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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

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I. INTRODUCTION

This case involves six patents related to Nike's innovative knitted footwear technology: U.S. Patent No. 8,266,749 ("the '749 patent"), U.S. Patent No. 9,060,562 ("the '562 patent"), U.S. Patent No. 9,510,636 ("the '636 patent"), U.S. Patent No. 9,730,484 ("the '484 patent"), U.S. Patent No. 9,918,511 ("the '511 patent"), and U.S. Patent No. 9,986,781 ("the '781 patent") (collectively, the "Asserted Patents", Exs. 1–6).[1]

The "general rule" of claim construction is that Courts should give disputed phrases their "ordinary and customary meanings." *See, e.g.*, *Apple Inc. v. MPH Techs. Oy*, 28 F.4th 254, 259 (Fed. Cir. 2022). If disputed phrases use common, non-technical words, the Court may determine that their ordinary meanings are readily apparent and require no further construction. *See Ironburg Inventions Ltd. v. Valve Corp.,* 64 F.4th 1274, 1287 (Fed. Cir. 2023); *see, e.g., Wilson Sporting Goods Co. v. Monsta Athletics, LLC,* No. 5:19-cv-738, 2020 WL 5835321, at *3 (C.D. Cal. Sept. 24, 2020) ("[T]he Court does not find 'outer' to be the type of technical term that requires clarification.").

That is the case here. Nike does not believe that any of the disputed claim phrases require further construction. Skechers, on the other hand, urges the Court to rewrite the ordinary and customary meaning of nineteen distinct phrases it asks the Court to construe. But those nineteen phrases use common, non-technical words with ordinary meanings that are readily understood by a lay jury and skilled artisan alike. The nineteen phrases require no further construction or clarification, and reinterpreting the phrases with Skechers' litigation-driven constructions would violate several cannons of claim construction law. Nike requests, therefore, that the Court reject Skechers' improper constructions and give each disputed phrase its ordinary and customary meaning.

[1] Citations to Exhibits 1-7 refer to the exhibits to the May 24, 2024, Declaration of Bridgette Gershoni, filed herewith.

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II. ARGUMENT

A. Legal Standards

"Courts do not rewrite claims; instead, [they] give effect to the terms chosen by the patentee." *Helmsderfer v. Bobrick Washroom Equip., Inc.,* 527 F.3d 1379, 1383 (Fed. Cir. 2008) (citing *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1364 (Fed. Cir. 1999)); *Oplus Techs., Ltd. v. Vizio, Inc.,* No. 2:12-cv-05707, 2012 WL 5519198, at *1 (C.D. Cal. Oct. 31, 2012). The central purpose of claim construction is to clarify "disputed meanings and technical scope," and "when necessary to explain what the patentee covered by the claims." *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008). Claim construction "is not an obligatory exercise in redundancy." *Id.*

1. Claims are the Cornerstone of Claim Construction

When construing claim phrases, the "analysis must begin and remain centered on the claim language itself, for that is the language the patentee has chosen to 'particularly point[ ] out and distinctly claim[ ] the subject matter which the patentee regards as his invention.'" *Source Vagabond Sys. Ltd. v. Hydrapak, Inc.*, 753 F.3d 1291, 1299 (Fed. Cir. 2014). "A patent holder should know what he owns, and the public should know what he does not." *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 731 (2002).

The intrinsic record—i.e., the patent specification and the prosecution history—may help inform "the subject matter which the patentee regards as his invention." *Interactive Gift Exp., Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001); *see also Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005). Although claims must be read in light of the specification, "it is improper to read limitations from the written description into a claim." *Bradium Techs. LLC v. Iancu*, 923 F.3d 1032, 1049 (Fed. Cir. 2019). "[T]he line between construing terms and importing limitations can be discerned with reasonable certainty and predictability if the court's focus remains on

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understanding how a person of ordinary skill in the art would understand the claim terms." *California Inst. of Tech. v. Broadcom Ltd.,* No. cv-16-3714, 2017 WL 11835433, at *5 (C.D. Cal. July 12, 2017) (citing *Philips,* 415 F.3d at 1316). The prosecution history is also relevant, but it "lacks [] clarity" and is "less useful for claim construction purposes" because it "represents an ongoing negotiation between the [Patent Office] and the applicant." *Id.*

After looking at the intrinsic evidence, courts may consider extrinsic evidence. *Phillips*, 415 F.3d at 1317. However, extrinsic evidence is "less significant than the intrinsic record" because it is generally "less reliable." *Id*. at 1317-18. Additionally, extrinsic evidence cannot be used to change the meaning of a term as used in the specification. *Merck & Co. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005). Thus, the extrinsic evidence must be considered, if at all, in context of the intrinsic evidence. *Phillips*, 415 F.3d at 1319.

2. The General Rule: Claims are Given their Ordinary and Customary Meaning

As a "general rule," claim phrases are given their "plain and ordinary meaning," or "ordinary and customary meaning." *Apple*, 28 F.4th at 259; *Phillips*, 415 F.3d at 1312. The "ordinary and customary meaning" is "the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Phillips* at 1313. A phrase's ordinary meaning "may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words." *Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 805 (Fed. Cir. 2007). When there is "no facial ambiguity or obscurity in the claim term," courts have imposed "demanding standards" for displacing the ordinary meaning. *Ancora Techs., Inc. v. Apple, Inc.*, 744 F.3d 732, 738 (Fed. Cir. 2014).

