

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

**TOP GLORY TRADING GROUP INC. and
DP DREAM PAIRS INC.,**

Petitioners,

v.

COLE HAAN LLC,

Patent Owner.

Case IPR2025-01395
Patent No. D768,969

**DECLARATION OF MR. GRANT DELGATTY
IN SUPPORT OF PETITIONERS'
REPLY TO PATENT OWNER'S RESPONSE**

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I. INTRODUCTION

1. I am the same Grant Delgatty who provided a declaration in support of Petitioners' Petition for *Inter Partes* Review of U.S. Patent No. D768,969 ("the D'969 Patent") (Ex. 1003 ("Delgatty Declaration" or "my Declaration")). I have been asked by Petitioners to respond to certain assertions raised by Patent Owner Cole Haan LLC in its Patent Owner's Response (Paper 24) and by Mr. Lance Gordon Rake in his supporting declaration (Ex. 2036 ("Rake" or "Rake Declaration")).

2. My experience, qualifications, and compensation are provided in my prior Declaration. Delgatty Declaration, ¶¶1-12, Appendix A. The materials I have considered or relied upon in formulating my opinions in this Reply Declaration are set forth in the attached Appendix A.

3. I understand that, in this proceeding, the Board has instituted *Inter Partes* Review proceedings of claim 1 ("Claim") of the D'969 Patent based on the following grounds set forth in my prior Declaration:

Ground	Reference(s)	Basis
1	C11947	§102
2	C11947	§103
3	C12652	§102
4	C12652	§103
5	Nike	§102
6	Nike	§103
7	C11947 in view of Nike	§103
8	C12652 in view of Nike	§103
9	Skechers in view of Nike	§103

4. In reaching the conclusions set forth in this Reply Declaration, I have relied on the documents and materials cited herein as well as those cited in my prior Declaration. I have also considered the documents and materials cited in the Patent Owner Response and those cited by Mr. Rake. I have also relied on additional materials to rebut certain positions that Mr. Rake has taken.

5. Mr. Rake's opinions generally repeat the arguments made by Patent Owner in the Patent Owner Response and vice versa. I disagree with Mr. Rake's opinions for the same reasons that I disagree with the corresponding assertions in the Patent Owner Response.

6. My opinions are also based upon my education, training, research, knowledge, and personal and professional experience.

7. I hereby declare that all statements made herein are of my own knowledge, made on information that is believed to be true, and made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001. If called to testify as to the truth of the matters stated herein, I could and would testify competently.

8. As my Petition Declaration details, Grounds 1-9 (the "Grounds") anticipate, or at least render obvious, claim 1 ("Claim") of the D'969 Patent. The claimed design and each prior art reference are substantially the same to an Ordinary

Observer and would have been obvious to a designer of ordinary skill in the art. Delgatty Declaration, ¶¶74-205.

9. Patent Owner's Response does not identify any differences that would change the overall visual impression of the claimed design to an Ordinary Observer. When considering the designs, the overall visual impression of the claimed design and the prior art is the same, such that the prior art anticipates and renders obvious the Claim. Nonetheless, Patent Owner alleges there are additional requirements in the Claim that are not in the prior art. These additional requirements are not present in Patent Owner's OriginalGrand shoes, which I understand Patent Owner alleges are covered by the Claim. I also understand that Patent Owner has accused other shoes ("Accused Shoe(s)") in District Court of infringement. I have reviewed the Accused Shoes. The Accused Shoes also do not include these additional requirements.

II. LEVEL OF ORDINARY SKILL IN THE ART

10. In my September 9, 2025 Declaration, I opined that on or before the October 13, 2015 priority date, a designer of ordinary skill in the art relating to the technology of the D'969 Patent "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. Additional graduate education could substitute for professional experience, or significant experience in the field could

substitute for formal education.” Delgatty Declaration, ¶57. Mr. Rake agrees with my understanding of a designer of ordinary skill in the art. Rake, ¶40.

