UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TOP GLORY TRADING GROUP, INC., AND DP DREAM PAIRS, INC.

Petitioner,

V.

COLE HAAN LLC

Patent Owner,

Case No. IPR2025-01395
Patent No. D768,969

ORAL AND REALTIMED DEPOSITION OF

GRANT DELGATTY

MAY 7, 2026

TAKEN VIA ZOOM VIDEOCONFERENCE

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ANNETTE PELTIER, CSR, CRR

ORAL AND REALTIMED DEPOSITION OF GRANT DELGATTY, produced as a witness at the instance of the Patent Owner, and duly sworn, was taken in the above-styled and numbered cause on May 7, 2026, from 11:02 a.m. to 7:30 p.m., before Annette Peltier, CSR, Texas Certified Realtime Reporter, in and for the State of Texas, reported by machine shorthand pursuant to the PTAB Rules of Civil Procedure and the provisions stated on the record or attached hereto.

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GRANT DELGATTY,

Having been first duly sworn, testified upon his oath as follows:

EXAMINATION

BY MS. CUTIE:

Q. Hi, Mr. Delgatty. Good morning.

A. Hi. Nice to meet you.

Q. Would you please state your full name for the record?

A. Grant Verdun Delgatty.

Q. And how do you spell your middle name?

A. V-E-R-D-U-N.

Q. What city do you presently reside in?

A. Glendale, California.

Q. Where are you today?

A. At my home in Glendale.

Q. Is anyone else in the room with you?

A. No.

Q. And you're here today to testify

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in an IPR, right?

A. That's correct.

Q. And that's IPR 2025-01395, right?

A. Yeah, I believe that's the number.

Q. All right. And it's concerning a U.S. design patent, right?

A. Yes.

Q. And that's design patent D768,969, right?

A. Yes.

Q. Have you ever been deposed before?

A. I have.

Q. About how many times?

A. I can't give you a specific number off the top of my head, but it's probably been at least ten times, I would say.

Q. Have you ever been an expert witness in a district court patent case before?

A. Yes, I believe so, yes.
Q. Okay. Do you recall about how many times?
A. Off the top of my head -- I'm trying to remember. I've done a few IPRs and I've done a few district courts. I think it's probably about half and half.
Q. Okay. So maybe about five and five?
A. Yeah, something like that.
Q. For the times you've been in the district court, have any of those cases ever involved design patents?
A. Yes.
Q. Okay. About how many of the approximately five?
A. A lot of the -- I -- probably four or five, probably -- you know, there's been a few utility that I've done and a few design patents that I've done.
Q. Okay. And with respect to the ones involving design patents, what was your

role?

A. My role, as in an expert witness?

Q. Yeah. What -- what issues were you covering as an expert witness with respect to design patents in the district court cases?

A. Oh, the -- the ornamental aspects of a claimed design.

Q. And in terms of legal issues, were you dealing with infringement or validity?

A. Both.

Q. Okay. Have you ever offered any opinions that a design patent was invalid in a district court proceeding?

A. Say -- sorry, say the question again.

Q. Yep. Have you ever offered any opinions that -- well, let me start back up.

In a district court proceeding, have you ever offered any opinions that a design patent was invalid?

A. Yes, I have offered those opinions.
Q. About how many times?
A. I believe in all the cases that were IPR-related.
Q. So not an IPR, so in the district court context.
A. Oh, in the district court.
I -- I believe the district court was more about infringement. I don't -- I don't know if I had any nonvalidity aspects in the district court, yeah.
Q. Okay. And in the district court, were you appearing on behalf of the plaintiff or the defendant or sometimes both, across the cases?
A. Most cases was the defendant.
Q. Okay. And then you said you've been an expert witness in IPRs before, right?
A. Yes.
Q. You said about five times?
A. I -- I believe so, yeah. I --

I -- I didn't look back and count it out.

Q. Did all of those involve design patents?

A. No, I don't believe so. No. I think that a few of them might have been utility.

Q. Okay. About how many IPRs have you been involved in that related to design patents?

A. Maybe -- the number of -- that I've been involved with might be higher. I can -- on the top of my head, I think I can say four or five were design patents.

Q. Okay.

A. Yeah.

Q. And in any of those were you appearing on behalf of the patent owner?

A. I don't believe so.

Q. All right. So you've been through this before, you know how this works, but -- and I'm going to ask you questions today and you're going to answer them under

oath, right?

A. I am.

Q. And if at any point you don't understand one of my questions, just please let me know, I'm happy to rephrase; but if you don't do that, I'm going to assume you've understood the question. Is that fair?

A. That's fair.

Q. And if at any point you need a break, just let me know. We'll try to take regular breaks here.

When was the first time you learned about the existence of this matter?

A. It's been some time. I'd have to go back and look at my dialogue, e-mail dialogue, to see.

I know that there was quite a large break between the time that I prepared my declaration and these proceedings; and so I would say, in general, it would have been in -- last year. Would have been in -- sometime in 2025. As far as the month is

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concerned, I can't recall exactly.

Q. How did you come to learn about the matter?

A. I was contacted by counsel to see if I would be open to being an expert witness on this case.

Q. Okay. And that's counsel for the petitioners?

A. Yes.

Q. Do you know how they found your name?

A. I believe they were doing research in similar cases and -- and probably in the records, it showed that -- that I had operated as an expert in some of those cases.

Q. Do you advertise your expertise in any way?

A. I don't.

Q. Okay. So I believe you have in front of you hard copies of all the exhibits for the IPR; is that right?

A. Yeah. I've got three big binders

next to me here.

Q. Okay.

A. One of the --

Q. Go ahead.

A. One of the binders, the rings aren't working, so it's kind of hard to flip through the pages, so just an FYI.

Q. Yeah. Take your time as you need to, or you can take it out of the binder too, if it's easier.

A. Sure.

Q. If at any time we're talking about a document and you need time to find it or you don't have it, we can always share electronically too, just let me know as we move along.

A. Okay.

Q. Aside from those three binders, you do not have anything else in front of you; is that right?

A. I have a hard copy of my declaration.

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Q. Okay. And that doesn't have any markings on it? It's a clean copy?

A. It's a clean copy.

Q. Same thing with all the documents in the binder?

A. Yes.

Q. All right. So your declaration in this case has been marked as Exhibit 1003.

Do you see that in the lower right corner?

(Whereupon Exhibit Number 1003 was referred to.)

A. Yes, I do.

(BY MS. CUTIE)

Q. Okay. Then on the first page, you can see there's the case number, IPR 2025-01395?

A. Yes, yes.

Q. And then the patent number is D768,969, right?

A. Yes.

Q. Okay. And today, when I refer to

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the patent number, if I refer to it as "D969," will you understand what I'm referring to?

A. Yes.

Q. All right. Then if we turn to Page 104 of your declaration -- well, let me -- let me back up.

It's actually -- there's two page numbers in your declaration, or at least part of it. Do you see there's -- in the lower right-hand corner there's a page number, right?

A. Yeah.

Q. And then in the -- throughout the declaration, there's page numbers with dashes on either side, kind of like you would see in a typical Word document?

A. Yeah.

Q. Okay. Today I'm going to do my best to refer to the page number that's in the lower right-hand corner.

A. Okay.

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Q. If ever there's confusion, let me know, and I'll clarify.

A. Okay.

Q. So with that in mind, can you actually turn to Page 107?

A. Okay. I'm there.

Q. Okay. And then you see your signature appears on that page?

A. Yes.

Q. And then when's this declaration dated?

A. 9th day of September, 2025.

Q. Okay. Does that date in any way jog your memory as to when you first learned about this matter?

A. Well, I would have learned about this matter prior to this date, obviously, because I've done a declaration. As far as how much further ahead of this date, probably a couple of months, I'm guessing.

Q. Okay. Can you describe generally for me what the process was for creating your

declaration?

MR. SHAPIRO: And just objection, attorney/client privilege, just caution the witness not to reveal the substance of any communications with counsel, but otherwise, you may respond.

A. In preparing my declaration, I -- so I'll just read from my declaration, paragraph 12: "In forming my opinions, I relied on the documents cited in this declaration and the documents identified in the attached Appendix B. These documents comprise patents, file/prosecution histories, printed publications, and other related documents."

So I reviewed all of these things, met with counsel. They presented to me information, I studied the information, had multiple meetings with counsel to identify the opinions that I had, and together we developed the -- the declaration.

Q. In terms of preparing the first

draft of the declaration, who did that?

A. The first draft of the declaration was a -- a combined effort, I would say, yeah. So me giving my opinions; you know, multiple Zoom meetings; actually writing the words down on the pages. I believe I actually did some of that, but a lot of it was -- was done by counsel based on the opinions that I gave them.

Q. Would you say that, you know, you're the original author of the words of your declaration?

MR. SHAPIRO: Object to form.

A. The original author. I'm not sure what the definition of "author" is. If the author is someone that is giving the substantive -- substantive, you know, opinions, then, yeah, I would be the original author.

As far as the -- the scribe, maybe -- maybe I would say that the -- scribing my opinions was a joint effort.

(BY MS. CUTIE)

Q. Okay. Aside from you and counsel for petitioners, was there anyone else involved in creating the declaration?

A. I don't believe so. You know, not -- not to my knowledge.

Q. And you discuss several prior art references in your declaration, right?

A. I do.

Q. How did you first become aware of those prior art references?

A. Those prior art references were -- were given to me by counsel.

Q. About how many hours did you spend preparing your declaration?

A. Well, this is back -- September. What is that, seven months ago? So I'm trying to -- you know, off the top of my head, it was a considerable amount of time, you know. I know -- I know that there was days and weeks of back-and-forth, but I would -- I -- the exact number I wouldn't be

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able to tell you.

Q. Okay. And you've submitted invoices in this matter?

A. I haven't submitted a recent invoice, but I did submit invoices back when -- when this was prepared.

Q. Okay. And those invoices record the time that you spent working on your declaration?

A. Yes, I believe they do.

Q. Okay. Do you recall the total amount you've invoiced thus far for this matter?

A. I -- I have not reviewed that. I -- I don't know.

Q. You don't have a ballpark number?

A. I honestly don't -- don't recall. I could probably give you a range, I would say.

Q. Sure.

A. I -- it's probably somewhere in the 20- to 50-hour range, I would think,

something like that.

Q. And most of that time within that range would have been spent preparing your declaration?

A. Yeah, and -- and forming the opinions, yeah.

Q. Sure. Okay.

Now, before you signed your declaration, you reviewed it carefully, right?

A. I have, yes.

Q. Okay. And at the time you signed your declaration, you believed that it accurately captured your opinions and your testimony?

A. I do.

Q. Did you review your declaration again in preparation for today's deposition?

A. I have.

Q. Is there anything in your declaration that you think needs to be corrected or clarified in any way?

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A. I believe that all of the opinions that I give are still my -- my opinions. I think, as I was going through it, I noticed maybe that there was an annotated image that might not be correct, but I -- and I think that was maybe the only thing that I came across.

Q. Do you recall what image that was?

A. Yeah, so the -- it's a -- it's a bottom view of the cited Nike prior art example that I submitted, and it is identifying the pinched midsection; and on the -- on the -- it's a side-by-side.

So if you go to page -- and I'll do it from the bottom right corner, as you requested. So I'm looking at Page 86.

Q. Yeah.

A. So there's a side-by-side of the '969 patent and a bottom view, and then beside it is the Nike. The upper blue line should have been drawn at the bottom edge of

that gray arched area.

Q. So between the gray and the white there?

A. Yeah.

Q. Do you plan to submit an errata to your declaration to change that?

A. That would be something that I would rely on my counsel to tell me if we need to do that or not.

Q. Okay. Okay. Aside from that -- and that -- that's true of anywhere that image appears in your declaration, right?

A. I believe it appears a few different times, yes.

Q. Okay. Okay. Aside from that change, is there anything else in your declaration that you would change?

A. As of now, I can't think of anything.

Q. Okay. Yeah, if at any point --

A. Yeah, there could be something that I've missed, but, yeah, as of now,

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that's the only thing I know of.

Q. Sure.

And as we're going through it today, if at any point you have anything else to revise, just let me know.

A. Sure, all right.

Q. Okay. And you're being compensated $400 an hour for your time on this matter, right?

A. That's correct.

Q. Other than that hourly rate, is there any other compensation you're receiving for your work on this matter?

A. No, there's not.

Q. What did you do to prepare for today's deposition?

A. I reviewed all of the documents, I reviewed my declaration, I reviewed the exhibits, I've had multiple meetings with counsel, tried to get sleep last night, and, you know, that's about it.

Q. Okay. When you say you've

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reviewed the exhibits, what exhibits are you referring to?

A. You know, the prosecution history, the patents, printed publications, some of the cited prior art that was presented at the time of the patent filing, so a number of different things.

Q. About how many times did you meet with counsel for petitioners to prepare for your deposition?

A. Let's see. It's been a handful of times, I would say.

Q. Were those in person, by Zoom, virtually? Just virtually, generally?

A. Virtually, yeah. Yeah, I'm -- I'm in California and they are in New York, so...

Q. So over that handful of times, about how many hours in total did you meet?

A. I'd say somewhere between -- I think somewhere between 8 to 12 maybe, something like that.

Q. And did you meet with them this week?
A. I did.
Q. How many times this week?
A. Couple of times.
Q. About how many hours total this week?
A. Probably about six.
Q. Okay. And aside from this week, when else did you meet with counsel for petitioners for preparing -- to prepare for your deposition?
A. A few weeks ago.
You say how many times?
Q. No, I asked when else. So like when were the other times?
A. When, okay. Well, I believe it was a couple of weeks ago.
Q. Okay. All right. So you look at your declaration on pages 114 and 115, there's an Appendix B.
Do you see that?

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A. Yes.

Q. Okay. And Appendix B lists the materials you considered in preparing your declaration, right?

A. Yes.

Q. And these are all the materials that you considered in forming your opinions and testimony that are in your declaration?

MR. SHAPIRO: Object to form.

A. What I've listed here is what I considered.

(BY MS. CUTIE)

Q. What you considered in forming your opinions that are in your declaration?

A. Yes.

Q. Did you rely on anything else other than the materials identified in Appendix B in forming your opinions?

MR. SHAPIRO: Object to form.

A. I've looked at a lot of documents. I'm assuming that everything is -- is identified here. I can't say for

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certain if there was anything else that I -- I may have considered. I'm -- I'm not sure.

(BY MS. CUTIE)

Q. And in preparing for your deposition today, did you review any materials that are not listed in Appendix B?

MR. SHAPIRO: Object to form.

A. I believe that I -- I'm just trying to -- I'm trying to understand what each of these things are on this list.

I know that there was a response that the patent owner had sent. I can't tell if this -- if that's -- I've reviewed that, I know.

So I don't know if that's listed on here or not.

(BY MS. CUTIE)

Q. No, it's not; so that's helpful.

A. Okay.

Q. Anything else you can think of?

Well, I'll represent to you that what's listed in Appendix B here are exhibits

that have been submitted by the petitioners in this IPR -- not all of them, but the ones that were submitted as of the time the petition was filed.

A. Yeah. Well, the -- so these are the things that I considered when I formed my declaration, so -- yeah, so there would be a number of things, I would say, that -- that have come about since then that I have reviewed for today's deposition; so, yeah.

Q. Okay. And one of those was the patent owner's preliminary response, right?

A. Yes.

Q. What are the others?

A. I -- I wasn't expecting this question. I haven't -- I'd have to go through and -- and -- I don't know exactly what else I'm missing here, so...

Q. Okay. So nothing else you can think of right now?

A. No.

Q. Okay. When was the first time

you reviewed patent owner's preliminary response?

A. I believe it was shortly after it was submitted or, you know, viewable.

Q. And you've reviewed it several times since then?

A. A number of times.

Q. Was there anything in the -- well, let me back up.

It was -- it was -- the patent owner's response -- or excuse me. The patent owner's preliminary response was issued or submitted after your declaration, right?

A. Yes, I believe so.

Q. So was there anything within the patent owner's preliminary response that impacted any opinions or testimony in your declaration?

A. I don't believe there was, no.

Q. Okay. I want to go through some of your background; and if helpful, I'll just point out to you that you have your CV

attached to your declaration at Appendix A and then you also discuss some of your background starting at paragraph 13.

Before we get into that, I should have asked this before, do you have any programs open on your computer aside from Zoom?

A. I have -- yeah, there are some -- I usually leave programs open, so I can -- I can close those programs.

Q. Yeah, that would be great.

A. Okay.

Q. And if you need to pull up any -- you know, an electronic version of an exhibit, that's fine; but if you could close out any other programs --

A. Yeah.

Q. -- that would be great.

A. I do have a digital copy of my -- of my declaration open in Acrobat.

Q. Okay.

A. You're saying I can keep that

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open?

Q. That's fine.

A. Okay. All right.

Q. No messaging apps or anything of that nature?

A. No, no.

Q. Okay.

A. In fact, I actually don't have anything open. I -- except for Google, but I can close Google.

Q. Okay. Yeah, that would be great.

A. Okay.

Q. And if for some reason you want to Google something, feel free to let me know, we can -- we can do that, but for now if you could close it, that would be helpful.

A. Okay. Done.

Q. All right. So let's get into your -- your background here.

So it looks like you graduated from ArtCenter College of Design in Pasadena, California in 1995, right?

A. Correct.
Q. And you graduated with a bachelor's of science in industrial design?
A. Correct.
Q. And is that your highest degree?
A. Yes.
Q. What was your -- did you have a field of study when getting your degree?
A. My time at ArtCenter was an interesting one because I was very uncertain of many different areas of interest I had, and so I actually debated between transportation design and product design. I ended up applying for product design, I got into product design, and halfway through my time at ArtCenter, I actually changed majors to environmental design but I did so under the understanding that I would be allowed to continue to take all of the upper term product design classes.
So I was -- I sort of had a double major; let's put it that way. I was

taking up to 28 units a semester.

Q. Wow, okay.

A. Yeah.

Q. Did any of your educational coursework specifically focus on shoe design?

A. It did not, actually. Shoe design was something I kind of fell into right after graduation from ArtCenter.

Q. So after you graduated from ArtCenter, you went to E-West Design; is that right?

A. Yeah. I actually -- oh, it is -- it is in here. So I actually -- my first job was K-Swiss.

Q. Oh, okay.

A. But the interesting thing about K-Swiss was I was hired by the owners of E-West Design to -- they were consulting for K-Swiss at the time, and they were finding talent and hiring for those positions.

So that's when I first met the -- the guys from E-West. And then their

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contract had ended during the tenure that I was at K-Swiss; and when I left K-Swiss, they contacted me and asked if I would work for them directly.

Q. Okay. So your time at K-Swiss -- it looks like a little less than a year, maybe six months -- five, six months?

A. Pretty short stint, yeah.

Q. That -- you focused there on athletic footwear?

A. Yes.

Q. And then when you -- you started at E-West Design in October of 1996?

A. Yes.

Q. And you were there through July of 1999?

A. Yeah. There was a -- it was an interesting transition because we had picked up DVS as a client. So I was technically working for E-West but primarily working for DVS for, I would say, about that last year, and then it transitioned into full-time at

DVS.

Q. Okay. So it looks like at DVS -- you were there until December of 2020?

A. Yeah.

Q. Starting in July of 1999?

A. Correct.

Q. Sorry, I said "2020," I meant 2000.

A. Yeah, yeah.

Q. Okay.

A. I -- I read it the same way.

Q. Okay. And then at E-West Design, is it fair to say you were working primarily on athletic shoes there?

A. Yes. Some -- some products were crossover men's dress, some golf product, things like that, but primarily athletic.

Q. Was there any particular aspect of shoe design that you were focused on?

A. Not a particular category, I would say, per se. I would -- but we were kind of known for developing new technologies

in -- in performance.

Q. Anything there related to midsole design?

A. Yes.

Q. Can you describe for me what your involvement with midsole design was at E-West?

A. So my -- my involvement in any footwear product that we were designing and developing would have involved -- primarily every project we did would have involved the -- the shoe as a whole.

So we would have done outsole, midsole, technology within the shoe, uppers, so the -- the combination. There were a few -- there were a few products that we worked on that were just sole technologies, which would, in most cases, incorporate outsole and midsole, you know.

Q. And when you worked on midsole designs, were you focused on functionality, ornamentation, both? What -- where was your

focus?

A. All of the above, yeah. I mean, a lot of the work that we would do would be focused on performance, but you can't design a -- you know, any kind of a performance -- let's call it a fashion product, right? You can't design it without taking into consideration the ornamental aspects of it, so very much aesthetic, as well.

Q. And you -- you personally had a role in the aesthetics as opposed to your team more generally?

A. Yeah, a very big role.

Q. And then at DVS it looks like you were working on skate shoes; is that right?

A. Yes.

Q. And is that -- does that generally fall into the category of athletic footwear?

A. Yes. Actually, in the mid-90s, the -- the trend that was happening was skate shoes were actually very performance-driven.

They had a much different look than a lot of the kind of more traditional skate shoes have, you know, in this day and age.

I think it's actually swinging back now a little bit. We used to -- we coined the term "puffy tech" back in the day, in the 90s, because the shoes were very, very overly-built with lots and lots of padding and giant tongues that -- you know, kids would actually cut out the tongue of their old shoe and stick it underneath the new tongue just to make it even fatter, so -- yeah, but very -- yeah, they -- and they were quite expensive because there was a lot of technology involved in them.

Q. Were you involved with any design of midsoles at DVS?

A. A lot of midsoles, yeah.

Q. Okay. The -- the ornamentation or design aspects as opposed to the functional aspects?

A. Again, it would be a combination

of -- every midsole I designed would have to take into account the ornamental aspects.

Q. Okay. And it looks like after DVS, you went to Vans; is that right?

A. That's correct.

Q. And you were there from January 2001 to January 2008?

A. Yes.

Q. And then at Vans you were also focused on more the athletic footwear?

A. Yes.

Q. And then while at Vans, it looks like you started teaching as an adjunct professor at the ArtCenter College of Design?

A. Yeah. The last year I was at Vans, I began teaching there.

Q. Okay. And you were there for -- for -- well, it looks like 11 years or so?

A. Yeah.

Q. And at -- you know, then for those, you taught a shoe design course?

A. I did.

Q. Anything that you taught there that specifically focused on midsole design?
A. As one of the components of an entire footwear product, yes. It's always -- that was part of the -- the curriculum.
Q. You were an adjunct professor at ArtCenter College of Design through September of 2018, right?
A. Yes.
Q. Then while you were there, you also were working as well, right?
A. Yes.
Q. So looks like you founded your own shoe company?
A. I did.
Q. And what was that called?
A. It's called Urshuz.
Q. Urshuz. Okay.
A. But people mispronounce it as "yer shoes."
Q. I wasn't going to attempt.
A. In retrospect, maybe not the best

name.

Q. Okay.

A. It was all done -- it became the shoe Urz, so...

Q. Okay. And that was until about May of 2011, right?

A. Correct.

Q. And then after that, it looks like you maybe stepped away from shoes a little bit and focused on design of other types of products?

A. Yeah. I always had a -- kind of a little bit of an in with doing some consulting work in shoes, you know, here and there after that point.

But as far as, you know, things that I focused on fully, yes, I -- I founded a -- you know, I was one of the cofounders of a -- of an innovation design firm.

I then founded a -- very early head -- ahead of the market, an electric scooter company. We were pretty much the

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first electric scooter on the market before the likes of Bird and Lime and all these things, so...

Q. So we have you to thank when they're laying around on the sidewalks in our cities?

A. Yeah. Ours was a direct-to-consumer product. So we were selling them to consumers for purchase, not for rental, so...

Q. Thanks.

A. Yeah.

Q. And I should have asked before: When you taught the -- that four years, you spent four years teaching shoe design at the ArtCenter College of Design, do you recall what four years those were?

A. I don't. I believe they were towards the end of the time that I was there because I think it was -- I think it was a -- a course that they were wanting to get involved with and they knew that my

background was in that and so, yeah, I believe -- I want to say it was probably the last four years that I was there.

Q. Okay.

A. Actually, still teach shoe design at U.S.C. It's one of my -- one of my classes.

Q. Okay. So now, since the --

A. Let's put it this way, it's not a complete class on shoe design. It's a class -- it's an introductory class on footwear design -- or sorry, on product design; and one of the sections of the curriculum is about a five-week-long project which is a footwear project.

Q. Okay. All right. So that brings us to present.

Since January of 2018 through now, you are chair of product innovation and associate professor of practice at University of Southern California?

A. Yes.

Q. Okay. Yeah.

And the -- the course you mentioned that -- the product design course that involves shoes, that's one aspect of it. Is that the only aspect of your current role that relates to shoe design?

A. As a full-time role, yes. I mean, there are -- I have served as an advisor on -- on a few different -- I had a student that actually started a shoe company, and I worked as an advisor to him on that.

I had another student that is in the process of shooting -- starting a shoe company, and I am advising him on that, as well.

Q. Okay. Okay. If we turn to paragraph 75 -- sorry, paragraph 57 of your declaration; it's on Page 30.

A. Okay.

Q. You see here you're talking about the designer of ordinary skill in the art?

A. Yes.

Q. Well, let me back up. Sorry, before we get into that...

You mentioned that you're advising some students that are starting a shoe company, right?

A. Yes.

Q. When you're advising them, are you mindful of patents that -- that exist in the space?

MR. SHAPIRO: Object to form and scope.

A. I mean, patents is part of the things that you have to understand, yeah. So I would say, yes. I -- do I spend a tremendous amount of time, you know, working with the students on how to navigate the patent process and understand infringement, all that kind of stuff? Probably not a lot, but, yeah, I would say that's definitely part of it.

(BY MS. CUTIE)

Q. You're -- you're aware that

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there's design patents out there on shoes, for instance?

A. Yeah. I believe I have a few of my own.

Q. Okay. You would agree there's a lot of patents out there on shoes?

A. There are a lot of patents on shoes, yes.

Q. Okay. And more specifically, on midsoles, there's a lot of patents on shoe midsoles?

MR. SHAPIRO: Object to form, scope.