If a claim phrase uses common words, the Court may determine that the ordinary meaning requires no further construction. *See Ironburg Inventions,* 64 F.4th at 1287. Where the ordinary meaning is readily apparent, the Court requires "only common sense

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application of a widely accepted meaning." *Wilson Sporting Goods*, 2020 WL 5835321, at *2. When construing a phrase comprised of several common words, courts simply apply "the established meanings of the individual words." *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1372 (Fed. Cir. 2003) (construing "boot selection flag" by applying the ordinary meanings of "boot" and "selection" as "descriptive modifiers of 'flag,'").

3. Limited Exceptions to the General Rule: Lexicography and Disclaimers, Which Have "Exacting" Standards

A court may depart from the ordinary and customary meaning in only three exceptional circumstances. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). Courts construe each exception narrowly, because it is "unjust to the public, as well as an evasion of the law, to construe [a phrase] in a manner different from the plain import of its terms." *White v. Dunbar*, 119 U.S. 47, 52 (1886); *InTouch Techs., Inc. v. VGo Commc'ns, Inc.,* No. cv-11-9185 , 2012 WL 12893291, at *2 (C.D. Cal. Nov. 16, 2012).

The first exception to "ordinary and customary meaning" is when the patentee acts as a "lexicographer" by redefining a claim phrase to have a special meaning. The "standard for lexicography is exacting." *Baxalta Inc. v. Genentech, Inc*., 972 F.3d 1341, 1349 (Fed. Cir. 2020). For the patentee to redefine a phrase, they must "clearly express that intent in the written description" with "sufficient clarity to put one reasonably skilled in the art on notice that the inventor intended to redefine the claim term." *Merck & Co., Inc. v. Teva Pharms. USA, Inc.*, 395 F.3d 1364, 1370 (Fed. Cir. 2005).

The second exception to "ordinary and customary meaning" is when the patentee makes a "specification disclaimer" or "specification disavowal." *Openwave Sys., Inc. v. Apple Inc*., 808 F.3d 509, 512–13 (Fed. Cir. 2015). A disclaimer occurs when "the specification make[s] clear that the invention does not include a particular feature." *Id.* The standard for a specification disclaimer is also "exacting": the specification must be "both so clear as to show reasonable clarity and deliberateness, and so unmistakable as

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to be unambiguous evidence of disclaimer." *Id.* There is no disclaimer when the specification discusses a "preferred" embodiment. *Vectura Ltd. v. Glaxosmithkline LLC*, 981 F.3d 1030, 1038 (Fed. Cir. 2020). Nor is there a specification disclaimer where the patentee provides "mere criticism of a particular embodiment." *Id.* Anything less than an "unambiguous" and "unmistakable" disavowal will fall short of a specification disclaimer. *Openwave*, 808 F.3d at 513.

The third exception is referred to as a "prosecution history disclaimer." Like a specification disclaimer, the standard for a prosecution history disclaimer is "exacting, requiring clear and unequivocal evidence that the claimed invention includes or does not include a particular feature." *Cisco Sys., Inc. v. ITC*, 873 F.3d 1354, 1361 (Fed. Cir. 2017). Here too, an "ambiguous disclaimer" will not "limit a claim term's ordinary meaning." *SanDisk Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1287 (Fed. Cir. 2005).

Absent one of these three exceptions, the ordinary and customary meaning of a claim phrase controls. *Mass. Inst. of Tech. v. Shire Pharms., Inc.*, 839 F.3d 1111, 1119 (Fed. Cir. 2016); *Unwired Planet, LLC v. Apple Inc.*, 829 F.3d 1353, 1358 (Fed. Cir. 2016).

B. The Person of Ordinary Skill in the Art ("POSITA")

The disputed phrases use common, non-technical words that are readily understood by judge, jury, and skilled artisans alike. Thus, the Court need not expressly define the person and level of ordinary skill in the art for purposes of claim construction. *In re Fought*, 941 F.3d 1175, 1179 (Fed. Cir. 2019); *Polaris PowerLED Techs., LLC v. Samsung Elecs. Am., Inc.*, 2019 WL 121970, at *4–*5 (E.D. Tex. 2019). If the Court determines it needs to define the person of ordinary skill in the art for purposes of claim construction in this case, the relevant field of art is knitted footwear. The level of ordinary skill in the art for the Asserted Patents at the time of invention was low. A person of ordinary skill in the art for the Asserted Patents would have at least a few

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years of experience in the footwear industry, a bachelor's degree in textile-related sciences, a bachelor's degree in engineering, or equivalent academic experience.

C. All of the Disputed Claim Phrases are Entitled to the Full Scope of Their Ordinary and Customary Meaning

None of the phrases or words contained in the disputed claim phrases are technical words that require further clarification. *See, e.g.*, *Wilson Sporting Goods*, 2020 WL 5835321, at *2. There is "no facial ambiguity or obscurity." *Ancora Techs.,* 744 F.3d at 738, 805. Moreover, no exception to the general rule that phrases have their ordinary and customary meaning applies in this case. The patentee did not act as its own lexicographer or disclaim any portion of the scope of the disputed phrases in the specification or during prosecution. Thus, these phrases are entitled to the full scope of their ordinary and customary meaning.

