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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

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I. INTRODUCTION

Nike has accused dozens of Skechers shoe styles of infringing 121 claims across six patents.[2] This brief explains why some of the key terms in these asserted claims require construction and how they should be construed.

Nike argues, implausibly, that none of these terms requires construction. According to Nike, the meaning that each term would have had to a person of ordinary skill in the art ("POSA") in view of the specification and prosecution history will be readily apparent to a jury. But many of the terms have no ordinary and customary meaning to a POSA (*e.g.*, "integral knit tongue" and "raised element"). And the parties apparently disagree on the ordinary and customary meaning of other terms.

During the meet-and-confers, Nike was unable or unwilling to identify anything inaccurate in Skechers' constructions for these terms. But Nike's apparent infringement contentions betray a dispute, and "[w]hen the parties present a fundamental dispute regarding the scope of a claim term, it is the court's duty to resolve it." *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008). As set forth in detail below, the Court should reject Nike's approach and adopt Skechers' constructions.

[2] U.S. Patents Nos. 8,266,749 ("the '749 Patent"), 9,060,562 ("the '562 Patent"), 9,510,636 ("the '636 Patent"), 9,730,484 ("the '484 Patent"), 9,918,511 ("the '511 Patent"), and 9,986,781 ("the '781 Patent").

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II. DISPUTED CLAIM TERMS

A. '749 Patent – "simultaneously knitting a textile element with a surrounding textile structure"

Nike's Construction	Skechers' 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"

"In some cases, the ordinary meaning of claim language as understood by a person of skill in the art 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." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (en banc). This is such a case with respect to the term "simultaneously knitting a textile element with a surrounding textile structure" in claim 1, and the analogous term in claim 13, of the '749 Patent. *See* D.I. 50-1 at 2-4. For example, "surrounding" is a commonly understood word with a well-established meaning. To surround is "[t]o extend on all sides of simultaneously; encircle" or "[t]o enclose." *See, e.g.,* Ex. A at 4.[3] Islands are surrounded by water.

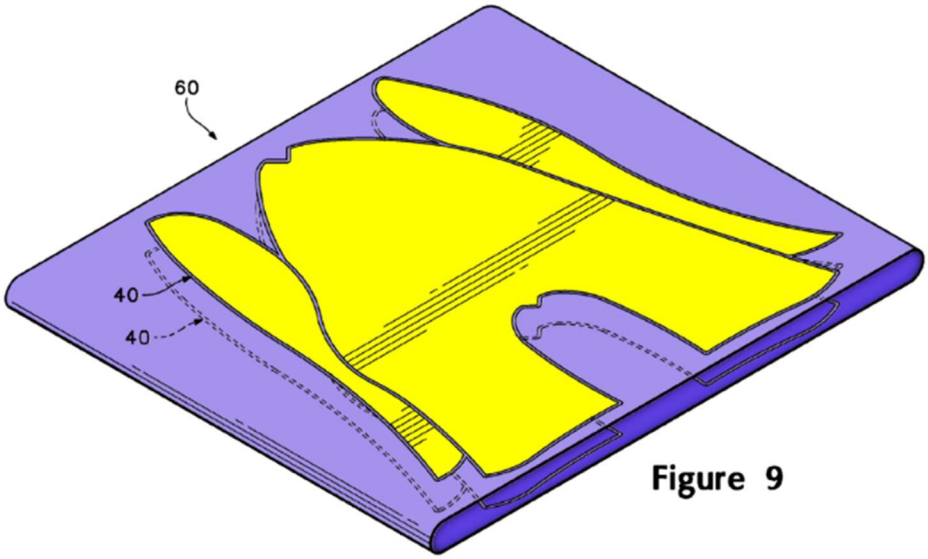
The specification of the '749 Patent describes textile elements knitted with a textile structure that borders the textile element on all sides. For example, the SUMMARY OF THE INVENTION in the '749 Patent describes "a textile element formed with a knitting machine" and states that "[t]he textile element is removed from a textile structure that includes an outline of the textile element." '749 Patent at 3:48-51. An outline of an object encircles or circumscribes the object. To include an outline of the textile element, the textile structure must border the textile element on all sides.

"Referring to FIG. 9," the DETAILED DESCRIPTION OF THE INVENTION states that "the outline of textile element 40 is depicted on a front portion of textile structure

[3] All references to lettered exhibits are to exhibits to the Declaration of Michael M. Rosen filed in support of this brief.

60, and the outline of another textile element 40 is depicted on a rear portion of textile structure 60" and "[a]ccordingly, a first textile element 40 and a second textile element 40 may be simultaneously formed in a single textile structure 60." *Id.* at 7:55-60. "Each textile element 40 is then removed from textile structure 60 with a die-cutting, laser-cutting, or other conventional cutting operation." *Id.* at 8:4-6.

Figure 9 of the '749 Patent shows textile structure bordering each textile element 40 on all sides. *Id.* at FIG. 9. Below is a colored version of FIG. 9 with front textile element 40 in yellow and surrounding textile structure, which includes the outline of textile element 40, in purple.



Id. (annotated). Although claim 1 of the '749 Patent does not require the surrounding textile structure to include an outline of the textile element, that the surrounding textile structure ***must accommodate*** an outline of the textile element further reinforces that the surrounding textile structure borders the textile element on all sides, as articulated in Skechers' construction.

Nike invokes "[o]rdinary and customary meaning," repeats the claim term verbatim, and asserts that "no further construction [is] necessary." D.I. 50-1 at 2-4. But further construction is indeed necessary if the parties do not agree on what the ordinary and customary meaning is. *See, e.g.*, *O2 Micro*, 521 F.3d at 1362. Moreover, the Federal Circuit has rejected the idea that "'ordinary meaning' controls absent

lexicography or disclaimer," explaining that this "narrow view" of *Thorner v. Sony Computer Entertainment America* would "necessitate adopting an acontextual construction of [] disputed claim term[s and] improperly isolat[e] the [] term from the…specification and prosecution history…." *AstraZeneca AB v. Mylan Pharms.*, 19 F.4th 1325 (Fed. Cir. 2021) (citing, *inter alia*, *Thorner v. Sony Comput. Ent. Am. LLC*, 669 F.3d 1362, 1365-67 (Fed. Cir. 2012)). *See also id.* at 1329, 1335 (relying on specification to conclude that proper construction of claim term "0.001%" was not as broad as it would be "ordinarily, as an abstract number on a page"); *Trustees of Columbia Univ. in City of New York v. Symantec Corp.*, 811 F.3d 1359, 1364 (Fed. Cir. 2016) ("[W]e reject [the] argument that the presumption of plain and ordinary meaning can be overcome in only two circumstances: [when] the patentee has ***expressly*** defined a term or has ***expressly*** disavowed the full scope of the claim in the specification and the prosecution history.") (quotation marks omitted).