A. I haven't done a full analysis on what the -- you know, the differences between midsoles and outsoles and uppers and stuff, but I would say that I believe that there would be a number of patents on midsoles, yes.

(BY MS. CUTIE)

Q. Okay. All right. If we -- we turn to your declaration then on Page 30,

paragraph 57, you're discussing the designer of ordinary skill in the art.

Do you see that?

A. I am. Yeah, I do see that.

Q. Okay. And you see that -- you say there, "I believe that a designer having ordinary skill in the art in this matter would have had at least a bachelor's degree in industrial design, or the equivalent thereof, or approximately two years of professional experience in designing shoes."

Do you see that?

A. I do.

Q. And then you also say, "Additional graduate education could substitute for professional experience, or significant experience in the field could substitute for formal education."

Do you see that?

A. Yes.

Q. And the priority date of D969 was October 13th of 2015, right?

A. I think so.

Are you waiting for me?

Q. Sorry. I missed that you had responded.

Do you consider yourself to have been a designer of ordinary skill in the art as of October 13th, 2015?

A. I would say yes.

Q. Would you consider yourself to have been more than a designer of ordinary skill in the art as of that time?

A. I'm not sure if there's a limitation to how much knowledge that one could have to the ordinary skill. I would say that --

THE COURT REPORTER: I'm sorry, sir. You're breaking up for me.

(Discussion off the record.)

A. To answer your question, I would say that my level of ordinary skill would probably be -- suffice, if not, you know, exceptional.

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(BY MS. CUTIE)

Q. All right. Then in paragraph 59 of your declaration, you define an "ordinary observer" as a "retail consumer considering the purchase of shoes," right?

A. I -- I say "is a consumer, or purchaser, considering a product in the ordinary course of business." Yeah.

Q. So --

A. Yeah, and -- further down, yes, "The ordinary observer is a retail consumer considering the purchase of shoes."

Q. Okay. So you -- your -- your statement of "the ordinary observer is a retail consumer considering the purchase of shoes," right?

A. Yes.

Q. And then on the -- the paragraph continues, and there's a sentence that starts with "although."

Do you see that?

A. I do.

Q. And in -- in this sentence, you acknowledge that "there are other potential observers of a shoe during the lifetime of a shoe"?

A. Yes.

Q. And you identify as examples, "wholesalers, retailers, fashion critics," as some, right?

A. Yes.

Q. And then you say, "all are consequent to and flow from the retail shoe purchase and the actions of those other potential observers depend exclusively on the perspective of and decisions made by the retail shoe purchaser who wears the shoe."

Do you see that?

A. Yes.

Q. What do -- what do you mean by "all are consequent to and flow from the retail shoe purchase"?

A. Well, wholesalers, retailers, fashion critics, right, they -- they will

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understand the -- you know, how significantly impactful a shoe is based on -- you know, we always -- we use the term "people vote with their wallet," right?

So when people are making decisions to buy shoes, that's when buyers for retailers, all that, they start to perk up and they start to understand, you know, what's working, what's not working in the marketplace.

So yeah, they would be very interested to know what the purchasers were -- were leaning towards when they were making a purchase.

Q. Okay. And that's why you identify the purchaser of the shoe or the -- sorry, the retail consumer purchasing the shoe as the ordinary observer relevant for D969?

A. Yes.

Q. Okay. And you believe that would be the appropriate ordinary observer for any

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design patent covering issue?

MR. SHAPIRO: Object to form, scope.

A. I believe that the retail purchaser would be the ordinary observer -- considered the ordinary observer of any shoe.

(BY MS. CUTIE)

Q. Now, the ordinary observer is not an expert in shoe design, correct?

A. That's my understanding.

Q. Okay. The ordinary observer views the overall appearance of the shoe as a whole, right?

A. Yes.

Q. And in this matter, you know, we're focused on the midsole; so it would be -- the ordinary observer would view the overall appearance of the shoe's midsole as a whole, right?

A. They would -- yes, they would understand the midsole as a whole, yes.

Q. And you wouldn't expect the

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ordinary observer to break a shoe midsole into discrete features or concepts when deciding whether to purchase that shoe over another shoe, right?

MR. SHAPIRO: Object to form.

A. Can you restate your question?

(BY MS. CUTIE)

Q. Yeah. I mean, would you expect when an ordinary observer is purchasing a shoe, to break the -- the shoe midsole into, you know, discrete features or concepts when they're making their decision to purchase the shoe?

MR. SHAPIRO: Object to form.

A. I believe that the ordinary observer would probably look at the shoe as a whole when they are making a decision to purchase the shoe. I don't know if the ordinary observer would, per se, break it down into different components.

I mean, there might be certain components that an ordinary observer would be

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interested in, but I -- I believe it would be the product as a whole.

(BY MS. CUTIE)

Q. But you would agree that an ordinary observer wouldn't, you know, looking at a shoe midsole, break it down or dissect it into individual features of that midsole when making their decision to purchase, right?

MR. SHAPIRO: Object to form.

A. There -- there may or may not be something that stands out to an ordinary observer with regard to a midsole that makes them make a decision. I -- I -- I don't -- I can't -- I'm not sure if I'm really understanding exactly what you're getting at here.

(BY MS. CUTIE)

Q. Okay. Well, we'll get into it more in a little bit.

A. Okay.

Q. But one example is, you wouldn't

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expect an ordinary observer to break a midsole into layers, right, and focus on how that -- those layers compare to layers of another shoe midsole?

MR. SHAPIRO: Objection, form; foundation.

A. There -- there could be a number of things that stand out to an ordinary observer that has to do with the midsole. I -- I'm not sure if being so specific to say I wouldn't -- you're saying I -- would I expect them to break it down into layers? I don't -- I don't know.

I think an ordinary observer would look at -- you know, would look at a shoe, and if the midsole of a shoe is attractive and it goes along with the rest of the shoe and they find the rest of the shoe attractive, that they would probably, you know, either decide to purchase or not purchase.

(BY MS. CUTIE)

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Q. Does -- in your view, does the ordinary observer view the midsole as one component that's an integral component to the shoe?

MR. SHAPIRO: Objection to form, foundation.

A. I would -- I would say it might depend on the level of -- of how much the ordinary observer is, you know, a shoe aficionado. I believe a lot of ordinary observers would not even know what a midsole is if you were to ask them; but, you know, when you have, you know, sneaker freaks that are really into shoes, they -- they might understand what the different components are, different layers or whatever.

(BY MS. CUTIE)

Q. And when you say "sneaker freaks," would you consider those to be ordinary observers?

A. I -- I mean, they could be an ordinary observer, but they're on a --

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they're a very niche ordinary observer. They're ones that are probably beyond the level of what an ordinary observer would be, is what I would say. They're not the -- they're a very small percentage of -- of the population, and I think an ordinary observer accounts for the larger percentage of the population.

Q. I think you said a lot of ordinary observers would not even know what a midsole is if you were to ask them. Is that your opinion?

A. I would have to -- I haven't done the exercise. I don't know, but I would -- I would make an assumption that, you know -- let me put it this way: When I teach my shoe design class and I go through shoe anatomy with them, I will point to different areas of a shoe and -- now, I don't know if it's the fact that some students might be intimidated, but when I get to the midsole, I've had several times classes that did not raise a

hand and tell me what it was.

Q. Or they just don't know the name of it?

A. Well, they would -- they would understand it to be part of the shoe and they would probably understand it to be, you know, the part that's kind of in that area of the shoe, but yeah, they wouldn't necessarily know what the name of that part of the shoe was.

Q. Okay. Okay. I want to ask you about a statement you made in paragraph 92 of your declaration. It's on Page 54.

A. Okay.

Q. You say, "An ordinary observer would view a shoe midsole from several feet away, not under high magnification, while considering a shoe for purchase."

Do you see that?

A. I see that.

Q. What -- what's the basis for this statement?

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A. The basis for this statement is that my opinion would be that the ordinary observer would view a shoe midsole from several feet away because that's typically where the level of a -- the head of a person as compared to the foot of a person would be, while considering a shoe for purchase. So...

Q. So you think -- you're saying that the head of a person to the foot of a person is several feet apart and that's the vantage point from which they would view a shoe when deciding to purchase it?

A. Yeah, if they -- because most people, when they go to purchase a shoe, they'll -- they'll get a pair, they'll put it on, they'll walk up to a mirror, and they will look at themselves in the mirror and they'll see what it looks like.

Q. Okay. You agree an ordinary observer might purchase a shoe in person, right?

A. They -- they -- I mean, things

are changing, obviously. I think a lot of -- a lot of the purchasing habits have shifted to online, but traditionally -- and I believe this is still the case, I haven't done a -- you know, I -- I don't -- I haven't done a research study on the actions of a typical shoe purchaser.

I would think that when it comes to purchasing shoes, it's probably still very, very common for people to go into a shoe store and try on something, especially something that's meant to, like, be comfortable and fit well and the way it looks on you, so...

Q. Do you agree that the relevant time for looking -- considering the ordinary observer with respect to D969 is October 2015, right?

A. It would be --

MR. SHAPIRO: Form.

A. -- around that time, yes.

(BY MS. CUTIE)

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Q. And you would agree that in October of 2015, that an ordinary observer might go into a store to purchase a shoe in person, right?

A. Yes.

Q. And you would agree that, as part of that purchasing decision, an ordinary observer might pick up a shoe to look at it, right?

A. They could, yes.

Q. Or they might view it on a shelf at eye level?

A. They perhaps might view it on a shelf at eye level, yes.

Q. In either of those instances, the shoe's going to be much closer to the ordinary observer than several feet away, right?

A. It could be. Yeah, it could be close, but I believe that most people like to see the way the shoe looks on them.

Q. Okay.

A. So I -- I think a lot of consumers would put the shoe on and look in a mirror to see what it looked like.

Q. What -- what's your basis for your opinion that a lot of customers would put on the shoe to -- and look in the mirror to see what it looks like?

A. I've spent a lot of time in shoe stores watching ordinary observers try on shoes.

Q. Okay. And so that's one thing they might do, but again, they might also pick it up and look at it as part of their purchasing decision?

A. Prior to putting it on, they would probably have to pick it up.

Q. Okay. And then you would agree that ordinary observers might also purchase shoes online, right?

A. They could.

Q. In October of 2015?

A. I believe those dates would align

with e-commerce, yes.

Q. Okay. And you'd agree that websites at that time would often offer the ability -- well, they would often have pictures of the shoes for purchase on the website, right?

A. Yeah, there could be. Yeah, there would be photos of the shoes, I'm sure. I bet -- you know, a lot of ordinary observers, I -- in my years of being in this industry, I know that a lot of ordinary observers make decisions about shoes that they want to purchase based on seeing the shoes out in the -- out in the wild and people wearing the shoes. That's how trends happen.

So somebody that might be walking down the street might see a new pair of shoes on someone and think that those are pretty cool, that they might look pretty cool in them, and then go home and find the shoe online and make the purchase.

Q. Okay. So my question was, you would agree that websites in October of 2015 would include pictures of shoes that are available for purchase, right?

A. That would be correct, yeah.

Q. Okay. And then you would also agree that those websites often offer the ability to zoom in to view the details of the shoe more closely, right?

A. I believe a lot of websites do have that feature.

Q. And had that feature in October of 2015?

A. I -- the technology was newer then, but I do think that back then you probably would have been able to do that. I'm not 100 percent sure when the zoom feature became more prevalent, so I -- I don't know if the -- you know, the hover -- you know, when you hover over an image and it gets bigger, I don't know if that was -- I can't recall if that was something that was

commonly used in -- in 2015.

Q. Okay. And you'd also agree that an ordinary observer, sitting, you know, at a computer to purchase a shoe online, would be, you know, closer to the screen than the distance between, you know, a typical person's head and feet, right?

A. Probably in most cases their head would be closer to the screen.

Q. Okay. Now I think you mentioned earlier that you considered -- well, you've considered D969 when forming your opinions in your declaration, right?

A. Sorry, can you repeat that?

Q. Sure.

You considered D969 -- you know, the patent-at-issue here -- when forming the opinions in your declaration?

A. I did.

Q. And you -- then you also considered its prosecution history?

A. Yes.

Q. So you saw that on the patent it lists nearly 70 references that the examiner considered before allowing D969 --

A. I did.

Q. -- right? Okay.

And you would agree that an ordinary observer would have been familiar with a range of midsoles that existed as of October 13th, 2015?

MR. SHAPIRO: Object to form, calls for a legal conclusion.

A. Can you restate what the question is?

(BY MS. CUTIE)

Q. Right.

As of October 13th, 2015, you would agree that there was a range of shoe midsoles on the market, right?

A. Sure, yes.

Q. You would agree that the -- the field of midsole design was a crowded field at that time, right?

MR. SHAPIRO: Object to form, foundation.

A. I mean, shoes are ubiquitous; so crowded field... I mean, yeah, they've been -- there's thousands of shoes on the market at any given time.

(BY MS. CUTIE)

Q. And those thousands of shoes have different midsoles that are also available as part of the shoe, right?

A. I would say so, yes.

Q. And you would agree that the ordinary observer would be aware of those thousands of shoes with different midsoles that were on the market, right?

A. I don't know what the ordinary observer -- they would have access to looking at thousands of shoes. I don't know if they would understand or know all of those shoes. They would -- probably a good amount of them.

Q. Okay. You would agree that when there is a crowded field, that even a small

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difference between a design or two different designs can be significant to the ordinary observer, right?

MR. SHAPIRO: Object to form, foundation.

A. I -- I believe that there would be a level of small differences to where an ordinary observer might not understand there to be a significant difference in a minor detail that would change the overall visual appearance.

(BY MS. CUTIE)

Q. But you would agree, it -- if there are, you know, a lot of different midsole designs available, that minor or small differences, let's say, in two different midsole designs can be more impactful on the overall visual appearance of the midsole, right?

MR. SHAPIRO: Object to form, incomplete hypothetical.

A. I believe a lot of ordinary

observers would notice differences between one shoe to another if they were relatively significant.

In my experience, ordinary observers are not keen eyes and a lot of times would not understand very small, insignificant differences between one shoe to another.

(BY MS. CUTIE)

Q. Why do you say that?

A. Well, my opinion is that ordinary observers are not the most -- I would -- I would say that they are -- let me give you an example.

I would consider -- it's sort of unrelated to this case, but I would consider that my wife is an ordinary observer of vehicles, and -- and when I -- when I point out a car that's the exact same car as hers, she doesn't realize that it's actually the same car as hers if it's a different color.

So an ordinary observer in -- in

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a lot of cases, I would say that if there was a very small difference in the overall visual appearance of something, that most ordinary observers would not necessarily catch that it is something that's actually different.

Q. In your example with your wife and the cars, would you say that the change in car color is a very small difference?

A. I would say that's a pretty small difference when it comes to the design of a car, yeah.

Q. And your wife would at least appreciate that the cars were different colors, right?

A. Yeah, she would understand they're different colors but not necessarily understand that it's actually the same car.

Q. Right, so that -- the rest of the car is the same, color changes, she would appreciate that the colors changed?

A. Appreciate or understand?

Q. What's the difference to you?

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A. I -- I guess what you're saying is she would understand that they're different colors.

Q. Right.

So just say that again, if there's two cars that are identical and the only thing that's changed is the color, you're saying your wife, as an ordinary observer, would notice that small difference between the two? She would understand the difference between the two?

MR. SHAPIRO: Object to form.

A. She would notice a pretty -- she would -- she would not notice a -- I'm not sure what you're -- what you're saying.

(BY MS. CUTIE)

Q. Okay. So stay with me if you -- let me try to back up here.

I'm going to rehash a little bit, but you said earlier that the change in colors would be a -- let me see what you say here -- would be a pretty small difference

between the two cars, right?

MR. SHAPIRO: Object to form, misstates testimony.

A. I would say that the change in color is a -- is a big difference when it comes to the color but not a -- not a difference when it comes to the design.

(BY MS. CUTIE)

Q. Okay. And you don't consider color to be part of the design?

A. If there was a design patent on the car, I don't believe it would incorporate a color as a difference. I believe it would only incorporate actual lines.

Q. Okay. So in your hypothetical that you gave me with the colors changing, it has nothing really to do with designs or differences in design?

A. My point is is that ordinary observers don't pay attention to very small differences, in my opinion.

Q. Differences in what?

A. In the design.

Q. Okay. So now -- okay. And if a design patent allowed color, you're saying a change in color of an otherwise identical design would be a very small difference, right?

A. I -- I think that -- maybe it was a -- it was a poor hypothetical -- an answer to give you.

Their -- if design -- if the color of the car was part of the patent, which it wouldn't be, white would be very different than black. So that would be a big difference, but the actual -- I don't consider that necessarily the -- it's an application of the design, but it's not -- in my opinion, it's not the -- if you were to say I like the design of that car, I wouldn't care what color it is, let's put it that way, it would be -- the -- the -- the lines that created the car would be the design, yeah, so...

Q. Okay. Do you agree that some people buy a car based on the color?

MR. SHAPIRO: Objection to form, scope.

A. I don't -- I would say that there's a number of factors that come into play when it comes to purchasing a car. They --

(BY MS. CUTIE)

Q. Of which color could be one?

A. Color might be one, but they might make a decision to buy a car based on the design and then prefer a certain color over another color.

Q. And are you aware that you can claim color in design patents?

MR. SHAPIRO: Objection to form and scope.

A. In a design patent, I -- my understanding is that it's -- it's typically a drawing, right, that you would be claiming.

(BY MS. CUTIE)

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Q. Right.

And is it your understanding that you can also, as part of that, include color within those drawings?

MR. SHAPIRO: Objection to form and scope.

A. I would need to review that.

(BY MS. CUTIE)

Q. Okay. All right. In paragraph 30 of your declaration, there's a last sentence there where you say -- well, let me know when you're there.

A. Okay, I'm at paragraph 30.

Q. Okay. The last sentence there on Page 15 says, "I state where I apply my analysis based on the ordinary observer, and where I apply my analysis based on the designer of ordinary skill in the art."

Do you see that?

A. No. Hold on one second. I missed that. Paragraph 30, it's a pretty long paragraph, so whereabouts --

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Q. The last -- the last sentence in paragraph 30.

A. Okay.

Q. On Page 15.

A. Okay.

Q. All right. You say, "I state where I apply my analysis based on the ordinary observer and where I apply my analysis based on the designer of ordinary skill in the art."

Do you see that?

A. Yes.

Q. Can you explain to me generally when your analysis is based on the ordinary observer versus when it's based on the designer of ordinary skill in the art?

A. Yeah. If you -- if you read over -- in paragraph 29 of my declaration I state here, "I understand that a patent claim is invalid as 'anticipated' if the claimed design and the prior art are substantially the same such that an ordinary observer,

giving such attention as a purchaser usually gives, would be deceived into purchasing one design" over the other.

So as far as what a -- an ordinary observer would be considering, it would be the anticipation, which would be the overall visual appearance.

Ordinary designer or a designer of ordinary skill in the art would be applying an obviousness, which would be the scope and content of the prior art, the level of ordinary skill in the art, the differences between the claimed invention and prior art, and secondary considerations.

Q. Okay. So you agree it's improper to include the -- or consider the designer of ordinary skill in the art in part of the anticipation analysis?

A. I believe the designer of ordinary skill in the art can consider anticipation but -- but -- but also obviousness.

Q. Would you agree it's improper to perform the anticipation analysis from the perspective of a designer of ordinary skill in the art?

A. I know that it's appropriate for a designer of ordinary skill in the art to apply obviousness to it. I believe that they can have an idea as to if a -- an ordinary observer would be anticipating it, but -- but yeah, that -- in general I would say that the ordinary observer applies anticipation. The ordinary -- or the designer of ordinary skill in the art would apply obviousness.

Q. Yeah, and so I'm asking whether you agree that it's improper to perform the anticipation analysis from the perspective of a designer of ordinary skill in the art.

A. I don't know if it's improper. I know that an -- a designer of ordinary skill in the art would apply obviousness.

Q. Okay. All right. We've been going for a little while now. Do you want to

take a break?

A. Yeah, that would be great.

MS. CUTIE: We can go off the record.

(Break taken from 12:26 p.m. to 12:40 p.m.)

(BY MS. CUTIE)

Q. Okay. Mr. Delgatty, you have a section in your declaration on technology background that I want to cover with you on -- starts on Page 17. Let me know when you're there.

A. Okay.

Q. Okay. In paragraph 36, which is on Page 18, you talk about this concept of a heel-to-toe drop.

Do you see that?

A. About halfway down the paragraph 36?

Q. Well, in the first sentence it says, "In most cases with athletic shoes, there's a heel-to-toe drop that occurs."

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A. Yes.
Q. See that?
And this discussion pertains to athletic shoes, right?
A. Athletic shoes. It could -- they're -- in most shoes there's typically a heel to drop [sic]. There's the -- the various levels of heel to drop [sic] depend on whether it's an athletic shoe or not.
Q. But in paragraph 36, you focus on athletic shoes, right?
A. Yes.
Q. And why did you make the choice to focus on athletic shoes as opposed to other types of shoes?
A. I'm not sure why I specify -- completely specified athletic shoes. I would say in most cases there's a heel-to-toe drop that happens with footwear in general. There are some shoes that don't -- that are, you know, flat bottom shoes, but, like, I guess I said athletic shoes because it's very

prevalent in athletic shoes.

Q. Okay. Was it also because most of your background focuses on athletic shoes?

A. A lot of my -- yeah, my background is -- is in athletic shoes, but I -- as I mentioned before, I've designed various types of shoes that maybe wouldn't be considered athletic shoes, per se.

Q. Okay. But you mentioned heel-to-toe drop would also apply to other types of shoes, right?

A. Typically, most footwear have some form of a heel-to-toe drop, yes.

Q. But it would apply to, like, men's dress shoes?

A. Varying levels of heel-to-toe drop, yes, but -- but, yeah, I would say that in most -- most shoes would have a typical heel-to-toe drop.

Q. Okay. And heel-to-toe drop refers to the -- the difference in height between the heel of the midsole and the toe

of the midsole, right?

A. It could refer to the height of the midsole, could refer to the bottom of the last, it could be -- it's -- it's where the foot would be sitting typically. The heel would be higher than the ball of the foot, the front portion of the foot.

Q. So is that height -- well, okay.

Can you just explain to me what heel-to-toe drop is in your own words?

A. Okay. Well, in my declaration I say it's where the heel portion of the midsole is typically higher than the toe portion.

Q. Okay. And when you're talking about the heel portion, is -- or being higher, that's the height of the heel portion relative to the height of the toe portion of the midsole?

A. Yeah, I would say the height would be -- yeah, it would be typically higher, the height would be typically higher.

Q. And the height is measured from the ground up to the top of the midsole?

A. It can -- it would be in context to where the -- the shoe sits on the ground to where the heel is and where the shoe sits on the ground to where the forefoot is.

Q. Okay. And that goes up to the height at the top of the midsole?

A. Typically, yes.

Q. And an example you give here in paragraph 36 is that a running shoe may have a greater heel-toe drop as compared to a court shoe; is that right?

A. That's what I state here, yes.

Q. Where do men's dress shoes fit into that? Would they tend to have more heel-toe drop or less compared to, say, running shoes?

A. It's a little bit arbitrary. Depends on the design of the shoe. You could have, I would say, a men's dress shoe that would be like a dancing shoe, which would

have a pretty substantial heel-to-toe drop.

As I've seen ballroom dancers, I -- they have kind of a thick heel section; and you can get a very low profile flat dress shoe that has a minimal heel-to-toe drop.

Q. And somewhere in between, as well?

A. Probably somewhere in between, yeah.

Q. And would you agree that the extent of the heel-toe drop affects the overall visual appearance of the midsole?

MR. SHAPIRO: Object to form.

A. The overall -- I mean, there's -- everything applies to the overall visual appearance of a shoe, but there's a -- there's a certain amount of performance that would be incorporated into -- so there would be a functionality aspect there to where having a more significant heel-to-toe drop versus less significant, that might come into play.

(BY MS. CUTIE)

Q. Okay. You also agree that there are ornamental aspects of a heel-toe drop, as well, right?

MR. SHAPIRO: Object to form.

A. I -- I believe a heel-to-toe drop would be primarily functional. Just the actual amount of -- of elevation change, there would be maybe an ornamental application, you know, viewable on -- on a midsole, but the -- I wouldn't say that it's ornamental that the -- the level of the heel-to-toe drop would be ornamental.

(BY MS. CUTIE)

Q. Are you saying the level of heel-to-toe drop is purely functional?

A. It is functional. Purely functional? I -- I -- not -- well, I would say it's -- it's more -- mostly functional.

Q. So are you saying it is purely functional?

A. I think there could be aspects to

heel-to-toe drop that could be for visual appearance, but in -- in a lot of cases it is a functionality aspect.

Q. Okay. So you would agree that the extent or level of the heel-toe drop could be something that impacts the overall visual appearance of a midsole?

A. I'm just reading through my declaration here to see if I say anything about this.

Well, I mean, as I state here in paragraph 37, "the heel-to-toe drop, a shoe last may also have more 'toe spring,' which translates to a midsole having a higher degree of curvature rising up in the toe area of the shoe."

So this also addresses different levels of performance an athletic shoe may have, where a shoe having more toe spring may allow the wearer to have more rocking motion.

So to -- I mean, to answer your question, there's -- there's a -- a visual

aspect to the -- the difference of the heel-to-toe, so -- but it's not -- I wouldn't -- I -- when you say "purely," it definitely -- heel-to-toe drop has a performance associated with it, right? It's -- it's a function.

So in -- in an athletic shoe, you might have more or less, but is there a visual difference? There would be probably a visual difference, as well.

Q. Okay. So let me unpack that a little bit.

You have two paragraphs in your declaration, paragraph 36, where you discuss heel-toe drop, right?

