

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3 WESTERN DIVISION

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5 HONORABLE ANDRE BIROTTE JR., UNITED STATES DISTRICT JUDGE
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8 NIKE, INC.,

9 Plaintiff,

10 v.

No. 2:23-cv-09346-AB

11 SKECHERS U.S.A., INC.,

12 Defendant.
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15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 LOS ANGELES, CALIFORNIA

17 SEPTEMBER 20, 2024
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1 (Proceedings commenced on September 20, 2024, at 10:45 a.m.)

2 THE COURTROOM DEPUTY: Calling Item 5, CV 23-09346,
3 Nike, Inc., versus Sketchers U.S.A., Inc.

4 Counsel, please come forward and state your appearances
5 for the record.

6 THE COURT: Go ahead, Counsel.

7 MR. HARRIS: Michael Harris for Plaintiff Nike, Inc.
8 And I would also like to note that in-house counsel for Nike
9 had planned to be here today. Her name is Kim Van Voorhis.
10 She tested positive for COVID and did not make the trip here
11 and wanted to extend our apologies on her behalf.

12 THE COURT: All right. No worries.

13 MS. STAUBACH: Lindsey Staubach also on behalf of
14 Nike.

15 THE COURT: All right. Good Morning.

16 MR. LU: Good morning, Your Honor. Samuel Lu on
17 behalf of Skechers. With me here today are my colleagues Keith
18 Orso.

19 THE COURT: All right.

20 MR. LU: Michael Rosen, and Connor He-Schaefer. And
21 with us is our client representative Mosima Thema.

22 THE COURT: Oh, I see. I'm sorry. Okay.

23 So I've got some questions apart from the hope or wish
24 this was a battle between Nike's premium brand and Nike Dunk so
25 I could the latest and greatest from both shoe companies.

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1 But let me just pull up my notes here. I'll just get
2 right into it. At least some of the questions that I had ---
3 just I want to talk about the throat area, if I could for a
4 moment.

5 And I'll ask the plaintiffs: How would you explain that
6 throat area to a jury?

7 MS. STAUBACH: Sorry, Your Honor.

8 THE COURT: Take your time. The lectern adjusts if
9 you need it. On the left hand -- to your right-hand side, I
10 believe.

11 MS. STAUBACH: Okay. Thank you.

12 Are you able to see it on the screen?

13 THE COURT: Nothing. If it doesn't show up on the
14 screen to the left, I'm not seeing it, either.

15 THE COURTROOM DEPUTY: I fixed it up.

16 MS. STAUBACH: Thank you for your question, Your
17 Honor. So we think that, in the context of the claims, the
18 claim term can't be read in a vacuum. We have to look at it
19 within the claim itself. That there will be no confusion over
20 what a throat area means.

21 If we look at claim 1 of the '562 patent, we have every
22 instance of throat area highlighted here. So what you will see
23 is that the integral knit tongue extends through a throat area.

24 THE COURT: If you don't mind, do me a favor. I
25 think you have the preview as opposed to the full screen.

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1 Okay. There. That's a little better.

2 MS. STAUBACH: Okay.

3 THE COURT: Go ahead.

4 MS. STAUBACH: So the integral knit tongue extends
5 through a throat area of the knitted component. So the claim
6 itself makes clear that the throat area is the area over which
7 the tongue extends. We don't believe there is any dispute over
8 where the tongue extends. A tongue is a term of art. Surely
9 Your Honor is familiar with it as well, where a tongue would be
10 in an article of footwear.

11 THE COURT: I guess, can the throat area extend from
12 anywhere other than the ankle opening?

13 MS. STAUBACH: So the throat area -- this is actually
14 one of Skechers' lines.

15 THE COURT: Okay.

16 MS. STAUBACH: This is in their foot gear overview
17 section. So this is like a generic cartoon picture of a shoe
18 here, and we have a throat area labeled. So the throat area
19 would extend from the forefront region up to the ankle opening.

20 THE COURT: And when you say "forefront region," you
21 are talking closer to where the lacing sign is or lacing --

22 MS. STAUBACH: The bottom --

23 THE COURT: Bottom.

24 MS. STAUBACH: -- end of the lacing where the shoe
25 connects -- the upper connects with the toe box, that would be

1 the forefront region.

2 THE COURT: Okay. Let me just see. I just had a
3 couple of questions that I wanted to make sure we covered.

4 MS. STAUBACH: well, this may be helpful to you, Your
5 Honor.

6 THE COURT: Okay.

7 MS. STAUBACH: So we actually don't dispute the
8 majority of Skechers' proposed construction for this term. Our
9 only dispute really is over their incorporation of ankle
10 opening and their construction of ankle opening. So if Your
11 Honor agrees with us on ankle, we have no concern with adopting
12 Skechers' proposed construction for this term.

13 THE COURT: Okay. All right. That is good to know.
14 Let me just jot that down here.

15 All right. And admittedly I'm jumping around here. So
16 it's going to be a bit of a tennis match.

17 Is there anything you wanted to add with respect to the
18 throat area?

19 MR. ROSEN: No, Your Honor. If Nike is now saying
20 they will effectively agree to our construction --

21 THE COURT: If.

22 MR. ROSEN: If ankle opening is construed or sort of
23 bracketing the issue of ankle opening, then I think we're in
24 agreement on that.

25 THE COURT: Okay. All right. Great. So the next

1 area I --

2 (Court reporter interrupted.)

3 MR. ROSEN: I'm sorry. Michael Rosen for Skechers.

4 THE COURT: We just got a lot of people here so
5 Ms. McKennon just wants to make sure she gets everybody's
6 attributes to the witty remarks of everyone to the right
7 person.

8 Can we shift for a second to the knitting and integral
9 knit tongue that is of unitary knit construction? Okay. I
10 have a question for Skechers. It doesn't seem to this leadite
11 to be anymore confusing than the patent language in general, so
12 tell me why you think it lacks sufficient clarity.

13 MR. ROSEN: Again, Your Honor, Michael Rosen for
14 Skechers. May it please the Court.

15 To make sure I understand your question, Your Honor,
16 you're asking specifically about the unitary knit construction
17 aspect of the claim?

18 THE COURT: Right.

19 MR. ROSEN: So there are intentionally two issues
20 with the construction here with what Skechers is proposing to
21 construe: One is that the entire integral knit tongue be of
22 unitary knit construction; that it be formed as a one-piece
23 element with the rest of the upper; that's part one. And part
24 two, that it extend from the forefoot over the instep to the
25 ankle opening. You will hear a lot of that today.