During the parties' meet-and-confers, Nike never contended that Skechers' construction differed in any way from the ordinary and customary meaning. And Nike's own statements about the '749 Patent during a *Markman* hearing in an earlier proceeding confirm that the surrounding textile structure must border the textile element(s) on all sides. *See* Ex. B at 36 (acknowledging that "[t]he 'textile element' does not have 'edges' until it is removed from the surrounding textile structure"); Ex. C at 52:17-25 (same); *see also* Ex. D at 33 (arguing that a prior art textile structure did not surround a textile element because it adjoined some—but not all—sides of the element); Ex. E at ¶¶ 42-43 (same).

Yet Nike's apparent infringement contentions suggest that Nike plans to argue ***in this new forum*** that the surrounding textile structure need not border the textile element on all sides. Accordingly, Skechers respectfully requests that the Court construe the "surrounding textile structure" terms as Skechers proposes to avoid future disputes—at trial, for example.

B. ’562 and ’636 Patents - Upper with integral knit tongue and raised element

1. “integral knit tongue” and “raised element”

	Nike’s Construction	Skechers’ Construction
“integral knit tongue”/“tongue”	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”
“raised element”	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”

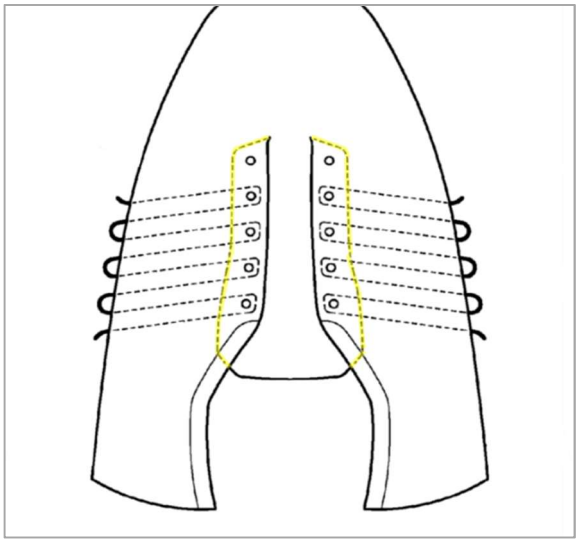
Each claim of the ’562 and ’636 Patents describes an article of footwear, or a method of manufacturing an article of footwear, having an “integral knit tongue.” The term “integral knit tongue” as a whole has no ordinary and customary meaning in the footwear field. It is not a term of art. Accordingly, its meaning must be found in the specification.[4] *Irdeto Access, Inc. v. Echostar Satellite Corp.*, 383 F.3d 1295, 1300 (Fed. Cir. 2004) (“[I]f a disputed term has ‘no previous meaning to those of ordinary skill in the prior art[,] its meaning, then, must be found [elsewhere] in the patent.’”) (quoting *J.T. Eaton & Co. v. Atl. Paste & Glue Co.*, 106 F.3d 1563, 1570 (Fed. Cir. 1997)) (alterations in original).

The BACKGROUND section of the specification notes that “material elements are often cut to desired shapes and then joined together” to manufacture an upper for a shoe, and asserts that “[b]y decreasing the number of material elements used in the upper, [] waste may be decreased while increasing the manufacturing efficiency and recyclability of the upper.” ’562 Patent at 1:65-66. “Therefore,” the specification

[4] The specifications of the ’562 and ’636 Patents are substantively identical, with only minor variations. Citations in this brief align with the ’562 Patent, but all quoted material also appears verbatim in the ’636 Patent, with the exception of certain material appearing exclusively in the Summary of the Invention of the ’562 Patent.

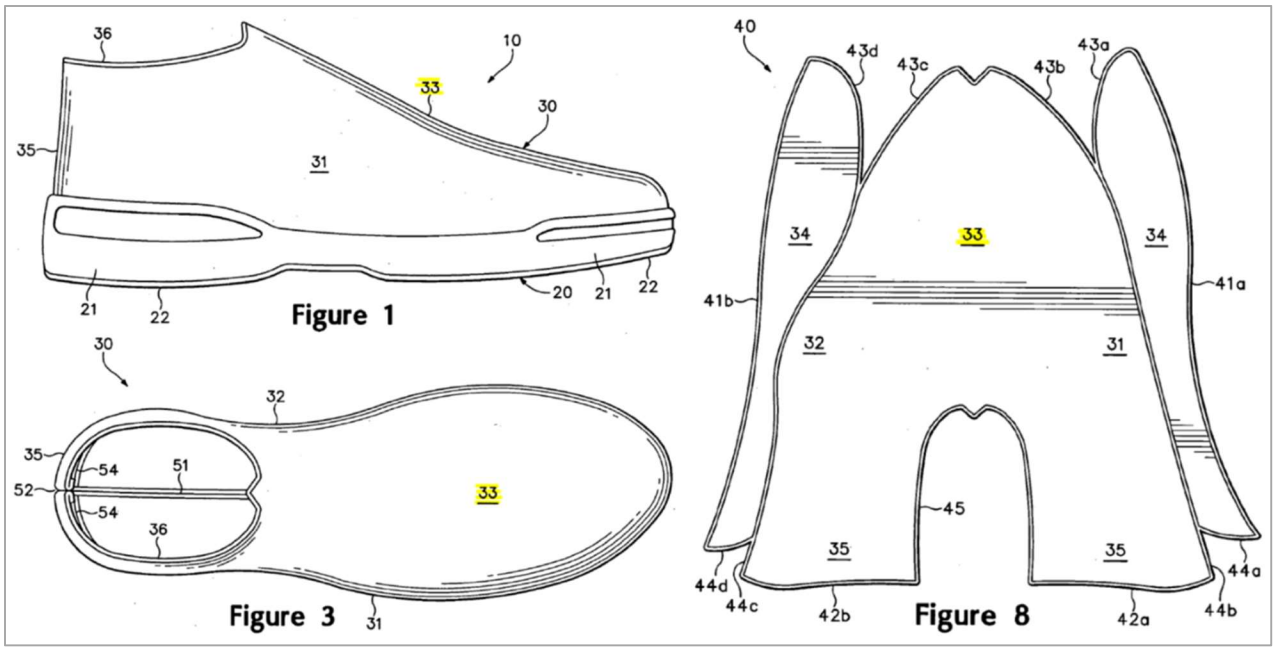
states, "there exists a need for an article of footwear that incorporates a knitted component with an integral knit tongue." *Id.* at 2:16-18.