A. Uh-huh.

Q. And you have paragraph 37 where you talk about toe spring, right?

A. Okay, yes.

Q. Do you view those as being different concepts?

A. Yeah, the -- yeah, the -- the toe

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spring is the area of the front of the shoe that curves up, so -- but the -- the amount that it curves up has a starting point. That starting point would be the lowest point of where the heel-to-toe drop would be.

Q. Okay. So they are different concepts but related; is that fair to say?

A. Yeah, yeah, let's call it that.

Q. Okay. Now, with respect to heel-to-toe drop -- I'd asked you a question before, and I want to focus on heel-to-toe drop.

A. Okay.

Q. Would you agree that the extent or level of the heel-to-toe drop could be something that impacts the overall visual appearance of a midsole?

A. I would say that the difference in the heel height to the -- to the -- the heel-to-toe drop would have a -- an impact visually on the side of the shoe, yeah.

Q. Okay. And more specifically of

the midsole in particular, right?

A. It -- the midsole would be the thing that would be most affected by the heel-to-toe drop.

Q. Okay. All right. Now, focusing on the toe spring, which you addressed in paragraph 37...

A. Yeah.

Q. Again, you -- you focus on athletic shoes with respect to toe spring, right?

A. I -- I do state the -- this addresses different levels of performance that an athletic shoe may have. So yeah, this is -- you know, I'm -- I'm specifying athletic shoe, but again, these principles are found in -- in all kinds of footwear.

Q. So it would also apply to, for instance, men's dress shoes, like, kind of business shoes?

A. Yeah, the -- a lot of -- most shoes will have some variation of toe spring.

Q. And you say toe spring "translates to a midsole having a higher degree of curvature rising up in the toe area of the shoe," right?

A. Yes.

Q. And then you give an example. Again, it's comparing running shoes to court shoes, and you say that the running shoe may have more toe spring than a court shoe, for example, right?

A. I do state that, yes.

Q. Where do men's dress shoes fit with respect to toe spring? Do they typically have -- I'm thinking of more like the business style shoe -- do they have more toe spring than a running shoe or less?

MR. SHAPIRO: Object to form, foundation.

A. I mean, yeah, the -- kind of like the answer I gave you before, there could be a -- a variable range of differences. I -- I -- I have seen some crazy dress shoes where

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the toe spring was exaggerated more than a running shoe.

But in general, I would say that a -- a dress shoe would probably have a little less toe spring than -- than, let's say, a running shoe, per se, but it -- not all the time. It's not on -- it doesn't have to be.

(BY MS. CUTIE)

Q. And you would agree that the extent of the toe spring affects the overall visual appearance of a midsole, right?

MR. SHAPIRO: Object to form.

A. I mean, the toe spring on any shoe is visible and, therefore, there would be, you know, a visual understanding of whether or not a shoe has more toe spring or less toe spring.

(BY MS. CUTIE)

Q. That's something that an ordinary observer would notice?

A. Depending on the significance of

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it. I -- you know, again, like, we talk about toe spring in my class and, you know, I'll -- I'll -- I'll mention that, you know, the shoe needs to have toe spring, and then my students give me a design of a shoe that's completely flat in the front.

So I -- you know, I don't know. I believe an ordinary observer would have some idea as to, you know, level of toe spring, but I don't know if they would be inclined to have a -- a very keen eye as to the difference in the level of toe spring.

Q. But you would agree that an ordinary observer may not know it's called a toe spring, right?

A. There's probably a very good chance an ordinary observer would not know it's called a toe spring, yes.

Q. But you'd also agree that an ordinary observer would visually detect when there is a more significant toe spring as opposed to no toe spring at all, even if they

don't know what it's called?

MR. SHAPIRO: Object to form.

A. And I say the -- an ordinary observer would probably know the difference if it was a significant difference, but I would think that most ordinary observers wouldn't notice -- for instance, they -- if you were to ask an ordinary observer, you know, if there's more toe spring -- but you'd have to explain what that is because they don't understand the terminology -- you know, what the difference between a basketball shoe and a running shoe is, I doubt that they would -- that they would come out and say that, well, the running shoe has more of a -- you know, a rise in the -- in the toe area of the shoe. I don't think an ordinary observer would pay that much attention.

(BY MS. CUTIE)

Q. Why do you say that?

A. In my experience, ordinary observers don't look at the -- those minor

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details that a -- say, for instance, someone like myself, who's had a career in footwear, would probably pay closer attention to.

Q. You would agree that the ordinary observer would view the -- the overall visual impression of a midsole as a whole, right?

A. Yeah, the overall -- yeah.

Q. And -- and part of that is the -- kind of the extent of curvature of the midsole, right?

MR. SHAPIRO: Object to form.

A. They would notice the curvature of a midsole, yeah.

(BY MS. CUTIE)

Q. And a toe spring contributes some curvature or possibly contributes no curvature, but it has an impact on the extent of curvature of a midsole, right?

A. It can have an impact on the extent of a curvature. Would the ordinary observer be able to identify small differences? I don't think so.

Q. Okay. All right. And then in the next paragraph of your declaration, paragraph 38, and then a few following that, you talk about different ways to secure an upper to the shoe sole, right?

A. Well, paragraph 38 is primarily talking about the way that the upper is lasted and how there's a, you know, differences in the way that they're lasted and then, yeah, the bottom material is bonded together along the perimeter of the bottom material. So right at the end of the paragraph, I state that the upper is bonded to the sole.

Q. Okay. So you identify two different ways of -- in which the shoe upper is secured to the shoe sole, right?

A. In paragraph 38?

Q. Yes.

A. No. I don't -- I don't identify two different ways it's attached to the sole. I identify two different ways that the upper

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is created.

Q. Okay. So I'm going to read to you the first sentence of paragraph 38. You say, "When manufacturing shoes, there are a limited number of ways the shoe upper is secured to the shoe sole."

Do you see that?

A. Yeah.

Q. Okay. And then you go on to say, "For example, two common ways to secure the shoe upper to the shoe sole are to use either 'slip lasting' or 'Strobel lasting.'"

Do you see that?

A. Yeah, but the -- both -- both of those cases, the way that -- if you keep reading, so that's the way that the shoe is constructed, the upper is constructed. Once the upper is -- at the bottom of that paragraph, I say, "Once the upper is complete, a bottom material is added to 'close' the bottom of the upper where the upper and the bottom material are bonded

together along the perimeter of the bottom material."

So in both those cases, the actual attachment of the sole is the same.

Q. Okay. So you're saying what you wrote in paragraph 38 isn't right, that slip lasting and Strobel lasting are not ways to secure a shoe upper to the shoe sole?

A. Those are -- those are ways to actually produce the upper.

Q. Okay. So again, what you have --

(Talking over each other.)

A. Slip lasting and Strobel lasting is not a -- a methodology of attaching a sole. So I believe that the first sentence, where I say "there are a limited number of ways a shoe upper is secured to the sole," that's -- that's talking about different ways that are not necessarily identified in that first paragraph.

Q. Okay. But then you go on to say, "Two common ways to secure a shoe upper to

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the shoe sole are to use either 'slip lasting' or 'Strobel lasting,'" and now you're saying that those aren't ways of securing a shoe upper to the shoe sole, those are ways of constructing the upper, right?

A. Yeah, it's probably worded a little -- not as clearly as it could have been.

Q. Okay. So explain to me the difference about -- well, actually, I won't go into that. You say that Strobel -- am I saying that right, Strobel?

A. Yeah, that's correct.

Q. You say Strobel lasting, it's common for casual and athletic shoes; is that right?

A. Yes.

Q. And then you say, "Slip lasting" -- in paragraph 39, slip lasting is common for running or racing shoes?

A. I do say that.

Q. And you don't discuss, like, the

men's dress shoes that we've mentioned before, like you don't discuss those here, right?

A. I don't believe I do.

Q. So you don't discuss, like, leather dress shoes?

A. Specifically, I -- you know, talking about dress shoes, I don't -- I don't say anything about sort of the traditional dress shoe assembly or manufacturing, but there are a wide range of different applications that dress shoes can utilize in the way that they're constructed; and some dress shoes can utilize some of these same methodologies -- probably not slip lasting, but California or Strobel lasting could be one of the methodologies that a casual dress shoe could utilize.

Q. What about a leather dress shoe, would that use Strobel lasting?

A. It could use Strobel lasting. There are plenty of leather athletic shoes,

as well.

Q. And what about, like, a suede dress shoe, would that use Strobel lasting?

A. I've designed a number of suede shoes that have utilized the Strobel lasting.

Q. Okay. And the lasting -- again, it just refers to how you construct the upper, right?

A. Did you say "lasting"?

Q. Yeah.

A. Yeah.

Q. And then --

A. Right.

Q. -- the upper half could be attached to the midsole in some way, right?

A. Typically, yes.

Q. And how -- with Strobel lasting, is the upper attached to the midsole?

A. Typically that would be using an adhesive to bond the midsole to the upper.

Q. And how with slip lasting would the upper be attached to the midsole?

A. Typically the same methodology.
Q. So with an adhesive?
A. An adhesive, yes. It's not always the case.
Q. What are the other ways?
A. Well, I actually invented a methodology that -- that attached the sole to an upper using a removable elastic strap methodology that didn't use any adhesives whatsoever. You could detach and attach a sole as you -- as you pleased.
Q. Okay.
A. So there's -- there's different methodologies. There's also direct inject methodology, where a special machine is designed to hold a lasted upper and a mold will be attached, you know, to the bottom of the lasted upper and the material the -- of the sole is directly injected onto the upper material.
Q. Now, in your view, would an ordinary observer be aware of the type of

lasting that was used just by looking at the shoe?

A. I would say in most cases an ordinary observer probably would not -- would not notice whether or not the shoe was Strobel stitch, California construction, or slip-lasted. I don't think -- that's a -- that's a detail that's probably beyond what the scope of their knowledge would be.

Q. Would an ordinary designer know what type of lasting was used just by looking at the shoe?

A. If -- if they were to observe the shoe and -- and probably, you know, if they were to take out the insole, they could -- they could tell what kind of a lasting it was.

Q. All right. And then paragraph 40, you start talking about welt construction.

Do you see that?

A. Yes.

Q. You say that "Welt construction is a high-quality method for attaching the sole of a shoe to the upper using a strip of material called a welt."

A. I see that.

Q. And that's a different attachment method than what's typically used with Strobel lasting or slip lasting, right?

A. It can be, but it can also be done in the same methodology where the sole is attached using an adhesive.

Q. So explain to me how that works together.

A. Okay. So there are -- well, here, let me -- let me read this first.

So "Welt construction is a high-quality method for attaching the sole of a shoe to the upper using a strip of material called a welt, which is then stitched to the upper and the sole of the shoe, forming a flange around the perimeter of the sole unit. The welt can be attached to either the top

perimeter" of the -- "edge of an outsole or the midsole, and the shoe upper is then sewn to the welt."

"In some cases, a shoe may be designed to have the appearance of a welt construction for aesthetic purposes, but may not, in fact, be an actual welt construction. In this case, the welt may be a detail that is molded into the midsole or outsole and colored separately to have the appearance of being a different material."

Does that answer your question, or would you like me to --

Q. No, not -- not exactly.

So you had said before that it's possible that the attachment -- that the welt construction attachment method could be used with uppers that had been Strobel-lasted or slip-lasted, if I understood you right.

A. It could be, yes.

Q. Okay. And I'm asking you to explain to me how that would work.

A. Well, as I stated in that last paragraph that I just read to you, right, so a welt can either be molded into a sole, into a midsole, or it can be attached to a midsole, and then that whole midsole, complete with the welt around it, would then be bonded to the bottom of either a Strobel-lasted or a slip-lasted upper. There may or may not be an additional application where they actually stitch the -- the edge of the -- of the welt to the upper, but in most cases, that would be a combination of both it being bonded and sewn.

They would -- you would never rely -- there's too much force exerted on the sole of a shoe when you're walking -- you would never rely on just the sole being stitched to the upper.

Q. So there's no shoes where the -- the upper is just stitched directly to the midsole through the welt?

A. There could possibly be that

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application. It's not a -- it's not -- I would say it's not a common -- it wouldn't be a common methodology. It would be -- it wouldn't be something I would recommend to do because the amount of force that would be exerted on just the stitching would be tremendous.

Q. Okay. So I want to go back up to some things you said earlier.

So you explained there's a few different ways a welt could be incorporated into a shoe, right? One of those ways is that the welt could be stitched to the midsole; is that right?

A. It does -- yeah, I do state here that that is a -- one of the methodologies, yes.

Q. And another way is that the welt could just be attached to the midsoles or, like, another -- like an adhesive?

A. That could be one way of doing it.

Q. Okay. And in both of those ways, the welt is an actual, like, separate piece of material that's being added to the midsole?

MR. SHAPIRO: Object to form.

A. In some cases, the welt could be a separate material and then in other cases it could be not a separate material. It could be part of the actual midsole-forming.

(BY MS. CUTIE)

Q. I understand. So I want to ask about the different methodologies that you stated.

So the one where the welt is stitched to the midsole, would that involve a separate piece of material for the welt?

A. Yeah. In that -- in the case where it would be sewn to the midsole, it would probably be a separate piece, yes.

Q. Okay. And in the case where the welt attached by adhesive to the midsole, the welt would also be a separate piece of

material?

MR. SHAPIRO: Object to form.

A. It may or may not be. It -- it either -- either methodology, but yeah, if -- if it's stitched to the top of the midsole, then it would be a separate piece.

(BY MS. CUTIE)

Q. I'm asking where the welt's attached to the top of the midsole using an adhesive, which I believe is another methodology you told me, right?

A. Yes.

MR. SHAPIRO: Object to form.

(BY MS. CUTIE)

Q. Okay. And that methodology, where the welt is attached to the top of the midsole using an adhesive, is the welt a different piece of material than the midsole?

MR. SHAPIRO: Object to form.

A. It could -- yes, it could be a different --

(BY MS. CUTIE)

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Q. Okay.
A. -- piece of material.
Q. And then I understand you identify another way of forming the welt, and the welt there could be that the welt is molded into the midsole or the outsole, right?
A. Yes.
Q. Okay. And in that instance, the welt would be part of the midsole, in your view, right?
A. Well, I would -- it doesn't matter the way that the welt is attached or not attached or molded into or not. I would consider the welt to be part of the midsole in any -- in any situation.
Q. Why -- why is that?
A. Well, because the midsole can comprise of many different types of materials. It doesn't necessarily have to be one material.
Q. Why is -- you agree that welt's a

common term in shoe construction?

A. Yeah, a welt can be a -- yeah.

Q. A midsole is a common term in shoe construction?

A. Yeah.

Q. Okay. Why give the welt a separate name if it's part of the midsole?

MR. SHAPIRO: Object to form.

A. Things can be combined in a midsole. Different components can be combined in a midsole to make up a midsole, so --

(BY MS. CUTIE)

Q. Okay. What if -- I'm sorry, go ahead.

A. So, for instance, you could have a midsole that has two different layers of density in the foam, right, and you would attach a -- I've done this before in my career -- you could have a piece of foam that has a higher density that controls a certain amount of performance in the shoe for certain

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reasons, could be lateral forces exerted in the shoe, and that material could be bonded to another, less dense material that has maybe more cushioning properties, and the combination of those two materials would, combined, become the midsole of the shoe.

You could have, for instance, a component like -- such as an airbag for -- you know, per se. An airbag is a different component to the EVA or PU or, you know, whatever the foam material is that you're using for a midsole. When you combine those two items, that becomes part of the midsole. When you either form a welt into the molded foam material or you attach a welt onto the top edge of a formed, you know, foam material, that then becomes a sole unit that's attached to an outsole, right? So that would be a midsole.

Then you would have an outsole, and then that whole thing would be attached to an upper.

Q. Why is the outsole not part of the midsole?

A. The outsole becomes part of an entire sole unit. So the outsole -- typically the way that the -- that people refer to shoes would be an outsole, a midsole, and an upper. That's -- that's -- that's common knowledge.

So, in my career, I've designed shoes; and like you stated at the beginning of this conversation, you said there's an outsole, a midsole, and an upper.

So those are the three commonly-used understanding of what the three main components are of a -- of a shoe. So an outsole is typically considered different than the midsole. The midsole is typically considered different than the upper.

Q. Okay. You -- have you ever designed a shoe that has a welt?

A. I have.

Q. Okay. And you agree that not all

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shoes have welts?

A. Yes, not all shoes have welts.

Q. But all shoes have outsoles?

A. All shoes have -- typically have outsoles. There are some shoes that the -- you know, that they've designed where they've made them very, very light, and so the midsole is actually -- continues on to a tread pattern on the bottom, and it's part of the exact same material; it's the same part.

In that case, you know, that would translate to the bottom of the shoe, which you probably wouldn't consider the outsole, it would be -- the bottom of the midsole would be the surface that you would run on.

Q. So because it's made of the same material as the midsole, it would be considered part of the midsole?

MR. SHAPIRO: Object to form.

A. Because it's made of the same material -- and I don't -- I'm not sure I

understand your question.
(BY MS. CUTIE)
Q. You said the tread part on the bottom, it's part of the exact same material, so it's the same part. So you were explaining that the tread part is made of the same material as the midsole, and because of that, you would consider the tread part to be part of the midsole rather than to be an outsole, right?
MR. SHAPIRO: Object to form.
A. Yeah. In that case, I would consider -- I would say that there wouldn't be an outsole. I would say that it would be the -- the bottom -- the bottom of the shoe.
(BY MS. CUTIE)
Q. And the reason for that was because the bottom of the shoe was made of the same material as the midsole, right?
MR. SHAPIRO: Object to form.
A. The bottom of the shoe, if it were to be the same material, yeah, I would

probably -- I would consider that a -- you know, a unibody outsole unit.

(BY MS. CUTIE)

Q. So you would no longer consider it to be a midsole?

A. The midsole would be part of the overall sole unit at that point.

Q. All right. So setting aside this example where, you know, you could not have an outsole -- generally most shoes have an outsole, right?

A. Typically, I would say most shoes have an outsole.

Q. And, typically, most shoes have a midsole?

A. In -- yeah, in most cases, I would say that shoes would have a midsole.

Q. And, typically, most shoes would have an upper -- I mean, setting aside sandals, but I mean the type of shoes -- like athletic wear, dress shoes, the kind of shoes we're talking about here would typically have

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an upper?

A. Yeah, there would be an upper.

Q. And most shoes don't -- don't have a welt, right?

MR. SHAPIRO: Object to form.

A. Most shoes don't have a welt?

It's -- it's a little bit arbitrary to say that. I --

(BY MS. CUTIE)

Q. Many shoes -- many shoes don't have a welt?

A. Yeah, many shoes don't have a welt, yeah. Many shoes don't have other components in the midsole, too.

Q. So you mentioned earlier that together, the outsole and the midsole make up a sole unit, right, or a sole?

A. Yeah.

Q. Why is it that you attribute the sole -- that -- the welt to being part of the midsole rather than to being part of the broader sole unit?

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A. Typically, if you were to -- well, okay, if you were to describe an outsole, it would be the part of the bottom of the shoe that comes in contact with the ground, right? That's typically a material that has more abrasion resistance, such as, you know, compression-molded rubber, things like that.

The midsole is the thing that can have multi components to it, right?

So, typically, a shoe designer would -- in designing a midsole, could incorporate a number of different components into that midsole. When you combine that midsole with an outsole, you get a sole unit.

Q. Okay. So what are the components that can be in a midsole?

A. Well, first of all, you can have different materials that provide a -- a foam cushion type of a -- you know, a material. So you can have injection-molded EVA, you can have compression-molded EVA, you could have

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die-cut EVA, you could have poured PU.

Then you could -- within that, you could have -- as I mentioned earlier, you could have an airbag that's incorporated into the midsole. You could have -- in some cases shoes might have a carbon fiber shank to provide a certain amount of stiffness and stability to a -- to a shoe. That can be part of a midsole.

You could have -- let me think what else. I designed a shoe that has a midsole that incorporated a different gel material into the top of the midsole that provided a shock absorption for skateboarders when they did tricks and landed hard on their feet.

You could have a -- an external heel counter -- sometimes we call it a heel clip -- which is a molded plastic wall that wraps around typically the heel area of a midsole, and that could combine with the top of the midsole to create more stability

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laterally.

As I mentioned, you could have a welt that wraps around the top of a midsole, the foam part of the midsole, to extend and create a different aesthetic visual.

You could -- see, there's a -- there's quite a -- quite a few varieties of things that can be added; and as I mentioned, dual density, right? So you could have a layer of foam -- you might have one type of foam and a different type of foam that could be bonded to the -- you know, any one of the surfaces of the midsole to create a varying degree of -- of density in -- in the midsole.

Q. Okay. I want to take you to paragraph 40 of your declaration. You -- this is talking about welt construction.

And you say that the welt is "stitched to the upper and the sole of the shoe."

Do you see that?

A. Uh-huh.

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Q. You don't say there that the welt's part of the sole of the shoe, right?

A. The way that it's worded, it says it's "stitched to the upper and the sole of the shoe."

So it's -- it's a way of describing the outcome of what the welt would be, right? It would be something that would be part of the midsole and that it would be stitched to the upper.

So I -- do I -- do I clearly state that it's part of the sole in that line, no. I -- but I am saying that it can be stitched to both the upper and the sole.

Q. Right.

So again, you don't say here that the welt is part of the sole of the shoe?

A. In that sentence I'm not specifically saying that it's part of the sole of the shoe, but I am telling you that it -- that's just the methodology of how it can be attached to the upper, right?

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So it could be attached to the sole, right? And it is, and it would then be stitched to the upper.

Q. You -- in this sentence here, you don't assign the welt to being part of the upper or part of the sole. You say it's stitched to both of them, right?

A. I'm saying that it's stitched to the upper of the sole -- the upper and the sole of the shoe.

Q. Okay. And then in the -- the next sentence there, you say that, "The welt can be attached to either the... perimeter edge of an outsole or the midsole."

Do you see that?

A. Yes.

Q. Again, you don't say that the welt is part of the midsole there, right?

A. When the welt is attached to the midsole, it becomes part of the midsole, but --

Q. But you don't say that there?

A. It doesn't necessarily say that there.

Q. Okay. But in paragraph 41, you give an example where the welt may be molded into the midsole, right?

A. Yes. It's just a different application of how the welt might be attached to the -- the midsole. It might be part of the midsole, like it can be molded in or it can be attached to it.

MS. CUTIE: Strike that as nonresponsive.

MR. SHAPIRO: I obviously disagree, and the witness was answering your question, Counsel.

(BY MS. CUTIE)

Q. Okay. So you talk about, in paragraphs 40 and 41, two different examples. You say there's the welt construction and then you also say there's an instance where there could be an appearance of a welt even when there's not welt construction, right?

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A. Well, I actually say, in this case, the welt may be a detail that is molded into the midsole. So I'm actually saying the welt -- it's not an appearance of a welt, it's the welt is actually molded into the midsole.

Q. Okay. So in paragraph 40 you say -- you talk about welt construction, right?

A. Yes.

Q. And then in paragraph 41, you say, "In some cases, a shoe may be designed to have the appearance of a welt construction for aesthetic purposes, but may," in fact -- "may not, in fact, be an actual welt construction."

Do you see that?

A. Yeah, and then the next sentence says --

Q. So --

A. -- "In this case, the welt may be a detail that is molded into the midsole."

Q. Yes, I understand.

But in that -- in the first sentence, you seem to be drawing a distinction between a welt construction and an appearance of a welt construction without it actually being welt construction; is that fair?

MR. SHAPIRO: Object to form.

A. There are different applications of the way that a welt can be put into a midsole, right? There's a construction method where you have a separate piece of material that's sewn to the top of the midsole and then bonded to the upper. In that case, the welt is a separate material that's attached very much like you would have a higher density foam attached to a lower density foam in a midsole.

If you wanted to save money and not have the expense of that separate process, you could mold the welt into the rest of the midsole and there would be an advantageous reason to do that.

And in that case, the welt would actually be of the same material.

(BY MS. CUTIE)

Q. In your view, would an ordinary observer appreciate the difference between those two examples you just gave?

A. In -- in my -- the way I have observed ordinary observers, I don't believe an ordinary observer would necessarily -- unless they are, like I said, very much up on their shoe game, I don't think an ordinary observer would understand the difference between the two different types of construction.

Q. You don't think an ordinary observer would know the difference between when a material's added to the top of foam versus whether it's integrated into the foam?

A. I -- I believe that an ordinary observer may not know the difference. I believe, for instance, in the -- in the prior art exhibit that -- that I cited with the

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Skechers, that's an -- obviously molded into the sole. You can tell if you look closely where the paint line is.

I don't believe an ordinary observer would see that as different than something that would be a separate material that would be attached to it.

Q. Okay. In your view, would an ordinary observer know the difference between the two? Sorry, let me rephrase that.

In your view, would an ordinary designer know the difference between the two?

A. I believe an ordinary, you know, skilled designer in the art would -- would probably know what the difference was.

Q. Why would a designer pick one option over the other?

A. There's probably a certain -- the designer would probably want to pick one or the other based on the price point that they're going after, what they feel that their consumer would be willing to spend for

a shoe. You know, there -- there are shoes that have a lot of added processes to them that may elevate the level of, you know, richness, let's say, and then there are other processes that -- that reduce costs, like I mentioned.

And, you know, an ordinary designer, if they were trying to produce a shoe that had an appearance of something but had a way to kind of design it in -- in such that it reduced the cost, they would be inclined to do so so that they could, you know, make a better margin and sell the shoe for a lower price.

Q. And there are instances where an ordinary designer would choose to go with the welt that's attached to the midsole as opposed to the welt that's molded into the midsole, right?

A. There -- yeah, there could be instances where an ordinary designer would do that.

Q. And why would an ordinary designer choose a welt that's attached to the midsole as opposed to a welt that's molded into the midsole?

A. Again, you know, it depends on what they're trying to achieve, but I would say the -- you know, to -- it's kind of like if -- if you -- you know, you had a -- an -- a detail on a shoe that was -- appeared to be gold and, you know, one was -- you know, one was fake gold and the other one was real gold and you would charge more for the real gold. Like, that's -- that you would just elevate the level of finish, I guess.

