	
	3	Petitioner's Demonstratives for Inter Partes Review IPR2016-00921, dated July 10, 2017 and for Inter Partes Review IPR2016-00922, 84 pages.	
	4	Patent Owner NIKE's Exhibit List (As of July 11, 2017) for Inter Partes Review IPR2016-00921, dated July 11,2017, 3 pages.	
	5	Petitioner's Updated Exhibit List (As of July 11, 2017) for Inter Partes Review IPR2016-00921, dated July 11,2017, 4 pages.	
	6	Patent Owner NIKE Inc.'s Demonstratives for Inter Partes Review IPR2016-00921, dated July 11, 2017 and for Inter Partes Review IPR2016-00922, 27 pages.	
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Name/Print	Elizabeth A. Lucas	Registration Number	74247

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CONFIRMATION NO. 4757

SERIAL NUMBER	FILING or 371(c) DATE	CLASS	GROUP ART UNIT	ATTORNEY DOCKET NO.
15/610,089	05/31/2017 RULE	012	3765	NIKE.276100/081313US82CON

APPLICANTS

NIKE, Inc., Beaverton, OR;

INVENTORS

BHUPESH DUA, Portland, OR;
EDWARD NATHANIAL THOMAS, Portland, OR;

**** CONTINUING DATA ***************************

This application is a CON of 14/503,514 10/01/2014
which is a DIV of 14/079,748 11/14/2013 ABN
which is a CON of 13/413,233 03/06/2012 ABN
which is a CON of 13/236,742 09/20/2011 PAT 8266749
which is a CON of 12/879,517 09/10/2010 PAT 8042288
which is a CON of 12/032,995 02/18/2008 PAT 7814598
which is a DIV of 10/791,289 03/03/2004 PAT 7347011

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Foreign Priority claimed	35 USC 119(a-d) conditions met	Verified and Acknowledged	Met after Allowance	STATE OR COUNTRY	SHEETS DRAWINGS	TOTAL CLAIMS	INDEPENDENT CLAIMS
☐ Yes ☑ No	☐ Yes ☑ No	/MARIE D BAYS/ Examiner's Signature	☐ Initials	OR	12	20	2

ADDRESS

SHOOK, HARDY & BACON L.L.P.
(NIKE, INC.)
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KANSAS CITY, MO 64108-2613
UNITED STATES

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	1	Order - Conduct of the Proceeding - 37 CFR 42.5 dated August 2, 2013, in IPR2013-00067.	
	2	Order - Case Transfer to Administrative Patent Judge Josiah C. Cocks dated August 12, 2013, in IPR2013-00067.	
	3	Motion to Amend dated August 19, 2013, in IPR2013-00067.	
	4	Patent Owner Exhibit List dated August 19, 2013, in IPR2013-00067.	
	5	Corrected Certificate of Service dated August 19, 2013, in IPR2013-00067.	
	6	NIKE 29Aug13 Ex List dated August 29, 2013, in IPR2013-00067.	
	7	Decision Motion to Withdraw § 42.10(e) dated October 30, 2013, in IPR2013-00067.	
	8	Petitioner adidas AG's Amended Notice of Cross Examination of Raymond Tonkel dated November 1, 2013, in IPR2013-00067.	
	9	Petitioner Opposition to Patent Owner Motion to Amend dated November 12, 2013, in IPR2013-00067.	
	10	Petitioner Exhibit List dated November 12, 2013, in IPR2013-00067.	
	11	Patent Owner NIKE, Inc.'s Notice of Cross-Examination of Sabit Adanur dated November 26, 2013, in IPR2013-00067.	