Were it considered to be the sum of its parts, based on the ordinary and customary meaning of each word individually in the context of the claims, an "integral knit tongue" might be understood to be a ***flap*** of knit material connected with the rest of an upper by knitting (as opposed to, *e.g.*, stitching) at a forward area of the upper over the instep (part of what is often referred to as the "throat area"), as depicted in the drawing below, where the two sides of the tongue (highlighted in yellow) are not connected to the upper.



But several claims of these two patents recite that the "integral knit tongue" is connected by knitting to the throat area of the knit upper at least along a portion of both sides of the tongue. *See, e.g.*, *id.* at claim 1 (reciting "wherein the integral knit tongue is joined by knitting with the knitting machine . . . at least along a portion of both of a lateral side and a medial side of the throat area"). Indeed, such claims allow an "integral knit tongue" to be connected by knitting to the knit upper all the way up both sides of the tongue. As one patent examiner considering similar claims remarked, the "integral knit tongue . . . loses the features characteristic for a tongue by fixing it to all sides of the throat area." Ex. F at 9. The examiner found the claims unpatentable based on US 2005/193592 A1 ("D1") and US 2005/115284 A1 ("D2") because the

claims did "not define what features differentiate this region from an ***instep*** section of documents D1 and D2." *Id.* Below are figures 1, 3, and 8 from D1 showing the continuous, featureless ***instep*** section **33** of an article of footwear and associated upper:



Ex. G, FIGs. 1, 3, and 8 (annotated); *see also* Ex. H, FIGs. 11A-13.

Nowhere do the specifications of these two patents describe any such article of footwear or associated upper as having an "integral knit tongue." Neither do the specifications set forth an explicit definition of "integral knit tongue" as such. But patent specifications "can provide guidance as to the meaning of the claims, thereby dictating the manner in which the claims are to be construed, even if the guidance is not provided in explicit definitional format." *SciMed Life Sys. v. Advanced Cardiovascular Sys. Inc.*, 242 F.3d 1337, 1344 (Fed. Cir. 2001). "In other words, the specification may define claim terms 'by implication' such that the meaning may be 'found in or ascertained by a reading of the patent documents.'" *Bell Atl. Network Serv. v. Covad Commc'ns*, 262 F.3d 1258, 1268 (Fed. Cir. 2001) (citation omitted). For example, "when a patentee uses a claim term throughout the entire patent

specification, in a manner consistent with only a single meaning, he has defined that term 'by implication.'" *Id.* at 1271.

Here, the specification implicitly defines as an "integral knit tongue" (1) the throat area adjacent to, often including,[5] one or more structures referred to as "raised elements," and (2) in the absence of raised elements, the throat area between overhanging portions of the upper.

The term "integral knit tongue" appears in the specification nearly 200 times, but often without much, if any, indication of what an "integral knit tongue" actually is—apart from being a component of an article of footwear. Several times, and in various different ways, the specification partially describes an "integral knit tongue" as "extend[ing] through a throat area of the upper." '562 Patent at 2:29-32; *see also, e.g., id.* at 2:43-44, 2:61-62, 3:11-13, 6:31-35. The specification also describes an "integral knit tongue" as "formed of unitary knit construction" with an upper. *Id.* at 2:29-31, 2:41-42, 2:58-59, 3:9-10, 6:31-32, 7:2-3. Figure 1, inset, shows integral knit tongue 140 (annotated).