1 Is there a particular one of those two aspects that the
2 Court would like us to focus on?

3 THE COURT: No. Just generally, I think, if I read
4 it right, you believe it lacks sufficient clarity that requires
5 construction. Tell me why.

6 MR. ROSEN: So there are actually a few different
7 places to what explains our construction. The first piece of
8 this, and this is slide number -- I think it's 109. No. I'm
9 sorry. 99.

10 So the first piece of this is that we're clarifying the
11 actual word structure. As Your Honor can see, the claim term
12 itself is -- it's sort of a little bit out of order with the
13 upper -- with the knitting machine. So we've simply rearranged
14 the terms to make it more grammatically sound. That's part
15 one.

16 The second part is to make clear that our construction is
17 consistent to what the parties have already agreed to on the
18 actual term unitary knit construction. Just to be clear, Your
19 Honor, the parties do agree to what that phrase means. We all
20 agree that that means formed as a one-piece element through a
21 knitting process.

22 The key here is to show that the integral knit tongue and
23 the upper are satisfied in that unitary knit construction; that
24 they're together.

25 And then the last piece is just to clarify what the throat

1 area is, which we just addressed, that it is respective to the
2 ankle opening.

3 So the key here again is to make sure that it's clear to
4 the jury that both upper and the integral knit tongue are
5 formed as a one-piece knit element. And that is crystal clear
6 in the specification throughout, but it is not 100 percent
7 clear in the language of the terms, of the claim term, itself.
8 And our understanding is that Nike disputes that, in fact, it
9 should be construed this way.

10 But, again, as we go through these, in every case, in
11 every embodiment that is presented in the patent the knit
12 element is forming the upper and the integral knit tongue
13 together. It's unitary knit construction of all of that. It's
14 defined that way; right? Moving through these, this is
15 column 7 to column 8 of the '562 patent. It's defined as being
16 a one-piece element.

17 And Nike, from what we gather to the extent we understand
18 Nike's position, they dispute that. They seem to be arguing
19 that only a portion of the upper can be considered of unitary
20 knit construction, meaning it could conceivably be stitched
21 together from other pieces. But the evidence they cite, there
22 is actually -- you'll see, Your Honor, there is some brackets
23 and a little bit of cutting out.

24 If we look at the entire quote -- what we put up here is
25 from Nike's brief. If we look at what the patent actually

1 says, it says that the upper extends through each of region --
2 forefoot region 101, the midfoot region 102, the heel region
3 103, along both lateral sides, over the forefoot region, and
4 around the heel region.

5 And, again, we just put up figure 1 so the Court can see
6 this illustrated. That's the whole shoe. That's all of it;
7 right? So it's not a portion. It's everything. It's the
8 whole shoe.

9 So the key here, again, Your Honor, is just we want to
10 make sure the '636 patent is consistent. We want to make sure
11 that the jury will understand the upper and the integral knit
12 tongue together, one piece, unitary. And we think that is
13 what's necessary for that. So that is the unitary piece of it.

14 THE COURT: Okay.

15 MR. ROSEN: We can talk about the extend, or we can
16 pause there.

17 THE COURT: Let's pause. I want to hear Nike's
18 response to that. And if it's easier for you to stay there as
19 long as you bring the microphone close to you so our reporter
20 can hear you.

21 MR. HARRIS: I'll approach if that is okay.

22 THE COURT: That's fine.

23 Skechers must have hacked it.

24 MR. HARRIS: Okay. Michael Harris for Nike. Your
25 Honor, I'm glad you asked this question because, as we were

1 preparing for this hearing, we had the same thought. Why are
2 we construing this term? It's 31 words that Skechers is
3 construing with even more words. And, you know, in their
4 briefing they say it's for clarity, but their construction
5 provides no fair clarity.

6 And I want to start by looking at this disputed phrase.
7 There are individual terms -- there are terms within this
8 disputed phrase that the parties are separately disputing --
9 for instance, integral knit tongue. That is a separate
10 dispute. It doesn't need to be construed here.

11 Unitary knit construction, as my colleague noted, the
12 parties agree on the construction on unitary knit construction
13 so why are we construing it again here in the context of this
14 phrase.

15 Upper, the parties don't dispute the meaning of upper.

16 Knitting machine, the parties don't dispute the meaning of
17 knitting machine.

18 Extending through a throat area, well, I think that we've
19 confirmed that we agree on throat area. We just don't agree on
20 ankle opening.

21 There is nothing else in this claim limitation that
22 requires the Court to provides any clarity. And the clarity
23 that Skechers is asking the Court to provide -- I'm now on
24 slide 76 of Nike's demonstratives. Let's take a look at it.
25 They're adding words to the claim that find no support in the

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1 specification, no support in the claim language.

2 Their proposed construction requires that the knitting
3 machine knit a tongue through a knitting process that's formed
4 as one piece with the rest of the upper. That claim language
5 is nowhere. I mean, that language is nowhere in the claims.
6 It's nowhere in the spec. They are adding that limitation.
7 This isn't about clarity; it's about trying to create or
8 manufacture a noninfringement defense for Skechers.

9 There is no reason to construe this term, this phrase.
10 You can construe integral knit tongue. Unitary knit
11 construction has already been construed. Throat has been
12 construed. You don't have to construe this phrase.

13 Now, Skechers -- I've pointed you to -- I'm going to go
14 back. We're jumping around a little bit. This is slide 121 of
15 Skechers' demonstratives. This is what Skechers pointed you
16 to. I think their argument is the entire upper of article of
17 footwear must be knitted and can have no other nonknitted
18 components. I think that is really what they're trying to get
19 at because they believe that will establish or create some
20 noninfringement defenses for them.

21 And they point to this example here and say, oh, well,
22 look. The whole upper is knitted. This is one example, one
23 nonlimiting example, from the specification. And, in fact,
24 this example doesn't say that the entirety of the upper has to
25 be knitted. It says the majority of the upper is for a

1 permitting component. This is Skechers' slide.

2 You can see they grayed out the sentence that begins, "In
3 addition." well, they didn't go on to show you what the
4 specification says. So this is the actual specification from
5 '636 patent. It is document 5554 attached to an exhibit to our
6 opening brief. I want to show you what the rest of the
7 language says. Oops.