Q. How does a welt that's attached to the midsole elevate the finish of a welt that's molded onto the midsole?

A. It's just a -- it's just a more expensive way of making the shoe, right?

So you would want -- if your shoe is a higher price point shoe that you want to justify, you might add some features to the

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construction of the shoe that -- that make it, you know, a little bit more expensive to produce.

Q. Does it also make it visually appear more expensive in some way?

A. In -- in -- in a lot of cases, I would say that it's -- an ordinary observer would not know the difference. They would know that they're buying something that's probably more expensive if they were to pay for details that were, you know, a more expensive process, but I don't know if an ordinary observer would -- would understand the difference between a molded welt versus a -- you know, an attached welt.

Q. Would you agree that an ordinary designer would view the attached welt as being a different aesthetic than the molded welt?

A. Aesthetic, no. I believe an ordinary designer would be able to achieve an overall visual appearance in both

methodologies. I think it's more about just -- it's kind of, like, you know, using a really high quality, full grain leather versus a -- you know, a synthetic vinyl leather, right?

They -- the overall visual appearance can be very much the same between those two, but a designer of ordinary skill in the art would probably know that the full grain leather would be something that they could charge more for.

Q. And you don't think an ordinary observer would be able to tell the difference between a full grain leather and synthetic vinyl leather?

A. It wouldn't have a different visual appearance.

Q. Okay. So you think an ordinary observer would just purchase full grain leather for the sake of purchase -- paying more?

A. They might know it's full grain

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leather, right, but does it -- would -- would someone watching them walk down the street, if they didn't know what the shoe was, the brand was, and how much they paid for it and all that kind of stuff, would they -- would they know that it's full grain versus synthetic? I doubt that an ordinary observer would know that.

Q. So the only reason an ordinary designer would include the attached welt as opposed to the molded welt is to make a more expensive product?

A. I would say to elevate the -- yeah, the -- yeah, to -- you know, to create a -- create a -- yeah, to create a -- maybe, yeah, more expensive product.

Q. Not that -- they don't do it with the intention of making it look different at all?

A. To make it look different than what, something that -- a welt that would be molded into it?

Q. Right.
A. Very minor -- you know, if someone were to be spending a lot of money, they might -- they might want to...
Repeat the question. Sorry.
Q. Yeah, let me rephrase it.
In your view, an ordinary designer would not include an attached welt as opposed to a molded welt for the purpose of making the midsole or the shoe have a different overall visual appearance?
A. Yeah, I -- I don't believe the overall visual appearance would be the -- the reason why a designer of ordinary skill in the art would apply that. I believe it would be more of a -- a -- like a construction quality issue would be the reason why an ordinary designer would do that.
Q. Okay. Not to change the appearance at all?
A. Very minorly.
Q. You say in paragraph 41 --

there's a part there about, "The welt may be a detail that is molded into the midsole or outsole and colored separately to have the appearance of being a different material."

Do you see that?

A. Yes.

Q. What is the purpose of having the molded welt colored separately?

A. Well, could be a design detail. It could be to visually make the shoe look like it might have a separate material. There's -- there's a number of different reasons why you would maybe want to color it differently.

Q. Part of that is to give the impression to the ordinary observer that it's a different material, right?

A. Could be.

Q. Because that's something an ordinary observer would notice?

MR. SHAPIRO: Object to form.

A. An ordinary observer would notice

a color strip around the top of the shoe, yeah, I would say so.

(BY MS. CUTIE)

Q. Would -- it would notice that there's two different materials there, as well?

A. They may notice that it's two different materials. They may look at it and go, oh, I like that color strip, you know, that's a cool detail.

Q. Could be multiple reasons?

A. And if it was a different material, if it was a welt, an actual, you know, different material onto it, an ordinary observer -- an ordinary observer might say, I'm going to buy that shoe because I like the color of the strip around the top of the shoe, not realizing that it's actually a different material.

Q. Sure.

But one of the reasons they could also purchase a shoe is because it has a

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different material -- or let me -- let me strike that. It's not about purchasing a shoe.

One of the things they may notice, in addition to there being different colors, is that they're a different material, right?

MR. SHAPIRO: Object to form.

A. They may or may not notice if it's a different material.

(BY MS. CUTIE)

Q. And again, you say here that the purpose of having a separate color is to give the appearance of being a different material, right?

A. I do say that, yes.

Q. Well, why even do that if they're not -- if the ordinary observer is not going to appreciate when things are made with different materials?

A. I don't know if an ordinary observer would -- would care that it's a

different material. I -- I don't think that most ordinary observers would care unless they're, you know, trying to get a -- something that they feel like is, you know, a higher level of construction or durability or whatever it might be, right? But it could give the appearance of being a different material.

Q. All right. Why don't we take another break here.

A. Okay.

MS. CUTIE: We can go off the record.

(Break taken from 1:51 p.m. to 2:30 p.m.)

(BY MS. CUTIE)

Q. Welcome, back, Mr. Delgatty.

A. Thank you.

Q. So a few follow-up questions to what we were discussing before.

What would you describe as being the function of a midsole?

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A. There's a number of things that a midsole does. It, one, provides -- it can provide cushioning, not necessarily all the time. It can, as we've talked about, elevate the foot into a position that is anatomically correct and more comfortable for a foot. There can be, as we talked about, heel-to-toe drop, which positions a foot in a more natural state for walking and -- and different types of activities. There -- in some cases there -- in a lot of cases there can be an aesthetic appeal to visual appearance that a midsole might have that, you know, makes -- makes a shoe attractive or not attractive to an ordinary observer. Those are a few I can think of right now.

Q. Okay. And what is the function of a welt?

A. The function of a welt can be -- as well, can be a few things. It can be a visual detail. It can be a form of construction. It can help to offset the

width of a -- of a sole unit to -- compared to the width of an upper. Yeah, it's a number of different things a welt can do.

Q. And when you say "could be a form of construction," what do you mean there?

A. Well, as we've discussed already, you know, a welt can be something by -- where it can be attached to the top of the -- you know, the foam part of the midsole. It can be attached to a different type of material, as well. I mean, it doesn't necessarily have to be foam, but -- and then it can be sewn to the upper, so there can be -- may be an -- an increased sense of durability that it might create, you know, having -- having actually sewn to the upper instead of only relying on the adhesive bond.

Q. So it's fair to say that one function of a welt is for securement of the upper?

A. Yeah, it can add to the securement of an upper.

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Q. Okay. Now, earlier you expressed your view that the welt is always part of a midsole, right?

A. Yes.

Q. And -- and you don't cite any references in your declaration to support that understanding, right?

A. Let me turn to the section that we talked about.

I do say that -- in paragraph 40, I say, "forming a flange around the perimeter of the sole unit."

So it kind of indicates that it's part of the sole unit at that point.

Q. Okay. So my question was, you don't cite any references in your declaration to support that statement?

A. References as in -- as in exhibits, any --

Q. Yeah, any other document or material to corroborate your testimony?

A. I don't believe there's anything

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that's in my declaration that supports that, other than, like, exhibits.

Q. Okay. So we just have your testimony to go on?

MR. SHAPIRO: Object to form.

A. Well, I'm -- I'm telling you what I know.

(BY MS. CUTIE)

Q. Okay. All right. I want to turn to D969, and I believe you have that in front of you as Exhibit 1001.

And we're also going to be talking about your declaration, so please keep that handy, too.

(Whereupon Exhibit Number 1001 was shown.)

A. Okay. Okay. This is the patent, the '969 patent.

Q. Yeah.

A. Yeah.

Q. Okay. So I want to take you to paragraph 61 of your declaration. It's on

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Page 31.

A. Okay, I'm there.

Q. All right. And this is where you have the claim construction section, right?

A. Uh-huh.

Q. And you're -- you're construing the claims of D969?

A. Yes.

Q. And you say that the claimed design in D969 reads on -- "the ornamental design for a shoe midsole, as shown and described." Do you see that?

A. Yes.

Q. And then there are several -- there are seven figures showing the claimed design of D969 within the solid lines, right?

A. Yes.

Q. You would agree that the preferable course for design patent claim construction is not to provide a detailed verbal description, right?

A. It's preferable to utilize a

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drawing.

Q. And here, in your -- in your declaration, in your claim construction section, you do provide a detailed verbal description of the figures from D969, right?

MR. SHAPIRO: Object to form.

A. I provide some verbal descriptions of different components of the patent.

(BY MS. CUTIE)

Q. All right. In particular, you identify four key features, right?

MR. SHAPIRO: Object to form.

A. There are four key features in my declaration that I've identified, yes.

(BY MS. CUTIE)

Q. And those are -- and these are listed on Page 32, if you want to reference it; but you have the "ridge layers, compressions, rounded upper layer, and pinched midsection," right?

A. Well, that is in my declaration,

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yes.

Q. And in your view, these four key features come together to give an overall visual impression of a soft, wave-like midsole design, right?

A. Yes.

Q. Are you familiar with the Gestalt principles of design?

A. Can you elaborate?

Q. Have you heard of the Gestalt principles of design?

A. I believe I have heard that terminology. I'm not completely aware of -- to my knowledge, right now, what it means.

Q. Okay. All right. So in paragraph 63, you describe "ridge layers" as "three vertically stacked, ridged-edged layers that extend continuously from a heel section till the toe section and beyond the lower perimeter of the shoe's sole."

Do you see that?

A. Yes.

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Q. And then in 65, you have the "rounded upper layer," which you say is "a rounded upper layer above the ridged edge layers."

Do you see that?

A. Yes.

Q. Why do you make a distinction between the ridged edge layers and the rounded upper layer?

A. Because the overall visual appearance of them are different.

Q. How so?

A. Well, the three ridge layers have a fairly noticeable peak to them and -- that protrude out a little bit further than the -- than the upper layer, and the upper layer has a -- a slightly different look to them.

Q. And why do you use the term "ridged" and "edged" to refer to the "ridged-edged layers"?

A. I would say it's -- it's a way to describe what the images seem to portray.

Q. How so?

A. Well, if -- if I'm looking at the drawing, it appears that the three bottom layers that we're referring to, as you observe it -- where you can observe it is around -- wrapping around the back of the shoe, the heel of the shoe. You can see that there is a -- a difference between the -- the visual appearance where the ridges appear to be -- have more of a ridge, like a ridge meaning more of a peak, let's say.

And the -- the upper layer appears to -- although it has a ridge, it's -- it's a softer ridge. It -- it appears to be a little bit more rounded.

Q. Okay. Can you -- are you able to kind of explain in more detail what you're talking about with respect to the peak that you're referring to?

A. The peak of the -- of the ridges have a slightly pointier, let's call it -- what appear to be slightly pointier, right, a

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little bit more pronounced.

Q. And is that on -- on the edge? Is that why you used the term "edge layers"?

A. I say "ridged-edged." So it's the -- I guess it would be the outermost portion of the -- of this particular design feature of the midsole. So it's a ridge that comes outwards on the edge.

Q. Did -- did you come up with that terminology, "ridged edge layers"?

A. I don't recall in our dialogue if that was the way that I described it. I think we were -- we were going back and forth on the best way to verbally describe it. I believe I agreed to that terminology.

Q. I have a question for you on paragraph 47 of your declaration, where you're also referring to these features of D969 on Page 23.

A. Okay.

Q. You say, like, in the second part there, second line, "a shoe midsole with

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three ridged edge layers resting atop a rounded upper layer."

Do you see that?

A. Yes.

Q. What do you mean by "resting atop"?

A. It seems like it's maybe awkwardly written, where I think it's -- I'm referring to the rounded upper layer. It should read the rounded upper layer is resting atop the three ridged layers.

Q. Okay. So maybe a typo?

A. Yeah, it might be just a -- kind of an oversight of the way I wrote it.

Q. Okay. So you -- if you were going to rewrite that, you would say -- it would say, a midsole with a rounded upper layer resting atop three ridged edge layers, right?

A. That would probably be a little more consistent with my opinion, yeah.

Q. Okay. But you would still use

the term "resting atop," right?

A. I don't know if "resting atop" is even the best way to say it. I would say the -- one layer on top of three ridged edge layers, you know, at -- at -- you know, resting -- I mean, resting atop -- I don't know if there's a better way to say it. I'd have to think that through.

Q. Okay. But -- but using the term "layers," are you suggesting in some way that the midsole of D969 is constructed in layers?

A. I would say that the -- the visual overall visual appearance of the midsole looks like there's layers, just the way that it's designed. It looks like -- linear -- as I stated, I think it looks like linear design elements that would appear to be layers.

Q. Okay. But you're not trying to suggest that the manufacturing process for D969 has to be one in which the -- what you call layers are laid on top of each other

during manufacturing?

A. I mean, I suppose it could be, but I'm talking about the -- the overall visual appearance. It looks like they're layers.

Q. That's not a common way of manufacturing midsoles, right?

A. It's -- I would say it's maybe not super common, but as I stated before, there -- there are times where, you know, you can have multiple layers.

You know, an example, actually a good example might be in, like, a rainbow sandal, right? You would actually have different layers of die-cut EVA to create a visual appearance of different layers that are going up the side of a midsole.

Q. Okay. But you're not suggesting that here for D969, right?

A. I'm not really talking about the construction. I'm talking more about the overall visual appearance.

Q. Okay. And in your view, the overall visual appearance is that the midsole is -- well, what you do you mean by "layers"? Let me ask you that.

A. Well, the way that this patent appears in the design, right, the -- the ornamental aspects of this design, if you're to try to describe it into words, right, it -- it would be -- it's what I've written here, it would be three ridged layers and an upper rounded layer and they both, you know, extend continuously from a generally linear heel section compressing downwardly, sloping into a midsection, and then compressing upwardly, slope towards the toe section.

So that's -- I mean, you're asking me to verbally describe the design, right? You don't -- you know, I would -- I would more rather rely on the images, but if we're trying to verbally describe something, then the design appears to me like it is a layered design. So that's where the

terminology comes from.

Q. Okay. So I didn't ask you to verbally describe the design. That's what you chose to do in your declaration, right?

A. Well, it is in my declaration that I've described it, yeah; and so if I -- I believe that -- and I'd have to -- you know, in my declaration I'm going to have to describe my opinion. My opinion would be that these would be layers. That's the best way to describe it.

Q. Okay. And so I'm asking you why you think "layers" is the best word to describe it.

A. Well, when I think of layers, right, I think of typically something that has a horizontal component to it with another horizontal component to it with another horizontal component to it, right, that are stacking upwards.

So if you were to build a brick wall, you would layer the bricks in -- in the

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height, right? If you make a cake with different frosting in the middle, you would layer the cake, and it would be horizontal as you go up.

So this -- to me, the best way to describe it would be layers.

Q. So you believe the overall visual impression conveyed by D969 is that there's layers constructed on top of each other?

A. I believe that the overall visual impression is that the design of this midsole has a layer effect to it.

Now, are they completely horizontal? No. But there are visual components that look like they are stacked, and that's why I used that terminology.

Q. Okay. Now, you said earlier that you considered the prosecution history of D969 when you were forming your opinions, right?

A. Yes.

Q. All right. And I think you

talked about that in paragraphs 53 to 55 in your declaration.

Are you there?

A. Yeah.

Q. Okay. And in paragraph -- so the prosecution history is Exhibit 1002, right?

Do you have that in front of you?

A. Exhibit 1002?

Q. Yeah.

A. I -- yes, I have that.

(Whereupon Exhibit Number 1002 was shown.)

(BY MS. CUTIE)

Q. Okay. So in paragraph 55, you quote a portion of a response that the applicant submitted to the patent office.

Do you see that?

A. Sorry, I -- I -- you cut out there for a second. What?

Q. In paragraph 55 of your declaration --

A. Okay.

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Q. -- you quote a portion of a response that the applicant submitted to the patent office.

Do you see that?

A. The -- are you talking -- there's two quotes in that paragraph. Are you talking about the first one or the second one?

Q. Both of them come from the same response, right?

A. Yes.

Q. Okay. And in the -- reading the first quote there, it's in reference of Figures 2 and 3 that were amended, right?

A. Uh-huh.

Q. And it says, "Neither the toe region of the sole nor the bottom boundary line adjacent the stippled shaded region of the lowermost flute are claimed."

Do you see that?

A. Yes.

Q. Okay. And I want to point you to

Exhibit 1002, and if you look at page -- the page that you cite there, it's Page 69.

Let me know when you're there.

A. I'm at Page 69.

Q. Okay. And you see the part we just -- we just read from your declaration is in the second sentence there? Do you see that?

Sorry, it's in the second sentence under Section A on 69.

Do you see that?

It starts with "Figures 2 and 3 have been amended to clarify"?

A. I see that sentence.

Q. Okay. And we see the reference to the "lowermost flute."

Do you see that?

A. Oh, sorry. I was reading one sentence below.

Yes, I see that.

Q. Okay. And then the start of the next paragraph -- do you see Figure 5?

Figure 5 has been amended -- oh, sorry, sorry, the second sentence of the next paragraph.

A. Okay.

Q. Figure 5 has -- also -- "has also been amended to show the outermost edges of the flutes extending beyond the perimeter of the upper when the shoe is shown in a top plain view."

Do you see that?

A. Yes.

Q. Okay. If we go back to your declaration in paragraph 55, there's -- there's -- that same portion is quoted in your declaration.

Do you see that, the same sentence?

A. The second quote on the paragraph?

Q. Yeah.

A. "The outermost edges... extending beyond the perimeter"?

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Q. Yeah.
A. Yeah.
Q. And that comes from the same sentence we just read in the prosecution history, right?
A. Yes, it appears so.
Q. But in your declaration you omit the words "of the flutes."
Do you see that?
A. I believe the -- I didn't refer to them as "flutes."
Q. Okay. And then if we go back to the prosecution history, the next -- the final sentence on the page, "Figure 7 has been amended to clarify that the bottom boundary line adjacent the stippled shaded region of the lowermost flute adjacent the stippled shaded region is not claimed."
Do you see that?
A. Sorry, tell me where you were.
Q. The last sentence on Page 69 of Exhibit 102 -- or 1002.

A. The start of the new paragraph, "Figure 7"?

Q. Yeah, "Figure 7."

A. Okay.

Q. I won't read it all again, but you see where it refers to the "lowermost flute"?

A. Yeah, I see that.

Q. Okay. So looking at this prosecution history and looking at the patent figures, what is your understanding of what the term "flute" refers to within the figures?

A. Well, I would -- I would say that the "flute" is referring to what I've identified as -- as a ridged edge.

Q. A ridged edge layer?

A. Yeah, it would be a ridged edge layer.

Q. Okay. So you -- you picked a different terminology than what the applicant used, right?

A. It -- it appears that the applicant used the term "flutes," and I used the term "ridged edges."

Q. "Ridged edge layers," right?

A. Well, I actually don't say "ridged edge layers" in paragraph 54.

I say, "The examiner additionally found that while Figures 2-3 and 6-7 demonstrate the ridged edges extend beyond the upper perimeter of the sole, this was not reflected in Figure 5."

So I didn't say "layers" in that particular section.

Q. No; but in general, you refer to them as "ridged edge layers," right?

A. There have been times throughout my declaration that I say "ridged edge layers."

Q. Right.

You call -- it -- that's one of the key features that you identify, right?

A. Yeah, I would say so.

Q. And so, just to clarify, your understanding of what the "flute" is referring to in the prosecution history is the same thing as what you refer to as "ridged edge layers," right?

A. I believe they could be used, you know, in place of each other, yes.

Q. Okay. Why did you pick a different terminology than what the applicant used?

A. I believe that "ridged-edged layers" is maybe a little bit more descriptive than what, you know, what a "flute" is.

So, for instance, a piece of cardboard has a -- you know, it's corrugated cardboard, right? So you have a top layer of cardboard and a bottom layer of cardboard, and you have these vertical walls that run linearly through cardboard, right?

The actual terminology for that is a "flute." So when you have flutes

running through cardboard, that's what it -- so a "flute" doesn't necessarily describe very well, in my opinion, the -- the visual appearance.

So I believe I used "ridged edge layers" because I felt like it was more applicable to a visual description.

Q. So have you heard of the term "fluting" used with respect to a cake?

A. I don't believe I've ever heard of "fluting" with, you know, regard to a cake.

Q. Okay. In D969, would you agree that what you refer to as a "rounded upper layer" is part of the same form as the "ridged edge layers"?

MR. SHAPIRO: Object to form.

A. Well, as I've -- as I've described in my declaration, I -- I consider them a different feature.

(BY MS. CUTIE)

Q. Okay. Would you consider them to

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be part of the same form as opposed to a separate component?

MR. SHAPIRO: Object to form.

A. When you say "form," are you talking about the shape?

(BY MS. CUTIE)

Q. Like a unitary component.

So would you consider the rounded upper layer to be part of the same unitary component as the three ridged edge layers?

MR. SHAPIRO: Object to form.

A. Are you -- are you talking about materiality or the visual impression?

(BY MS. CUTIE)

Q. Materiality. Let's go with that.

A. Materiality, it could or could not be. I mean, it's -- it's -- yeah, materially -- sorry, restate the question.

I thought you were talking about aesthetically or visual -- the visual appearance of it.

Q. I'll ask you that next, but --

A. Would you --
Q. -- for -- in terms of --
A. Sorry, you go.
Q. Yeah, sure. In terms of materiality, would you consider the rounded upper layer to be part of the same unitary component as the three ridged edge layers?
MR. SHAPIRO: Object to form.
A. The overall visual appearance of it, I believe, could or could not necessarily be that. It -- it could be a different material.
Hold on one sec. Let me -- let me confirm something.
Yeah, I believe that that upper layer could be the same material or it could be a different material.
(BY MS. CUTIE)
Q. In looking at D969, would you describe the three edge layers and the upper rounded layer to have a monolithic visual appearance?

MR. SHAPIRO: Object to form.

A. What do you mean by "monolithic"?

(BY MS. CUTIE)

Q. Do you have any understanding of what that term means?

A. I do, but I'd like to know what -- what -- how you're using it.

Q. How do you understand the term "monolithic"?

A. "Monolithic," in my opinion, would -- would mean that it's all sort of uniform.

Q. Okay. With that understanding --

A. With that understanding?

Q. -- would you describe the three edged layers and upper rounded layer of D969 to have a monolithic visual appearance?

MR. SHAPIRO: Object to form.

A. I believe that the three ridged layers and the upper layer go nicely with each other, but I don't believe that the upper layer has the same visual identity as

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the three ridged layers.
(BY MS. CUTIE)
Q. How do you think an ordinary observer would visualize the ridged edge layers and the rounded upper layer of D969?
And more specifically, would you -- in your view, would an ordinary observer have the impression that the three ridged edge layers and the rounded upper layer of D969 have a monolithic visual appearance?
MR. SHAPIRO: Object to form.
A. I think an ordinary observer, there's a good chance that they might look at this and maybe not notice the slight difference in the edge of the top layer versus the three bottom ones.
(BY MS. CUTIE)
Q. And so, in that instance, you would agree that an ordinary observer would view the three edge layers and the rounded upper layers as having a monolithic visual

appearance?

MR. SHAPIRO: Object to form.

A. I think that an ordinary observer might view the overall design as a -- as a holistic, monolithic design. There -- the only case where I think that there could be potential for an ordinary observer to note -- make a noticeable difference in understanding would be if the -- if the -- if there was a color break or a color difference, they might notice that.

(BY MS. CUTIE)

Q. All right. So going back to your declaration and the -- and the four key features you identify, one of them is "compressions," in paragraph 64.

A. I see that.

Q. Okay. And you say that compressions are "a generally linear heel section, a downwardly sloped midsection in which the ridged edges are compressed, i.e., decrease in height, and an upwardly slope

towards the toe section with compressed ridged edges."

Do you see that?

A. Yes.

Q. When you refer to the "decrease in height," you don't note the extent to which the height decreases, right?

A. As in a measurement?

Q. In a measurement or how significant it is. You just don't comment on that part of it, right?

A. Not -- not specifically, no.

Q. Why not?

A. Because I'm giving a description of a general aesthetic visual impression of the shoe, and the general visual impression is that there's a downward slope midsection and the ridged edges are compressed in that section and then there's an upward slope towards the toe with those compressed ridges, so I -- I didn't find it necessary to give a -- some kind of indication of the actual

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measurement or distance of -- of that.

Q. And even beyond an actual, you know, measurement or distance of that, you don't make any efforts to convey in words the significance of the decrease in height?

A. My comments are of an overall visual impression. So it's -- generally the visual impression is -- is what I'm stating.

Q. Okay. And in -- in paragraph -- well, on Page 34 of your declaration, you include an annotated version of Figure 2 for D969?

A. Yes.

Q. Okay. And you annotate in purple what you refer to as "compressions"?

A. I do.

Q. And you -- you generally include annotated drawings like this throughout your declaration, right?

A. I do.

Q. Who -- who prepared those annotations?

A. In combination with counsel and -- and my advice, I believe they had one of their graphics people do this.

Q. Okay. And did you provide input on the annotations?

A. I did.

Q. So you've divided the midsole into three sections here.

Do you see that?

A. Yes.

Q. You have a toe section, the midsection, and the heel section, right?

A. Yes.

Q. There's nothing in D969 that tells you where to draw those sections, right?

A. There's an image that shows me.

Q. But there's nothing that tells you where the heel section stops, for example, and the midsection starts, right?

A. Well, someone of ordinary skill in the art would -- would understand, just

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based on the proportions of the shoe, where the heel section would end, where the middle -- midsection would start, the arch area, and where the metatarsals of the foot would land in the toe section and upwards. So I'm relying on my knowledge of footwear construction.

Q. So often that's how you determine what the heel section was?

MR. SHAPIRO: Object to form.

(BY MS. CUTIE)

Q. Walk me through how you determine what the heel section was.

A. Typically, a heel section is defined by -- from the back of the shoe to where the heel-to-toe drop starts to happen, generally, roughly, right? It's not a super definitive -- like it's exactly one-third of the shoe or whatever, but it's generally where the -- so you have a last, right? The upper is created around a last.