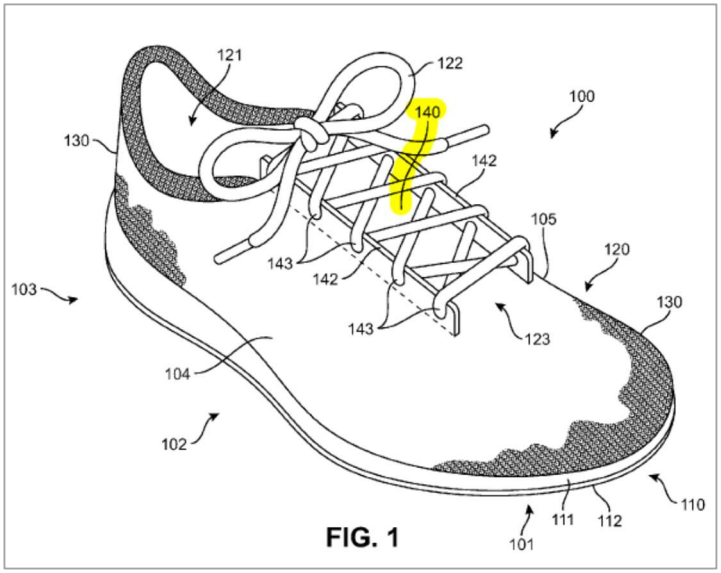


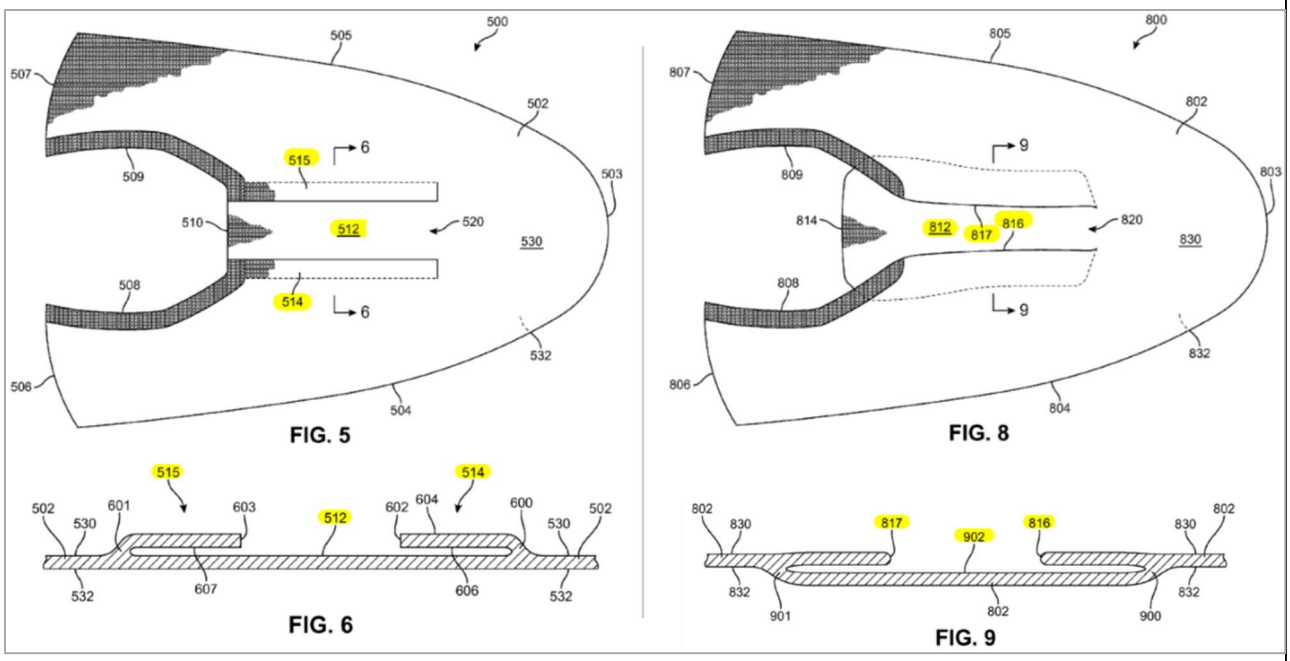
FIG. 1

While these descriptions address particular aspects of an "integral knit tongue," the specification also provides a more fulsome disclosure in connection with

[5] *But see, e.g.*, '562 Patent at 10:22-26 (disclosing that "raised elements are formed of unitary knit construction with integral knit tongue"), 17:14-15 (describing that "lateral raised element **1312** begins to extend outward over integral knit tongue **1310**"), 21:6-7 (referring separately to "integral knit tongue **512**, lateral raised element **514**, medial raised element **515**, and a portion of the rest of first knitted component **500** forming upper **502**").

Figures 5 to 15. *Id.* at 7:44-17:47. With reference to the knitted component of FIG. 5, the specification describes "a first portion defining an upper **502** and a second portion defining an integral knit tongue **512**" and discloses "upper **502** and integral knit tongue element **512** formed of unitary knit construction." *Id.* at 7:57-62; *see also id.* at 9:40-41. The specification also identifies "throat area **520** where integral knit tongue **512** is located." *Id.* at 8:55-56; *see also id.* at 9:34-39.

The specification then describes the scenario where an "integral knit tongue" is connected to the knit upper by knitting along both sides of the tongue, stating that "integral knit tongue **512** may be further formed of unitary knit construction with upper **502** along the sides of integral knit tongue **512** extending along a length of throat area **520** of first knitted component **500**." *Id.* at 9:49-52. The specification states that in that scenario: (i) referring to FIGs. 5-6 (below left), the "integral knit tongue **512** may include raised elements [**514** and **515**] disposed on opposite sides of throat area **520** and extending along the length of integral knit tongue **512**," *id.* at 9:60-10:8, or (ii) referring to FIGs. 8-9 (below right), the knit component may "not include raised elements" but rather "a portion of upper **802** that extends over integral knit tongue **812** to form a lateral inner edge **816** and a medial inner edge **817**." *Id.* at 11:45-51.



Id., FIGS. 5-6 and 8-9 (annotated). The specification 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** that extends outward away from first surface **530** of upper **502**," *id.* at 9:62-66; *see also id.* at 10:29-32, and "may include one or more lace apertures disposed at various locations along the raised element for receiving a lace." *Id.* at 10:12-14; *see also id.* at 10:14-11:12 and FIG. 7. The specification also describes an "integral knit tongue" with "raised elements" and either a "partially integral portion," *id.* at 13:46-49; *see also* 13:50-14:43; FIGs. 10-12, or "partially decoupled knit elements." *Id.* at 15:47-49; *see also* 15:50-17:47; FIGs. 13-15. Like the term "integral knit tongue" itself, "raised elements" is not a term of art and its meaning must be found in the specification. *Irdeto*, 383 F.3d at 1300.

For the overhanging-portions alternative, the specification explains, with reference to FIGs. 8-9, that "first edge **900** and second edge **902** of integral knit tongue **812** are joined with second surface **832** of upper **802** such that integral knit tongue **812** extends below lateral inner edge **816** and medial inner edge **817** of upper **802**." *Id.* at 11:59-63; *see also id.* at 11:63-12:3. The balance of the specification describes knitting processes for manufacturing uppers with the integral knit tongues described above. *See id.* at 17:48-24:14; FIGs. 16-29.

As seen from both the figures and text, whenever the Patents describe an "integral knit tongue," they always refer or point to either the throat area adjacent to/including one or more "raised elements" or, in the absence of "raised elements," the throat area between overhanging portions of the upper. Similarly, the patents consistently refer to a "raised element" as 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. No broader constructions for these terms are supported by the Patents.