8 That portion of the spec -- I've highlighted it here, Your
9 Honor. It goes onto say, "In addition, knitted component forms
10 portions of an anterior and exterior surface." Not the
11 entirety. It doesn't have to form the entirety.

12 The spec continues on "As such knitted component defines
13 at least a portion of the void." Not the entire void. It
14 doesn't have to be the whole thing. The spec contemplates that
15 the upper, the entirety of the upper, does not have to be
16 knitted. There can be other nonknitted components.

17 So that's Nike's position on that term. Any other
18 questions, Your Honor?

19 THE COURT: Not on that issue. Forgive me. I have
20 certain things that were troubling or just a concern of when me
21 and the crew -- when we were going over this, so I just wanted
22 to make sure I covered those. And so thank you. Let me see
23 here what I have --

24 MR. ROSEN: Your Honor, may I respond?

25 THE COURT: Yes. Go ahead.

1 MR. ROSEN: And, Mr. Cruz, if I can get slide 113
2 please. Thank you.

3 Just to make sure that the Court understands this -- I
4 know we're jumping around a little bit. It's important to
5 note, Your Honor, that one of the very key central aspects of
6 this invention is the unitary knit construction. It's making
7 everything out of one single piece. In fact, throughout the
8 patent, through the background section during the patent
9 prosecution, the applicant over and over again contrasted what
10 used to be the way of making shoes or what they say used to be
11 the way of making shoes -- taking lots of pieces and cobbling
12 them together; literally the term "cobbler"; right?

13 And the new inventive way that they have which is taking a
14 single piece, taking one flat knit element out of which the
15 entire upper can be made. And we just want to be clear that in
16 both the way that the patent -- the applicants described it in
17 their invention over and over again, described what their
18 invention is contrasted with what came back before, that, in
19 fact, it needs to be clear the unitary knit construction, when
20 putting it together, together is the upper and the integral
21 knit tongue -- all one piece. That's really the key.

22 THE COURT: Okay. The parties have disagreement as
23 it relates. While I want to give you an opportunity to give me
24 your spiel as it related to -- not spiel, but give me your
25 position as it relates to integral knit tongue.

1 MR. ROSEN: My colleague Mr. Orso will handle that.

2 THE COURT: All right. So everyone looks like
3 they're going to get a chance today to handle that.

4 MR. ORSO: Keith Orso on behalf of Skechers and may
5 it please the Court.

6 If we could start, Mr. Cruz, with slide 48.

7 So here is our construction of integral knit tongue, Your
8 Honor. Throat area between overhanging portions of the upper
9 or adjacent to one or more raised elements. And I think it
10 will make sense to address this. This is what you requested.
11 We may need to veer into raised element as well, but let's
12 start here.

13 Integral knit tongue is a coined term. It has no ordinary
14 and customary meaning. And Nike hasn't disputed this and
15 hasn't submitted any evidence of an ordinary or customary
16 meaning for the term.

17 And we know, if we go to slide 52, please -- we know that,
18 if a disputed term has no previous meaning to those of ordinary
19 skill in the art, its meaning then must be found in the patent.
20 So we turn to the specification. That is the Irdeto case.

21 So when we go to the specification, if we can have slide
22 54 -- this is just a summary, but we see the specification
23 identifying as integral knit tongues: one, the throat area
24 adjacent to, often including, one or more structures referred
25 to as raised elements; and, two, in the absence of raised

1 elements, the throat area between overhanging portions of the
2 upper.

3 And we can walk through the parts of the patent that
4 disclose that. I don't think Nike disputes those disclosures,
5 though, in the patent. And I'm happy to go circle in if need
6 be. But I think Nike's position is we shouldn't be looking to
7 the specification to construe integral knit tongue.

8 Nike asserts that integral knit tongue, those three words,
9 that phrase, can be broken up into its constituent words and
10 construed that way. Although their position, of course, is no
11 construction is required. But they think it's understandable
12 by breaking it up into its individual words. But Nike offers,
13 as I said, no corresponding sort of sum of the parts
14 construction for integral knit tongue. It simply argues that
15 integral knit tongue relates to how a tongue is affixed, and
16 that is not a construction. And it doesn't help anyone to
17 determine whether there is an integral knit tongue or not.

18 Nike argues that everyone knows what a tongue is, in the
19 context of shoes, but if that is true, then it should be easy
20 to construe it, but it isn't.

21 If I can have slide 50, please.

22 What is shown here on slide 50 is probably what most
23 people consider a tongue. You see a flap of material on the
24 right. It's kind of splayed open, so that you can see it
25 coming out. And it's connected to the rest of the shoe. And

1 if it's connected to the rest of the shoe by knitting, then,
2 Nike would say, well, that is an integral knit tongue.

3 If I could have slide 51, please.

4 But Nike will say that, according to the patent, integral
5 knit tongues can be also joined by knitting -- you see the
6 highlighted portion -- at least along a portion of both the
7 lateral side and medial side of that throat area.

8 So if we go to slide 63, what do we do with a shoe like
9 this? Does this have an integral knit tongue that is joined by
10 knitting up the sides of the throat area? well, Nike says,
11 "No."

12 If I can have slide 64, please.

13 This is an excerpt from a piece of prior art. It's
14 referred to as Dua 2. It's U.S. 2005/0193592, and it has these
15 figures in it.

16 If we go to slide 69, Nike's expert has argued that Dua 2
17 does not disclose an integral knit tongue. Do you see at the
18 bottom portion of the slide quoted?

19 And if we look at slide 68, please, Nike's expert also
20 says that an integral knit tongue is not just any knitted
21 material that exists over the throat area/instep of the foot.
22 And you can see the figure at the top of the slide. That's
23 that figure, one of those figures from Dua 2.

24 So the problem, of course, -- and it's been recognized --
25 if you look at slide 65, as the patent examiner recognized in

1 examining a related patent claim -- recognized that the
2 integral knit tongue loses the features characteristic of a
3 tongue by fixing it on all sides of the throat area.

4 So Nike thinks that the shoe, on slide 50 that we saw,
5 does have an integral knit tongue, that one with the tongue
6 splayed open, but that the shoe on slide 64 doesn't have an
7 integral knit tongue. And Nike makes no effort to draw a line
8 between the two.