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	12	Patent Owner NIKE, Inc.'s Notice of Second Cross Examination of Edward Frederick dated November 26, 2013, in IPR2013-00067.	
	13	Submission of Power of Attorney dated November 26, 2013, in IPR2013-00067.	
	14	Petitioner's Power of Attorney dated November 26, 2013, in IPR2013-00067.	
	15	Mandatory Notice Information (Addition of Back-Up Counsel) dated November 26, 2013, in IPR2013-00067.	
	16	Patent Owner's Reply to Petitioner's Opposition to Motion to Amend dated December 11, 2013, in IPR2013-00067.	
	17	Patent Owner Exhibit List (December 11, 2013) dated December 11, 2013, in IPR2013-00067.	
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	19	Patent Owner Request for Oral Argument dated January 7, 2014, in IPR2013-00067.	
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Skechers EX1013-p. 7342
Skechers v Nike

INFORMATION DISCLOSURE STATEMENT BY APPLICANT

(Not for submission under 37 CFR 1.99)

Application Number	15610089
Filing Date	2017-05-31
First Named Inventor	BHUPESH DUA
Art Unit	3765
Examiner Name	MARIE D. BAYS
Attorney Docket Number	NIKE.276100/081313US82CON

CERTIFICATION STATEMENT

Please see 37 CFR 1.97 and 1.98 to make the appropriate selection(s):

That each item of information contained in the information disclosure statement was first cited in any communication from a foreign patent office in a counterpart foreign application not more than three months prior to the filing of the information disclosure statement. See 37 CFR 1.97(e)(1).

OR

☐ That no item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application, and, to the knowledge of the person signing the certification after making reasonable inquiry, no item of information contained in the information disclosure statement was known to any individual designated in 37 CFR 1.56(c) more than three months prior to the filing of the information disclosure statement. See 37 CFR 1.97(e)(2).

See attached certification statement.

☒ The fee set forth in 37 CFR 1.17 (p) has been submitted herewith.

☒ A certification statement is not submitted herewith.

SIGNATURE

A signature of the applicant or representative is required in accordance with CFR 1.33, 10.18. Please see CFR 1.4(d) for the form of the signature.

Signature	/ELIZABETH A. LUCAS/	Date (YYYY-MM-DD)	2017-07-24
Name/Print	Elizabeth A. Lucas	Registration Number	74247

This collection of information is required by 37 CFR 1.97 and 1.98. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 1 hour to complete, including gathering, preparing and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

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The information provided by you in this form will be subject to the following routine uses:

1. The information on this form will be treated confidentially to the extent allowed under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a). Records from this system of records may be disclosed to the Department of Justice to determine whether the Freedom of Information Act requires disclosure of these record s.

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7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.

8. A record from this system of records may be disclosed, as a routine use, to the public after either publication of the application pursuant to 35 U.S.C. 122(b) or issuance of a patent pursuant to 35 U.S.C. 151. Further, a record may be disclosed, subject to the limitations of 37 CFR 1.14, as a routine use, to the public if the record was filed in an application which became abandoned or in which the proceedings were terminated and which application is referenced by either a published application, an application open to public inspections or an issued patent.

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PTO/SB/08a (03-15)
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INFORMATION DISCLOSURE STATEMENT BY APPLICANT

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Application Number	15610089
Filing Date	2017-05-31
First Named Inventor	BHUPESH DUA
Art Unit	3765
Examiner Name	MARIE D. BAYS
Attorney Docket Number	NIKE.276100/081313US82CON

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Examiner Initial*	Cite No	Patent Number	Kind Code[1]	Issue Date	Name of Patentee or Applicant of cited Document	Pages,Columns,Lines where Relevant Passages or Relevant Figures Appear
	1	2178941		1939-11-07	Schuessler	
	2	2150730		1939-03-14	Schuessler	
	3	6984596		2006-01-10	Dickerson	
	4	4354318		1982-10-19	Frederick et al.	

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Examiner Initial*	Cite No	Publication Number	Kind Code[1]	Publication Date	Name of Patentee or Applicant of cited Document	Pages,Columns,Lines where Relevant Passages or Relevant Figures Appear
	1	20140150294		2014-06-05	Thomas et al.	