III. CLAIM CONSTRUCTION

A. The Claim’s Overall Visual Impression: Soft, Wave-Like Design of a Midsole

11. Patent Owner and Mr. Rake dispute the characterization in the Delgatty Declaration that the overall visual impression of the D’969 Patent Claim is a soft, wave-like midsole design. Delgatty Declaration, ¶67. For the reasons explained below, I disagree with Patent Owner and Mr. Rake. As explained in the Delgatty Declaration, the visual impression created by the Claim is the product of the rounded upper layer and three ridged-edge layers that compress and slope as they run laterally along the midsole, with the vertically stacked ridged layers slightly pinching in the midsection towards the arch of the foot. Each prior art reference—C11947, C12652, Nike, and Skechers—presents the same soft, wave-like midsole design. Delgatty Declaration, ¶¶97-100, 129-131, 157-159, 191-205.

12. I agree with Patent Owner and Mr. Rake that a detailed verbal description is helpful to point out the various features of the claimed design as they relate to the prior art. Patent Owner Response, 1, 7; Rake, ¶42. Thus, I discuss the design using verbal descriptions, while continuing to focus on the overall visual impression created by the design.

13. As part of my assessment of the overall visual impression, I explained the visual similarities and any relevant differences between the D’969 Patent and the prior art as a whole, while also recognizing that certain features have a more meaningful contribution to the overall visual impression. *See, e.g.,* Delgatty Declaration, ¶¶83-100, ¶¶115-131, ¶¶144-159. In fact, I understand that out of five prior art references, two are Patent Owner’s own products (C11947, C12652) and one is a patent publication from Patent Owner’s former owner, Nike. Ex. 1004, 5 (“Cole Haan LunarGrand”); Ex. 1010 (Cole Haan website); Ex. 1012 (applicant Nike International Ltd.). Regardless of the language assigned to the design, Grounds 1-9 show that the D’969 Patent is anticipated, or at least rendered obvious, by the prior art. Delgatty Declaration, ¶¶77-205.

14. Patent Owner and Mr. Rake focus their challenge on annotations and semantics rather than the actual design. *See* Patent Owner Response, 16-35, 36-86; Rake, ¶¶63-69, 90-121. Both Patent Owner and Mr. Rake challenge my use of “wave-like” instead of “wavy” (Patent Owner Response, 27; Rake, ¶¶94-95) and assert that I “carefully selected ‘soft’ and ‘wave-like’...to make the D’969 Patent design seem more like the prior art.” Patent Owner Response, 27; *see also* Patent Owner Response, 1, 3; Rake, ¶¶120-121. But this is a dispute over terminology, not visual appearance. The same is true for Patent Owner’s and Mr. Rake’s claimed difference between “rolling” curves and a “wave-like design.” My description

accounts for the undulating nature of the midsole. For example, “undulating” is defined as “in a wavy or flowing way.” Ex. 1052. Thus, the “rolling or undulating curves (i.e., peaks and valleys)” described by Patent Owner and Mr. Rake (Patent Owner Response, 10-11; Rake, ¶¶78-81) are already encompassed within my description. And contrary to Mr. Rake’s assertion that he provides no verbal description (Rake, ¶43), “undulating curves” with “peaks and valleys” is a verbal description. The overall visual impression is the same regardless of the descriptor assigned. Delgatty Declaration, ¶¶51-52.