9 That's important because, if we look at slide 66, Nike
10 actually accuses of infringement shoes that look a lot like
11 those on slide 64. On the left you have again those figures
12 from Dua, and on right you have an excerpt showing some of the
13 accused shoes that Nike says have integral knit tongues.

14 Something is missing from that shoe on slide 64.

15 will you bring that up again?

16 Something is missing from that shoe on slide 64.

17 Something extra must be needed for that shoe to have an
18 integral knit tongue. And the patent specification tells us
19 what that is. It's either raised elements or those overhanging
20 portions of the upper.

21 So maybe it makes sense to transition to raised element --

22 THE COURT: I want to hear Nike's response before we
23 get to the raised element.

24 MR. ORSO: Please. Yes.

25 THE COURT: Obviously, you can cover whatever area

1 you think is appropriate, but as it relates to last photograph
2 that was shown, is it Nike's position that, I guess, the pink,
3 sand, or beige shoe has an integral knit tongue?

4 Daniel. There we go.

5 MS. STAUBACH: Thank you, Your Honor. I think I'll
6 start in a little bit of a different spot and end up with your
7 question.

8 THE COURT: Okay.

9 MS. STAUBACH: So integral knit tongue, first of all,
10 Skechers says this is a coined term. They say Nike agrees with
11 that. Nike doesn't agree with that. But to begin with, I want
12 to start by looking at Skechers' proposed construction here.
13 So the term is integral knit tongue. And as you can see on the
14 upper right side here, they've construed this as throat area
15 between overhanging portions of the upper or adjacent to one or
16 more raised elements, and then they have this extended proposed
17 construction of raised element here.

18 But what you'll notice -- and as Your Honor knows, claims
19 are the cornerstone of a claim construction analysis, and we
20 should be giving meaning to every word in the claim. And if we
21 are proposing constructions, they should be explaining the
22 claim language and adding clarity for the jury.

23 But if you look at this construction on the right, what
24 you won't see is any requirement that this tongue be knit, and
25 you won't see any requirement that this tongue be integral.

1 "Knit" doesn't even appear in here, and there is no suggestion
2 that this is knit in their construction. So that is the first
3 reason we think Skechers' proposed construction is improper.

4 Furthermore, Skechers' proposed construction, it doesn't
5 explain what the integral knit tongue is. What it does, it
6 says there is this area of the shoe, and it provides like a
7 positional relationship between other optional features of the
8 specification, which is an overhanging portion or a raised
9 element.

10 So Skechers goes into the specification. They cherry-pick
11 these two features from the specification, and they say --

12 (Court reporter interrupted.)

13 MS. STAUBACH: This is what it needs to be.

14 And so let's go back to coined term. This is not a coined
15 term. There is no dispute between the parties that tongue has
16 an ordinary meaning.

17 THE COURT: So, I mean, we don't need to construe the
18 term "tongue"?

19 MS. STAUBACH: We don't need to construe the term
20 "tongue."

21 We don't need an affirmative construction for integral
22 knit tongue. That is Nike's position.

23 But a coined term means that there is no accepted common
24 meaning, and that the inventor coined this term for this
25 particular patent application. And that's not the case here.

1 what we're looking at is the word "tongue," that there is
2 no dispute. Everyone knows what that means. And then "tongue"
3 is modified by "integral" and "knit. And so that means a knit
4 tongue that is a part of the article of footwear or that is a
5 part of the upper or connected to the upper.

6 And Skechers concedes this in their briefing with what is
7 highlighted here. This is from Skechers' claim construction
8 brief. It says, "Given what it means for two things to be
9 integrated, given what knitting is, and given the well
10 understood shape of a tongue, both generally and in the
11 construction of shoes." Skechers knows that this has an
12 ordinary meaning. So this is not a coined term.

13 But even if we did look at this, all three words together,
14 integral knit tongue, as a coined term, federal circuit law
15 says the inquiry for an ordinary meaning doesn't stop there.
16 We have to look at each word separately, as opposing Counsel
17 mentioned when they were up here.

18 So, again, like we just discussed, we know what "tongue"
19 means; we know what "knit" means; we know what "integral"
20 means. Putting those together, we would have a tongue joined
21 by knitting to the upper.

22 THE COURT: Okay.

23 MS. STAUBACH: Plain and simple.

24 Keeping that in mind, that either this isn't a coined term
25 or, if it is, it has an ordinary meaning, Skechers' proposed

1 construction is improper because their entire argument is based
2 around limiting this to certain embodiments in the
3 specifications, and that runs contrary to the most fundamental
4 claim construction law, which is you can't import limitations
5 from a specification into the claims.

6 Now, with respect to that image that they put up, which
7 I'm sorry I don't have in my slide presentation --

8 THE COURT: At least from my naked eye, is there a
9 tongue there? Or is it your view that, because as you
10 define -- we all know what a tongue is, we all know what
11 knitted is, and integral is part of it. So because it's knit
12 and it's part of the shoe, we can just say there is a tongue
13 there?

14 MS. STAUBACH: Well, it's a good question, Your Honor
15 but --

16 THE COURT: Even a broken clock is read twice a day.

17 MS. STAUBACH: Nike's position is that a tongue, as
18 we've discussed -- we know what it is; we know what it looks
19 like. A tongue may have different features, which some of
20 these are in Skechers' proposed construction. In the context
21 of this patent, could have overhanging portions, could have
22 raised elements, could be under laces, could be partially
23 connected and partially free at the end, could have an
24 overhanging extension at the ankle.

25 THE COURT: I get that. But the photo that was

1 shown, does it fit within any of those from Nike's view?

2 MS. STAUBACH: Yes, Your Honor. So something that
3 was a little bit misleading, I think, in what Skechers put up
4 is that, from the side view, you could only see that each side
5 seemed to have like a little bit of an overhanging portion at
6 the ankle opening.

7 But if you look at the patent figure head-on next to
8 Skechers' shoe, you would actually see that there is a
9 tongue-like feature at the top of Skechers shoe; whereas in the
10 image from the patent, there was only this little notch in the
11 middle.

12 THE COURT: So are you saying that -- I'm just trying
13 to envision this shoe. If there is a little lip at the top, in
14 your view, that would be enough to be characterized as a
15 tongue?