The last will -- will typically

have a flat section, relatively flat section that is in the heel, and then it gets to the point where the heel would then drop down, and as it drops down, that would be considered the midsection or the arch of the shoe.

And then as it gets down to where the metatarsals of the foot would be, that would be the start of the toe section of the two -- of the shoe.

Q. The last is part of the upper?

A. The upper is defined by the last. The last is the insert that the upper gets sewn around.

I mean, there's many different lasts for different applications. Some lasts have more heel-to-toe drop, some lasts have more toe spring, right? It depends on what you're -- the outcome that you're trying to get out of the shoe.

Q. Does the midsole match the -- the shape of the last?

A. Yeah, the midsole has to match the shape of the last.

Q. So when you were referring to the last before, that's -- the same explanation could apply to the midsole?

A. The -- the top edge, the top surface of the midsole would have to match the bottom of the last. If it weren't -- if it weren't to do that, you wouldn't get proper bonding when -- because the last is left inside the upper with a -- when the sole unit is attached to the upper, and it uses the last as pressure to force everything down and -- to create that bond.

If you -- if you didn't have a match on the bottom of the last, you would have an area that wouldn't have any compression when it was being glued together.

Q. Okay. So the heel -- I understand it starts at the back of the shoe, moves forward until the heel-toe drop starts to happen. Is that what you said?

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A. Typically, yes.
Q. And then the midsection starts from there and goes on through the arch of the foot?
A. Typically, yes.
Q. And then anything -- once the arch stops, you pick up the toe section, and that goes to the forward part of the shoe; is that right?
A. Typically, yes.
Q. And that's what you've drawn here?
A. That's what I've indicated in my annotations, yes.
Q. Now, in your claim construction of the heel section, you describe this as being a generally linear heel section, right?
A. Generally, yes.
Q. What do you mean by "generally linear"?
A. You know, in the -- in the patent drawing, you can see a slight -- a slight dip

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in the -- sort of the middle area of the heel section, but if you go from the back of the heel to the front of the heel, it's relatively the same height.

And so the -- that slight little dip, you know, I -- I wouldn't necessarily consider that anything dramatic or, you know, obvious. It would -- it's -- I mean, you would -- you would see it, but it's general -- in my opinion, it's generally linear.

Q. All right. So you agree that in that -- what you call the generally linear heel section, that there is a dip within that so it's not perfectly linear, right?

A. Not perfectly linear, no. It's generally linear.

Q. There's some curvature to it?

A. There's no --

MR. SHAPIRO: Object to form.

A. The visual impression is that it's fairly linear.

Q. Okay. But in this heel section, there's some curvature to it, right?

MR. SHAPIRO: Object to form.

A. There is a slight amount of curvature.

(BY MS. CUTIE)

Q. Okay. But in your view, that amount of curvature, or what you call it, a slight dip, wouldn't be considered anything dramatic or obvious, right?

MR. SHAPIRO: Object to form.

A. I would not consider that to be dramatic or obvious.

(BY MS. CUTIE)

Q. Why not?

A. The -- the overall visual impression that it gives is that it's generally linear. If the shoe last was designed to have more of a pocketed heel, that might define the -- the aesthetic design in this area of the -- of the sole unit. It's -- it's a very minor detail, so...

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that's just my opinion.

Q. So you say that the overall general impression is that there's a wave-like design to the midsole; is that right?

A. I believe that's how I stated it, yes.

Q. And you would agree that curvature contributes to that wave-like design?

MR. SHAPIRO: Object to form.

A. I believe that the curvature that is expressed in the -- kind of from the forefoot, you know, toe section to the heel section, that's a fairly significant amount of curvature; so it's almost like, you know, a Coke bottle logo, right? It's -- kind of has a wave, like, to it; so that -- that definitely, in my opinion, has a wave-like aesthetic visual appearance.

Q. And do you believe that the dip that you've identified in the generally

linear heel section contributes to the overall wavelength -- wave-like visual impression?

A. I feel that the dip in the heel section is fairly insignificant. I think that the significant wave visual impression is created from the heel to the toe drop.

Q. Do you think that the dip in the generally linear heel section contributes in any way to the visual -- the overall wave-like visual impression?

MR. SHAPIRO: Object to form.

A. It's sort of -- you can say that -- you know, any -- anything contributes a slight amount of -- you know, how did you word it? What was the wording you used?

(BY MS. CUTIE)

Q. I asked whether you believe that the dip in the general linear heel section contributes in any way to the overall wave-like visual impression.

MR. SHAPIRO: Object to form.

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A. It's -- I would say that it's very minor. In fact, as I sit here right now -- and I'm squinting. If I were to be looking at this from a long distance away -- but up close and I'm squinting -- I can definitely tell that there is a very significant, pronounced curvature that happens from the toe area to the heel area, but it is very insignificant in the heel area where the little bit of a dip is.

(BY MS. CUTIE)

Q. If it's insignificant, why was it included at all?

MR. SHAPIRO: Object to form, calls for speculation.

A. I don't -- designers make certain decisions about the most random things. So, you know, I guess maybe when the designer was coming up with this design, they thought maybe just a slight nuance would be something they'd want to do.

(BY MS. CUTIE)

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Q. Okay. If we look at Page 36 of your declaration, you have an annotated version of the rearview of D969, which is Figure 7.

Do you see that?

A. Yeah.

Q. And you've annotated the ridged edge layers and the upper -- rounded upper layer, right?

A. Yes.

Q. Okay. And you don't otherwise address or describe this rear view; is that right?

A. Other than paragraph 72?

Q. Yeah, I guess more specifically --

A. Hold on.

No, paragraph 72 is referring to the next page. Paragraph 71 is referring to the -- Figure 7. So just Figure 7.

Paragraph 71 just states that, "The rear view of the claimed design depicted

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in Figure 7 includes the same ridged edge layers and rounded upper layer."

Q. All right. So you -- you don't describe any compressions with respect to Figure 7, the rear view, right?

A. With respect to Figure 7 on Page 35, it does not appear -- hold on.

Yeah, the only thing I'm referring to in paragraph 71 is the fact that it has the same ridged edge layers and rounded upper layer.

Q. Okay. So you don't describe any compressions with respect to the rear view in Figure 7?

A. I don't think I describe it in my declaration. I mean, I can tell by the image, but -- that it has that, but yeah, nothing -- looks like there's nothing that I refer to in that rear figure.

Q. Okay. So looking at the figure on Page 36 of your declaration, you would agree that the bottommost ridged edge layer

has a higher degree of curvature than the other layers?

MR. SHAPIRO: Object to form.

A. So what's happening in that view, in my opinion, is you can see part of the outsole that's indicated with the dotted line; and because you can see part of that outsole, that means that they are depicting the shoe as having a slight amount of what we would call -- the opposite would be the heel lift or heel spring, same kind of -- like you would find in the toe of the shoe.

And so because it's coming up in the -- in the drawing at that angle, right, and the back of the shoe is rounded, the heel area of the shoe is rounded, you're actually seeing in perspective the -- you're not looking at this as a straight-on view, right?

You're seeing it as a perspective; and because it's a perspective, that bottom ridge appears to be curved, when, in fact, if you were to look at it from the

side, it -- it would look more like a straight line going up on a slight angle.

(BY MS. CUTIE)

Q. What do you mean by a "straight line going up on a slight angle"?

A. Well, the slight angle would -- would indicate -- okay, so if you look at the -- Figure 2, for instance, right, you can see how there's -- there's heel spring or heel lift in the back, right? It's curving upwards, okay?

Because it's curving upwards and we're looking at it now from a direct back view, it's very similar to how in Figure 6, when you look at the front view of the shoe and you see the disclaimed toe area, how curve -- how curved that is, right?

That has to do with the fact that you're looking at it in an upward perspective.

So because we're looking at a -- at a perspective and we can see that -- that

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angle of the heel coming up, a straight line, right, if -- if I were to just elevate my view of Figure 7 to where I'm slightly above the ground, those three red lines would be straight.

Does that -- does that make sense?

Q. I understand that's your view, yes.

A. Okay.

Q. With respect to Figure 6, though, you -- you don't disagree that when you're looking from Figure 2, that it shows the layers, as you call them, sloping upward, right?

A. In Figure 6?

Q. In Figure 2.

A. Oh, in Figure 2?

Q. In the toe region.

A. Yeah, the -- the ridged lines.

Q. Yeah.

A. Yeah, those are -- those are

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sloping upwards.

Q. So Figure 6 is consistent, showing it's sloping upward, as well, right?

A. Yeah, they're sloping upwards.

Q. And in Figure 2, for the heel, you do -- you do note that the -- the bottommost ridged layer slopes upward in the heel, too, right?

A. Yeah, the -- yeah.

Q. And so in Figure 7, consistent with Figure 2, we see that the bottommost ridged edge layer has a slope upward, as well.

MR. SHAPIRO: Object to form.

A. Yeah, I -- but you -- the way that you asked the question was -- it was curved. You said that the -- the bottom ridge layer was more curved than the top layers.

And I'm telling you that it appears -- in a back view, it appears to be curved because we're looking at it in a

perspective view. We're not looking at the angle. It's definitely angling upwards, but it's not curving.

(BY MS. CUTIE)

Q. Okay. So in your view, you -- or let me say it -- you agree that the bottommost ridge layer's angled upwards?

A. Yes.

Q. But you disagree that it's more curved relative to the other ridge layers?

MR. SHAPIRO: Object to form.

A. As far as it peaking in the middle and going back down, it looks like it might taper a little bit from Figure 2, but those three ridged edge layers, as you were to look at it -- if you were to look at it perpendicular to the -- to the wall of the -- the back wall of the midsole, those would not appear to be nearly as curved as what they look like in Figure 7.

(BY MS. CUTIE)

Q. Okay. Why, when looking at

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Figure 7, with your interpretation of it, why would the top, you know, the upper rounded layer as you call it, appear horizontal while the, you know, bottommost ridged layer appears curved?

MR. SHAPIRO: Object to form.

A. So that has to do with perspective, right?

So you can see that where the -- in perspective, we call it a horizon line, right? So where the horizon line is is the -- the place where a person would be viewing this, and as you -- as you -- hold on a second. I just want to make sure I'm stating this correctly.

I believe what's happening is, because the ridges are pronounced closer to the viewer, what's going to happen is, as that gets closer to you, it's going to appear more curved. As it gets further away, it becomes less curved, and I -- I believe that the way that this image is drawn is in

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that -- is in that rear perspective view.

And so because those three ridges are closer to the viewer and the horizon line is at the -- let's call it the ground level, those ridges will appear to be more curved.

They -- they -- it -- Figure 2 would inform me, as a designer of ordinary skill in the art, that if -- so let's say they were curved, right, the red lines were curved. You would actually see those three red lines in Figure 2 -- you would see them drop off. You would actually see them start to curve more horizontally on the image. They don't. They -- they continue up at the same angle.

So because they continue up, to me that indicates that there isn't an actual curve on the back of the shoe.

I need to actually take a bathroom break.

Q. Sure.

A. If that's possible.

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MS. CUTIE: Yeah, no problem. We can go off the record.

(Break taken from 3:40 p.m. to 3:44 p.m.)

(BY MS. CUTIE)

Q. All right. Mr. Delgatty, you said before that you believed Figure 7 to be in a perspective view; is that right?

A. Yeah. As it's -- as it applies to having something angled up, it would be in perspective, angled up on an angle, right?

Q. And then if you look at the first page of the patent, Exhibit 1001...

(Whereupon Exhibit Number 1001 was shown.)

A. Oh, yeah.

(BY MS. CUTIE)

Q. Do you see it says "Figure 7 is a rear elevation view thereof"?

A. Okay. Yeah.

So it is an elevation view. Just so I -- I can make myself clear, so it's --

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it is an elevation view. We -- a lot of times we will call that an orthographic view, right, when we're doing design work. So the heights are actual, right?

So -- but when there is -- when you're looking at something and there is an angle that's coming upwards, right, and that angle then wraps around a 180-degree turn like it does around a heel, the way that that line will appear, it will appear in a perspective orientation.

So even though it's -- it's a plan view, right, if that line were to be straight, let's say, then the way that that would inform you on Figure 2 would be you would see that angle come up and then it would have a very sharp turn and -- and you would see that. Do you understand? It would be a straight -- it would be straight. You would actually see it go straight.

But because it's going up on an angle, right, as it turns that corner, that

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is a perspective view of that line; and actually, now that I'm looking at it, you asked earlier why the green line appears to be flatter than the red lines.

And if you look at Figure 2, you can see that the angle of which it's -- the green line is going is flatter than, let's say, the -- the bottom red line. The bottom red line is taking more of that heel spring into account, and that's a -- that's a little bit of a steeper angle upwards.

Because of those two differences, you're going to notice a different perspective line as it wraps around that -- that heel section and the green will appear to be flatter.

Now, if -- let's say the green line was -- was perfectly horizontal at the top there and that when you looked at the heel view, it would be perfectly horizontal. It wouldn't have a curve. Does that make sense?

Q. I'm -- you lost me on that last part there. You said --

A. Okay.

Q. -- the green line was perfectly horizontal at the top there --

A. On the -- yeah, the green line was perfectly horizontal in Figure 2.

Q. Uh-huh.

A. Okay. The side view.

Q. So --

A. Right? That would inform the designer that the back view would be perfectly horizontal, right?

But if it has a slight elevation going upwards, it has to get back down to that elevation on the other side, so it's going to -- so in the back it's going to have a visual appearance of a slight curve.

Q. Okay. So with respect to the green line, you're saying on the side view in Figure 2, it's not perfectly horizontal, right?

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A. It's not perfectly horizontal, no.

Q. Okay. And because it's not perfectly horizontal, you're telling me it appears perfectly horizontal in Figure 7?

A. It doesn't appear perfectly horizontal.

Q. Okay.

A. It has -- it has a slight curve to it.

Q. And the green upper rounded layer, you say, has a slight curve to it in Figure 7?

A. It does, yeah. If you would take a ruler from edge to edge, you would see that there's a curve there.

Q. Okay. And my -- my understanding of what you've told me is that because the layers, as you described them in Figure 2, do go upwards at an angle at the heel, when they wrap around the back of the heel, they appear curved in Figure 7 due to the perspective at

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which you're looking at the shoe in Figure 7.

A. The -- due to the perspective of which is happening to those lines as they wrap around the shoe. There's -- there's no way that -- it's a direct back view, it's not a perspective view of the heel, right, of the shoe.

But because the lines are -- are going up on an angle and turning a corner, wrapping around the heel and going back down to the medial side of the shoe, right, from the lateral side, there is going to be an understanding of curvature there because it's going to -- it's -- it's a perspective of an orthotic plan view of the shoe, right?

That's just the way it's going to visually appear. There's no way to get around it. If I drew a straight line across the back, that wouldn't translate to Figure 2.

Q. Okay. So in Figure 7, looking at it, how you interpret it, do the three -- the

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bottom three ridged edge layers have any amount of curvature to them?

A. No. I would say the answer is no to that.

Q. Okay.

A. If I go -- I can give you an example. So let's say if you look at Figure 2 and -- so right now, in a plan view from the back, you're seeing all of the elevations as they are exact to -- to the back of Figure 2. Now, if -- if I were to put my -- do you -- do you have a -- is what you're looking at a digital copy or do you have a paper copy?

Q. I have a paper copy.

A. Okay. On Page 35, the page next to it, do you -- do you have Figure 6?

Q. Yes.

A. Okay.

So you see where the dotted lines are that would indicate, I guess, laces?

Q. Yeah.

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A. Okay. Now, imagine that you're viewing -- actually, probably the -- just the top of the collar right there, the top of the top lace, let's say.

Imagine that that's where your eye is positioned and you're looking across to the left at the back of Figure 2, all right? So now you're looking perpendicular to the angle of those -- those ridge lines. All of a sudden what you're looking at would look like three straight lines or four straight lines if you're including the top rounded layer.

Does that -- do you understand how that would...

Q. I have to admit, I'm not quite following you there in the example, but --

A. Okay. See this?

Q. But just for --

A. See this coffee cup? See how the top of the coffee cup looks round?

Q. Uh-huh.

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A. See that?

Q. No, it does not look curved to me; but setting aside that example, I just want to make sure --

A. How about that? Does it look straight?

Q. -- I just want to make sure we have your position clear on the record with respect to these figures.

A. Okay.

Q. All right. So if I understand everything you've told me, with respect to Figure 7, as drawn in the patent drawing, if we're looking at that, the layers, as you call them, appear to be curved to the eye based on the angle at which this image is drawn; but in your view as an ordinary designer interpreting this drawing in conjunction with the other drawings, figure -- the layers on the heel are not actually curved in the design.

Did I summarize that correctly?

A. Yeah, I would say that's a pretty good summary.

Q. Okay. But you do agree, with respect to Figure 2, that the ridged edge layers and the upper edge layer have some angle to them at the heel going upwards, right?

A. Yes.

MR. SHAPIRO: Object to form.

A. Yeah, there's a -- there's a slight amount of -- of -- we call that heel lift or heel spring, similar to what's happening in the front of the shoe; and that's a functional aspect to the shoe. It provides an easier cadence when you're walking.

(BY MS. CUTIE)

Q. Okay. And it also contributes to the overall visual impression of the midsole, as well?

MR. SHAPIRO: Object to form.

A. It -- minorly.

(BY MS. CUTIE)

Q. Okay. And the last of the four key features that we haven't discussed is the pinched midsection, right?

A. Yeah.

Q. And you say that's a "slightly pinched midsection and wider foot area following the typical shape of a human foot," right?

A. Yes.

Q. And if we look at Page 37 of your declaration, you show that Figure 4 and Figure 5 of D969 --

A. I see them.

Q. And you annotate the -- what you refer to as the "pinched midsection" in blue; is that right?

A. In Figure 4?

Q. In Figure 4, yes.

A. Yes.

Q. Okay. And in Figure 5, what do the blue annotations represent?

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A. They represent the outermost layer of the -- of the midsole, which shows how it's wider towards the toes and slightly wider towards the heel.

Q. Okay. You would agree that the -- the width of the heel is appreciably narrower than the width of the toe?

MR. SHAPIRO: Object to form.

A. Define "toe." There's a lot of tapering that happens from the metatarsal area of the toe to the front of the shoe.

(BY MS. CUTIE)

Q. Do you -- you refer to a toe section, right? And it's not drawn on this figure, but at its widest part of that toe section you identify, you would agree that's appreciably wider than the widest part of the heel section that you identify?

A. So the furthest back portion of the toe area would be wider than the heel portion.

Q. Okay.

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A. The top view and bottom view.
Q. And then the -- the rest of the toe section is kind of a rounded, bulbous shape?
A. Well, the -- the rest of the toe section in the front is unclaimed, but the claimed portion, I would say, sort of curves inward the same way that an anatomical foot would curve inwards.
Q. Would you agree that the -- the difference in the width between the -- that you just mentioned between the toe section and the heel section contributes to the overall visual impression of D969?
A. I mean, yeah, I guess you could say that the -- so the silhouette -- I mean, a lot of times we'll call this the nut shape, right? So the nut shape of the bottom -- yeah, you could have something that looked like a Ronald McDonald shoe, where it was like a clown shoe, right, where it gets super fat, right? That would definitely apply to

it.

So yeah, this applies to the visual impression, but there's not a lot of variation between shoes in this area, right?

Most shoes are going to have this same type of tapering in the arch area of the shoe. The heel is going to be slightly narrower than the widest part of the toe section. It -- the toe section's going to taper towards the front to mimic the -- I mean, shoes are functional, right? So your foot needs to fit properly in a shoe. So that's really the defining feature as to what the shape would be.

Q. So I can appreciate the overall shape, as you point out, is the -- the shape of an anatomical foot and that shoes generally follow the shape of an anatomical foot, right?

A. Generally, yes.

Q. Yeah. But with respect to the ratio of the width of the heel section to the

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toe section, the -- the portions we talked about before, that could be something that contributes to the overall visual appearance separate and apart from the overall anatomical shape?

MR. SHAPIRO: Object to form.

(BY MS. CUTIE)

Q. Right?

A. I know I wrote about this in my declaration, but I'm having a hard time locating it right now. I'll try to give you -- I was going to read to you from my declaration what I said about this, but -- just give me one more minute here.

I can't seem to find the section that I was looking for in my declaration. Oh, is this --

Q. Okay. So if you find it later, you can point it out to me, but --

A. Yeah.

Q. -- for now --

A. So -- all right. I'll try to

give you the answer without reading my declaration.

So what is the question again?

Q. Yeah. So you recall before, we talked about kind of the -- the widest part of the toe region being wider than the widest part of the heel section, right?

A. Yes.

Q. And my question was whether the -- the ratio of those widths is something that would contribute to the overall visual impression of D969.

MR. SHAPIRO: Object to form.

A. I -- the main reason to have those different varying widths is more functional in the way that a shoe would be constructed. Some feet are wider than others.

I know there's a section in here where I talk about New Balance and the fact that New Balance -- that -- you know, has made a market of -- of creating wider shoes.

Oh, you know what? Hold on. I'll open my digital. Okay. Good. Found it.

Okay. Here we go. So start at paragraph 105 of "Overhanging Midsole."

All right. "Depicting the bottom view of the '969 patent requires an overhanging midsole, extending past the bottom of the sole, those proportions would have been obvious to the designer of ordinary skill in the art as they would have been purely functional, rather than ornamental. Making the midsole wider to result in an overhang would have been obvious to accommodate those with wider feet since" -- "since, fit of a shoe (including the midsole) is key in comfort."

And then I -- I address example 1019, 7-8.

(BY MS. CUTIE)

Q. So I'm not asking you about the overhanging midsole. We'll get to that. I'm

asking you about something different.

A. Well, it's -- it's -- they're related, right? That's the width of the -- the width of the heel and the width of the -- of the forefoot, right? So these -- these, in my opinion, are related, right, because if you're going to have something that's a wider shoe, it's going to fit a wider foot, it's going to provide more stability in some cases, right?

I say down here, "Additionally, wider midsoles offer a greater lever arm to the ground reaction force, increasing angular displacement and pronation velocity," right? So...

Q. With the overhanging midsole, you're talking about the width of the midsole relative to the sole, right, the outsole?

A. I'm -- I'm talking about the width of the midsole, right? In the last sentence, I say, "Thus, the width of the midsole is functional."

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Q. Okay. So I'm not talking about the width of a midsole as a whole. I'm talking about the ratio between the width of the toe section to the width of the heel section.

Are you with me?

A. Yeah, that ratio, that --

Q. Yeah.

A. -- that's determined by the last. It's determined by a foot. That -- that's a functional aspect of the shoe.

Q. Okay. You agree that different shoes can have different ratios of those widths and still be the same anatomical foot shape, right?

MR. SHAPIRO: Object to form.

A. Generally the shoe will have an anatomical foot shape, right?

(BY MS. CUTIE)

Q. Yeah.

A. The width of the sole, right, the width of this -- the heel area and the width

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of the forefoot area can still maintain a general shape to an anatomical foot, but those can have varying degrees of width to them based on what the designer is attempting to accomplish with the design of the shoe.

So you could have something that's wider and it might be -- you know, give you more stability in the heel. You might have something that's a narrower forefoot designed for, I don't know, high jumping or something or -- or a track spike, let's say, right? So -- or a soccer cleat is a good example. They keep those pretty narrow in the front.

Q. So setting aside why a designer might choose to vary those -- that ratios -- or those ratios -- the -- excuse me, vary the ratio between the width of the toe section and the width of the heel section, would you agree that the ratio of the toe section to the ratio of the heel section, the width of those contributes to the overall visual

impression of the design?

A. I would say it's -- it's more functional, but sure, if -- if the visual impression is -- you know, what somebody might see, they -- they -- they might notice that a shoe is wider and narrower or, you know, vice versa in the heel and the forefoot.

Q. Yeah.

A. So there -- there could be an extent of which, you know, an ordinary observer would see that the visual impression is somewhat defined by the -- those widths. Perfect example is the clown shoes I mentioned earlier.

Q. The -- you agree that there are other features of the D969 midsole that you don't address in your declaration, right?

MR. SHAPIRO: Object to form.

A. Can you be more specific?

(BY MS. CUTIE)

Q. Well, for example, you talk about

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the heel-toe drop in your background section, right?

A. I talk about heel-to-toe drop, yeah.

Q. You don't address that for D969, though?

MR. SHAPIRO: Object to form.

A. So as far as addressing the heel-to-toe drop, that is an area that I've identified as where those compressions are in the ridges; so if you want to -- and I don't know if you want to translate how I've discussed that the compressions are tapering inwards on that heel-to-toe drop, then -- then I do sort of talk about the heel-to-toe drop.

But specifically heel-to-toe drop, that's not one of my, you know, four things that I've identified.

(BY MS. CUTIE)

Q. Okay. And like, similarly, the toe spring that you mentioned in your

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background section, you don't call that out when you're discussing the D969, right?

MR. SHAPIRO: Object to form.

A. Well, I -- I speak about an upwardly slope towards the toe section with compressed ridge edges, so that -- that part of what I'm discussing in my declaration has to deal with toe spring.

(BY MS. CUTIE)

Q. Okay. So you would equate the upwardly sloped -- slope towards the toe section within compressions as being the toe spring?

A. The toe spring would -- would help to define that, yes.

Q. And -- and you call these four features that you point to key features, right?

A. Yes, I do.

Q. Why do you use that language or that terminology?

A. Those are the best ways to define

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the way that I view this '969 patent.

Q. Does the use of key features imply that there are other features that are present that you just haven't addressed?

MR. SHAPIRO: Object to form.

A. I mean, there could -- there could potentially be some other features that I haven't addressed, but these are the ones that I felt were the most pertinent to the case.