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Examiner Initial*	Cite No	Foreign Document Number[3]	Country Code[2] i	Kind Code[4]	Publication Date	Name of Patentee or Applicant of cited Document	Pages,Columns,Lines where Relevant Passages or Relevant Figures Appear	T[5]

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Examiner Initials*	Cite No	Include name of the author (in CAPITAL LETTERS), title of the article (when appropriate), title of the item (book, magazine, journal, serial, symposium, catalog, etc), date, pages(s), volume-issue number(s), publisher, city and/or country where published.	T5
	1	Order Trial Hearing dated January 13, 2014, in IPR2013-00067.	
	2	Patent Owner Opposition to Motion to Exclude dated January 21, 2014, in IPR2013-00067.	
	3	Order Conduct of the Proceeding § 42.5 dated January 23, 2014, in IPR2013-00067.	
	4	Mandatory Notice Information (Addition of Back-Up Counsel) dated January 28, 2014, in IPR2013-00067.	
	5	Petitioner's Reply to Patent Owner's Opposition to Petitioner's Motion to Exclude Evidence dated January 28, 2014, in IPR2013-00067.	
	6	Petitioner's Exhibit List (As of February 6, 2014) dated February 6, 2014, in IPR2013-00067.	
	7	Submission of Patent Owner's Trial Hearing Demonstratives dated February 6, 2014, in IPR2013-00067.	
	8	Oral Hearing Transcript dated March 5, 2014, in IPR2013-00067.	

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	Attorney Docket Number	NIKE.276100/081313US82CON

	9	Final Written Decision dated April 28, 2014, in IPR2013-00067.	
	10	Notice of Appeal dated June 30, 2014, in IPR2013-00067.	
	11	Cross Examination Deposition of Raymond Tonkel dated November 12, 2013, in IPR2013-00067.	
	12	Declaration of Sabut Adanur Ph.D dated November 12, 2013, in IPR2013-00067.	
	13	Excerpt of Knitted Fabrics dated November 12, 2013, in IPR2013-00067.	
	14	Excerpt of Bharat J. Gaijar, Wrap Knit Fabrics Technologies dated November 12, 2013, in IPR2013-00067.	
	15	J. Watel, the Milanese Machine: Little Progress Made in Development of Milanese Fabric dated November 12, 2013, in IPR2013-00067.	
	16	Supplemental Declaration Edward C. Frederick, Ph.D. dated November 12, 2013, in IPR2013-00067.	
	17	Billy Hunter, Editor Viewpoint: Nike Flyknit: Quantum Leap for Flat Knitting dated November 12, 2013, in IPR2013-00067.	
	18	Billy Hunter, Editor Viewpoint: Nike Flyknit: Ready, Steady, Go dated November 12, 2013, in IPR2013-00067.	
	19	Petitioner's Oral Hearing Demonstratives dated February 6, 2014, in IPR2013-00067.	

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	Art Unit	3765
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	Attorney Docket Number	NIKE.276100/081313US82CON

	20	Edward C. Frederick, Ph.D Declaration dated August 19, 2013, in IPR2013-00067.	
	21	Chapter 16 of Textiles in Sport dated August 19, 2013, in IPR2013-00067.	
	22	US Patent 2147197 with markings dated August 19, 2013, in IPR2013-00067.	
	23	US Patent 7347011 with markings dated August 19, 2013, dated August 19, 2013, in IPR2013-00067.	
	24	Decision on Appeal dated August 19, 2013, in IPR2013-00067.	
	25	Edward C. Frederick, Ph.D Deposition Transcript dated August 19, 2013, in IPR2013-00067.	
	26	Raymond F. Tonkel Declaration dated August 19, 2013, in IPR2013-00067.	
	27	Excerpts from Man-Made Fiber and Textile Dictionary dated August 19, 2013, in IPR2013-00067.	
	28	R-H Websters Dictionary Excerpt dated August 19, 2013, in IPR2013-00067.	
	29	Edward C. Frederick, Ph.D Deposition Errata Sheet dated August 29, 2013, in IPR2013-00067.	
	30	Exhibit 2015 dated December 11, 2013, in IPR2013-00067.	