16 MS. STAUBACH: If it's distinctive enough and has the
17 shape of a tongue, then, yes, I think that is our view.

18 THE COURT: Got it. Okay.

19 Let me hear from Skechers. I see a box that says
20 "Skechers." Is the shoe here?

21 MR. LU: Yes, Your Honor.

22 THE COURT: Okay. So let's have a little show and
23 tell.

24 MR. LU: I would be happy to pass it up.

25 THE COURT: Well, I think I saw it. Maybe I just ask

1 Nike point blank, from your perspective, is there a tongue on
2 the shoe, and if so, where is it?

3 MS. STAUBACH: Yes. Thank you, Your Honor.

4 Yes, we do think there is a tongue on this shoe, and we
5 think that because -- and we can pass it up to you if that
6 would be helpful. But there is a lip that extends all the way
7 across where a tongue would go, and it is knitted through a
8 throat area to the forefront and to the medial and lateral
9 sides of the throat area.

10 THE COURT: Even though the knitting is -- I guess
11 the counter on it, it's just one shoe that just happens to have
12 a shape at the top; right? And so but your view is that, when
13 you look at the term, because there is knitting and it's in the
14 upper portion, that is enough for it to be a tongue?

15 MS. STAUBACH: So if this wasn't raised, if there
16 wasn't this lip here, it would not be our opinion that this was
17 an integral knit tongue.

18 THE COURT: So literally if -- I'm being a leadite
19 here. You shave off of top quarter inch of that, then there is
20 no tongue?

21 MS. STAUBACH: Yes, Your Honor.

22 THE COURT: Okay. All right. Let me hear from
23 Skechers.

24 MR. ORSO: Thank you, Your Honor.

25 THE COURT: And if that is in size 11, you can leave

1 that.

2 If I could have 64 again, please, -- 64. Here we go. So
3 this is this the Dua 2 reference that Nike's expert says does
4 not have a tongue.

5 I don't think I can use the tracing feature here. But do
6 you see there is a little notch on the inside on figure 8, on
7 the inside of the "U" shape? In fact, on figure 1 at the top
8 you see there is a little pointy spot on the side view of the
9 shoe?

10 THE COURT: Right. Hold on. We've been having some
11 trouble.

12 MR. ORSO: Are you able to see the cursor? That's
13 the best I can do. The cursor up here?

14 THE COURT: Yeah, I can see it.

15 MR. ORSO: Okay. So I was talking about this portion
16 up here.

17 THE COURT: Right.

18 MR. ORSO: And I was also talking about this portion
19 here, that little thing that sticks out.

20 THE COURT: That's aerial view up top looking from --

21 MR. ORSO: Yes, Your Honor. So what I'm circling now
22 is on the upper as it's splayed out.

23 THE COURT: Right.

24 MR. ORSO: You have the top view of the shoe down
25 here in the lower left corner.

1 THE COURT: Right.

2 MR. ORSO: Is that a tongue?

3 THE COURT: You see --

4 MR. ORSO: That is a rhetorical question, yes.

5 THE COURT: Okay.

6 MR. ORSO: So let me get back to sort of what -- I
7 think, what Counsel told you with respect to this shoe, I
8 believe is inconsistent with what their expert said with
9 respect to that shoe, the Dua 2 shoe.

10 I do want to get back to this question of whether this a
11 coined term, because Counsel got up and stated that it is not a
12 coined term, but you didn't see her point to any evidence of
13 its use in the art at all because there isn't any evidence.
14 They put in no evidence.

15 THE COURT: But is that dispositive?

16 MR. ORSO: Well, what is the evidence that it's a
17 coined term. She's saying that to you. We're showing you that
18 this patent uses this term -- it's a term; right? It's a
19 three-word term.

20 THE COURT: Right.

21 MR. ORSO: And there is no evidence in the record
22 that it's a term known in the art or term used in the art.
23 They don't cite other patents that use the term other than
24 maybe their own patents do, because they're related. They
25 don't cite prior art. They don't have expert testimony.

1 THE COURT: But I guess the question is what about
2 the converse? There is no evidence to the contrary, is there?

3 MR. ORSO: Well, but they're the ones taking the
4 position that it's not a coined term. So we see this language,
5 and they came forward with no evidence that, oh, here is what
6 it is. Here's where you can find it in whatever.

7 THE COURT: I get their argument. I am not going to
8 speak for Nike. But you've got three words, I mean, and
9 they're not overly complex; right?

10 MR. ORSO: Right.

11 THE COURT: Integral knit tongue. What more do you
12 need?

13 MR. ORSO: So that gets back to the point that we
14 talked about earlier which is this word "tongue."

15 And if we go to -- what is it -- slide 50, please.

16 Again, we talked about this sort of canonical example,
17 maybe you'd say, of a tongue; right?

18 THE COURT: Right.

19 MR. ORSO: Splayed out. We all have them oftentimes
20 on our shoes.

21 The other thing that Counsel for Nike didn't tell you,
22 when she was up here, was how to actually define tongue. So I
23 said it in my first -- in my opening statements. I mentioned
24 that, if it's so known and knowable, what is the definition?
25 So I am very sure that Nike would not want to limit itself to a

1 flap-like structure joined to an upper.

2 THE COURT: Because there is no flap; right? At
3 least with the shoe at issue.

4 MR. ORSO: She said this is infringing. So what
5 would be Nike's definition of tongue? What would Nike tell a
6 jury the word "tongue" meant in the context of shoes. I don't
7 think it's simple. I think they may want to tell us, oh,
8 everyone knows what a tongue is, but do we? And do we know
9 what a tongue is in this context where it is an integral knit
10 tongue where the patent says, well, you can join it up the
11 sides?

12 So what is a tongue then? That is the whole question
13 here. The word "tongue" does need construction. It's not
14 enough to say that there's is a tongue, and it's joined by
15 knitting or whatever to the rest of the upper.

16 THE COURT: Okay. I would like to hear
17 Ms. Staubach's response to that, only because it's interesting,
18 just to me, playing this out in front of a jury, you know, do
19 we need to define what a tongue is, because I think most people
20 would at first think it's the flap? And they might be
21 surprised or at least interested to hear that Nike's view is
22 that that upper lip portion is also a tongue.

23 So does that beg the question that perhaps tongue needs to
24 be defined? Look, initially, I think no, but hearing this back
25 and forth, maybe it does.

1 MS. STAUBACH: Your Honor, I would like to begin by
2 addressing opposing Counsel's remark about coined term. So it
3 is Skechers' position that this is a coined term. There is no
4 evidence in the record that it is. Coined terms are generally
5 established by sometimes agreement of the parties, if you look
6 at the case law, or by expert testimony. There is no expert
7 testimony in this case.