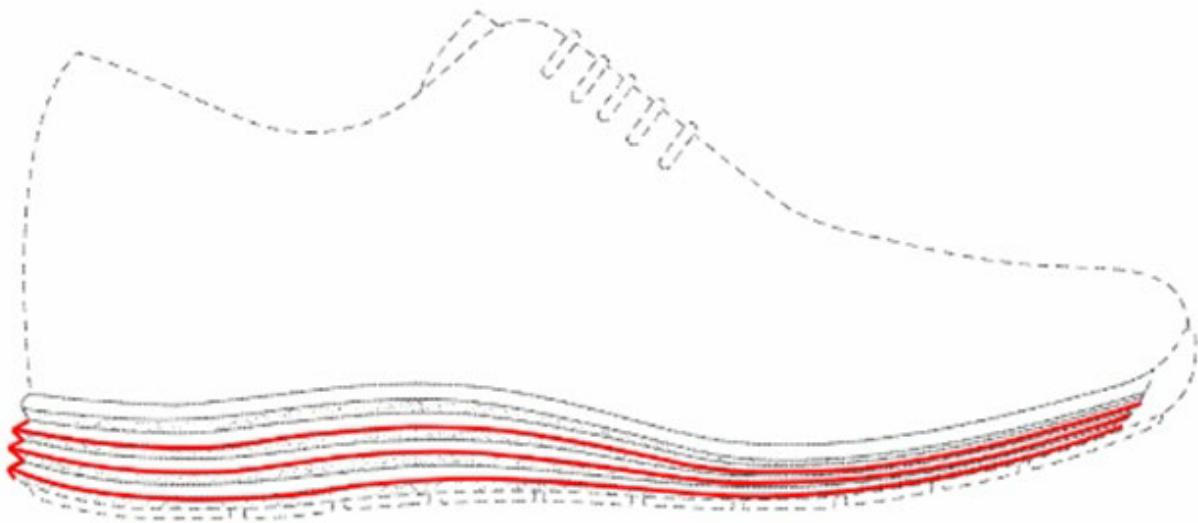


FIG. 3

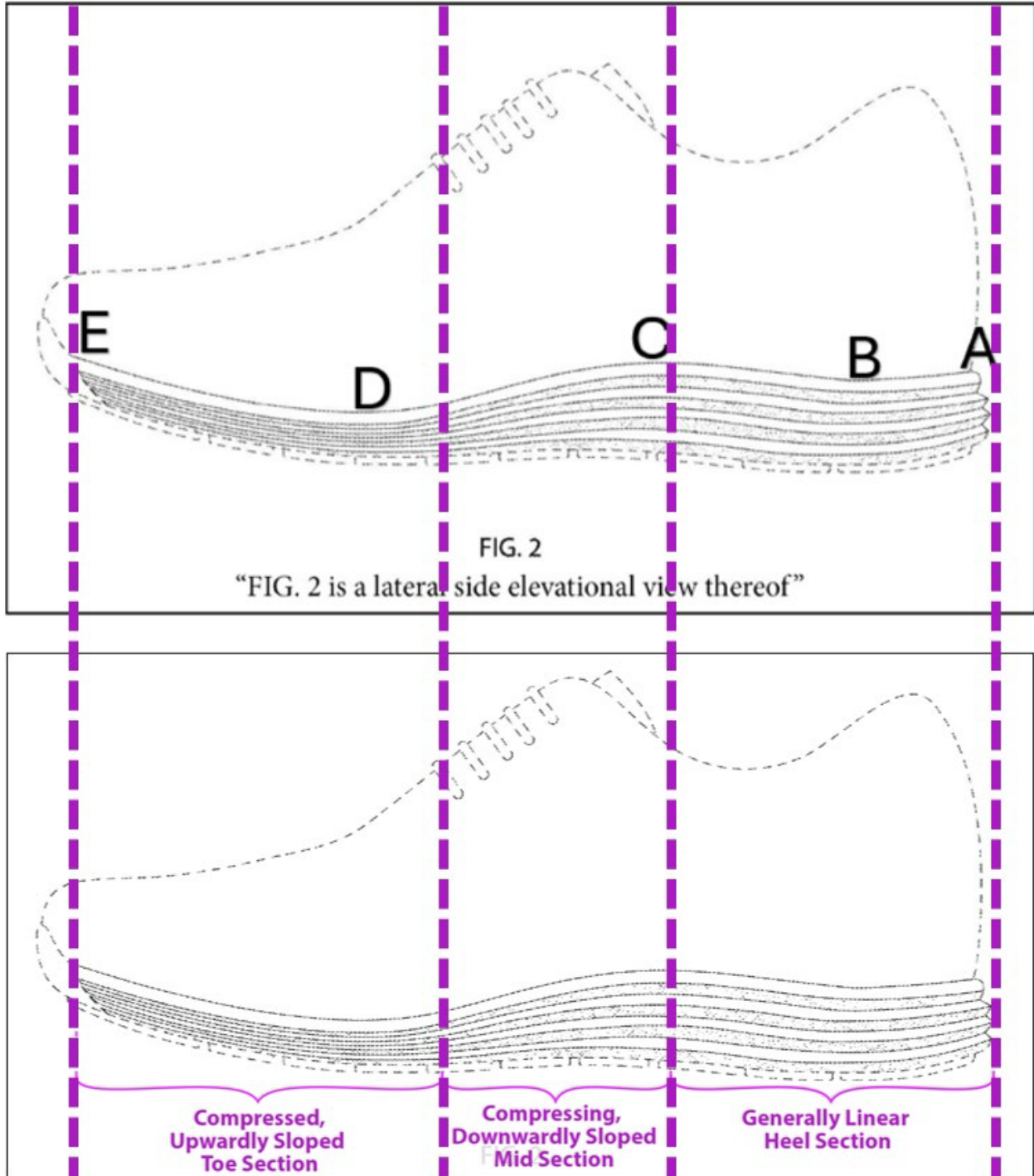
15. Patent Owner’s and Mr. Rake’s argument that the use of “layer” rather than “flute” “inaccurately suggests the D’969 Patent consists of multiple layers ‘resting atop’ one another” (Patent Owner Response, 28; Rake, ¶¶100-101) is another argument about terminology, not visual appearance. These arguments do not