Nike offers no construction for either term. It simply invokes "[o]rdinary and customary meaning," repeats the claim term verbatim, and asserts: "no further construction necessary." D.I. 50-1 at 16, 22-23. As explained above, however, neither "integral knit tongue" nor "raised element" has an ordinary and customary meaning in the art. Rather, the patent applicants coined, and implicitly defined, both terms in the patents. Jurors will not apply the applicants' implicit definitions without constructions from the Court. Accordingly, these claim terms require interpretation. Skechers submits that the intrinsic evidence leads to its proposed constructions.

2. <u>"ankle opening"</u>

Nike's Construction	Skechers' 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"

The parties dispute what constitutes the boundaries of the claimed ankle opening. This is not simply a hypothetical question: the "integral knit tongue," which is central to the patent claims, ***must*** "extend[]…to an ankle opening of the upper." *See* '562 Patent claims 1, 8, 16; *see also* 2:43-49, 2:61-67, 3:12-17. And it is clear from Nike's apparent infringement contentions that there is a dispute regarding what, exactly, defines the ankle opening (*e.g.*, whether it is defined by the edges of the upper). In the absence of a claim construction for this term, the parties will be arguing at trial, and/or will leave the jury to argue during deliberations, about what exactly constitutes an "ankle opening."

Skechers' construction comports with common sense and each and every embodiment in the specification. *See, e.g.*, *id.* at FIGs. 1-15. Indeed, the specification makes clear that the "integral knit tongue" (which is part of the upper) extends to an opening defined by the edges of the upper encircling the ankle. For example, with reference to Figure 8 of the Patent, the specification recites that, "[t]aken together, ***lateral inner edge*** 508, ***medial inner edge*** 509, ***and front inner edge*** 510 ***form an***

ankle opening, including ankle opening 121 described above, and extends forward to a throat area 520 where integral knit tongue 512 is located." *Id.* at 8:52-56; *see also id.* at 12:31-34 ("The inner perimeter of third knitted component 1000 includes a lateral inner edge 1008 and a medial inner edge 1009 which may form an ankle opening"); FIG. 10; 13:54-14:3; FIG. 11.

While Nike proposes that no construction is necessary, Skechers' construction accurately describes the boundaries of the ankle opening, precisely as laid out in the specification, and will give the jury necessary guidance regarding the meaning of "ankle opening" during deliberations.

3. <u>"throat area"</u>

Nike's Construction	Skechers' 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"

Like "ankle opening," "throat area" is another claim term whose boundaries appear to be in dispute and which is critical to the scope of the "integral tongue" element. Moreover, "throat area" is hardly a term with which jurors are likely to be familiar in the context of footwear. In the absence of a claim construction for this term, the parties and/or their attorneys will be arguing at trial regarding what exactly constitutes a "throat area," leaving jurors to decide a claim construction issue.

Skechers' claim construction relies upon the specification, which consistently describes the term "throat area" as follows, with reference to Figure 3: "In some embodiments, a throat area 123 extends from ankle opening 121 in heel region 103 over an area corresponding to an instep of the foot to an area adjacent to forefoot region 101." '562 Patent at 6:28-31. The specification additionally depicts a "throat area 520" in Figure 5, in a similar way. *See, e.g.*, *id.* at 8:60-62; 9:40-55. In light of this unambiguous description of throat area, Skechers has proposed adopting exactly this definition as the proper construction of the term. Nike contends that no

construction is necessary but failed, during the meet and confer process, to articulate anything inaccurate in Skechers' construction or how this term is understandable to a lay jury in the context of footwear. Since the specification clearly describes the throat area in accordance with Skechers' proposal, it should be adopted.

4. "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"[6]

Nike's Construction	Skechers' 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"

This claim term, due to its wording and confusing grammatical structure, lacks sufficient clarity such that further construction in view of the intrinsic evidence is needed. *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1367 (Fed. Cir. 2002) (claim construction appropriate where "the term 'chosen by the patentee so deprive[s] the claim of clarity' as to require resort to other intrinsic evidence for a definite meaning") (citation omitted).

There is no dispute between the parties that the integral knit tongue is knitted "using a knitting machine." However, there are two other concepts, captured in parts (1) and (2) of Skechers' claim construction, that are clarified through the intrinsic evidence. First, the tongue, "through a knitting process, is formed as a one-piece element with the rest of the upper." This construction of "unitary knit construction

[6] As set forth in the Joint Claim Construction Statement (Dkt. No. 50-1 at 13-15), there are three closely related terms in play, with slight variations in claim language not pertinent to the issues disputed by the parties. Thus, Skechers has consolidated these claim terms for the purposes of briefing.

with the upper" is consistent with the claim language and the specification. Indeed, the SUMMARY of the invention states in much clearer language that "The upper and the integral knit tongue are formed as ***a one-piece knit element***." '562 Patent at 2:25-26. Second, the tongue "extends from an area adjacent to the forefoot region of the upper over the instep to an ankle opening." This construction of "extending through a throat area of a knitted component" is consistent with the claim language and the specification, as well as Skechers' construction for "throat area" set forth above. For example, the specification states that:

- "…[I]ntegral knit tongue…may ***extend from an ankle opening…to an area adjacent to a forefoot region***…." *Id.* at 9:34-38.
- "…[I]ntegral knit tongue ***extend[s] through a throat area*** of the knitted component; and wherein the integral knit tongue is joined by knitting with the knitting machine to a forward portion of the throat area and at least along a portion of a lateral side and a medial side of the throat area of the knitted component ***extending from the forward portion to an ankle opening*** of the upper." *Id.* at 2:43-49

Indeed, every single mention in the specification of the integral knit tongue extending through the throat area is consistent with Skechers' construction. Although the specification is not limiting, it does clarify the meaning of the claim language.

5. <u>"knitting a portion of the knitted component defining an upper" and variants thereof</u>[7]

Nike's Construction	Skechers' 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"[8]

[7] As set forth in the Joint Claim Construction Statement (Dkt. No. 50-1 at 12-13, 19), there are four closely related terms in play, with slight variations in claim language not pertinent to the issues disputed by the parties. Thus, Skechers has consolidated these claim terms for the purposes of briefing.