D. Construction of the Disputed Claim Phrases

1. "article of footwear"

This disputed phrase is in each independent claim of the Asserted Patents. The dispute is whether "an article of footwear" includes "hose (e.g., socks)," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., article of footwear; no further construction necessary	any foot covering in the form of shoes, boots, slippers, or hose (e.g., socks) used for utility and/or dress wear. Not necessarily synonymous with shoes, which are simply one category of footwear

The disputed phrase "article of footwear" is not a technical phrase that requires further clarification. *See, e.g.*, *Wilson Sporting Goods*, 2020 WL 5835321, at *2.

A POSITA would readily ascertain that an "article of footwear" as used in the Asserted Patents does not include "hose" or "socks." For example, the plain language of the words surrounding the claims in which this phrase appears refers to a textile

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element being incorporated into an article of footwear – not that the textile element is itself an article of footwear. *See, e.g.*, '511 and '781 patents, cl. 1 ("An upper for an article of footwear, the upper comprising: a flat knit textile element[.]"); '749 patent, cl. 1 ("incorporating the knitted textile element into the article of footwear."); '484 patent, cl. 1 ("An article of footwear comprising an upper including a flat-knitted element[.]"); '562 patent, cl. 1 ("A method of manufacturing a knitted component for an article of footwear[.]"); '636 patent, cl. 1 ("An article of footwear having an upper and a sole structure secured to the upper[.]").

The ordinary meaning of an "article of footwear" in the context of the Asserted Patents is further supported by each Asserted Patent's specifications, which explain that an "article of footwear" includes two primary elements: "an upper and a sole structure." '749 patent, 1:25–26, 43–44; '781 patent, 1:39–40, 4:62–63; '562 patent, 1:20–21; '636 patent, 1:25–26; '484 patent, 1:27–28, 3:10–12; '511 patent, 1:40–41, 4:63–64.

In fact, the specifications for the '636 and '562 patents expressly distinguish between "footwear" and "socks" by explaining that "[i]n addition to footwear, the knitted components may be used in other types of apparel (e.g., shirts, pants, socks, jackets, undergarments)[.]" '562 patent, 4:62–64; '636 patent, 4:65–67.

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

The disputed phrase is found in claims 1, 2, and 9–11 of the '749 patent. The dispute is whether the word "surrounding" requires "border[ing]" the textile element "on all sides," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., simultaneously knitting a textile element with a surrounding textile structure; no further construction necessary	"knitting a textile element simultaneously with knitting a textile structure that borders the textile element on all sides"

This disputed phrase is not a technical phrase that requires further clarification. Skechers concedes that the meaning of the words "knitting," "textile element," "textile

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structure," and "simultaneously" are all readily ascertainable by using these words in its proposed construction. In the context of footwear, the remaining word "surrounding" is not the type of technical term that requires clarification. *See, e.g.*, *Wilson Sporting Goods*, 2020 WL 5835321, at *2.

A POSITA would readily ascertain that the full-scope of the word "surrounding" as used in the '749 patent is not limited to "border[ing] on all sides." Referring to Figure 14, the specification explains that an "interior layer of the upper may be formed of a moisture-wicking textile that removes perspiration from the area immediately surrounding the foot." '749 patent, 10:45–48. As shown below in blue, however, the interior layer only "immediately surround[s]" the foot on three sides. On the fourth side, the sole structure 220 contacts the bottom of the foot, as shown in red.

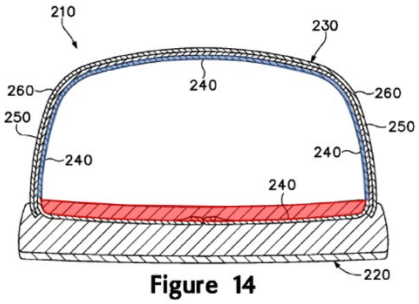

Figure 14

3. "knitting a first textile element and a second textile element simultaneously with knitting a surrounding textile structure"

The disputed phrase is found in claim 13 of the '749 patent. The dispute is whether the word "surrounding" requires "border[ing]" the first and second textile element "on all sides," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., knitting a first textile element and a second textile element simultaneously with knitting a surrounding textile structure; no further construction necessary	"knitting a first textile element and a second textile element simultaneously with knitting a textile structure that borders both the first textile element and the second textile element on all sides"

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The Court should adopt Nike's proposed construction for the reasons provided for the other disputed phrase "simultaneously knitting a textile element with a surrounding textile structure." *See* Sec. II.D.2, *supra*.

The phrases "a first textile element" and "a second textile element" do not transform this readily ascertainable phrase into a technical phrase that requires further construction. In addition to "knitting," "textile element," "textile structure," and "simultaneously," Skechers also uses the phrases "a first textile element" and "a second textile element" in its proposed construction, which concedes that their meaning is readily ascertainable.

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

The disputed phrase is found in claims 1 and 12 of the '781 patent and claims 1 and 15 of the '511 patent. The dispute is whether this phrase requires that the flat knit textile element have "***only***" flat knit edges.

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., a flat knit textile element having: (1) flat knit edges free of surrounding textile structure such that the flat knit edges are not surrounded by textile structure from which the textile element must be removed; no further construction necessary	"a textile element that has only flat knit edges, where a flat knit edge is itself flat knit, e.g., not formed by cutting from a flat knit textile element or by otherwise removing the textile element from a larger textile material"

Nike's construction is consistent with the intrinsic record of the '781 patent. For example, 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" does not on its face require that the textile element have "only" flat knit edges. *See* '511 patent, cl. 1 & 15; '781 patent, cl. 1.