affect the visual similarity between the D'969 Patent and the prior art. Whether we call them “layers” or “flutes,” both of which are verbal descriptions, the visual result is the same: stacked, ridged layers visible on the side of the midsole. *See* Ex. 1053 (Fluting and Reeding, Britannica, <https://web.archive.org/web/20150905191329/https://www.britannica.com/technology/fluting-and-reeding> (archived Sept. 5, 2015) (“surfaces worked into a regular series of (vertical) concave grooves or convex ridges”)). An Ordinary Observer, who is a retail shoe consumer, would not assign significance to the manufacturing process used to create the article. As I previously testified, the overall visual impression is that the design of this midsole has a layered effect, that “ridged-edged layers” is more descriptive than a “flute” and that “ridged edge layers” is more applicable as a visual description. Ex. 2037 (“Delgatty Transcript”), 153:7-16, 161:8-162:7; Delgatty Declaration, ¶59. In my opinion, the visual impression of an Ordinary Observer would be a layered midsole design. Patent Owner’s and Mr. Rake’s flute/layer argument requires a niche manufacturing distinction into a purely ornamental claim, which I understand to be a kind of functional narrowing that design patent claims exclude. Delgatty Declaration, ¶28.

B. Patent Owner’s Four Alleged Design Features Do Not Impact the Overall Visual Impression

16. Despite repeatedly claiming that “Gestalt principles show that people perceive whole objects or figures rather than isolated bits and pieces of sensory

information,” Mr. Rake pivots to isolating four discrete features required by the D’969 Patent. *E.g.*, Rake, ¶¶67, 82-83, 103, 107, 109. And Mr. Rake’s attempt to explain the “wavy” overall visual impression is no different from my “wave-like” description. In fact, his A-E positions line up almost exactly with the sections I identified in my Petition Declaration:



Rake, ¶82; Delgatty Declaration, ¶88. If anything, Mr. Rake’s “annotations,” i.e., the placement of the letters A-E, “distort and modify the D’969 figures...[to] distract from the claimed D’969 design’s overall visual impression as would be perceived

by an ordinary observer.” Rake, ¶92. Placing the “B” and “D” inside the purported “valleys” and the “C” at the alleged peak creates an overaccentuated wave-like shape in violation of Mr. Rake’s application of the Gestalt principles.