(BY MS. CUTIE)

Q. Okay. All right. So then you have some nine different grounds in your declaration, right?

A. On Page 39?

Q. Yeah. They're listed there on Page 39, right?

A. Yes.

Q. Okay. And the first one -- in Ground 1 you opine that D969 is anticipated by C11947?

A. Yes.

Q. And in Ground 2, you opine that D969 is obvious over C11947?

A. Yes.

Q. And in Ground 2, you don't combine C11947 with any other reference, right?

A. Later on I do combine it with the Nike in Ground 7.

Q. All right. In Ground 2, you're not combining C11947 with any other reference, right?

A. Correct.

Q. C11947 is a YouTube video that shows a Cole Haan shoe, right?

A. Yes.

Q. And the C11947 refers to kind of the model or style number of the shoe?

A. To be honest, I'm not sure how that number came about. If that's -- if -- if that's the model number, then that's the model. I just referred to that as the -- the number that has been identified for this.

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Q. And who identified that number?
A. Counsel.
Q. So Exhibit 1005's a YouTube video, right? That's what shows C114 -- 11947?
A. Yes.
Q. But then in Exhibit 1007, you include excerpts from that video, right?
A. Yes, that's correct.
Q. Who selected those excerpts?
A. I believe counsel had done screenshots of the different pertinent views from the video.
Q. All right. And those are shown in your declaration on pages 43 through 46?
A. I see them as pages 44 through 46 in my declaration.
Q. Ahh. Yeah, yeah, there's a -- just a heading on the table starts on Page 43.
A. Yeah.
Q. Did you have any input in

selecting these excerpts?

A. As far as where the screenshots -- at what point the screenshots were taken? I don't think I specified. I think counsel did a pretty good job of -- of capturing all of the pertinent views.

Q. Why are these the pertinent views?

A. Well, I would say that these views relate very well to the views depicted in the '969 patent.

Q. And is it important to have visuals from the prior art that compare to the seven figures of D969?

MR. SHAPIRO: Object to form.

A. Yeah, based on the patent being a drawing depicting a shoe, then, yeah, I think having -- having the same views or very, very similar views is something that would help me inform whether or not there is a -- you know, any similarities or differences.

(BY MS. CUTIE)

Q. Okay. And these views that are excerpted from the YouTube video, these are taken from several feet away, right?

A. A lot of them look like they're pretty close.

Q. So in your view, is this the appropriate distance at which an ordinary observer would view the C11947?

MR. SHAPIRO: Object to form.

A. Yeah, to the -- I mean, to the point you made earlier, I would say that, you know, this would be an appropriate distance for observing these shoes.

(BY MS. CUTIE)

Q. I want to direct your attention to Page 46 of your declaration, the rear elevation view of C11946 [sic].

A. Okay.

Q. You would agree with me that the -- what you call layers there are not curved; is that right?

MR. SHAPIRO: Object to form.

A. In -- in Figure 7?

(BY MS. CUTIE)

Q. Yeah.

A. Yeah, I -- that's correct.

Q. Why --

A. In fact, the -- the point that I was making to you earlier about having a slightly elevated view is actually depicted in the image to the right on Page 49. If the camera was at ground level, those ridges would appear to have a slight curve to them.

Q. So make sure we're on the same page. Page 46 of your declaration, right?

A. Page -- okay. So I was looking at -- sorry, I was looking at Page 49, which is the -- you know, which says "46" in the middle section there.

Q. Yeah, okay.

A. Okay. So that -- I was -- I was looking at those images there. I thought that's where you were directing me.

Q. It may be, in fact, similar

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images, if not the same, but I was looking at Page 46, in the lower right-hand corner of Page 46, what you've labeled as the rear elevation [sic] view.

A. Of the left corner?

Q. Yeah.

A. Yeah. Yeah.

Q. And so you're saying those do not appear curved because the camera's not at ground level?

A. Yeah, the -- the -- the camera, the view right there, the camera would be perpendicular to the angle of those ridges, kind of similar to the -- to the illustration I gave you earlier of the cup, right, curved edge, not curved edge, so...

Q. Okay. So you're -- and you're -- do you know where the camera was located in taking the -- the picture that's shown in the rear elevation view of C11947?

A. It appears that it is -- I'm going to guess maybe about a five-degree

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angle above the ground surface, roughly, I guess.

Q. What's that based on?

A. My ability to understand if -- if the -- if the camera was at the ground surface, you would -- you would see the ground right -- right there, right at the edge of the camera, right?

But I can tell that that's not the case here. I can tell that the camera is probably -- and again, it's a degree.

So it's -- you know, if it was 12 inches from the back of the shoe, it might be 4 inches off the ground. If it's 6 feet from the back of the shoe, it might be whatever that 5-degree angle would be, right?

So it would be -- but I can just tell by the angle of which this -- this is taken that it is slightly above the ground surface.

Q. Okay. And in the D9 -- D969 -- sorry, excuse me, in Figure 7 of D969, where

we're looking at the rear view, your belief is that the angle at which that image was drawn was the ground level?

A. It's -- it's not a -- I'm trying to describe this to you. It -- it's not a perspective view of the -- the drawing is not a perspective view, right? So it's an orthographic view.

An orthographic view, the -- the way that an orthographic view is done is all of the dimensions are actual, right?

So if that first red line -- if you were to take a ruler to the ground and to where that first red line was and if it was, let's say, 10 millimeters off of the ground, that's exactly where it would be on the orthographic. Okay?

So it -- there is -- there is no camera level, right? There's not -- the camera is not at the -- it's not on the ground. It's not at the top of the collar. It's an orthographic, straight view with

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exact dimensions.

Q. Okay.

A. Right?

Whereas, when you have a photograph -- inherently a photograph is going to have a certain focal point where the lens was, right? And everything will be in perspective from that focal point.

So Figure 7 isn't a perspective; but because those lines are coming up at an angle and wrapping back around, the back view, those lines are in a perspective view.

So if you took the -- if you look at Page 49, okay, and you look at the two images at the top -- one is Figure 7 and the other is the annotated screenshot of the back view of the -- of the Cole Haan example -- right?

If -- if the camera was a few inches away from the shoe and it was directly on the ground, the -- the image that you would see would replicate very closely to

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what is -- you're seeing in Figure 7 because of the perspective.

Q. So your -- your view is that C11947, if placed at the same angle as Figure 7, would have -- would appear curved, as well?

A. Yeah. If you were looking from a lower angle looking up at it, yes, it would appear curved.

Q. Okay. All right. So in your analysis of C11947, you assess whether it has each of the four key features that you identify for D969, right?

A. Yes.

Q. And then you include claim charts that do a feature-by-feature comparison between D969 and C11947, right?

A. Yes.

Q. And then based on that feature-by-feature comparison of those four features, you conclude that C11947 and D969 are substantially the same, and as a result,

D969 is anticipated by C11947, right?

A. That's correct.

Q. Okay. And those are the only four features of C11947 that you considered to arrive at that conclusion, right?

MR. SHAPIRO: Object to form.

A. Those are the four features that I have identified.

(BY MS. CUTIE)

Q. And that you considered?

MR. SHAPIRO: Object to form.

A. I considered -- I considered everything, but these are the -- these are the four features that I felt were pertinent.

(BY MS. CUTIE)

Q. Okay. And you say there's no -- no minor variations between C11947 and D969, right?

MR. SHAPIRO: Object to form.

A. The overall visual impression is the same. Minor differences that I feel an ordinary observer would not notice could be

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there, but in my opinion, an ordinary observer would understand that the overall visual appearance would be the same or substantially similar.

(BY MS. CUTIE)

Q. With respect to Ground 2, you do point out some differences between C11947 and D969, right?

MR. SHAPIRO: Object to form.

A. So as I state in my declaration, "To the extent the patent owner argues that C11947 is materially different, the claim of the '969 patent is obvious over C11947. C11947 is a suitable primary reference as it is visually similar to the '969 patent. C11947 was something in existence and is visually similar to the '969 patent. The scope and content of the C11947, considered with the knowledge of a designer of ordinary skill in the art (as defined in Section VI) is essentially identical to the '969 patent: a shoe midsole with ridge layers,

compressions, a rounded upper layer, and a pinched" mid-design, right?

But then I go on to say, "Differences between the claimed invention and prior art: To the extent that patent owner argues that such features do not exist, in the C11947, comparing the visual appearance of the '969 patent with the prior art, from the perspective of a designer of ordinary skill in the art, the differences between the claimed midsole and the C11947 are an overhanging midsole and a more rounded upper layer."

(BY MS. CUTIE)

Q. Okay. So you do identify differences in Ground 2 between D9 -- '969 and C11947, and those are the overhanging midsole and a more rounded upper layer, right?

MR. SHAPIRO: Object to form.

A. What I just stated.

(BY MS. CUTIE)

Q. Okay. Paragraph 4 -- or paragraph 104 of your declaration, the last sentence, "the differences between the claimed midsole and C11947 are an overhanging midsole and a more rounded upper layer," right?

A. That's what I stated, yes.

Q. Would you agree that those differences would be apparent to an ordinary observer?

MR. SHAPIRO: Object to form.

A. I would say that -- you said an ordinary observer?

(BY MS. CUTIE)

Q. Yes.

A. Oh, I would think that an ordinary observer would not pay close attention to those.

Q. I'll have you turn to Page 47 -- sorry, not Page 47. It's Page 50 of your declaration.

A. Okay.

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Q. You included a side-by-side comparison of Figure 2 of D969 and C11947, right?

A. Yes.

Q. And then you've added those purple annotations identifying the various sections of the midsole?

A. Yes.

Q. It looks to me that the midsection of C11947 is wider or longer, depending on how you want to phrase it, than the midsection of D969. Do you agree?

MR. SHAPIRO: Object to form.

A. You're talking about the -- the annotated parentheses?

(BY MS. CUTIE)

Q. I'm talking about the sections you've identified as the midsection between the two.

A. Right. Very minorly. I would say that you're correct. I actually feel like the annotations on the '969 patent could

have been a little bit longer in that front section, to be honest.

Q. So that's a correction you want to make somewhere?

A. I -- I do feel that the -- where it says compressingly downward [sic], the midsection of the annotated '969 patent -- technically, as I stated earlier, where the heel-to-toe drop ends up at the metatarsal area of the foot, that would be that lowest part of the -- of the dip, let's call it, right?

So you can actually -- there's a pretty significant amount of distance between the -- the forward-most edge of the annotated midsection and where that lowest part of the dip is.

So the -- I think you could actually take the annotations from the C11947 and translate them exactly over to the '969 patent and they would actually line up better as -- as the annotation.

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Q. Okay. So you're -- you're basically saying that the -- the midsection should kind of stop where the ball of the foot is.

A. Yeah.

Q. Okay. Between the toe section and the midsection?

A. Yes.

Q. Okay.

A. So the toe section annotated parentheses would be a little bit shorter and the midsection would be a little bit wider going to the left.

Q. Got it. Okay.

Would you agree that the slope within the midsection of D969 is greater than in C11947?

MR. SHAPIRO: Object to form.

A. The -- yeah, the slope of the midsection appears to be slightly more significant, like a degree. I'd say it's relatively more sloped forward, which would

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be defined by the last of the shoe, as I mentioned earlier.

(BY MS. CUTIE)

Q. You would agree that an ordinary observer would observe the difference in the slopes between the -- the midsection of D969 and C11947?

MR. SHAPIRO: Object to form.

A. I don't believe an ordinary observer would see much difference between the two, as far as an overall visual appearance. Yeah, I -- I don't think most ordinary observers would pay that close attention to the -- the degree of which the slope is.

(BY MS. CUTIE)

Q. You would agree that the degree of which the slope is contributes to the -- what you call the overall wave-like design of D969?

MR. SHAPIRO: Object to form.

A. There is a wave-like design

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that's created by having a slope in the midsection, as can be seen in the C11947 example, as well, that I'm sure an ordinary observer would notice that the -- the front of the shoe is definitely a lower profile than the heel of the shoe. However, the overall visual impression, I don't think they would pay too close attention to the actual degree angle of which that slope is.

(BY MS. CUTIE)

Q. Okay. So you say in paragraph 90 of your declaration, with respect to the downward slope midsection, that "such a minor difference in the sloping angle does not affect the design as a whole," right?

A. Where was that?

Q. It's in paragraph 90, Page 51.

A. Yes, I state that.

Q. Okay. And you say, "for the same reasons as stated in" the above section IX.B.1.c(i), "such a minor difference in the sloping angle does not affect the design as a

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whole," right?

A. Yes, I state that.

Q. Can you show me where in your declaration you provide reasons for why, in your view, the minor difference in sloping angle doesn't affect the design as a whole?

A. Can I show you in my declaration why I say that?

Q. Where you say that.

A. What you just read?

Q. Yeah. You say -- you point to a section in your declaration as providing reasons for why such a minor difference in sloping angle does not affect the design as a whole.

I'm asking you if you could point me to where those reasons are within your declaration.

A. Okay. Hold on a sec.

Okay. So it says "for the same reasons" I -- "as stated" in the above section, IX.B.1.c, Page 47, under "Claim

Chart," it states, "Ridge layers: Three vertically stacked, ridged-edged layers that extend continuously from A heel section till the toe section."

Q. Okay. Is there anywhere in that section that provides a reason for why a minor difference in the sloping angle does not affect the design as a whole?

A. Sorry, I'm thinking about something else here. Quick recap of that question for me --

Q. Yeah.

A. -- or state the question again, I guess, I'm sorry.

Q. Okay. To support your statement that such a minor difference in sloping angle does not affect the design as a whole, you cite to section Roman numeral IX.B.1.c(i).

And I'm asking if there's anywhere in that section that you point to that provides a reason for your statement.

A. Well, it doesn't appear that I --

I give a -- a -- an expanded opinion on that in that section.

Q. Do you give an expanded opinion on that anywhere in your declaration, that you can recall?

A. Well, in that paragraph 90 I do state that a minor difference in the sloping angle does not affect the design as a whole.

Q. Right --

A. I state it there.

Q. You state that, but you don't give reasons for that statement, right?

A. I don't know why I would. I mean, that's my -- that's my opinion, so I don't -- I don't necessarily give a reason why I would state that.

Q. Okay.

A. You know, it's interesting, if you look at the -- the four images on Page 50 that we were looking at earlier, if you -- if you look at the bottom medial side image and you compare that to the '969 patent, in that

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image it does appear to have the same degree of downward slope and pinching.

Q. Okay.

MS. CUTIE: I'm going to strike that as nonresponsive.

MR. SHAPIRO: Counsel, he was answering the question about where the reasons are provided.

MS. CUTIE: No, he was not. I did not ask the question.

MR. SHAPIRO: The question was, (as read) For the record, you state that, but you don't give reasons for that statement, right?

And then he provides where he gives the reasons.

MS. CUTIE: We can agree to disagree, but he pointed to a picture, not any reasons. He's now expanding on something that was not put in his declaration.

MR. SHAPIRO: Okay, then we agree to disagree on it.

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(BY MS. CUTIE)

Q. Okay. I want to direct you back to -- let's look at Page 34 of your declaration. This is going back to Figure 2 in D969.

A. Is that Page 34, you said?

Q. Yeah.

A. Okay.

Q. All right. So in between where you -- the -- the point where the heel section you identified and the midsection meet -- do you see that?

A. Where the heel section and the midsection meet?

Q. Yeah.

A. Yes. In -- in which -- which view?

Q. In your annotation in Figure 2.

A. Figure 2. Oh, I see, figure -- the bottom one's Figure 3, but the -- the description is on the top of the next page.

Q. Yeah. You see there's a citation

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to the top figure, to Figure 2?

A. Yeah.

Q. Okay. All right. So looking at that Figure 2 on Page 34 where your annotations for the heel section and the midsection meet -- see that?

A. Are you talking about the -- the actual purple annotations on the drawing?

Q. Yes.

A. Yes, I see where those meet.

Q. Okay. And then if you go up to the upper layer that you identify to where the -- the midsole meets the upper --

A. Yes.

Q. -- you'd agree that that is a high point in the midsole of D969?

A. It appears to be a -- a high point, yes.

Q. And then the rest of the midsole section to the left of that is lower in height than the -- that high point?

A. Yeah, decreasingly, yes.

Q. And then the rest of the heel section to the right also is lower than that mid-point -- or that high point, rather?

MR. SHAPIRO: Form.

A. I would say very slightly.

(BY MS. CUTIE)

Q. In your opinion, would any downward slope in the midsection -- let me strike that, ask again.

In your opinion, would any amount of downward slope be significant enough to affect the design of the midsole as a whole?

MR. SHAPIRO: Object to form.

A. Yeah, I'm not sure I quite understand the question.

(BY MS. CUTIE)

Q. Right. So you -- you acknowledge that the downward slope in the midsection of D969 is greater than the downward slope of the midsection in C11947, right?

MR. SHAPIRO: Object to form.

A. Well, as the -- as the point that

I just made a second ago that you moved to strike was a -- the -- I -- it actually kind of looks like it's the same on the medial side, but the -- I'd say maybe the lateral side, it's a -- slightly less of a -- of a degree downwards.

(BY MS. CUTIE)

Q. Okay. And on the medial side, you agree that those two side-by-side images that you pointed to are from different perspectives?

A. They look to be -- the -- very, very slight angle on the -- on the image, but it looks to be mostly from the direct side view of the medial side.

Q. So the D969 on the medial side is a straight-on medial -- straight-on elevation view, right?

A. The medial side?

Q. Yeah, the -- the bottom drawing that we're talking about there, D969.

A. I would say it's -- it's close to

being a straight-on medial side view, but it might be a little bit angled. It might be a little bit angled towards the front.

Q. Okay. And then the view we have of C11947 of the medial side is more significantly angled. It -- right?

A. We were just talking about the medial side.

Q. But this time I'm talking about C11947. That medial side view is more significantly angled than the -- the medial view of D969?

A. Sorry, my last answer was in reference to C11947. The -- I didn't -- you -- you -- the question you had asked was regarding the medial side of the '969 patent.

Q. Yeah. So let's start again then.

A. Okay.

Q. I asked, with respect to D969, medial --

A. Yeah.

Q. -- side --

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A. Yeah.
Q. -- whether that is an elevation view that is straight on.
A. Yes, I would say so.
Q. Okay. And for the medial side of C11947, we have a more angled view than what we have in D969, right?
A. I would say there's a -- there's a slight angle, yes.
Q. And it is off the ground in the heel and in -- and in the foot, right?
A. And "in the foot" -- what do you mean? It is off the ground --
Q. The toe. Sorry, the heel and the toe are both off the ground in the view we have of C11947's medial side?
A. Yes, yes. It's slightly elevated off the ground.
Q. Okay. And when you say "slightly," what -- I mean, how many inches do you think it's off the ground there?
A. To me, it appears that the

forefoot of the outsole is probably about a half an inch, and the back of the heel is probably about one and a half inches off the ground.

Q. Okay. And so it's not level?

A. No, it's -- it does not appear to be level.

Q. And you agree that the medial view of D969 is level, right?

A. Yes, it is.

Q. And you -- I assume would agree, based on our subsequent -- or our prior discussion, rather, that the perspective at which you're viewing something or the angle at which you're viewing it can alter how you perceive the image, right?

A. It can, yeah.

MR. SHAPIRO: Object to form.

(BY MS. CUTIE)

Q. Okay. Okay. So going back to where we were before that, on the lateral side -- we'll stick there. The lateral side

comparisons, you would agree that the D969 midsection on the lateral side has a more significant downward slope than the midsection on the lateral side of C11947?

A. There is --

MR. SHAPIRO: Object to form.

A. I would say that there is a slight difference in the -- in the angle in which it -- it -- it goes down.

(BY MS. CUTIE)

Q. Okay. And you said before that you don't think the angle at which it goes down would affect the overall visual impression?

A. That's correct.

Q. Is there any amount of angle or downward slope that you would agree affects the overall visual impression?

MR. SHAPIRO: Object to form, incomplete hypothetical.

A. I think if this was a platform shoe for a woman, let's say, and it had the

same overall design and the rear of the shoe was twice as high as it is now and the front of the shoe is where it's at, that would probably be a -- a significant enough of a difference that an ordinary observer would notice.

(BY MS. CUTIE)

Q. Okay. So you agree at some point the -- a difference in slope -- a downward slope in the midsection could contribute to a difference in overall visual impression, but in this instance you're saying it does not?

A. Yeah, at -- at some point, yes, it could.

Q. What would you, you know, ballpark estimate, say the difference in slope is between the midsections of D969 and C11947?

MR. SHAPIRO: Object to form.

A. I would probably want to get my protractor out, but I haven't actually measured the differences in the degree. To

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me, it's very minimal. It could be maybe 1 degree difference.

(BY MS. CUTIE)

Q. Okay. So you agree, you think a 1 degree difference in slope would not impact the overall visual impression, right?

MR. SHAPIRO: Object to form.

A. Yeah. To an ordinary observer, the overall visual impression that I believe they would have would be the same with what we see here in the '969 and the C11947.

(BY MS. CUTIE)

Q. Okay. If the heel and the toe sections are the same on two different shoes but the -- the midsection has a downward slope, would you agree that the ordinary observer's eyes would be drawn towards the midsection slope when comparing the two shoes?

MR. SHAPIRO: Object to form, incomplete hypothetical.

A. Yeah, I feel that's very

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hypothetical in this case. I haven't formed an opinion on anything like that.

(BY MS. CUTIE)

Q. Okay. You believe that the toe section and the heel sections of D969 and C11947 are substantially similar to an ordinary observer, right?

A. Well, I believe all of the sole is substantially similar, but yes, to answer your question, those two sections are.

Q. Okay. And given that those are, in your view, substantially similar, do you believe that the ordinary observer's eyes would be drawn towards what you have agreed is at least a minor difference in downward slope between the two?

MR. SHAPIRO: Object to form, incomplete hypothetical.

A. My opinion is, is that the ordinary observer would be looking at the shoe and the sole as a whole. So I don't think they would necessarily be drawn to any

one aspect of the design.
(BY MS. CUTIE)
Q. Okay. So given that, why did you annotate the midsole and break it up into toe section, midsection, and heel section?
A. It's a way to break down the -- I mean, I'm having to verbally describe the -- the design of the shoe, right, and the design of the patent and the design of the -- of the prior art that we came across, and, you know, having those -- those are commonly referred to as sections of a shoe, so it helps in identifying what I'm talking about.
Q. Okay. So there's no other way to do it without breaking it into those sections?
A. Yeah. It would be -- I could say there's -- there's a -- a sole of the shoe, and the sole of the shoe is -- yeah, it just wouldn't work. It's -- it's much easier for me to describe the things that I'm describing, the elements of the shoe that

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I've identified as, you know, key, into areas that we can focus on.

Q. So you agree you are breaking the midsole up into areas to focus on?

A. Yes.

Q. Okay. Okay. I want to look at the lateral view of C11947 and looking at the intersection of the -- what you call the heel section and the midsection, right, in your annotations.

A. Uh-huh.

Q. And then drawing a line up to the top of what you've identified as the midsole --

A. Okay.

Q. -- would you agree that point there is perfectly linear with the top contour of the midsole -- midsole to the heel?

A. I would say that there could be slight variation in curvature, but, in general, I would say that it's relatively

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linear from that point to the back of the shoe.

Q. Okay. Where is the slight variation in curvature that you're referring to?

A. Well, it -- it -- it could be noticeable in different views.

Q. Okay. Can you --

A. If you were at a -- to have a slightly higher perspective view, there could be a slight curvature that someone would notice.

Q. Okay. So like looking at Page 48 of your declaration, the top image, there is a -- more of a perspective view?

A. The top image of the C11947?

Q. Yeah. Do you see any curvature in the heel section?

A. Yeah. From -- from this angle, there's -- those lines that I've annotated appear to be relatively flat.

Q. Okay. And of -- a -- including

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not just the lines you annotated, but the -- what you consider the -- the top edge of the midsole?

A. Actually, the -- the top edge of the midsole where you see the -- the heel panel, the leather heel panel, and then the perforations of the brogue style shoe, where those perforations intersect the top of the midsole, I can -- here, let me actually -- if you put a -- if you put a straight edge from the further-most left side of the midsole to the midsection, the highest point of the midsection, you can actually notice a slight curvature downwards. I'm doing it right now.

Q. Okay. So a slight curvature downwards, but it would still be linear, just a linear --

A. Relatively linear, yeah.

Q. Okay.

A. But you asked me how -- where -- where I would be able to see some of that defining curviness, right? And -- and in

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that case, that's where I would find it.

Q. You don't see any kind of dip in the heel section of C11947 like you see in D969?

A. Well, as I just stated in that view, there -- there could be a slight amount of dip. It's a very -- the differences between them are very insignificant, but I wouldn't say that it's perfectly straight. I can't tell. I don't have the shoe in front of me. In this image, there is a slight dip in there.

Could that be caused by the particular, you know, perspective angle of the camera? Maybe. But it -- it's very difficult for me to tell you whether or not there is or is not a -- a slight curvature in that heel area.

Q. Okay. And in the lateral view of C11947 on Page 50, you're not able to identify a dip either?

A. You know, again, in this

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particular perspective of where the camera is, it looks relatively linear, but again, I don't have the shoe in front of me and there's -- you know, I reserve the right to -- it having a slight curvature to it. I'd have to take some measurements and -- and do some further investigation.

Q. You would need the actual shoe to do that?

A. Well, no. I mean, I -- if there were -- if there were other photos that I could -- that were more, I don't know, detailed -- it's hard for me to know for sure, based on the photos, if that has a slight dip to it or not.

Q. Okay.

A. That's what I'm saying.

Q. And in D969, the pictures, you could tell there was a dip, though, right?

A. There's a slight dip downwards in that heel area.

Q. Okay.

A. Yes.
Q. All right. Let's take a break.
A. Okay.
(Break taken from 5:12 p.m. to 5:25 p.m.)
(BY MS. CUTIE)
Q. All right. Mr. Delgatty, can you look at Exhibit 1007 --
A. Okay.
Q. -- on Page 3.
(Whereupon Exhibit Number 1007 was shown.)
A. Okay.
(BY MS. CUTIE)
Q. This is the lateral view of the C11947, right?
A. Yeah.
Q. And this is a -- a leather dress shoe?
MR. SHAPIRO: Objection, form.
A. You know, I remember when these shoes came out. I -- we -- I considered this

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a -- more of a -- like a casual lifestyle shoe.