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Skechers' construction, on the other hand, is inconsistent with the intrinsic record. As discussed above, there is nothing in the intrinsic record that requires a "flat knit textile element" to have "***only*** flat knit edges." In fact, the phrase "flat knit edges" was defined in the prosecution history of the '781 patent, which shares the same specification as the '511 patent, to "have ***a finished edge*** that would be present in a finished article"—not "only" finished edges, as Skechers suggests. *See* NIKE-SKX_0507569-71 (Exhibit 7).

5. "ankle opening"

The disputed phrase is found in claims 1, 8, and 16 of the '562 patent and claims 1, 13, and 21 of the '636 patent ("Ankle Opening Claims"). The dispute is whether this phrase requires that the claimed "portion of the knitted component" have an "ankle opening" that "encircl[es] the ankle when a foot is fully inserted into the opening," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., ankle opening; no further construction necessary	"an opening in the article of footwear defined by the edges of the upper encircling the ankle when a foot is fully inserted into the opening"

This disputed phrase is not a technical phrase that requires further clarification. Skechers concedes that the meaning of the words "ankle" and "opening" are readily ascertainable by using these words in its proposed construction. Using these words together does not transform them into a technical term in the context of footwear that requires clarification. *See, e.g.*, *Wilson Sporting Goods*, 2020 WL 5835321, at *2.

The ordinary and customary meaning of the phrase "ankle opening" as used in the '562 and '636 patents does not require that the edges of the upper "encircl[e] the ankle." This is supported by the plain language of the Ankle Opening Claims, its surrounding words, and the specifications of the '562 and '636 patents.

The plain language of the Ankle Opening Claims are directed to "knitting a

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portion of the knitted component defining an upper." *See, e.g.*, '562 patent, cl. 1; '636 patent, cl. 1. The surrounding words do not recite any limitations requiring that this "portion of the knitted component" have its edges joined – let alone in a manner that "encircl[e]s the ankle."

The specifications of the '562 and '636 patents also confirm that no such requirement exists. For example, the specifications specifically explain that the "knitted component" may have a "generally U-shaped configuration." *See, e.g.*, '636 patent, 8:37–39; '562 patent, 8:33–35. As shown below, the "generally U-shaped configuration" of the "knitted component" itself does not "encircl[e] the ankle," as required by Skechers' proposed construction.

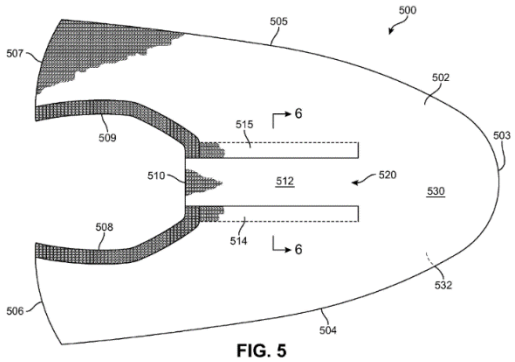

FIG. 5

Even if there were a requirement in the Ankle Opening Claims that the edges of the "portion of the knitted component" be joined, as Skechers' proposed construction assumes, other embodiments in the specifications of the '562 and '636 patents are inconsistent with a requirement that an "ankle opening" must "encircl[e] the ankle when the foot is fully inserted into the opening." For example, Figure 10 of the '562 and '636 patents show a knitted component containing a "lateral inner edge 1008 and a medial inner edge 1009 which may form an ankle opening." '562 patent at 12:31–34; '636 patent at 12:46–49. But as Figure 10 illustrates, the lateral inner edge 1008 and medial inner edge 1009 would not "encircl[e] the ankle when the foot is fully inserted into the opening" in view of the "free portion 1014" of the integral knit tongue.

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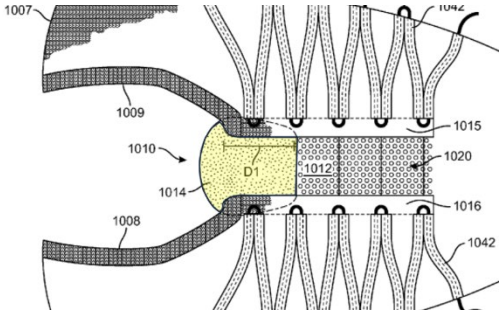
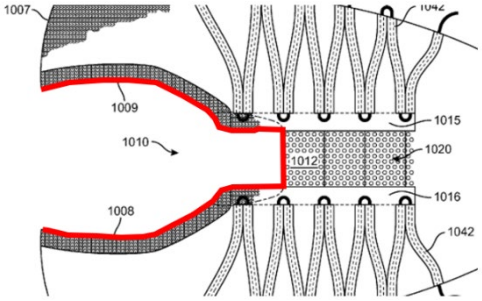
Free Portion Annotated	Free Portion Removed
	

6. "extending … toward the heel region"

The disputed phrase is found in claims 1 and 12 of the '781 patent ("Heel Region Claims"). The dispute is whether this phrase (1) requires importation of Skechers' improper construction of "ankle opening," as discussed above, and (2) excludes extending "in a diagonal or vertical orientation up towards the ankle opening of the article of footwear," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., extending … toward the heel region; no further construction necessary	"extending in the direction of the heel region, not in a diagonal or vertical orientation up towards the ankle opening of the article of footwear, wherein an ankle opening is an opening in the article of footwear defined by the edges of the upper encircling the ankle when the foot is fully inserted into the opening"

This disputed phrase is not a technical phrase that requires further clarification. Skechers concedes that each word in this phrase (i.e., "extending," "toward," and "heel region") is readily ascertainable by using them in its proposed construction.