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	Examiner Name	MARIE D. BAYS
	Attorney Docket Number	NIKE.276100/081313US82CON

	31	Exhibit 2016 dated December 11, 2013, in IPR2013-00067.	
	32	Exhibit 2017 dated December 11, 2013, in IPR2013-00067.	
	33	Exhibit 2018 dated December 11, 2013, in IPR2013-00067.	
	34	Exhibit 2020 dated December 11, 2013, in IPR2013-00067.	
	35	Exhibit 2021 dated December 11, 2013, in IPR2013-00067.	
	36	Exhibit 2022 dated January 7, 2014, in IPR2013-00067.	
	37	Exhibit 2023 dated January 7, 2014, in IPR2013-00067.	
	38	Exhibit 3001 dated April 28, 2014, in IPR2013-00067.	
	39	Exhibit 3002 dated April 28, 2014, in IPR2013-00067.	
	40	Form PTO SB 42 dated November 28, 2012, in IPR2013-00067.	
	41	Form PTO SB 42 dated November 12, 2013, in IPR2013-00067.	

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EXAMINER SIGNATURE

Examiner Signature	/MARIE D BAYS/	Date Considered	08/01/2017

*EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609. Draw line through a citation if not in conformance and not considered. Include copy of this form with next communication to applicant.

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Skechers EX1013-p. 7350
Skechers v Nike

INFORMATION DISCLOSURE STATEMENT BY APPLICANT

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Art Unit	3765
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Signature	/ELIZABETH A. LUCAS/	Date (YYYY-MM-DD)	2017-07-24
Name/Print	Elizabeth A. Lucas	Registration Number	74247

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Doc code: IDS
Doc description: Information Disclosure Statement (IDS) Filed

PTO/SB/08a (03-15)
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U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE
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Examiner Name	MARIE D. BAYS
Attorney Docket Number	NIKE.276100/081313US82CON

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Examiner Initial*	Cite No	Patent Number	Kind Code[1]	Issue Date	Name of Patentee or Applicant of cited Document	Pages,Columns,Lines where Relevant Passages or Relevant Figures Appear
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Examiner Initial*	Cite No	Publication Number	Kind Code[1]	Publication Date	Name of Patentee or Applicant of cited Document	Pages,Columns,Lines where Relevant Passages or Relevant Figures Appear
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Examiner Initial*	Cite No	Foreign Document Number[3]	Country Code[2] i	Kind Code[4]	Publication Date	Name of Patentee or Applicant of cited Document	Pages,Columns,Lines where Relevant Passages or Relevant Figures Appear	T[5]
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	Examiner Name	MARIE D. BAYS
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	1	Declaration of Dr. Edward C. Frederick from the US Patent and Trademark Office Inter Partes Review of US Patent No. 7,347,011 (178 pp).	
	2	David J. Spencer, Knitting Technology: A Comprehensive Handbook and Practical Guide (Third ed., Woodhead Publishing Ltd. 2001) (413 pp).	
	3	Excerpt of Hannelore Eberle et al., Clothing Technology (Third English ed., Beuth-Verlag GmnH 2002) (book cover and back; pp2-3, 83).	
	4	File History for U.S. Patent No. 7,347,011 (202 pgs.), filed November 28,2012, as Exhibit 1003 in IPR2013-00067.	
	5	IDS Under 37 C.F.R. 1.501 (2 pgs.), filed November 28, 2012, as Exhibit 1004 in IPR2013-00067.	
	6	Notice of Filing Date accorded to Petition and Time for Filing Patent Owner Preliminary Response in IPR2013-00067 (8 pgs.), December 4, 2012.	
	7	Petition for Inter Partes Review Under 35 U.S.C. §§ 311-319 and 37 C.F.R. § 42.100 et seq. (65 pgs.), filed November 28, 2012, in IPR2013-00067.	
	8	Petitioner Power of Attorney dated November 22, 2012 (2 pgs.), and filed November 28, 2012, in IPR2013-00067.	
	9	Revised Petition for Inter Partes Review Under 35 U.S.C. §§ 311-319 and 37 C.F.R. § 42.100 et seq. (64 pgs.), filed December 10, 2012, in IPR2013-00067.	
	10	List of Related Matters filed December 14, 2012, in IPR2013-00067.	
	11	Mandatory Notice Information filed January 25, 2013, in IPR2013-00067.	