(BY MS. CUTIE)

Q. Okay.

A. It was kind of, like, a cool brogue athletic shoe.

Q. You consider a leather shoe to be an athletic shoe?

A. When it has an injection-molded EVA sole like this, it definitely has a lot of the performance features that an athletic shoe would have versus a -- you know, a very hard, rigid, dress shoe sole.

Q. Okay. So someone would play sports in this shoe?

A. That's up to them. It depends on how they want to look, but -- I don't think the shoe is intended for sports, per se, but, you know, if you had to run a couple of blocks to grab a quick lunch, it would be a great shoe to do that in down in the Wall Street area.

Q. Okay. It's intended more for a business attire or more of a casual attire?
A. It's that crossover between business and casual, yeah.
Q. What would you call the blue portion?
A. Part of the --
MR. SHAPIRO: Object to form.
(BY MS. CUTIE)
Q. You say there's a blue portion in the image there?
A. Yeah.
Q. What would you call that?
A. I would call that a part of the midsole.
Q. Does it have a separate name?
A. A separate name? Yeah, I would say that's the injection-molded EVA component of the midsole.
Q. Okay. That blue --
A. I believe -- I believe the -- Nike always comes up with these fancy names

for their pretty traditionally standard materials. I believe at the time they were calling this something like Lunarlon or something, but it's essentially injection-molded EVA.

Q. Okay. You would agree that the -- the blue portion has four -- what you would call layers?

A. Well, the blue portion is three layers.

Q. What would you consider the -- the topmost part there?

A. I would consider the sort of the -- the -- if you -- if you look at the way that the layers are -- are stacked, I would say that the little sliver of blue at the top combined with the -- the brown welted edge would be considered that top layer.

Q. Okay. But you don't consider the sliver of blue at the top, as you called it, to be its own layer?

A. Oh, I consider -- it's a -- it's

not a complete layer. It's -- yeah, I would say it's -- it's a -- half a layer, let's call it.

Q. Why do you call it a "half a layer"?

A. Because the part above it completes that layer.

Q. So in your view, the welt and the sliver of blue at the top are combined together to form a layer?

A. That would be the -- the way that it would translate if you were to consider the other three ridged areas below it layers --

Q. And -- and that --

A. -- because the other three ridged -- you know, the other three layers below have a middle point with a -- a slope going inward on the top and a slope going inward on the bottom, right? And that -- that combination creates one layer.

And so if you were to think about

the point where the sliver of the blue meets the bottom of the welt, that would be that sort of middle section as defined by the other three layers.

So in the way that I've explained it in my -- in my declaration, I would say that each one of those comprises a half layer that in combination would make a complete layer.

Q. In that -- the brown welt there, you would agree that's not molded into the blue portion?

A. I -- I'm not 100 percent sure. I don't have the shoe in front of me.

Knowing -- you know, knowing what Cole Haan, the -- you know, the -- the attention that they put towards detail and -- and durability and quality, I'm guessing that might be an actual separate material.

Q. And you're telling me you can't tell from this picture?

A. They could have done an excellent

job of coloring the top of the EVA and creating a molded welt, so I -- I -- I suspect it's real, but I can't tell from the picture exactly if it is or not.

Q. Do you believe an ordinary observer would consider the brown welt to be part of the blue midsole?

MR. SHAPIRO: Object to form.

A. I would believe that the ordinary observer would identify the -- the sole -- the midsole as a -- as a complete, overall visual impression, to include the brown welt material.

(BY MS. CUTIE)

Q. Do you believe the ordinary observer would -- sorry.

Do you believe an ordinary observer would believe that -- well, actually, strike that.

Okay. You say in paragraph 107 of your declaration that C11947's "upper layer is already rounded and appearing softer

and less sharply ridged than the bottom three... layers."

What are you talking to -- about when you're referring to the "upper layer" there?

A. Well, as I indicated earlier, the three bottom layers have a -- a very sharp ridge in the middle of those layers with, you know, a -- a facetted angled edge that goes inward on both the top and bottom of that ridge, whereas that top layer that includes the -- the sliver of the blue and the -- and the brown, what looks to be a welt, doesn't have that same sharp angle that -- that those three ridges do and -- and, thus, as I'm looking at this picture, has a -- a much softer overall visual appearance.

Q. You would agree that the top sliver of the blue is already rounded?

A. Already -- the top sliver of the blue is already what, now?

Q. Rounded.

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A. It looks to be relatively flush with the -- with the brown above it.

Q. So it doesn't round and then become flat so the welt can fit upon it?

A. It appears to me that they are meeting almost at the exact same level.

Q. Okay. You note there's a minor discontinuity between them, right?

A. Very, very small, very minor.

Q. Okay. And you say an ordinary observer would not notice that from several feet away?

A. I don't believe an ordinary observer would pay close attention to something like that, no.

Q. But you agree that an ordinary observer would at least notice the difference in color between the brown welt and the blue?

A. I would think that an ordinary observer would notice the difference between a color.

Q. You would agree that the brown

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welt is not rounded, right?

MR. SHAPIRO: Object to form.

A. I don't know that I would say that. As I'm looking at this image and I -- and I look at the toe area, for instance, it appears that there is a slight rounding over that front edge of the welt.

(BY MS. CUTIE)

Q. You don't think the welt goes -- kind of sits vertically, more of a straight line?

A. I mean, it looks like it could have kind of a soft edge. Maybe it was treated with a -- you know, a sanding process that, you know, knocked the edge off a little bit.

Q. You -- you suggest that an ordinary designer in the art would have found softening the curve of the upper layer of the midsole to be trivial, right?

A. I'm sorry, state that again.

Q. You say that a designer of

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ordinary skill in the art would have found softening of the curve of the upper layer of the midsole to be trivial, right?

A. Yeah.

Q. Okay.

A. Yeah.

Q. You don't provide any examples of a welt in the prior art that had a soft curve -- or a softer curve than what's shown here?

A. I don't, but, I mean, I -- look at the -- another exhibit.

Q. That's fine. I'll withdraw my question.

A. Okay.

Q. Let's assume that the welt is not part of the midsole. Are you with me?

A. Okay.

Q. And that only the blue part is considered the midsole.

Do you understand?

A. Yeah, hypothetically, sure.

Q. Okay. You would agree in that instance, then, that that -- the blue portion of C11947 has a different overall visual impression than D969?

MR. SHAPIRO: Object to form, incomplete hypothetical.

A. I mean, my opinion is that the combination of the -- the welt and that upper slivered part of the blue portion is a combined effort, but if -- if for some reason we weren't to incorporate that welt, I would say that the -- I mean, maybe less so, but I still feel that the overall visual impression to an ordinary observer would be very similar to the '969 patent.

(BY MS. CUTIE)

Q. Okay.

A. You would just have to extend that blue section up a little bit higher than what it is.

Q. Okay. For -- we talked a bit about -- earlier about your opinion on the

overhanging midsole?

A. Yeah.

Q. And the overhanging midsole relates to the width of the midsole relative to the width of the outsole or the bottom sole?

A. Yes, I believe so.

Q. The -- you would agree that the width of this -- the midsole by itself is not the same as the width of the midsole relative to the bottom sole, right?

MR. SHAPIRO: Object to form.

A. Restate, please.

(BY MS. CUTIE)

Q. You would agree that the width of the midsole by itself is not the same thing as the width of the midsole relative to the width of the bottom sole, right?

MR. SHAPIRO: Object to form.

A. The width of the midsole by itself is not the same as the width of the midsole relative to the outsole?

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(BY MS. CUTIE)

Q. Right.

A. I don't quite -- the width of the midsole would be the same in both those cases, but the width of the outsole is narrower.

Q. The -- the -- an overhanging midsole, it's about -- it relates to the width of the midsole relative to the width of the outsole, so it considers both the width of midsole and the width of the outsole, right?

A. Okay, yes.

Q. You agree?

A. Yes.

Q. And if you were modifying only the width, or considering only the width of the midsole -- let me rephrase that or restart that.

If you were considering only the width of the midsole, that's not the same thing as considering the overhang of the

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midsole, right?

A. I suppose if you had, you know, an outsole that was a prescribed width and it had a certain amount of overhang -- that the midsole had a certain amount of overhang over the outsole and then you widened the outsole and you kept -- or -- or, sorry, you widened the midsole and kept the outsole the same width, then the percentage would be probably greater, right, because nothing had changed with the outsole. Is that what you're -- I'm -- I'm --

Q. Well, just changing -- let's see. You make a statement that -- in your declaration that the width of the midsole is functional, right?

A. Yes.

Q. You would agree that the width of the midsole is not the same as an overhanging midsole because the overhanging midsole also accounts for the relative width of the outsole, right?

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MR. SHAPIRO: Object to form.

A. I'm still trying to -- I'm sorry, I'm still trying -- it's been a long day. I'm still trying to understand what you're -- what you're getting at here. The width of the -- you're saying the width of the midsole as compared to the width of the outsole, and then what's the question?

(BY MS. CUTIE)

Q. You make a statement that --

A. Can you tell me where I'm looking?

Q. 105.

A. Paragraph 105?

Q. Yeah, last sentence.

A. Okay. Okay. Where it starts with example 1022?

Q. No, last sentence: "Thus, the width of the midsole is functional."

Do you see that?

A. Oh, okay, yeah, I get you.

Q. Okay. You would agree that the

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width of the midsole by itself is not the same thing as the overhanging midsole because the overhanging midsole also accounts for the relative width of the outsole, right?

A. Okay. All right. I'm following you.

Q. You agree with that?

A. Sure.

Q. Okay. In 105, you make a statement -- it is -- fifth line down, "Making the midsole wider to result in an overhang would have been obvious to accommodate those with wider feet... fit of a shoe (including the midsole) is key to comfort."

Do you see that?

A. Yes.

Q. You -- you don't explain here why you would only change the width of the midsole and not the sole, right?

A. Well, the -- the -- the sole wouldn't necessarily apply -- and by the way,

the -- the sole is not even included in -- you know, it's this -- this -- what's it called?

So I'm not sure why we're talking about the sole, but -- anyways, but the midsole is the part that a foot would fit into, whereas the outsole is -- you could have little tiny rubber pads on the bottom of the midsole and that would form the outsole.

So there isn't really anything that defines whether or not the outsole has anything to do with the width of the foot. It would be the midsole that would define that.

Q. If -- if someone were making a midsole wider to accommodate those with wider feet, it's also possible that an ordinary designer would make the outsole wider, as well?

A. It's possible.

Q. You want to keep the same proportions, potentially?

A. Possibly, or they might decide to create a more interesting look by having a narrower outsole on the bottom.

Q. Okay. And it's also possible to achieve this overhang by keeping the existing size of the midsole and making the outsole smaller, right?

A. Yeah. The distance of the overhang could be -- could be theoretically accomplished by -- by doing what you just said.

Q. Okay. And you cite -- like you mentioned earlier, you cited New Balance as an example of extra wide sizes, right?

A. Yeah.

Q. But you don't explain how New Balance achieves those extra wide sizes, right?

A. I might not explain it. I could tell you how they would.

Q. It's not something you put in your declaration, right?

A. I'm just -- I'm reading the part right here, actually. So, yeah, I guess I don't say how they would make it wider, no.

Q. Okay. And then for Ground 7, you combine C11947 and Nike; is that right?

A. Okay. I got to the page.

Ground 7, the '969 patent is obvious over C11947 and Nike, yes.

Q. Okay. And Nike is an athletic shoe?

A. I believe so.

Q. And the actual Nike reference, is that a European design registration showing that shoe, right?

A. I believe so.

Q. Okay. And this Nike shoe in particular would be considered a court shoe?

MR. SHAPIRO: Object to form, foundation.

(BY MS. CUTIE)

Q. Do you have an opinion one way or another on whether Nike's a court shoe?

A. I want to make sure that I -- I'm not misspeaking from what I've written in my declaration here.

So it starts to talk about being the Nike shoe in Ground 5. I'm not sure if I identify in my declaration if it's a court shoe or not.

It appears -- in my opinion, just looking at it, it would appear to be probably a court shoe.

Q. Okay. And in Ground 7, if you're looking at Page 92 of your declaration, 91 -- this starts on Page 91 -- you suggest that a person -- a designer of ordinary skill in the art would have implemented Nike's overhang --

A. Sorry to interrupt, but where on Page 91 are you reading?

Q. That's just where Ground 7 is. I'm just directing you to where it starts.

A. Oh, that's Page 90?

Q. Yeah, Page 90 there, then into 91. Yeah.

A. All right. I'm following you now.

Q. Okay. So just in general -- and you can use this to reference if you need to, you incorporate from Nike into C11947 the overhanging midsection and the rounded upper layer, right?

MR. SHAPIRO: Object to form.

A. Yes.

(BY MS. CUTIE)

Q. And then there's no other features from Nike that you incorporated into C11947, right?

MR. SHAPIRO: Object to form.

A. Well, I mean, all -- all the aspects of the C11947 are present in the Nike, but as far as the -- anything that differs, I would say that those -- those are the two that I've identified.

(BY MS. CUTIE)

Q. Okay. In paragraph 71 -- sorry, one -- paragraph 175 on Page 92, you state

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that "A designer of ordinary skill in the art would have been aware of Nike and found it obvious to vary the width of the midsection of the midsoles in C11947 or C12652 in view of Nike, because the shoe manufacturer Nike was famous and well-known for making shoes."

Do you see that?

A. Yeah.

Q. So in your opinion, does Nike being famous and well-known for making shoes make whatever features are in a Nike shoe obvious to try in another shoe?

MR. SHAPIRO: Object to form.

A. Well, I think, you know, Nike can try a lot of things. They have a pretty long history of making shoes, so...

(BY MS. CUTIE)

Q. So not quite my question.

You're proposing -- if I understand your combination for Ground 7, you're proposing to take Nike's overhang and incorporate it into C11947, right?

A. Yes.

MR. SHAPIRO: Object to form.

(BY MS. CUTIE)

Q. And you're saying a designer of ordinary skill in the art would have been motivated to do that because Nike was famous and well-known for making shoes, right?

A. Yes.

Q. By that logic -- or can you extend that logic to say that because Nike's famous and well-known for making shoes, it would have been obvious, or a designer of ordinary skill in the art would have been motivated to take any feature that Nike includes in its shoe and implement it into any other shoe?

MR. SHAPIRO: Object to form.

A. I mean, hypothetically, I guess any designer could take anything from Nike and incorporate it into another shoe.

(BY MS. CUTIE)

Q. Okay. All right. In paragraph

175 -- it's a very long paragraph, but looking on Page 93, about halfway down, there's a sentence that starts with "Implementing."

A. I see it.

Q. Says, "Implementing C11947's or C12652's midsole with Nike's overhang would have been beneficial in designing a midsole such that the design would be more prevalent in the overall shoe, and advantageously hides the tread on the sole and increases stability."

Do you see that?

A. Yes.

Q. Why would it be beneficial -- why would it have been beneficial that a midsole design would be more prevalent in the overall shoe?

A. Well, I mean, I further go on to say that it would have been desirable "so that the wave-like design of the midsole could be more noticeable on the shoe," right,

"creating a sensation of depth in the shoe," so...

And I say, "More surface area would be covered by the design. A designer of ordinary skill... would have been motivated to apply" this overhang to C111 -- 11947's or C12652's midsole to create a design that stood out within the greater shoe and, thus, more distinctive to the consumer.

Q. Okay. So in your -- if I'm understanding what you're -- how you're answering that question, Nike's overhang would have been beneficial in designing a midsole shoe because the design would be more prevalent? It would make the wave-like design more prevalent?

A. Yeah, I would say that that could be one of the reasons.

Q. Okay. And then why would Nike's overhang -- why would it be advantageous that Nike's overhang hides the treads on the sole?

A. Could be a number of different

reasons. One might be that it might give a -- sort of a visual impression that the -- the shoe might be kind of hovering over the ground surface. Well, that could be one of the reasons why having the tread tucked in underneath there might be like that.

Q. Okay. And when you say "increases stability" in that sentence, what is that increased stability relative to?

A. I would say relative to the midsole.

Q. What do you mean?

A. Well, if you increase the -- the overhang of the -- of the midsole, right, you're essentially increasing the width, and there could be more lateral support on the foot.

Q. Okay. All right. Paragraph 180 -- sorry, actually paragraph 177, last sentence.

You say, "It would have been obvious to implement an even rounder top

layer as disclosed by Nike when implementing the midsole of C11947 or C12652."

Do you see that?

A. I was trying to find it. It's at the bottom here, so hold on. "It would have been obvious to implement..."

Q. Yeah.

A. Yes.

Q. Are you suggesting that you would somehow modify the leather welt to be rounded, or is it some other way to implement a rounder top later, based on Nike?

MR. SHAPIRO: Object to form.

A. It would have been obvious to create a more rounded top layer of the sole like they have in Nike.

(BY MS. CUTIE)

Q. And how would you do that based on Nike?

A. You would create -- you would create a -- a more rounded top edge. I mean, what do you mean, how would I do that?

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Q. Is it -- you're a designer of shoes. How would you go about creating a more rounded top edge of C11947 in view of Nike?

A. I would round it off, that's it.

Q. Okay. And in paragraph 180, you say that -- there's a sentence that starts with "Furthermore," five lines down.

A. Okay.

Q. "A designer of ordinary skill in the art would be motivated to modify C11947 or C12652 as taught by Nike by removing the leather welt and bonding the midsole directly to the upper to create a more continuous aesthetic, and doing so would reduce a step in the manufacturing process, making the shoe less expensive to produce."

Do you see that?

A. Yes.

Q. So is that your proposed modification for how you would modify C11947 in view of Nike?

MR. SHAPIRO: Object to form.

A. That would -- that would be one way of doing it, yes.

(BY MS. CUTIE)

Q. Okay. Are you proposing any other ways?

A. You could have a -- a welt that had a -- a more rounded top edge to it. You could do that, as well, but this would probably be the better way to do that.

Q. Okay. And you talk about here removing the leather welt and bonding the midsole directly to the upper and -- because that reduces a manufacturing step.

Does that mean, in your view, for C11947 as well as C12652, that you discuss here, that the welts in those are a separate piece of leather? So, in other words, they're not molded into the midsole?

MR. SHAPIRO: Object to form.

A. As I state here, it -- it does state that you could remove the leather welt,

right? So I guess it is identifying that the -- the welt is a different material.

(BY MS. CUTIE)

Q. Okay. In both C11947 and C12652?

A. Yes.

Q. Okay. Are there any other changes you would need to make if you remove the welt to make C11947 more similar to D 19 -- '969 in this proposed --

MR. SHAPIRO: Object to form.

A. I stated earlier, I think, if you were to remove the welt, you would probably take that top layer of the EVA and increase it slightly to have it like -- like proposed the -- by the Nike example, you would have that curve inwards and become, you know, more of a softed -- softer edge.

(BY MS. CUTIE)

Q. Okay. And why would -- why would you do that? Why would you make that top -- well, I don't know -- you called it a top sliver. Why would you make that bigger?

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MR. SHAPIRO: Object to form.

A. Well, you would want to have it curve back into the upper so that it created a more continuous aesthetic.

(BY MS. CUTIE)

Q. And as it exists now in C11947, your view is that the -- the top sliver, as you called it, does not curve into the upper adequately?

MR. SHAPIRO: Object to form.

A. As it is right now, it -- it -- it is a -- combined with the leather welt to create that top layer.

(BY MS. CUTIE)

Q. Yeah, I guess -- sorry. To be more clear, in a scenario where you remove the leather welt and you're left with just the blue portion of the midsole in C11947 --

A. Uh-huh. Okay.

Q. -- your view is that what you're left with there is the top sliver is inadequate to attach to the upper in some

way?

MR. SHAPIRO: Object to form.

A. The -- it could probably be attached to the upper still.

(BY MS. CUTIE)

Q. Okay.

A. Yeah.

Q. All right. I'm going to move on to Grounds 3 and 4 that you have, and this one addresses -- Ground 3, you opine that D969 is anticipated by C12652?

A. Can you direct me to the page you're at, please?

Q. Sure.

So your grounds are listed on Page 39.

A. Okay.

Q. So in Ground 3, you opine that D969 is anticipated by C12652, right?

A. Yes.

Q. And in Ground 4, you opine that D969 is obvious over C12652, right?

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A. Yes.
Q. And in Ground 4, you don't combine C12652 with any other reference, right?
A. Not in Ground 4, no.
Q. Okay. But in Ground 8, you do combine it with Nike, right?
A. Yes.
Q. Okay. C12652, it's a website showing another Cole Haan shoe; is that right?
A. Yes.
Q. And then Exhibit 1011, you've included images from that website, right?
(Whereupon Exhibit Number 1011 was shown.)
(BY MS. CUTIE)
Q. They're also, just for your reference, on Page 60 -- paragraph 114, pages 63 and 64 of your declaration. So whatever's easier for you to look at.
A. Well, that would probably be

easier because these binders are huge.

I'm sorry, what was the page again?

Q. 63 and 64.

A. All right. Okay. I see it.

Q. Okay. So you include five different views, right?

A. Yes.

Q. And you -- you know in paragraph 114 that there is no unobstructed image of the medial side elevation view, right?

A. Yeah, that's -- that's correct.

Q. And there's no image of the bottom view, right?

A. Yes, that's correct.

Q. Okay. But you say, still, if -- these images "are enough for an ordinary observer to have understood the entire product, much like the ordinary observer would have done in looking at limited images of products for online sale," right?

A. Yeah, that's correct.

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Q. And you don't limit the ordinary observer to an online retail customer, concerning the purchase of shoes, right?

A. No. An ordinary observer would be someone that would be shopping for shoes.

Q. Right. Not just online but also in person?

A. Yeah.

Q. And if they're in person, they would be able to inspect all angles of the shoe?

A. I believe they would, yeah.

Q. You would agree that a medial side of a midsole could impact the overall visual impression of the midsole?

MR. SHAPIRO: Object to form.

A. It's possible.

(BY MS. CUTIE)

Q. And you would agree that the medial side view of D969 is part of the claim, right?

A. Yes, I believe it is.

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Q. Okay. And so like -- like we saw with C11947, you analyze each of the four key features that you identified in D969 for C12652, as well, right?

A. Yes, I did.

Q. And then you include claim charts doing a feature-by-feature comparison between D969 and C12652?

A. Yes.

Q. Okay. And then based on that feature-by-feature comparison, of those four key features, you conclude that C12652 and D969 are substantially the same, and as a result, D969 is anticipated by C12652, right?

MR. SHAPIRO: Object to form.

A. I would say that they're anticipated, yes.

(BY MS. CUTIE)

Q. And you -- you arrive at that conclusion but -- based on your feature-by-feature comparison of those four key features?

MR. SHAPIRO: Object to form.

A. Those are the four key features that I've analyzed.

(BY MS. CUTIE)

Q. Okay.

A. I just noticed there is a typo.

Q. Where is that?

A. In the declaration. Page 69 of the images shown there, it says "C11947."

Q. Yeah. And I see that also on Page 71?

A. Yeah.

Q. And that, of course, you mean to be "C12652"?

A. That's correct.

Q. Okay. I want to go to paragraph 135.

A. Okay.

Q. And it's on the -- Page 75, the first full sentence.

You say, "The medial features of C12652 would have been obvious to a designer

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of ordinary skill in the art once having viewed the perspective view image."

Do you see that?

A. Yes.

Q. How so?

A. So in the image that you see here from the rear elevational view, I believe it's Page 70 -- I think there's other pages, also on Page 66 -- you can see a portion of the medial side as well as the -- the lateral side.

And what I'm -- what I'm observing on the medial side is consistent to what the bilateral symmetry of that shoe would be if it was translated from the lateral side to the medial side.

It's -- it's very, very common, almost -- it's very un- -- let's put it this way, it's very uncommon to not continue the symmetry of an article on the medial side from the lateral side.

So just having that image there,

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to me, would -- you know, a designer of ordinary skill would assume that that would be symmetrical.

Q. Okay. So earlier you suggested that -- with C11947 that the lateral and medial sides may not be symmetrical; is that right?

MR. SHAPIRO: Object to form, misstates testimony.

A. Where did I say that?

(BY MS. CUTIE)

Q. You had indicated that the slope on the lateral side was less -- was -- sorry, the slope on the medial side was potentially more similar to D969 than the slope on the lateral side in the midsection?

A. Yeah, I would say the overall visual impression of both were very similar. To -- to the -- you know, to kind of what you -- you pointed out, there was a little bit of an angled perspective that could possibly alter the visual impression, but --

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but, yeah, I would say that the C11947 was generally uniform bilaterally.

Q. You would agree that the Nike shoes are not bilaterally symmetrical?

A. The overall visual impression is that they are.

Q. If you look at the -- the lateral side and the medial side of the Nike shoes, you say those are symmetrical?

A. Not completely. The -- they have very minimal differences, but the overall impression that they both have is that they are symmetrical.

Q. All right. Page 75 of your declaration, you include a top plan view.

You see that?

A. Yes.

Q. And the blue there, what is that intended to indicate?

A. The blue would be the outermost ridge layer of the midsole.

Q. Okay. And you agree in D969 that

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you can see your blue annotations going all the way around except in the disclaimed toe region, but you see it going all the way around the perimeter of D969?

A. I do.

Q. And then in C12652, do you see that in the medial midsection you can't see a portion of the midsole, right?

A. In the -- in the photograph of the C12652?

Q. Yeah, the top plan view.

A. That's correct.

I will state, though, that -- remember that this is a photograph and that portion of the shoe is at a higher elevation than where the sole is and it's not a true orthographic drawing.

So there's a chance that in the perspective, that that inside medial side of the upper could, in fact, block that -- that view.