A POSITA would readily ascertain that the full-scope of the phrase "extending … toward the heel region" as used in the '781 patent does not exclude "extending in a diagonal or vertical orientation." This interpretation would read out Figure 10 of '781

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patent, which depicts ribs that would extend in a diagonal orientation when the heel edges are secured to each other. *See* '781 patent, Fig. 10.

A POSITA would likewise readily ascertain that the full-scope of the phrase "extending … toward the heel region" as used in the '781 patent does not require the presence of an "ankle opening" as improperly defined by Skechers. In fact, the Heel Region Claims do not mention the phrase "ankle opening" or word "ankle" once.

7. "knitting a portion of the knitted component defining an upper"

The disputed phrase is found in claim 1 of the '562 patent. The dispute is whether "knitting a portion of the knitted component" requires that the "portion of the knitted component" (1) be a "one-piece knitted element," and (2) "include[] edges that define an ankle opening in the article of footwear," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., knitting a portion of the knitted component defining an upper; no further construction necessary	"knitting a portion of a one-piece knitted element that, when further knit to add an integral knit tongue, will be an upper that includes edges that define an ankle opening in the article of footwear"

This disputed phrase is not a technical phrase that requires further clarification. Skechers concedes that the meaning of the words "knitting," "portion," "define," and "upper" are all readily ascertainable by using these words in its proposed construction. In the context of footwear, the remaining word "component" is not the type of technical term that requires clarification. *See, e.g.*, *Wilson Sporting Goods*, 2020 WL 5835321, at *2.

To the contrary, Skechers' proposed construction would inject considerable ambiguity into the disputed phrases. For example, Skechers replaces "knitted component" with "knitted element," even though the phrase "knitted element" does not appear in the claims or specifications. As a further example, Skechers' proposed construction appears to suggest, without basis, a temporal requirement: "*knitting* a

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portion of a one-piece knitted element that, *when further knit* to add an integral knit tongue[.]"

In any event, a POSITA would readily ascertain that this phrase as used in the '562 patent does not require that the "portion of the knitted component" be a "one-piece knitted element." The phrase "one-piece knitted element" is nearly identical to the parties' agreed upon construction for "unitary knit construction." *See* ECF No. 50 ("formed as a one-piece element through a knitting process"). However, this disputed phrase does not require that the "knitted component" itself be of "unitary knit construction." '562 patent, cl. 1.

A POSITA would likewise readily ascertain that this phrase as used in the '562 patent does not require an "ankle opening" as improperly defined by Skechers. In addition to the reasons discussed in Section II.D.5, *supra*, the only reference to an "ankle opening" in claim 1 of the '562 patent is in reference to where the "integral knit tongue is joined." '562 patent, cl. 1 ("wherein the integral knit tongue is joined by knitting with the knitting machine to … (2) at least along a portion of both of a lateral side and a medial side of the throat area of the knitted component extending through a portion of a length of the throat area in a longitudinal direction from the forward portion to an ankle opening of the upper."). Skechers' disputed term, however, is directed to the "portion of a knitted component defining an upper," which is separate from the "integral knit tongue."

8. "knitting a first portion of the knitted component defining an upper"

The disputed phrase is found in claims 8 and 16 of the '562 patent. The dispute is whether "knitting a first portion of the knitted component" requires that the "first portion of the knitted component" (1) be a "one-piece knitted element," and (2) "include[] edges that define an ankle opening in the article of footwear," as Skechers proposes:

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Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., knitting a first portion of the knitted component defining an upper; no further construction necessary	"knitting a first portion of a one-piece knitted element that, when further knit to add an integral knit tongue, will be an upper that includes edges that define an ankle opening in the article of footwear"

The Court should adopt Nike's proposed construction for the reasons provided for the other disputed phrase "knitting a portion of the knitted component defining an upper." *See* Sec. II.D.7, *supra*.

The addition of the words "a first portion" does not transform this readily ascertainable phrase into a technical phrase that requires further construction. In addition to "knitting," "portion," "define," and "upper," Skechers also uses the phrase "a first portion" in its proposed construction, which concedes that its meaning is readily ascertainable.

9. "knitting a second portion of the knitted component defining an upper"

The disputed phrase is found in claims 8 and 16 of the '562 patent. The dispute is whether "knitting a second portion of the knitted component" requires that the "second portion of the knitted component" (1) be a "one-piece knitted element," and (2) "include[] edges that define an ankle opening in the article of footwear," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., knitting a second portion of the knitted component defining an upper; no further construction necessary	"knitting a second portion of a one piece knitted element that, when further knit to add an integral knit tongue, will be an upper that includes edges that define an ankle opening in the article of footwear"

The Court should adopt Nike's proposed construction for the reasons provided for the other disputed phrases "knitting a portion of the knitted component defining an

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upper" and "knitting a first portion of the knitted component defining an upper." *See* Sec. II.D.7–8, *supra*.