17. Both the Patent Owner Response and Mr. Rake’s declaration emphasize that the Claim allegedly requires, and the prior art purportedly lacks, (1) a valley at the heel; (2) a peak at midfoot; (3) a greater speed of the central slope and variable thicknesses; and (4) a monolithic rounded upper (“New Features”). *See, e.g.*, Patent Owner Response, 28-35; Rake, ¶¶99-111. But these alleged differences are minor variations, at best, that do not change the overall visual impression of the shoe. The figures of the D’969 Patent do not supply precise measurements, specific angles, manufacturing descriptions, or functional geometry.

18. An Ordinary Observer, a retail shoe consumer, does not measure inflection depths, curvature radii, slope, or thickness variations. *E.g.*, Ex. 1035, 4-5 (2022 eye movement study for sneaker design preferences demonstrating that consumers spent much more time, on average, fixated on elements other than the midsole). The Ordinary Observer instead perceives the overall visual impression and asks whether it creates the same impression as the D’969 Patent. Delgatty Declaration, ¶59. Even with more modern tools used in online shopping where consumers can zoom into images, an Ordinary Observer would not give attention to these characteristics when purchasing a shoe.

1. Patent Owner's OriginalGrand Assertions Contradict its Four Alleged Design Features

19. Patent Owner's and Mr. Rake's newfound distinguishing features are also undermined by the products that Patent Owner says are covered by the D'969 Patent. As I discuss below, Patent Owner states that its "OriginalGrand" shoes are protected by the D'969 Patent. I understand that, by making this assertion, Patent Owner is asserting that the OriginalGrand shoes include all the claimed features of the D'969 Patent. Put differently, I understand from counsel that placing a patent number on a product is an admission by the marking party that the marked product falls within the scope of the patent claims. I also understand that the act of marking is akin to a corporate officer admitting in a letter or at a deposition that the company's product infringes a patent.

20. I understand that Patent Owner claims that its OriginalGrand products practice the D'969 Patent. Ex. 2008 at 3. For example, according to Patent Owner's patent list on its website, the "OriginalGrand" practices the D'969 Patent. *Id.* Indeed, Patent Owner's patent list distinguishes between patents covering a whole product line, such as the OriginalGrand, and products that cover a specific set of models within the product line (e.g., "OriginalGrand Ultra Wingtip Oxford"). *Id.* For the D'969 Patent, Patent Owner identifies the full "OriginalGrand" line as practicing the D'969. *Id.* Patent Owner describes the OriginalGrand on its "About Us" webpage, using images of two OriginalGrand shoes, as depicted below:



Ex. 2014, 2. Patent Owner’s Chief Financial Officer declared as part of this proceeding that “[s]ince November 2015, Cole Haan has launched several shoes with the midsole design claimed in U.S. Patent No. D768,969.” Ex. 2009. Notably, the Chief Financial Officer selectively identifies only a handful of example shoes, all of which relate to the OriginalGrand “Perforated” sub-line. *Id.* at 7-8. But Patent Owner’s own website tells a different story, stating that the “OriginalGrand Perforated[’s]” shoe sole is separately covered by a different design patent, U.S.

Patent No. D756,620. Ex. 2012 at 2. In other words, Patent Owner’s patent marking page distinguishes the D’969 Patent as covering the entire OriginalGrand line, while the narrow subset of OriginalGrand “Perforated” models cited by the Chief Financial Officer are separately covered by D756,620. *Id.* Patent Owner’s selective reliance on only the “Perforated” models in its declaration—while its own website confirms that the D’969 Patent extends to additional OriginalGrand shoes beyond those cherry-picked examples—demonstrates the full scope of products Patent Owner itself believes practice the D’969 Patent.