[8] As set forth in the Joint Claim Construction Statement (Dkt. No. 50-1 at 12-

Based on Nike's apparent infringement contentions, there is a live dispute between the parties regarding the meaning of these claim terms, necessitating their construction. *O2 Micro*, 521 F.3d at 1362. The ordinary and customary meaning of these claim terms specifies "a portion of the knitted component defining the upper." In other words, it is the knitted component (or at least a portion thereof) that "defines" the upper. However, in its apparent infringement contentions, Nike contends that a ***knitted*** component (comprising the front half of an upper, for example) and a ***non-knitted*** component (comprising the back half of an upper), ***when stitched or glued together,*** would satisfy the "defining an upper" limitation. But that is not what the claims say.

When Nike prosecuted the claims of the '562 and '636 Patents, it could have pursued claims written more broadly to cover such knitted and non-knitted upper combinations (by adding the ***bolded*** language as follows): "a portion of the knitted component defining ***at least a portion of*** the upper." Nike's failure to do so was ***no*** mistake because certain ***dependent*** claims recite "at least a portion of the upper" when Nike intended to claim less than the entire upper. *See, e.g.*, claims 3 and 15 in '636 Patent. Nike should not be permitted to re-write, through attorney argument and expert opinion at trial, what it chose not to claim during prosecution.

Moreover, the intrinsic evidence makes clear that the claims do not cover uppers defined by a combination of knit and non-knit components. The notion that the upper is defined entirely by a knitted component is central to the two patents:

> The upper and the integral knit tongue are formed as a ***one-piece knit*** element….The integral knit tongue is formed of ***unitary knit construction*** with the upper as a ***one-piece knit*** element…

---

13), Skechers proposed construing a variant of this term reading, "knitting a second portion of the knitted component defining an upper." The second portion, together with the first portion, make up an upper that includes edges that define an ankle opening in the article of footwear.

'562 Patent at 2:25-31. The Federal Circuit has given "particular weight to statements in the Summary of the Invention" for claim construction purposes. *Virnetx, Inc. v. Cisco Systems, Inc.*, 767 F.3d 1308, 1318 (Fed. Cir. 2014) (citing *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 864 (Fed. Cir. 2004)). Other parts of the specification further confirm the importance of a one-piece construction in the claimed invention: "A unitary knit construction may be used to form a knitted component having structures or elements (including upper 502 and integral knit tongue 512) …." '562 Patent at 8:3-5.

Moreover, Nike distinguished its invention from prior art multi-piece uppers where multiple materials were stitched or glued together, noting that such "upper[s] may have multiple layers that each include a variety of joined material elements." *Id.* at 1:56-60. Nike disparaged these prior art uppers, touting the advantages of its one-piece knit upper: "By decreasing the number of material elements used in the upper, therefore, waste may be decreased while increasing the manufacturing efficiency and recyclability of the upper." *Id.* at 2:11-14. This further supports Skechers' claim construction that the upper is limited to a unitary one-piece knitted construction, and does not cover uppers defined by two or more components. *See Poly-America, L.P. v. API Industries, Inc.*, 839 F.3d 1131, 1136 (Fed. Cir. 2016) ("[A]n inventor may disavow claims lacking a particular feature when the specification distinguishes or disparages prior art based on the absence of that feature."); *see also Chicago Bd. Options Exchange, Inc. v. Int'l Securities Exchange, LLC*, 748 F.3d 1134, 1137 (Fed. Cir. 2014) (patentee's disavowal of prior art in specification limited scope of claims).

Skechers' claim construction would preclude Nike's lawyers and experts from arguing at trial, contrary to the claim language and the specification, that the knitted upper need define only a portion of the upper. Specifically, the claim construction identifies the elements of the one-piece upper that are required by the claims (*e.g.*, the tongue and the ankle opening), foreclosing the possibility that Nike might argue, for

example, that an accused upper could be defined, in part, by a non-knitted component (for the tongue or for part of the ankle opening) and still be infringing.

C. ’781 and ’511 Patents – Flat knit textile element with flat knit edges

1. “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” (’781 and ’511 Patents)

Nike’s Construction	Skechers’ 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”

The ’781 and ’511 Patents share the same specification as the ’749 Patent, but while the ’749 Patent claims knitting a textile element simultaneously with knitting a surrounding textile structure and shaping the textile element by removing it from the surrounding textile structure, the ’781 and ’511 Patents claim textile elements that are knit to their final shapes without cutting.

The claim terms “flat knit textile element” and “flat knit edges” appear nowhere in the specification. But Nike has insisted that the specification, which is also shared with U.S. Patent No. 7,347,011 (“the ’011 Patent”), nonetheless discloses “a flat knit textile element having: (1) flat knit edges free of surrounding textile structure….” During an *inter partes* review proceeding in which Adidas challenged the validity of the ’011 Patent before the Patent Trial and Appeal Board (“PTAB”), Nike submitted an expert declaration stating that the specification discloses textile elements that have been flat knit. Ex. I at ¶¶ 53, 55, 58-60. Contrasting the embodiment shown in FIG. 9, where the textile element is formed by cutting out of a surrounding textile structure, *id.* at ¶ 62, Nike’s expert stated that the specification:

> 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.

Id. at ¶ 63. According to Nike's expert, the specification discloses that "these textile elements can be knit to the shapes shown in the figures (i.e., without surrounding textile structure) using flat knitting." *Id.* at ¶ 64. "Moreover," Nike's expert explained, "one of ordinary skill in the art would understand that such textile elements knit to the shape of Figures 8, 10 and 11 [shown below] using flat knitting would have flat knit edges because the edges, rather than being formed by cutting from a larger textile