Q. Oh, and we don't know because we

don't have a medial side view, right?

A. We don't have a clear medial side view.

Q. Yeah.

Could that potentially indicate that the pinching on -- in the midsection of C12652 is more significant than in D969?

A. I guess there's always a possibility.

Q. If we could turn to Page 68 of your --

A. How much time do we have left? I'm sorry. I'm starting to get kind of faded here.

MS. CUTIE: Let's go ahead and take a break.

THE WITNESS: Yeah.

(Break taken from 6:19 p.m. to 6:34 p.m.)

MR. SHAPIRO: While we're waiting, we'll take a same day rough.

THE COURT REPORTER: Regular

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timing on the final, I assume?

MR. SHAPIRO: That's right.

(BY MS. CUTIE)

Q. Okay. Mr. Delgatty, I want to talk to you about your Nike grounds, Grounds 5 and 6.

A. All right.

Q. And in reference to your declaration, that starts on Page 77. So it -- with Nike Ground 5, it's anticipation, and with Ground 6 it's obvious, right?

A. I believe so.

Q. Okay. And you don't combine any other reference with Nike in Ground 6, right?

A. No.

Q. In your analysis of Nike, you assess whether each of the same four key features that you identified for D969 are present, right?

A. Yes.

Q. And then you include claim charts that do a feature-by-feature analysis

comparing -- or a feature-by-feature comparison between D969 and Nike, right?

A. Yes.

Q. And then based on that side-by-side or that feature-by-feature comparison, for those -- of those four key features, you conclude that Nike and D969 are substantially the same, and then as a result, D969 is anticipated by Nike, right?

MR. SHAPIRO: Object to form.

A. I do state that it is anticipated, yes.

(BY MS. CUTIE)

Q. Based on your comparison of those four key features?

MR. SHAPIRO: Objection to form.

A. Yes.

(BY MS. CUTIE)

Q. Okay. And now in paragraph 158 of your declaration on Page 88, you acknowledge that there is at least one

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variation between Nike and D969, and more specifically, you identify the vertical slanted ridge etching through the layers of the midsole on the medial side of Nike.

Do you see that?

A. Yeah.

Q. You call this a minor variation; is that right?

A. Relatively minor. It doesn't affect the overall impression, though.

Q. Okay. I think you discussed this more in paragraph 144 of your declaration. I could have that wrong, too.

Oh, no, in paragraph 144, right, there's a picture there where you call it a -- an "extension outwards."

Do you see that?

A. Yes.

Q. That's what you're referring to as like a slight discontinuity or the vertical slanted ridge?

A. Yes.

Q. Can you look at figure -- or sorry, Exhibit 1012?

(Whereupon Exhibit Number 1012 was shown.)

A. Okay, I'm there.

(BY MS. CUTIE)

Q. Can you tell me which side is the lateral side and which side's the medial side?

A. What pages are we looking at here?

Q. So Exhibit 1012 has all images of the Nike shoe --

A. Yeah.

Q. -- from the Nike reference, and there are -- the -- Page 4 and Page 5 identify -- one's the lateral side, and one's the medial side.

And in your declaration, you identify the discontinuity or the outward extension as being on the medial side, and I'm wondering if that's correct or whether

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it's a mistake.

So if you look at Page 7 of Exhibit 1012, it appears that the discontinuity is on the medial side -- or on the lateral side, excuse me, sorry, lateral side?

A. Okay. So it appears that the -- the image that I'm looking at on Page 3 --

Q. Uh-huh.

A. -- 3 of 9, or sorry -- sorry, Page 4, the bottom right corner of the page, Page 0004.

Do you see that?

Q. Yeah.

A. Okay. It -- it appears that that is the lateral side.

Q. Okay. So when you refer to it being in the medial, the slight discontinuity or the outward extension being on the medial side in your declaration, that should actually refer to the lateral side?

A. Yeah, I believe so.

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Q. Okay. Okay. We're looking at the Nike shoe. You describe this midsole as having a wave-like design, right?

A. Yes.

Q. Can you explain to me how the midsole in the Nike shoe has a wave-like design?

A. Well, if you look at the ridges, they definitely appear to go from wide across the heel section and then they do slope downwardly in the middle -- midsection of the shoe and then they compress in the toe section of the midsole and start to tip upwards.

Q. Which view are you looking at?

A. It's apparent in both the lateral and the -- and the medial. It's a little bit more apparent in the medial, but the lateral does have a -- I was actually looking at the lateral when I described that.

Q. So you describe a downward and compression, and then it goes upward at the

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tip, right?

A. Yes, that's correct.

Q. And then, in your view, that -- the upward at the tip is what creates the wave?

A. There's a downward compression in the midsection that comes gradually down to the toe area, and then it does start to tip up in the -- in the toe area. It's a -- it's a more subtle wave, but there is a wave-like pattern.

Q. So you would agree that the downward slope in the midsection here is minor or slight?

MR. SHAPIRO: Object to form.

A. It's -- I would say it's a -- a slighter slope than the -- the other prior art examples that I've already discussed.

(BY MS. CUTIE)

Q. As compared to the '969?

A. It's a slighter slope than the '969.

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Q. Okay. And you still say, even though it's a slighter slope, it still has the wave-like design, right?

A. Yeah. There's definitely motion to it. It -- it comes kind of down in the heel, sort of up in the midsection, then down in the forefoot, and then back up in the toe section; so it's more subtle, but there is definitely the same overall visual appearance.

Q. And, in your view, an ordinary observer is going to pick up on the slight downward in the heel and then the -- up in the midsection that you pointed to and then down in the forefront, back in the toe section, your...

A. I don't know if an ordinary observer would pay that much attention to what it's doing. I think the overall impression is what they would be looking at.

Q. So, in your view, an ordinary observer is more likely to see this and view

it as a wave-like design as opposed to, say, a wedge-like design?

MR. SHAPIRO: Object to form.

A. I wouldn't say it's a wedge design. I would say that they would find it to be a wave-like design. It just -- more subtly.

(BY MS. CUTIE)

Q. So you mentioned that you believe that it picked back up in the midsection.

A. Yeah. It kind of plateaus.

Q. Where is that?

A. I'm looking at my annotated image on Page 83.

Q. Okay. Where, relative to your annotations, do you see the plateau, as you called it, in the midsection?

A. You can see that it sort of plateaus just a little bit in front of -- well, where -- kind of where -- the parentheses section that's talking about the heel section and the midsection, where those

two sections meet.

It's relatively plateaued there, and then it kind of goes forward a little bit and then at that point in that -- in that midsection it then starts to tip downwards and compress.

Q. Where in the midsection relative to your annotation does it start to tip downward and compress?

A. I would say close to the -- the downward pointed section of the parentheses or the bracket or whatever you want to call that thing.

Q. Uh-huh.

A. That points at "compressing," the word "compressing." Just slightly to the right of that, I would say, is where it starts to go down, kind of where the -- I guess the downward pointed part of that bracket curves upwards -- and I'm talking about the bracket, not -- not the design of the shoe, right?

Q. Right.
A. But that curves upwards and then it turns into, like, the flat portion of that bracket.
Q. Uh-huh.
A. Right at that curve, I would say, would be where I -- where visually I can see that it starts to slope downwards.
Q. Okay. So it goes from a plateau to sloping downwards, right?
A. That's what I see, yes.
Q. Okay. So you would agree that a plateau is not the same thing as an upward trajectory?
A. Well, there's a curvature at the back that's coming from a higher position than it curves to that plateau. So I mean, there's a -- there's a wave-like aesthetic that's happening there.
So in reference to the back, it is curving upwards, right?
If the shoe is doing a little bit

of a wheelie, you would see it curve upwards, but it's not going up on a flat surface but it is creating a wave-like pattern because of the curved -- the upward curved nature in the heel area.

Q. Okay. So I asked: Would you agree that a plateau is not the same thing as an upward trajectory?

A. As it applies to -- in this case where it's horizontal, I wouldn't say it's going upwards.

Q. Okay. So if I understand what you've testified to, if you start at the back of the heel, there's a downward slope --

A. Uh-huh.

Q. -- to the heel that plateaus out, and then a little over midway through the midsection, it starts to slope down again, right?

A. There's a downward slope at the heel that curves to a -- a plateau area that then curves again downwards into a downward

slope towards the toe.

Q. And in the toe, where do you see it going upward?

A. I would say where the word below says "compressed," I would say it starts to go upward, kind of right above this -- between the C and the O in that word "compressed."

Q. Is it going upward, or is it plateauing again?

A. It appears to be going upward at that point.

Q. And you would agree that the extent at which it's going upward or the slope at which it's going upward is less than the slope at which D696 is going upward, right?

A. It's not quite the same level of slope. Yeah, it's a -- it's a little bit less pronounced.

Q. And you would agree that the curvature that you describe within the Nike

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midsole is to a lesser extent than the curvature that's present in the D969 midsole, right?

A. I would say the curvature is less.

Q. In Nike, right?

A. The Nike, yeah; the curvature in the Nike sole would be slightly less than the '969 patent.

Q. Okay. And that would be apparent to an ordinary observer, right?

A. I don't know if the ordinary observer would notice the overall visual impression being that much different. It depends on, I guess, how observant they are.

Q. Where is the highest point in the Nike midsole?

A. It appears that the highest point is the heel, the back of the heel.

Q. And every other point upwards to the toe is lower than that point, right?

A. That's -- that's what I see here

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in the --

Q. Okay.

A. -- image.

Q. I want to ask you about your obviousness opinions with respect to Nike, paragraph 163.

You -- you included an obviousness argument to account for any differences in the -- the sloping or curvature of the midsole; is that right?

A. Yes.

Q. And you say that -- find it here for you, sorry.

You say that -- and there's a sentence that starts with "For instance," about three lines down, "a designer of ordinary skill in the art would have found it obvious to ever so slightly vary the degree of sloping and resulting change of curvature of the layers of the midsole."

Do you see that?

A. Yes.

Q. What do you mean by "ever so slightly vary the degree of sloping"?

A. Well, as I stated earlier, the -- the -- the amount of sloping and curvature in the Nike is -- is not quite as overly present as the '969 patent; so if you were to slightly vary that degree, have it be a little bit more sloped, then it might be a little bit closer.

Q. Closer to the D969?

A. Yeah. It would have been a little bit closer; and you would have, you know, done this to follow the -- the curvature of the last to present a more athletic silhouette shape to the -- to the shoe.

So there would be a number of different reasons why you might do that, but it would -- it would definitely change that -- that degree a little bit.

Q. So the last, you told me, is already built to fit the existing midsole,

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right?

MR. SHAPIRO: Object to form.

A. Lasts are developed -- lasts are developed specifically to midsoles; so depending on the type of shoe that you're wanting to develop, you would choose a last that would fit the needs of that particular -- you know, what you're trying to accomplish.

(BY MS. CUTIE)

Q. Right.

So fitting -- fitting the midsole to the last would not be a reason to change the midsole, right?

A. Well, you would have a -- you would have a different last, and then you would have to make the midsole fit that last. So I'm not sure what you mean by that.

Q. Well, I thought you just told me that the lasts are made to fit the midsole.

A. No. Actually, it's -- it's kind of vice versa, it's the midsoles are made to

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fit the lasts.

Q. Okay. On -- let's see. The next sentence you say, "Such small variations of curvature would have been obvious to a designer of ordinary skill in the art as they would have been purely functional, rather than ornamental, to accommodate different types of feet."

A. Uh-huh.

Q. What are you talking about as "curvature"?

A. So, for instance, if you wanted to make the shoe closer to a performance running shoe, you would choose a running last. A running last would have a higher degree of toe spring that would then translate -- when you take the midsole and you translate that, that would cause that toe area of the midsole to curve upwards more.

You might choose a last that has a larger heel-to-toe drop, which puts the wearer of the shoe in a more prone position

for -- for certain athletic endeavors, and if the last had a -- a larger heel-to-toe drop, there would probably be a more pronounced downward slope in the midsection of the shoe, and that would also translate to more curvature in that mid -- midsole section.

Q. Okay. So the curvature is kind of like the going up and down of the midsole, whether it's at the top or at the bottom?

A. Right.

Q. Okay. And the slope -- when we talk about the slope, that's -- that's related to the curvature? Those are the same thing?

A. Yes.

Q. How do variations in the curvature of the midsole accommodate different feet types?

A. How do the -- sorry, say it again slower.

Q. How do variations in curvature --

A. Okay.

Q. -- of the midsole --
A. Yeah.
Q. -- accommodate different feet types?
A. Someone might have a higher arched foot; and if you have a higher arched foot, you might have a last that accommodates for that, and thus, you would have a midsole that would also fit that last shape and you would have, you know, more curvature in that -- in that arched area, right?
Your width of a -- of a foot could change, and you would have slightly variations on the amount of curvature on the net [sic] shape, the outer -- the outer silhouette of looking down at the shoe. So that's -- yeah, that's what I would say.
Q. And that last line, the -- the foot shape, you're talking about a different curvature than the -- than the curvature we've been talking about, which is kind of like the up and down of the midsole. In that

last example, you're talking about the outer perimeter curvature?

A. Yeah.

MR. SHAPIRO: Object to form.

(BY MS. CUTIE)

Q. Okay. And in paragraph 163, when you say -- use "curvature," which one are you referring to?

A. This -- this would be referring to the curvature -- the up and down curvature in the midsection of the shoe.

Q. Okay. I want to ask you about Ground 9, which relates to Skechers. For Ground 9, you opine that D969 is obvious over the combination of Skechers and Nike, right?

A. That's correct.

Q. And "Skechers" is -- the reference itself is a website showing a Skechers shoe?

A. Correct.

Q. And then you've included in Exhibit 1017 some images taken from the

Skechers website; is that right?

(Whereupon Exhibit Number 1017 was shown.)

A. Yes.

(BY MS. CUTIE)

Q. And you also include those in your declaration, or at least one of them, in -- on Page 101; but if we look at Exhibit 117 -- do you have that in front of you?

A. Did you want me to look at the exhibits or the -- can you reference from my declaration?

Q. Well, yeah. Exhibit 117, there's only two. I -- I think you have to pull that up.

A. Yeah, this is that binder that has the -- that doesn't -- the rings don't close. So give me a second. Okay, I got it.

Okay. I have -- huh. My -- the binder that I have under 117 only has two pages, it's -- so it's only two --

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Q. Can you hold those up? Right.
So there's only two images --
A. Okay.
Q. -- included within 117, right?
A. Yeah.
Q. Okay. So there's only two views that we have of the Skechers shoes?
A. In -- in my exhibit binder, yes.
Q. Yeah.
A. There's more images in my declaration book.
Q. Okay. So if we look at your declaration on Page 98 --
A. Okay.
Q. -- there's no medial side elevation view, right?
A. No, I don't see any.
Q. There's no bottom plan view?
A. I do not see a bottom plan view, no.
Q. Yeah.
So on Page 99, there's something

labeled "bottom plan view," but that doesn't actually show a bottom plan view, right?

A. I wouldn't necessarily call that a bottom plan view, but --

Q. Okay.

A. That would be a very -- heel detail maybe.

Q. There's no top plan view?

A. I don't see any top plan view.

Q. Now, we have something called a front elevation view, but again, that doesn't actually show the front elevation, right?

A. It's more of an overhead -- yeah, it's not really a front elevation.

Q. Right.

And there's no rear elevation view, right?

A. Not a direct back view elevation, no.

Q. Okay. For Skechers, unlike the others, you don't do detailed annotations; is that right?

A. It does not appear so --
Q. Why is that?
A. -- no.
I'm not 100 percent sure why we decided not to annotate them.
Q. Is that a decision you would have made?
A. Again, this is, you know, a collaboration with my attorneys. I didn't specifically say let's not do annotated views of the -- the Skechers prior art, but I --
Q. Okay.
A. -- in retrospect we probably could have and maybe should have.
Q. Okay. With Skechers, you say that -- in paragraph 190, that "The Skechers publication discloses a design of the midsole shoe with most of the features of the D969," right?
A. Yes.
Q. And the feature of your four -- excuse me -- of your four key features, the

feature you do not identify as being present in Skechers is the pinched midsection; is that right?

A. It appears that I have some annotated drawings, but I don't -- I'm not seeing anything where I identify the pinched section.

Q. Yeah. In paragraph 190 -- it starts on Page 99, goes to Page 100 -- you see you list out most of the features that are present in D969?

A. Yeah.

Q. And the one of the four that's missing is the pinched midsection, right?

A. Yeah. In that section, yeah, I don't have -- I haven't identified it.

Q. Right.

And then later you rely on Nike for the pinched midsection; is that right?

A. Oh, yes.

Q. In paragraph 192, you make the statement, the second full paragraph, that

"The scope and content of Skechers, considered with the knowledge of a designer of ordinary skill in the art..." "is the same as the '969 patent: a midsole shoe with ridge layers, compressions, a rounded upper layer, and a pinched midsection."

So there you include the pinched midsection.

A. Okay.

Q. Is that a typo?

A. That's what I was looking for, but it didn't pop out at me; so yeah, it does say that.

Q. Okay. Is that intentional, or is that a typo?

A. It -- it -- there's -- the -- the images -- because I don't really see a medial side, there's -- and a top plan view, I can't define completely if there's a pinched midsection. It might be -- it might be a typo.

Q. Okay. Okay. Looking at

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Exhibit 1017, Page 4...

A. Okay.

Q. I believe you -- you said earlier that this welt or the top layer there is molded into the midsection or the midsole; is that right?

A. It appears so, yes.

MR. SHAPIRO: Object to form.

(BY MS. CUTIE)

Q. In other words, the welt, in your view, is not a separate -- piece of separate material that's been added on top to the -- the white portion?

A. I -- from what I can see in this image, I would suspect that it's part of the molded section of the -- of the midsole.

Q. Okay. You would agree with me that the top layer, what you identify -- I assume, is it -- well, you don't actually annotate in your declaration what you -- you think to be the rounded upper layer.

So could you tell me what you

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consider to be the rounded upper layer in Skechers?

A. Yeah, I -- it would -- it would appear to me that the -- that the rounded upper layer would -- would be primarily the -- the area that's depicted by the welt.

Q. Okay. So you wouldn't include any of the white midsole in the rounded upper layer?

A. Yeah. I think in this case, I -- I think it -- it would be only the part that's painted.

Q. Okay. And looking at Exhibit 1017, Page 4, would you agree that the -- the part that's painted up top isn't rounded, it's more of a scalloped top, almost?

A. It's -- I would say it's less rounded than the other examples.

Q. Would you agree with the -- that it's scalloped?

MR. SHAPIRO: Object to form.

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A. How would you define "scalloped"? I haven't --

(BY MS. CUTIE)

Q. The small up and down through the entire perimeter.

A. I don't know if you call it scalloped or small ridge lines or, you know, a little bit of a -- of a ridge detail.

Q. Okay. So you would agree that that top upper layer has repeated consecutive grooves in it?

A. On the top edge?

Q. Yeah.

A. Yeah.

Q. And a little bit down on the -- on the side?

A. I -- I don't have a -- a very clear view of this, so I don't -- I can't completely tell if it would be visible from a -- from a purely side view, but it could be.

Q. Do you have any sense for what

the purpose of those grooves are?

A. I would -- I'm not sure what would motivate the designer. Maybe -- maybe a -- a small design detail.

Q. Do you think it's intended to give the impression of stitching within a welt?

A. Could be.

Q. Looking at Page 2 of Exhibit 1017, can you identify for me the highest point you see in the midsole?

A. It's a little bit challenging because it of being from an overhead view. It -- if I were to look at this and take into consideration the perspective that I'm looking at it, I would think that the -- the area closest to the midsection at the -- where the -- the heel section is, where the heel section meets the midsection, it -- it appears like that might be the highest point.

Q. Okay. And do you -- does it appear to you that the -- the heel is at the

same height as that, or you just can't tell from this angle?

A. Kind of can't tell from this angle. It looks kinda like the heel might be slightly -- slightly lower than that part where the heel meets the midsection, and it looks like it might come back up a little bit where the back of the heel is.

Q. Okay. You -- where do you think it comes back up?

A. It's hard to tell, but kind of like in the way that you've identified the '969 patent where there's a slight dip in that heel area, it -- it -- it appears that that could be present in this -- in this shoe.

Q. But you can't tell from this angle?

A. Not completely.

Q. Okay.

MS. CUTIE: We can go ahead and take a break.

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A. Okay.

(Break taken from 7:17 p.m. to 7:22 p.m.)

(BY MS. CUTIE)

Q. All right. Mr. Delgatty, can you turn to page, I believe, 50, of your declaration?

A. Okay.

Q. All right. Do you see the lateral view of C11947 there?

A. Yes.

Q. What point would you identify as the highest point along the top edge of the midsole?

And just to be clear, when I say "top edge," I mean the -- the top contour where the midsole meets the upper.

A. Yeah. It looks like it -- it's right around the heel area.

Q. Okay. Then if you could turn to Page 68 of your declaration...

A. Okay.

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Q. Do you see there's a lateral side elevation view of C12652?

A. Yeah.

Q. What would you identify as being the highest point in the midsole along the top contour?

MR. SHAPIRO: Object to form.

A. From this view, I would say that it -- it appears that the highest point would be where the -- if you take the words below, "generally linear," I would say above the -- a -- A and R at the end.

(BY MS. CUTIE)

Q. In the "linear"?

A. At the end of "linear," yeah.

Q. Okay. And from that high point, everything towards the heel goes downward?

A. For the most part, I would say it slightly slopes downward.

Q. Okay. And then -- or -- or it's -- yeah, I see it's either slightly sloped downward or nearly horizontal?

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A. Yeah, I would say that's fair.
Q. And then everything to -- towards the front, towards the toe, slopes downward relative to that high point you identified?
A. Yeah. In the mid -- midsection of the shoe, it -- everything compresses inward and slopes downward, and then it -- and then it curves back up into the toe spring area of the -- of the front of the shoe.
Q. Okay.
MS. CUTIE: All right. I have no further questions.
THE WITNESS: Okay.
MR. SHAPIRO: Give me a second here.

EXAMINATION

(BY MR. SHAPIRO)

Q. Okay. Mr. Delgatty, do you recall a moment ago when you were asked about Page 50 of your declaration? If you could turn there, please.

A. Okay.

Q. And counsel had asked you at what point would you identify as the highest point along the top edge of the midsole.

Do you recall that testimony?

A. Yes.

Q. And I believe your answer was that it's right around the heel area.

Do you recall that?

MS. CUTIE: Objection, form.

A. Yeah, I believe I stated that it was around the heel area.

(BY MR. SHAPIRO)

Q. Is there a specific portion of the heel area that you were referring to?

A. I would -- I would say that it would probably be pretty much dead center where the heel would sit in the shoe.

MR. SHAPIRO: Okay. No further questions.

FURTHER EXAMINATION

(BY MS. CUTIE)

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Q. Just a couple more, Mr. Delgatty. Previously you -- in previous instances, you identified, you know, based on the letters and annotations where you thought the high point was.

A. Yeah.

Q. Could you do that again for C11947?

A. Yeah. I would say that it's probably -- where it says "generally linear in the heel section," I would say it's probably right around where the L and I is in the word "linear."

Q. Okay. And then everything to the -- the left of that slopes downward to some degree? *

A. I think it -- it probably stays fairly nominal to that height.

Q. Through the heel section?

A. Through the back of the --

MR. SHAPIRO: Objection, outside the scope.

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A. From that section backwards, I would say, that's probably all fairly similar in height.

(BY MS. CUTIE)

Q. Okay. Just to restate, because I think we may have been talking about different things, from the high point you had just identified above the I and N in -- or the L and I in "linear" --

A. Yeah.

Q. -- to the right of that, back towards the heel, you said it stays fairly nominal, fairly flat, right?

MR. SHAPIRO: Objection, outside the scope.

A. Yeah. We're looking at a slightly elevated view, so it's hard to completely determine whether or not it goes down or up at that point.

I do know that if -- if I'm looking at it at a slightly elevated view and you start to turn that corner around the heel

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area in that view, it would start to appear to rise high -- higher, as -- in just that perspective view, but -- so I'm taking into account the angle of where the camera is and it looking like it's fairly flat.

I don't know exactly. I would need a perfectly side view shot to determine -- what's the word -- whether or not it actually is, in fact, flat or slightly slopes downward or slightly slopes upwards.

MS. CUTIE: Okay. No further questions.

MR. SHAPIRO: All right. We just reserve the right to read and sign.

MS. CUTIE: Okay.

Can we get an expedited transcript?

THE COURT REPORTER: Yes, ma'am. When do you need it by?

MS. CUTIE: As soon as possible. And I will get those exhibits uploaded by tomorrow.

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Top Glory Trading Group Inc. and DP Dream Pairs, Inc. v. Cole Haan LLC, IPR2025-01395

(Deposition concluded.)

COLE HAAN LLC, EXHIBIT 2037, Page 335
Top Glory Trading Group Inc. and DP Dream Pairs, Inc. v. Cole Haan LLC, IPR2025-01395

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TOP GLORY TRADING GROUP, INC., AND DP DREAM PAIRS, INC.

Petitioner,

V.

COLE HAAN LLC

Patent Owner,

Case No. IPR2025-01395
Patent No. D768,969

Certificate of Shorthand Reporter

I, Annette Peltier, CSR, Texas Certified Realtime Reporter in and for the State of Texas do hereby certify:

That Grant Delgatty, the witness whose deposition is herein before set forth, was duly sworn before the commencement of such deposition and that such deposition was taken before me and is a true record of the testimony given by such witness.

I further certify that the adverse

party, Petitioner, was represented by counsel at the deposition.

I further certify that the deposition of Grant Delgatty occurred via Zoom videoconference on May 7, 2026, commencing at 11:02 to 7:30, Central time.

I further certify that I am not related to any of the parties to this action by blood or marriage, I am not employed by or an attorney to any of the parties to this action, and that I am in no way interested, financially or otherwise, in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of May, 2026.



Annette Peltier, Texas CSR 3253
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