21. This is further confirmed by Mr. Linko’s Declaration, which states that Cole Haan launched shoes with the claimed midsole design beginning in November 2015. However, Patent Owner’s OriginalGrand website captured as of December 1, 2015 includes numerous products with midsoles similar to the OriginalGrand shoe depicted above and does not include any Perforated models. *See* Ex. 1054. The same is true a few months later in March 2016. *See* Ex. 1055.

22. As explained below, Patent Owner’s OriginalGrand shoes lack the four key features Patent Owner and Mr. Rake now identify as claim-defining. “The Cole Haan OriginalGrand’s design is based on the 2011 Cole Haan LunarGrand; the latter was inspired by the Nike Lunaracer.” *E.g.*, Ex. 1036. Two of the primary prior art references (C11947, C12652) originate from Patent Owner’s LunarGrand line of shoes. *E.g.*, Ex. 1004 at 5 (“Cole Haan LunarGrand LongWing – Camello”); Ex.

1010 at 5 (“LunarGrand Long Wingtip Style #C12652”). The LunarGrand received its name from the combination of Cole Haan’s upper with Nike’s Lunarlon sole. *E.g.*, Ex. 1037 (interview with Phil Russo, VP of Design at Cole Haan, discussing Cole Haan LunarGrand: “For the development of the LunarGrand, we combined the insights, experience and expertise of both teams to harness this Nike-invented ultra-lightweight cushioning system.”); Ex. 1038 (“Taking Nike’s lightweight Lunarlon cushioning system and fusing it into their traditional shoe construction process, Cole Haan has created a wingtip that merges classic men’s footwear with the needs of a modern shoe.”). The third prior art reference (Nike) is a design from Patent Owner’s former owner that appears related to its Lunar shoes, which also include a Lunarlon sole. *E.g.*, Ex. 1012; Ex. 1039 (depicting a Nike LunaRacer+ 3 – Vivid Blue – Volt – Black design, with a Lunarlon sole). Meanwhile, the fourth primary reference, Skechers, is similar to the LunarGrands. *E.g.*, Ex. 1016 (describing the Skechers shoe as “near identical match” to the LunarGrand). Collectively, the C11947, C12652, Nike, and Skechers as well as Patent Owner’s patent-practicing OriginalGrand shoes originate from the same body of work. *E.g.*, Ex. 2014 (Cole Haan describing the OriginalGrand as “bringing forth *our original hybrid dress shoe...it was inspired by the way astronauts walk weightlessly on the moon*” (emphasis added)); Ex. 1040 (describing the origin of Nike Lunarlon as originating “from images of astronauts walking on the moon.”).

23. As shown below, Patent Owner's claimed patent-practicing OriginalGrand shoes lack the New Features Patent Owner and Mr. Rake identify. *Cf.* Patent Owner Response, 12-13, 28; Rake, ¶¶81-83, 100-101.

OriginalGrand Wingtip Oxford (Style #W01559) (Exs. 1041-42)



Men's OriginalGrand Remastered Wingtip Oxfords (Ex. 1048)



Men's OriginalGrand Remastered Waterproof Chukka Boots (Ex. 1049)



Men's OriginalGrand Remastered Wingtip Oxfords (Ex. 1050)