The addition of the words "a second portion" does not transform this readily ascertainable phrase into a technical phrase that requires further construction. In addition to "knitting," "portion," "define," and "upper," Skechers also uses the phrase "a second portion" in its proposed construction, which concedes that its meaning is readily ascertainable.

10. "a portion of the knitted component defining an upper"

The disputed phrase is found in claims 1 and 13 of the '636 patent. The dispute is whether "a portion of the knitted component" requires that the "portion of the knitted component" (1) be a "one-piece knitted element," and (2) "include[] edges that define an ankle opening in the article of footwear," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., a portion of the knitted component defining an upper; no further construction necessary	"a portion of a one-piece knitted element that, when further knit to add an integral knit tongue, will be an upper that includes edges that define an ankle opening in the article of footwear"

The Court should adopt Nike's proposed construction for the reasons provided for the other disputed phrases "knitting a portion of the knitted component defining an upper," "knitting a first portion of the knitted component defining an upper," and "knitting a second portion of the knitted component defining an upper." *See* Sec. II.D.7–9, *supra*.

In addition to the reasons discussed in Sections II.D.7–9, *supra*, Skechers' inclusion of the "one-piece knitted element" limitation takes its construction outside of how a POSITA would understand that disputed phrase because neither claims 1 nor 13 use the term "unitary knit construction." *See* ECF No. 50.

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11. "throat area"

The disputed phrase is found in claims 1, 5, 7, 11–13, 18, 21, and 23–24 of the '636 patent and claims 1, 5, 8, 13–14, 16, and 20–21 of the '562 patent ("Throat Area Claims"). The dispute is whether the phrase "throat area" requires (1) Skechers' improper construction of "ankle opening," as discussed above, or whether the "throat area" (2) must "extend[] from an ankle opening," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., throat area; no further construction necessary	"an area of the upper that extends from an ankle opening over the instep to an area adjacent to the forefoot region"

Skechers' importation of its construction of "ankle opening" renders its proposed construction inconsistent with the ordinary meaning of "throat area" as used in the '562 and '636 patents. In addition to the reasons discussed above, there is no express requirement in the Throat Area Claims that edges must be joined such that the claimed component "encircl[es]" an ankle. *See* Sec. II.D.5, *supra*.

Moreover, a POSITA would understand that a "throat area" as used in the '562 and '636 patents would not be an area that extends "from" an "ankle opening" because that requirement would contradict the surrounding claim language for each independent Throat Area Claim. For example, claim 1 of the '636 patent requires that an "integral knit tongue is joined … at least along a portion … of the ***throat area*** … ***extending from the forward portion to an ankle opening*** of the upper." '636 patent, cl. 1, 13, 21; *see also* '562 patent, cl. 1, 8, 16. Skechers' proposed construction, however, would lead to the non-sensical interpretation where the integral knit tongue is joined in an area that extends "from an ankle opening" (Skechers' construction) "to an ankle opening" (surrounding claim language).

12. "integral knit tongue"

The disputed phrase is found in claims 1, 3–17, 19–21 of the '562 and claims 1–4, 7–8, 10, 13–16, 18–19, 21–22, and 25–26 of the '636 patent. The dispute is whether

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the phrase "integral knit tongue" must include "overhanging portions of the upper" or "one or more raised elements, where a raised element is a flap or overhanging portion that extends outward away from the surface of the upper and along the length of the side of the tongue," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., tongue; no further construction necessary	"throat area between overhanging portions of the upper or adjacent to one or more raised elements, where a raised element is a flap or overhanging portion that extends outward away from the surface of the upper and along the length of the side of the tongue"

This disputed phrase is not a technical phrase that requires further clarification. Skechers concedes that the meaning of the word "tongue" is readily ascertainable by using this word in its proposed construction. In the context of footwear, the remaining phrase "integral knit" is neither a technical term nor modifies the word "tongue" in such a way that requires clarification. *See, e.g.*, *Wilson Sporting Goods*, 2020 WL 5835321, at *2.

A POSITA would readily ascertain the ordinary meaning of the phrase "integral knit" as used in the '562 or '636 patents. *See, e.g.*, '562 patent, 9:53–54 ("integral knit tongue 512 is joined through knitting to upper 502[.]"). This is because when construing a phrase comprised of several common words, courts simply apply "the established meanings of the individual words" – here, "integral" and "knit." *Altiris, Inc.*, 318 F.3d at 1372 (Fed. Cir. 2003) (construing "boot selection flag" by applying the ordinary meanings of "boot" and "selection" as "descriptive modifiers of 'flag.'").

A POSITA would likewise readily ascertain that the ordinary meaning of "tongue" or "integral knit tongue" does not require "overhanging portions" because such an interpretation would be inconsistent with the intrinsic record of the '562 and '636 patents for at least the following reasons.

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First, the phrase "overhanging portion" does not appear once in any of the claims of the '562 or '636 patents. Likewise, none of the claims of the '562 patent, which are directed in part to an "integral knit tongue," use the phrase "raised element."