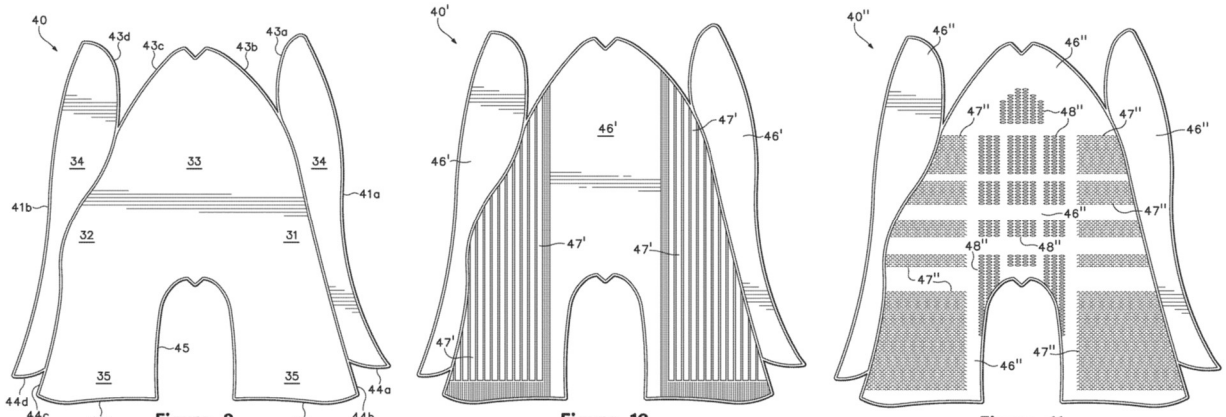


Figure 8 Figure 10 Figure 11

structure, are formed directly by the flat knitting machine." *Id.* at ¶ 65. Nike's expert stated that "[s]uch 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" and "also eliminate the extra processing steps associated with stabilizing the cut edges" (*e.g.*, by searing). *Id.* at ¶¶ 45-46. "Furthermore," the expert continued, "such embodiments are environmentally beneficial because they reduce the expense and waste associated with the extra material that must be removed from the textile element." *Id.* at ¶ 46. Thus, according to Nike itself, the intrinsic evidence shows that "a flat knit textile element having: (1) flat knit edges free of surrounding textile structure…" is a textile element that has only flat knit edges.

Nike's expert testimony and argument persuaded the PTAB that textile elements 40, 41' and 40", shown in figures 8, 10, and 11, respectively, "may be made by the flat knitting of yarn by the known process of 'knit[ting] to shape.'" Ex. J at 22. The PTAB concluded that 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" describes a "knit to shape textile element formed by flat knitting, having flat knit edges." *Id.* at 22-23; *see also id.* at 29-31. The PTAB further construed "a flat knit edge to be an edge of a flat knit textile element, which is itself flat knit, e.g., which is not formed by cutting from a flat knit textile element." *Id.* at 19. Nike did not appeal these constructions. Adidas appealed only the construction of "flat knit edge," but on appeal, the Federal Circuit affirmed the PTAB's construction, ruling that "[a]n interpretation that included a flat-knit, textile element that has been cut from a larger textile web would contradict the express claim language." *Nike v. Adidas AG*, 812 F.3d 1326, 1346-47 (Fed. Cir. 2016) (overruled on other grounds).

During the appeal, Nike explained to the Federal Circuit that "[f]lat knitting may be used to 'knit to shape,' meaning that the textile is knit into its final form in the first instance" and emphasized that "the edges of the textile are 'flat knit edges' that are unbroken and remain joined between the rows." Ex. K at 6. "By contrast," Nike pointed out, "if a textile element is cut from a larger web of material, its edges must be treated (such as by further stitching or searing) in order to prevent fraying and unraveling." *Id.* at 6-7. Nike asserted that the specification describes forming a shoe upper by "using a technique such as flat knitting to knit the textile directly into the shape of the upper in the first instance (as depicted in the patent's Figure 8) or by cutting an upper from a larger textile element (as depicted in the patent's Figure 9)." *Id.* at 7-8. Nike described one claim as having "a requirement for a 'flat knit' textile

element having 'flat knit edges' (*i.e.*, such that the upper is not removed from a larger textile material but is knit to shape in the first instance)." *Id.* at 14.

After the appeal, in an International Trade Commission ("ITC") proceeding asserting claims 1 and 15 of the '511 Patent against Adidas, Nike adopted the PTAB's "knit to shape textile element formed by flat knitting, having flat knit edges" construction and all but the "e.g." clause in the Federal Circuit's construction of "flat knit edge." Ex. B at 55. Nike argued:

> [T]he claim language provides the flat knit edges are free of surrounding material from which the knitted textile element must be removed. It means exactly what it says. You don't have to remove this element from a larger textile.

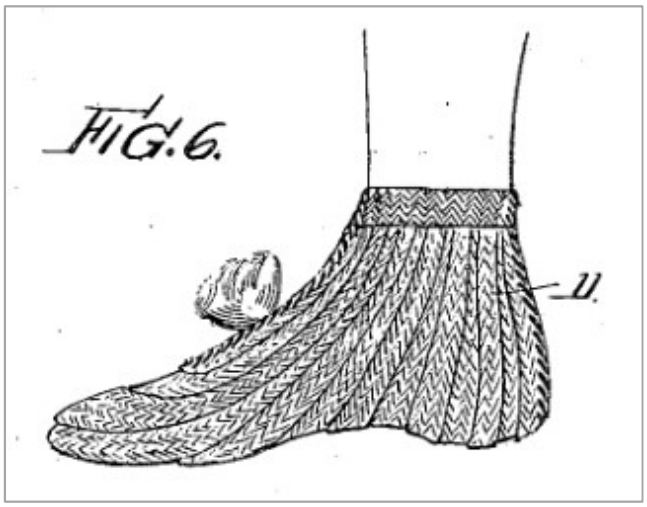
Ex. C at 67:14-18; *see also id.* at 68:19-69:1 ("In other words, there isn't any material around the edges of this flat knit textile element. It doesn't have to be cut out of anything."); *id.* at 77:19-21, 83:12-23, 84:11-14.

Skechers' construction closely tracks Nike's ITC construction, adding the omitted part of the Federal Circuit's construction of "flat knit edge" ("e.g., not formed by cutting from a flat knit textile element") and integrating the meaning of a term with which jurors are unlikely to be familiar: "knit to shape" (having only flat knit edges, not removed from a larger textile material). Despite offering a construction for the exact same claim language in the ITC proceeding, in this case Nike invokes "[o]rdinary and customary meaning," repeats the claim term verbatim, and asserts: "no further construction necessary." D.I. 50-1 at 6, 9. During the parties' meet-and-confers, Nike never explained its inconsistency or identified any alleged flaw in Skechers' construction. But once again, Nike's apparent infringement contentions indicate that Nike plans to make arguments inconsistent with that construction. For these reasons, the Court should adopt Skechers' construction of this term.