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	12	Submission of Power of Attorney filed January 25, 2013, in IPR2013-00067.	
	13	Mandatory Notice Information filed February 28, 2013, in IPR2013-00067.	
	14	Patent Owner's Preliminary Response to Petition filed February 28, 2013, in IPR2013-00067.	
	15	Decision Institution of Inter Partes Review 37 C.F.R. § 42.108, entered May 17, 2013, in IPR2013-00067.	
	16	Scheduling Order dated May 17, 2013, in IPR2013-00067.	
	17	Notice of Stipulation dated June 14, 2014, in IPR2013-00067.	
	18	Patent Owner's List of Proposed Motions dated June 14, 2014, in IPR2013-00067.	
	19	Order- Conduct of the Proceeding dated June 19, 2014, in IPR2013-00067.	
	20	Stipulation Regarding Discovery Relating to Expert Witness dated July 11, 2013, in IPR2013-00067.	
	21	Motion to Authorize Withdrawal of Counsel and Appointment of New POA dated July 11, 2013, in IPR2013-00067.	
	22	Petitioner Power of Attorney dated July 11, 2013, in IPR2013-00067.	

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	23	Notice of Cross Examination dated July 11, 2013, in IPR2013-00067.

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EXAMINER SIGNATURE

Examiner Signature	/MARIE D BAYS/	Date Considered	08/01/2017

*EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609. Draw line through a citation if not in conformance and not considered. Include copy of this form with next communication to applicant.

[1] See Kind Codes of USPTO Patent Documents at www.USPTO.GOV or MPEP 901.04. [2] Enter office that issued the document, by the two-letter code (WIPO Standard ST.3). [3] For Japanese patent documents, the indication of the year of the reign of the Emperor must precede the serial number of the patent document. [4] Kind of document by the appropriate symbols as indicated on the document under WIPO Standard ST.16 if possible. [5] Applicant is to place a check mark here if English language translation is attached.

ALL REFERENCES CONSIDERED EXCEPT WHERE LINED THROUGH. /M.D.B/

INFORMATION DISCLOSURE STATEMENT BY APPLICANT

(Not for submission under 37 CFR 1.99)

Application Number	15610089
Filing Date	2017-05-31
First Named Inventor	BHUPESH DUA
Art Unit	3765
Examiner Name	MARIE D. BAYS
Attorney Docket Number	NIKE.276100/081313US82CON

CERTIFICATION STATEMENT

Please see 37 CFR 1.97 and 1.98 to make the appropriate selection(s):

That each item of information contained in the information disclosure statement was first cited in any communication from a foreign patent office in a counterpart foreign application not more than three months prior to the filing of the information disclosure statement. See 37 CFR 1.97(e)(1).

OR

☐ That no item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application, and, to the knowledge of the person signing the certification after making reasonable inquiry, no item of information contained in the information disclosure statement was known to any individual designated in 37 CFR 1.56(c) more than three months prior to the filing of the information disclosure statement. See 37 CFR 1.97(e)(2).

See attached certification statement.

☒ The fee set forth in 37 CFR 1.17 (p) has been submitted herewith.

☒ A certification statement is not submitted herewith.

SIGNATURE

A signature of the applicant or representative is required in accordance with CFR 1.33, 10.18. Please see CFR 1.4(d) for the form of the signature.

Signature	/ELIZABETH A. LUCAS/	Date (YYYY-MM-DD)	2017-07-24
Name/Print	Elizabeth A. Lucas	Registration Number	74247

This collection of information is required by 37 CFR 1.97 and 1.98. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 1 hour to complete, including gathering, preparing and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

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7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (i.e., GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.

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