8 Because they say it's a coined term, it is their burden to
9 prove that. It is not our burden to come forward with evidence
10 up-front about why this is not a coined term. And Skechers has
11 not established that this is a coined term.

12 And can you remind me of your question?

13 THE COURT: Yes. Do we now need to discuss or
14 construe the term "tongue," I mean, because I'll tell you
15 just --

16 MS. STAUBACH: Yes.

17 THE COURT: -- hearing it, it is a little bit
18 surprising that Nike takes the position that that upper -- I'll
19 just call it upper lip towards the ankle opening is a tongue,
20 when, I think, many people -- and I'm curious -- would feel
21 differently; that they would think of a flap, like the long
22 flap. And your view is that, because there is this knitting
23 connected to the ankle opening and it's integral to the shoe,
24 that also equals tongue.

25 So the question is: Do we need to construe the term

1 "tongue"?

2 MS. STAUBACH: We think that tongue is evident from
3 the claim itself. So the claim describes that the tongue -- it
4 describes where it extends; right? It extends through a throat
5 area of the knitted component.

6 THE COURT: Throat area of the knitted component.
7 So, in your view, you have a knitted component with the shoe at
8 issue in front of you. And it's extending through the throat
9 area, which is where again?

10 MS. STAUBACH: It's from the forefront of the foot to
11 the ankle opening to the --

12 THE COURT: Forefront of the foot to the ankle
13 opening.

14 MS. STAUBACH: -- instep.

15 That's Skechers' language --

16 THE COURT: Right.

17 MS. STAUBACH: That we said earlier that we would
18 agree with.

19 THE COURT: And so you think this knitting extends
20 over that throat area in the shoe at issue?

21 MS. STAUBACH: Yes, it does. You think about a
22 conventional tongue that is not joined by knitting at the sides
23 or at the forefront location. It's in the same location. Only
24 here it is integrally knitted with the upper, and it still has
25 features of a conventional tongue. For example, like we just

1 talked about with this shoe, it still has this. This piece
2 right here, that would be the top of the tongue.

3 THE COURT: So if you cut that off, then it's not a
4 tongue.

5 MS. STAUBACH: So Nike's position is that, if this
6 shoe right here did not have this look, then this would not
7 have an integral knit tongue.

8 THE COURT: Okay. Okay. All right. That's helpful.
9 Thank you. I appreciate it.

10 I think you want to talk about raised element, which is
11 the other area, but I assume you want -- as lawyers you want to
12 have the last word so you want to respond?

13 MR. ORSO: Just very, very briefly.

14 THE COURT: Okay. All right.

15 MR. ORSO: And I'll just end with this which is, if
16 we bring up slide 64, what Nike just told you does not
17 distinguish the shoe on slide 64. How do we know -- it's like
18 a shell game; right? They want to have all their options open
19 in trial on what integral knit tongue is. They want to say,
20 "Our shoe has one." But they've already they said that this
21 shoe doesn't, that you see on this slide. And so I don't think
22 that we've moved the ball here. There is still no definition
23 on the table of what a tongue is.

24 THE COURT: I think Ms. Staubach -- she defined it.
25 You guys have a different interpretation of what that means. I

1 mean it's the knitting through that throat area up to the ankle
2 opening. There is knitting in that throat area up to the ankle
3 opening; right?

4 MR. ORSO: That's what she said with respect to this.
5 But what about this one? This one is knitted. And this has --
6 remember we talked about those -- the part up here and this
7 part here. My point is that we don't have a construction we
8 can use to assess alleged infringement and validity.

9 THE COURT: Okay. Okay.

10 MR. ORSO: Let me speak briefly, unless you have
11 further questions on integral knit tongue, about raised
12 element.

13 THE COURT: Go ahead.

14 MR. ORSO: I think it would be relatively quick. We
15 can start with slide 56, please. This is our construction of
16 raised element -- a flap or overhanging portion extends outward
17 away from the surface of the upper along the length of the side
18 of the tongue.

19 Again, our position here, as it is with respect to
20 integral knit tongue, is that this is a coined term. It's
21 obviously very difficult to prove a negative. They haven't
22 come forward with evidence that it is a coined term.

23 THE COURT: It's interesting. Both of you are both
24 saying -- your pointing fingers at each other saying, "You need
25 to prove it."

1 "No, you need to prove it."

2 MR. ORSO: So I guess they are saying, if we had come
3 in with an expert saying it was a coined term, then they would
4 have folded. I doubt that is true.

5 THE COURT: I doubt that as well.

6 MR. ORSO: That's true. But raised element, we don't
7 see that anywhere else. "Element" itself is kind of an empty
8 word; right? "Element" is kind of a placeholder word. Raised
9 element.

10 So we have to look to the specifications. We think it's a
11 coined term so we think you look straight to the specification.
12 I think if you just look at raised element on its own, you say,
13 "What am I going to do with that? I don't know what that
14 means." So I've got to look to the patent specification. It
15 doesn't work -- don't even argue that you can break it apart
16 and construe it that way. So we look to the specification and
17 what do --

18 (Court reporter interrupted.)

19 MR. ORSO: We see a sole description on slide 57. So
20 this is in the '562 patent, column 9, lines 63 to 66, and this
21 is where we get the language. This is talking about a flap or
22 overhanging portion of integral knit tongue '512 that extends
23 outward away from the first surface '530 of upper '502.

24 If we look at, I believe, the next slide, yes, here we see
25 slide 58. We see examples of the raised element, and there are

1 a couple different examples. You see in the upper left you
2 have that flap with the overhanging portion. You see a
3 cross-sectional view, figure 6, in the bottom left of the
4 slide. And on the right you have an embodiment where there are
5 holes for laces in there.

6 So this is all we have. This is literally all we have
7 from the patent specification about what a raised element is.
8 So absent anything else, there is no more general description
9 that what you saw on previous slide 57. There is no more
10 general description than that. That is all we have to go on.

11 So that is how we arrived at our proposed construction for
12 raised element. If we just say to the jury that there are
13 raised elements there, I think the jury is going to look at
14 each other and say, "We don't know what that means."

15 So we think it needs construction. And we think the only
16 thing you can do is look to the patent to identify what a
17 raised element is.