2. The ribs "extending…toward the heel region" ('781 Patent)

Nike's Construction	Skechers' 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"

Skechers' construction for "extending…toward the heel region" is based on Nike's clear and unmistakable disclaimer during the prosecution of the '781 Patent. The examiner had rejected all of the then-pending claims in view of Bellak (U.S. Patent No. 1,841,518) and Holden (U.S. Patent No. 1,902,780), explaining that "Holden teaches a knitted pattern comprising a plurality of longitudinally extending ribs," and citing, *inter alia*, Bellak's FIG. 6 (see inset). Ex. L at 2; *see also* Ex. M at 8 (citing Bellak's FIG. 6).



Nike distinguished the prior art by amending what would become claim 1 of the Patent to limit the claim to "the one or more ribs extending from the forefoot region ***toward the heel region*** and terminating in one of the midfoot region or the heel region." Ex. M at 7-9 (similarly amending what would issue as claim 12). In its remarks, Nike expressly distinguished Bellak and Holden from Nike's amended claims by arguing that Bellak's ribs "extend along the lateral or medial side ***in a diagonal or vertical orientation up towards the ankle opening***," and that Holden's ribs "extend[] from the toe region or the bottom portion ***up towards the ankle opening***." *Id.* at 8. The claims were then allowed on the basis of this amendment.

Skechers' construction accords with the well-established principle that "a claim term will not carry its ordinary meaning if the intrinsic evidence shows that the patentee distinguished that term from prior art on the basis of a particular embodiment, expressly disclaimed subject matter, or described a particular embodiment as important to the invention." *CCS Fitness, Inc.*, 288 F.3d at 1366-67. Here, Nike chose to distinguish the '781 Patent's longitudinal, integrally knit ribs from the prior art by expressly disclaiming ribs that extend "in a diagonal or vertical orientation up towards the ankle opening," as in Bellak and Holden, and Nike should not now be permitted to claim such an interpretation. *See Traxcell Techs., LLC v. Nokia Solutions and Networks Oy*, 15 F.4th 1136, 1141 (Fed. Cir. 2021) ("The doctrine of prosecution disclaimer…preclud[es] patentees from recapturing through claim interpretation specific meanings disclaimed during prosecution.'") (alterations in original) (citation omitted).

Skechers' construction is consistent with the specification. Figure 10 depicts a textile element that "includes a second texture 47' that is a plurality of longitudinal ribs" (see inset). '781 Patent at FIG. 10 (rotated); 9:23-46. As clearly shown in Figure 10, all of these ribs extend only ***longitudinally*** along the lateral and medial sides of the upper, and not "in a diagonal or vertical orientation up towards the ankle opening." Moreover, while the dependent claims of the '781 Patent describe ribs having various lengths (*e.g.*, claims 2, 8, 11, 13, 18-19) and spacings (*e.g.*, claims 4, 6, 15-16), not a single claim suggests a rib that would extend up towards the ankle opening.

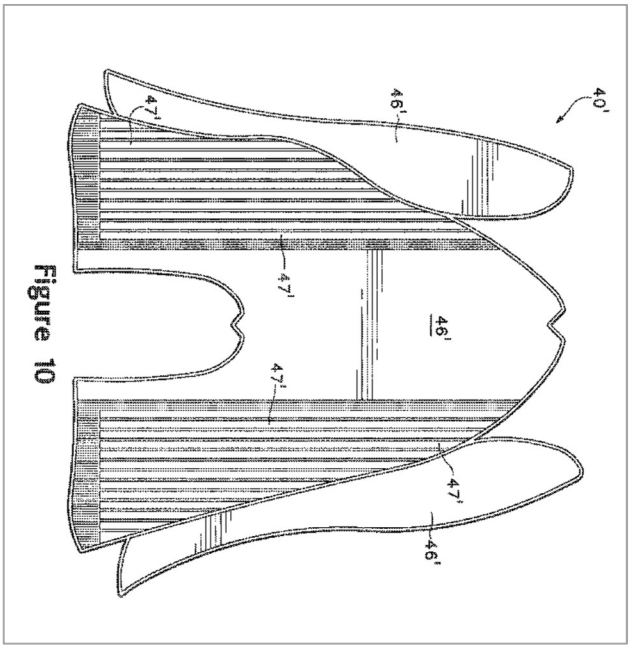


Figure 10

D. All Patents – "article of footwear"

Nike's Construction	Skechers' 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"

"A court construing a patent claim seeks to accord a claim the meaning it would have to a person of ordinary skill in the art at the time of the invention." *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.,* 381 F.3d 1111, 1116 (Fed. Cir. 2004). Skechers' construction is consistent with that meaning. Indeed, Skechers' definition comes almost verbatim from *The Complete Footwear Dictionary*, which defines footwear as follows: "***Any foot covering*** in the form of shoes, boots, slippers, or hose used for utility and/or dress wear. ***Not necessarily synonymous with shoes***, which are simply one category of footwear." Ex. N at 4. The only deviation from this definition of "footwear" in Skechers' construction is the addition of "(e.g., socks)," which clarifies that "hose" includes socks, and is not just panty hose, for example. The definition of "hose" to include socks also comes from *The Complete Footwear Dictionary*. *Id.* at 5-6.

Nike's "ordinary and customary meaning" construction would leave the jury unclear as to the meaning that "article of footwear" would have to a POSA. This would lead the jury to apply their own definition of "footwear" (or to argue over the term's meaning in deliberations). The Court should thus adopt Skechers' construction.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

The undersigned, counsel of record for Skechers U.S.A., Inc., certifies that this brief contains 6,994 words, excluding the caption, the table of contents, the table of authorities, the signature block, and this certification, which complies with the word limit of L.R. 11-6.1.

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/s/ Michael M. Rosen

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