Second, interpreting the phrase "integral knit tongue" to include a "raised element" would improperly render the phrase "raised element" elsewhere in the independent claims of the '636 patent superfluous. For example, if Skechers' construction is adopted, the following portion of claim 1 of the '636 patent could be removed in its entirety:

> 1. An article of footwear having an upper and a sole structure secured to the upper, the article of footwear incorporating a knitted component comprising:
>
> a portion of the knitted component defining the upper, the upper including a portion of at least one of an exterior surface of the knitted component and an opposite interior surface of the knitted component, the interior surface defining a void for receiving a foot; and
>
> [[a] throat area between overhanging portions of the upper or adjacent to one or more raised elements, where a raised element is a flap or overhanging portion that extends outward away from the surface of the upper and along the length of the side of the tongue] formed with the upper and extending through a throat area of the knitted component; and
>
> ~~at least one raised element extending a height above the exterior surface of the knitted component,~~
>
> wherein the [throat area between overhanging portions of the upper or adjacent to one or more raised elements, where a raised element is a flap or overhanging portion that extends outward away from the surface of the upper and along the length of the side of the tongue] is joined to a forward portion of the throat area and at least along a portion of a lateral side and a medial side of the throat area of the knitted component extending from the forward portion to an ankle opening of the upper.

Third, there is no requirement in the specifications of the '636 and '562 patents that an integral knit tongue must have "overhanging portions," "flaps," or "raised

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elements." To the contrary, the specifications only provide such features as examples. For example, the specifications state that the "***[i]n some embodiments***, integral knit tongue 512 ***may include raised elements***" and that such "raised elements" "***may*** be a portion of integral knit tongue 512 that are formed through the knitting process to ***be a flap or overhanging portion***." '562 patent, 9:60–66; '636 patent, 10:1–8 (emphasis added). In fact, the specifications of the '636 and '562 patents expressly explain that "raised elements" are not required. For example, the specifications of the '636 and '562 patents state that "[i]n an exemplary embodiment, integral tongue 812 of second knitted component 800 ***does not include raised elements***." '562 patent, 11:45–47; '636 patent, 11:58–60 (emphasis added).

13. "raised element"

The disputed phrase is found in claims 1, 4–6, 13, 16–17, 26–27 of the '636 patent. The dispute is whether the phrase "raised element" must be limited to "a flap or overhanging portion," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., raised element; no further construction necessary	"a flap or overhanging portion that extends outward away from the surface of the upper and along the length of the side of the tongue"

Skechers' proposed construction is inconsistent with the intrinsic record. Indeed, the references to a "flap" or "overhanging portions" in the specification of the '636 patent are clearly identified as examples of "raised elements." The specification for the '636 patent explains that "[r]aised elements ***may be*** a portion of integral knit tongue 512 that are formed through the knitting process to be a flap or overhanging portion of integral knit tongue 512[.]" '636 patent, 10:1–8. The specification does not state that a raised element must be a "flap" or "overhanging portion."

This construction is also inconsistent with Skechers' other proposed constructions which needlessly inject ambiguity into already readily ascertainable claim

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language. For example, Skechers proposes that an "integral knit tongue" must include a "throat area between ***overhanging portions*** of the upper ***or adjacent to one or more raised elements***[,]" which it separately defines here as "overhanging portions." *See* Sec. II.D.12, *supra*.

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

The disputed phrase is found in claim 1 of the '562 patent. The dispute is whether this phrase requires (1) importation of Skechers' improper construction of "throat area" and "ankle opening," as discussed above, and (2) the limitation that an "integral knit tongue" is formed as a "one-piece element with ***the rest of*** the upper."

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., knitting an integral knit tongue that is of unitary knit construction with the upper with the knitting machine, the integral knit tongue extending through a throat area of the knitted component; no further construction necessary	"using a knitting machine to knit a tongue (1) that, through a knitting process, is formed as a one-piece element with the rest of the upper and (2) that extends from an area adjacent to the forefoot region of the upper over the instep to an ankle opening"

Skechers' proposed construction is inconsistent with the ordinary meaning as informed by the intrinsic record. In addition to the reasons discussed in Sections II.D.5, 11–12, *supra*, the express language of the claim does not require that the "integral knit tongue" be of "unitary knit construction" with the entire, or "rest of," the upper, as Skechers' suggests.

To the contrary, the claims of the '562 and '636 patents recite knitting "a ***portion of*** the knitted component defining an upper." *See, e.g.*, '562 patent, cl. 1, '636 patent, cl. 1. There is no express requirement that the knitted component defining the upper must include the entire, or "rest of," the upper. *See, e.g.*, *id.* The specification of the '562 patent confirms this by explaining that, in one embodiment, not all of the upper is

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formed from a knitted component. *See, e.g.*, '562 patent, 6:54–55 ("[A] majority of upper 120 is formed from a knitted component 130[.]"); '636 patent, 6:57–59 (same).

15. "knitting an integral knit tongue that is of unitary knit construction with the upper with at least one of the first feeder and the second feeder of the knitting machine, the integral knit tongue extending through a throat area of the knitted component"

The disputed phrase is found in claim 8 of the '562 patent. The dispute is whether this phrase requires (1) importation of Skechers' improper construction of "throat area" and "ankle opening," as discussed above, and (2) the limitation that an "integral knit tongue" is formed as a "one-piece element with ***the rest of*** the upper."

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., knitting an integral knit tongue that is of unitary knit construction with the upper with at least one of the first feeder and the second feeder of the knitting machine, the integral knit tongue extending through a throat area of the knitted component; no further construction necessary	"using a knitting machine to knit, with at least one of the first feeder and the second feeder of the knitting machine, a tongue (1) that, through a knitting process, is formed as a one-piece element with the rest of the upper and (2) that extends from an area adjacent to the forefoot region of the upper over the instep to an ankle opening"

The Court should adopt Nike's proposed construction for the reasons provided in Sections II.D.5, 11–13, *supra*.