18 THE COURT: Okay. Ms. Staubach, any response?

19 MS. STAUBACH: Yes, Your Honor. Just like integral
20 knit tongue, Skechers says that raised element is a coined
21 term. Just like integral knit tongue, this is not a coined
22 term, and even if it was, it would be the sum of its parts,
23 just like integral knit tongue.

24 But once again, its Skechers' position that this is a
25 coined term. There is no evidence in the record for this term

1 either. No expert testimony. No agreement of the parties.
2 They just expect the Court to take Skechers' word for it.

3 And as you know, there is a heavy presumption that claim
4 terms are given their ordinary and customary meaning. It can't
5 be that you can just pluck any series of words out of a claim
6 and be like, well, this only has a meaning within this patent
7 application or this specification.

8 If that were the case, that would run directly contrary to
9 the most fundamental claim construction law. But getting to
10 the words of the term itself -- raised element -- that is not
11 confusing. That is not confusing to positas. That is not
12 confusing to lay persons. It is two words. The first is
13 "raised." "Raised" is protruding above, elevated, heightened.
14 Maybe with respect to something else in this case it would be
15 with respect to the knitted component. And "element" is a
16 component or part of something. That's not confusing. It's a
17 component that is raised; that is raised with respect to the
18 knitted component.

19 And, you know, Skechers says, "well, 'element' is a knots
20 word." well, that is kind of conflating means plus function
21 claim construction with a coined term because it means less
22 function. You may have like a means for -- I don't know. A
23 means for forming something.

24 And then you have to understand what that means is -- that
25 is able to achieve that function is, and then you go to

1 specification, and you look for that. But there is no
2 functional claim in here. This isn't something that is doing
3 anything. It is a raised element that is on a knitted
4 component.

5 So taking that into account that this is not a coined
6 term -- or if it is, just like integral knit tongue, it is a
7 sum of its parts. Skechers' construction is improper. It has
8 to be because, you know, they concede in their argument "We are
9 limiting this to certain things in the specification. We are
10 limiting this to either flap or overhanging portion. Where
11 it's a flap or overhanging portion that extends along the
12 length of the side of the tongue.

13 But those aren't in claim language. You can see the claim
14 here. And the underlying portion is where raised element is.
15 At least one raised element extending --

16 THE COURT: Slow down. Ms. McKennon -- go ahead.

17 MS. STAUBACH: At least one raised element extending
18 a height above the exterior surface of knitted component. So
19 there is no requirement in here for flap or overhanging portion
20 or that it extend along the length of the side of the tongue.
21 And the specification makes clear that, if there is a flap or
22 overhanging portion, that is just a nonlimiting example of what
23 a raised element can be. The claims are broader than that.
24 The claims just say "raised element" or "extending above the
25 surface of the knitted component."

1 We don't think a jury would be confused by this term. We
2 don't think it requires any affirmative construction. And it's
3 not a coined term.

4 THE COURT: Okay. Mr. Orso, I assume you have
5 something you want to say in response. Go ahead.

6 MR. ORSO: Very brief, Your Honor.

7 what Counsel just articulated as the sort of split apart
8 construction of something that is protruding above and an
9 element being just a thing. So I guess my question would be --
10 let's go back to our friend, this shoe. Does this have raised
11 elements? I mean, maybe you can't see -- and I won't approach
12 obviously without your permission, but there is texture on
13 here.

14 THE COURT: Right.

15 MR. ORSO: What if a shoe has ribs? Ribs are one of
16 the terms -- there is a term with ribs --

17 THE COURT: Right.

18 MR. ORSO: -- that is at issue here today.

19 THE COURT: Is that a raised element?

20 MR. ORSO: Is that a raised element? Are they really
21 taking the position that any protuberance, anything extending
22 above some plain in the shoe is a raised element.

23 I think when we look at the patent and we look at the
24 specification, the patent is clear about what raised elements
25 are, and I don't think we have much else to go on except that.

1 And if they want to blow it up and say any single thing, I
2 would be surprised because during prosecution adding the term
3 "raised elements" is what allowed them to get their claim
4 through. And if anything in the world is rising above the
5 surface can be a raised element, I don't know how that would
6 have distinguished the prior art. Thank you, Your Honor.

7 THE COURT: Let me ask Ms. Staubach. I am curious of
8 that question.

9 Does that shoe -- does that contain raised elements, in
10 your view -- not yours. I mean Nike's view.

11 MS. STAUBACH: So opposing Counsel pointed to ribs on
12 here.

13 THE COURT: The texture of the shoe; right?

14 MS. STAUBACH: There --

15 THE COURT: Would be considered a raised element?

16 MS. STAUBACH: -- are some other textures on here.
17 And the answer to the question is "No," Your Honor. And all we
18 have to do to ascertain that is to look at language of the
19 claim itself.

20 THE COURT: Okay.

21 MS. STAUBACH: And so we can see that the claim says
22 a knitted component; right? This is knitted component here.

23 THE COURT: Okay.

24 MS. STAUBACH: So if we then also have to have an
25 additional element that says, "At least one raised element

1 extending a height above the exterior surface of the knitted
2 component," we aren't going to look at things that are the
3 knitted component itself.

4 THE COURT: But read that last portion that you just
5 said, "raised above." Would you mind reading that one more
6 time?

7 MS. STAUBACH: Sure. "At least one raised element
8 extending a height above the exterior surface of the knitted
9 component."

10 THE COURT: So a height above the exterior component.
11 I've got teenagers, so sneakers are all over the house. I've
12 seen all different types -- slip ons, dunks. I've seen some
13 that have that sort of material on that shoe, but they have a
14 fabric that kind of adds as, I guess it would be, a rib. It
15 does extend above the height.

16 would that be infringing, potentially infringing? I mean,
17 I don't -- I'm not intentionally trying to put you on the spot.
18 But my question is that, in a shoe -- I can literally just see
19 it right now, in our entryway where there is ridges above the
20 knitting. Is there a potential for that be viewed as a raised
21 element?

22 MS. STAUBACH: Can I have just a moment?

23 THE COURT: Absolutely.

24 (A discussion was held off the record between Counsel.)

25 MS. STAUBACH: Thank you, Your Honor.

1 THE COURT: Sure.

2 MS. STAUBACH: So, first of all, to assess
3 infringement we would need to have -- consider whether a shoe
4 meets all of the limitations in this claim, and we would really
5 have to see the shoe to assess whether it has something
6 distinctive enough to be a raised element.