The addition of the phrase "with at least one of the first feeder and the second feeder of the knitting machine" does not transform this readily ascertainable phrase into a phrase that requires further construction. In fact, Skechers concedes that this phrase is readily ascertainable by using this exact phrase in its proposed construction.

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

The disputed phrase is found in claim 16 of the '562 patent. The dispute is whether this phrase requires (1) importation of Skechers' improper construction of

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"throat area" and "ankle opening," as discussed above, and (2) the limitation that an "integral knit tongue" is formed as a "one-piece element with ***the rest of*** the upper."

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., knitting an integral knit tongue that is of unitary knit construction with the upper with a third feeder of the knitting machine, the integral knit tongue extending through a throat area of the knitted component; no further construction necessary	"using a knitting machine to knit, with a third feeder of the knitting machine, a tongue (1) that, through a knitting process, is formed as a one-piece element with the rest of the upper and (2) that extends from an area adjacent to the forefoot region of the upper over the instep to an ankle opening"

The Court should adopt Nike's proposed construction for the reasons provided in Sections II.D.5, 11–14, *supra*.

The addition of the phrase "with a third feeder of the knitting machine" does not transform this readily ascertainable phrase into a phrase that requires further construction. In fact, Skechers concedes that this phrase is readily ascertainable by using this exact phrase in its proposed construction.

17. "integral knit tongue formed with the upper and extending through a throat area of the knitted component"

The disputed phrase is found in claim 1 of the '636 patent. The dispute is whether this phrase requires (1) importation of Skechers' improper constructions of "ankle opening" and "throat area," as discussed above, and (2) the limitation that an "integral knit tongue" is formed as a "one-piece element with ***the rest of*** the upper," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., integral knit tongue formed with the upper and extending through a throat area of the knitted component; no further construction necessary	"a tongue (1) that, through a knitting process, is formed as a one-piece element with the rest of the upper and (2) that extends from an area adjacent to the forefoot region of the upper over the instep to an ankle opening"

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The Court should adopt Nike's proposed construction for the reasons provided in Sections II.D.5, 11–15, *supra*.

In addition to the reasons provided in Sections II.D.14, *supra*, Skechers' proposed construction is further inconsistent with the ordinary meaning of this phrase because it adds the limitation "unitary knit construction" into independent claim 1, which does not use the phrase "unitary knit construction." *Compare* '636 patent, cl. 1 ("an integral knit tongue formed with the upper") *with* cl. 21 ("an integral knit tongue formed of unitary knit construction with the upper").

18. "integral knit tongue with the upper and extending through a throat area of the knitted component"

The disputed phrase is found in claim 13 of the '636 patent. The dispute is whether this phrase requires (1) importation of Skechers' improper construction of "ankle opening," as discussed above, and (2) the limitation that an "integral knit tongue" is formed as a "one-piece element with ***the rest of*** the upper," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., integral knit tongue with the upper and extending through a throat area of the knitted component; no further construction necessary	"a tongue (1) that, through a knitting process, is formed as a one-piece element with the rest of the upper and (2) that extends from an area adjacent to the forefoot region of the upper over the instep to an ankle opening"

The Court should adopt Nike's proposed construction for the reasons provided in Sections II.D.5, 11–16, *supra*.

In addition to the reasons provided in Sections II.D.14, *supra*, Skechers' proposed construction is further inconsistent with the ordinary meaning of this phrase because it adds the limitation "unitary knit construction" into independent claim 13, which does not use the phrase "unitary knit construction." *Compare* '636 patent, cl. 13 ("an integral knit tongue with the upper") *with* cl. 21 ("an integral knit tongue formed of unitary knit construction with the upper").

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19. "integral knit tongue formed of unitary knit construction with the upper and extending through a throat area of the knitted component"

The disputed phrase is found in claim 21 of the '636 patent. The dispute is whether this phrase requires (1) importation of Skechers' improper construction of "ankle opening," as discussed above, and (2) the limitation that an "integral knit tongue" is formed as a "one-piece element with ***the rest of*** the upper," as Skechers proposes:

Nike's Proposed Construction	Skechers' Proposed Construction
Ordinary and customary meaning, i.e., integral knit tongue formed of unitary knit construction with the upper and extending through a throat area of the knitted component; no further construction necessary	"a tongue (1) that, through a knitting process, is formed as a one-piece element with the rest of the upper and (2) that extends from an area adjacent to the forefoot region of the upper over the instep to an ankle opening"

The Court should adopt Nike's proposed construction for the reasons provided in Sections II.D.11–18, *supra*.

III. CONCLUSION

For the foregoing reasons, Nike respectfully asks the Court to resolve the parties' claim construction disputes by rejecting Skechers' improper constructions, "give effect to the terms chosen by the patentee," *Helmsderfer*, 527 F.3d at 1383–84 (Fed. Cir. 2008), and giving each disputed phrase its ordinary and customary meaning, which requires no further construction.

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Dated: May 24, 2024 ARNOLD & PORTER KAYE SCHOLER LLP

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2024, I electronically transmitted the foregoing document using the CM/ECF system for filing, which will transmit the document electronically to all registered participants as identified on the Notice of Electronic filing, and paper copies have been served on those indicated as non-registered participants.

/s/ Timothy Haugh
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