7 THE COURT: Fair enough. You can see the other
8 argument that, hey, use in that could be a problem. But your
9 point is that we would have to see the specific shoe before we
10 can make an assessment on that. Okay. Fair enough. Okay. Go
11 ahead.

12 MS. STAUBACH: Nonetheless, for all the reasons we
13 just discussed, Skechers' proposed construction is incorrect
14 because it's not a coined term. Just throwing that out there.

15 THE COURT: Okay. Got it. Let me see --

16 MR. ORSO: Your Honor, can I point you to piece of
17 evidence?

18 THE COURT: All right.

19 MR. ORSO: I won't bring it up.

20 THE COURT: Just get close to the mic.

21 MR. ORSO: I'm sorry. Can I just point to piece of
22 evidence? If you look at claim 16 of the '636 patent, it's the
23 knitted component recited in claim 13 where at least one raised
24 element is formed of unitary knit construction with the upper
25 and integral knit tongue.

1 So it's talking about one piece that has a raised element,
2 unitary knit construction.

3 THE COURT: Okay. Fair enough. All right. Look,
4 those are all questions I have. Although I have to tell you,
5 just hearing the discussion which was very helpful and both
6 sides did a great job, I'm contemplating -- which means
7 generally that I'm going to do this. I'm wondering if I can
8 get the parties' position in maybe a two-page supplement on
9 whether or not -- what is the plain and ordinary meaning of
10 tongue?

11 I mean, I am little sort of torn about that particularly
12 in light of seeing the shoe, the shoe that has been presented.
13 And probably we should state for the record what is the brand
14 of that shoe or model of that shoe?

15 MR. ORSO: Your Honor, that is a Skechers' shoe.
16 That's an accused shoe in this case.

17 THE COURT: No, no. But which one is -- if you know,
18 like the model.

19 MR. ORSO: This is the Go Walk Arch Fit 2.0 Paityn,
20 P-A-I-T-Y-N in mauve.

21 THE COURT: In mauve.

22 MR. LU: This is Samuel Lu. It's probably best to
23 also provide the style number 125300.

24 THE COURT: Okay. So in light of seeing the mauve
25 shoe, it just raises a question in my mind -- I'm just trying

1 to play this out long term, summary judgment, trial.

2 Is this going to be an issue. So I guess I come down
3 to -- I mean, would the parties be willing to give me a
4 two-page brief or supplement and the evidence supporting sort
5 of the plain and ordinary meaning of tongue, because I think
6 there is an --

7 MR. HARRIS: Sure.

8 THE COURT: Go ahead, Mr. Harris.

9 MR. HARRIS: Michael Harris for Nike. Yeah, we would
10 be happy to do that, Your Honor. One or two pages, whatever
11 you want.

12 THE COURT: Two pages. I assume you folks want to
13 get the billables up before the end of the month so we can get
14 it done in the next ten days. That would be fine, by on or
15 before September 30. That would work.

16 MR. ORSO: Yes, Your Honor.

17 MR. HARRIS: Yes, Your Honor

18 THE COURT: All right. So we've been going at this a
19 little while. I don't have any other questions. If there is
20 some burning issues that either side wishes to raise in the
21 next few minutes, I'm happy to hear it. But we spent a lot of
22 time going through it so I wanted to try to make this as
23 productive as possible by focusing on some of the issues that I
24 was struggling with.

25 Mr. Harris?

1 MR. HARRIS: Thank you, Your Honor, really
2 productive. I'm glad we could focus on your issues. We don't
3 have any burning issues that we need to address, but thank you.

4 THE COURT: Mr. Orso?

5 MR. ORSO: Nothing further, Your Honor.

6 THE COURT: I am just curious. Again, I love shoes.
7 So what shoe is that that you have in your hand, Mr. Lu?

8 MR. LU: Well, Your Honor, I think there was a little
9 bit of confusion regarding the difference between a flat knit
10 and a three-dimensional upper. And so one of the things we
11 did, Your Honor, was to print some of the patent figures on
12 T-shirts. And this was kind of my idea.

13 THE COURT: Okay.

14 MR. LU: And then we cut these flat knit elements
15 that you were shown in the patent, which as you can see are two
16 dimensional. This was, I think, addressed on a number of the
17 claim construction elements, and I am not going to go into
18 that. But what we ended up showing is how those flat knit
19 elements would be situated on what is called a last, which is
20 the shape of a foot that they use to make shoes.

21 And as Your Honor can see, that makes it a
22 three-dimensional upper that has an interior and exterior and
23 ankle opening and all of the other stuff. And this back
24 portion here, as explained in the briefing and as shown in some
25 figures, gets kind of wrapped --

1 THE COURT: wrapped around the back heel?

2 MR. LU: Yeah. And oftentimes there is a seam --
3 there is a layer that gets put on top of that to hide the seam.

4 THE COURT: Got it.

5 MR. LU: But that was kind of, you know, the purpose
6 of this. And we actually had some concerns that security
7 wouldn't allow us to bring this through because they're really
8 heavy.

9 THE COURT: Oh, but they did. Okay. Good.

10 All right. Well, thank you. I appreciate the time.

11 Mr. He-Schaefer, I just want to give you an opportunity so
12 you can justify your existence today.

13 Anything that you wanted to add? I'm teasing, of course.
14 But I just didn't want you to feel left out.

15 MR. HE-SCHAEFER: Oh, I don't feel left out. Thank
16 you, Your Honor.

17 THE COURT: All right. Okay. Thank you very much.
18 I really appreciate it. I'm just going to be candid with you
19 all. I've been in trial since August 20, in back-to-back
20 trials. I've got another one starting next week, so it may be
21 a little while before I issue our order in connection with this
22 case.

23 In fact, actually, I'm going to wait. I want to wait
24 until I get your positions with respect to tongue. So I'll
25 probably get that done sometime in mid to late October then.

Suzanne M. McKennon, CSR, CRR, RMR
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1 All right. Thank you all. Have a wonderful weekend.
2 safe travels. All right.

3 (Adjourned at 11:50 a.m.)

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10 REPORTER'S CERTIFICATE

11

12

13 I certify that the foregoing is a correct transcript of
14 proceedings in the above-entitled matter.

15

16 /s/ Suzanne M. McKennon, CSR, CRR, RMR

Date: 09/25/2024

17 United States Court Reporter

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