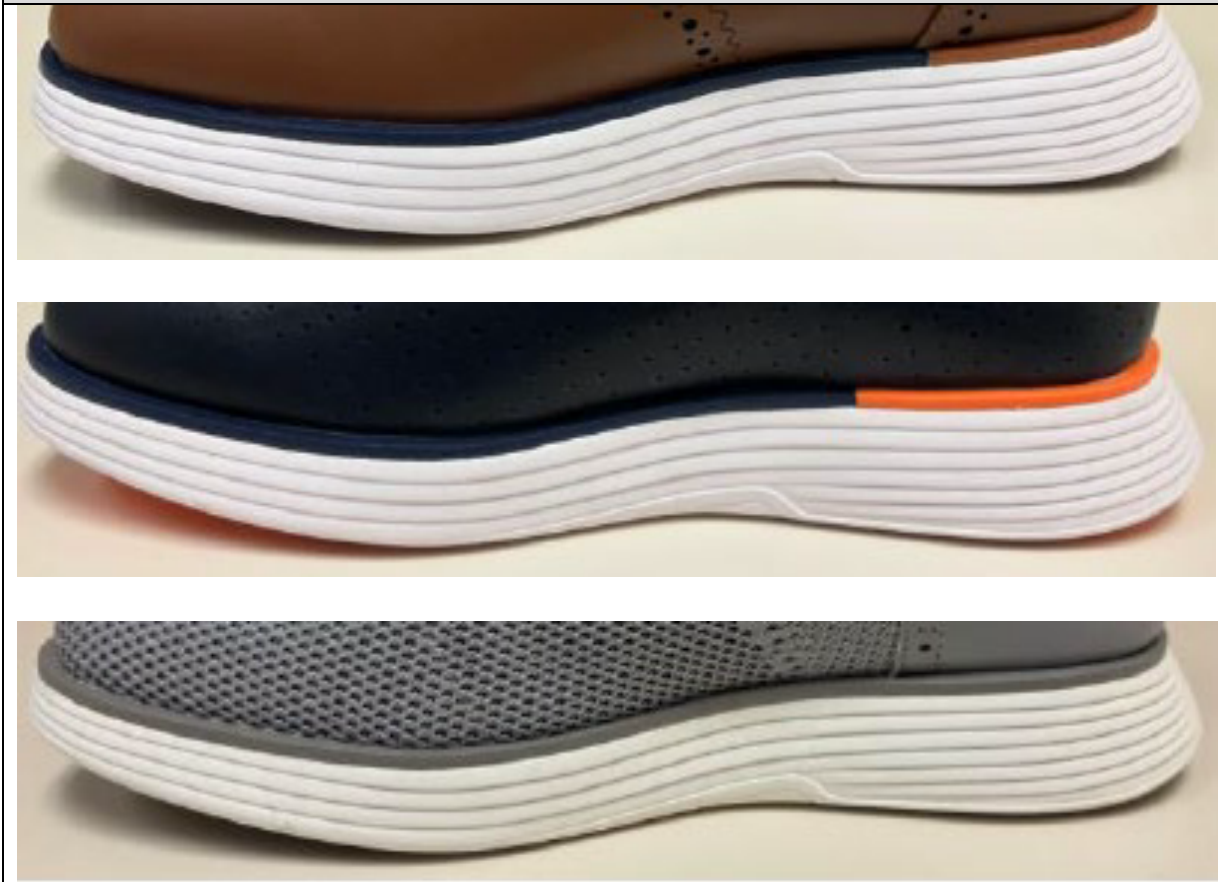


2. Patent Owner's District Court Assertions Contradict its Four Alleged Design Features

24. As I explained in my prior declaration, I have reviewed Patent Owner's District Court infringement allegations, and I understand that Patent Owner has

asserted that certain of Petitioners' shoes allegedly infringe the D'969. *E.g.*, Delgatty Declaration, ¶¶92, 123; Ex. 1018, 25-33. Specifically, I understand that Patent Owner has asserted that the [MaxFlex SuiteCraft] Men's Casual Wingtip Dress Sneakers, [MaxFlex SuiteCraft-] Men's Business Casual Oxford Sneakers, and [MaxFlex SuiteCraft+] Men's Smart Casual Knit Oxford Shoes infringe the D'969. Ex. 1018, 25-33. Additionally, I understand in response to Petitioners' motion to dismiss Patent Owner's claim, Patent Owner stated that "[o]nce the products are compared side-by-side as a whole, it is apparent that the products are substantially similar." Ex. 2023 at 32 (referring to "side-by-side comparisons of the '969 patent and the Accused Products" in Patent Owner's complaint). Lateral views of the Accused Shoes are depicted below:

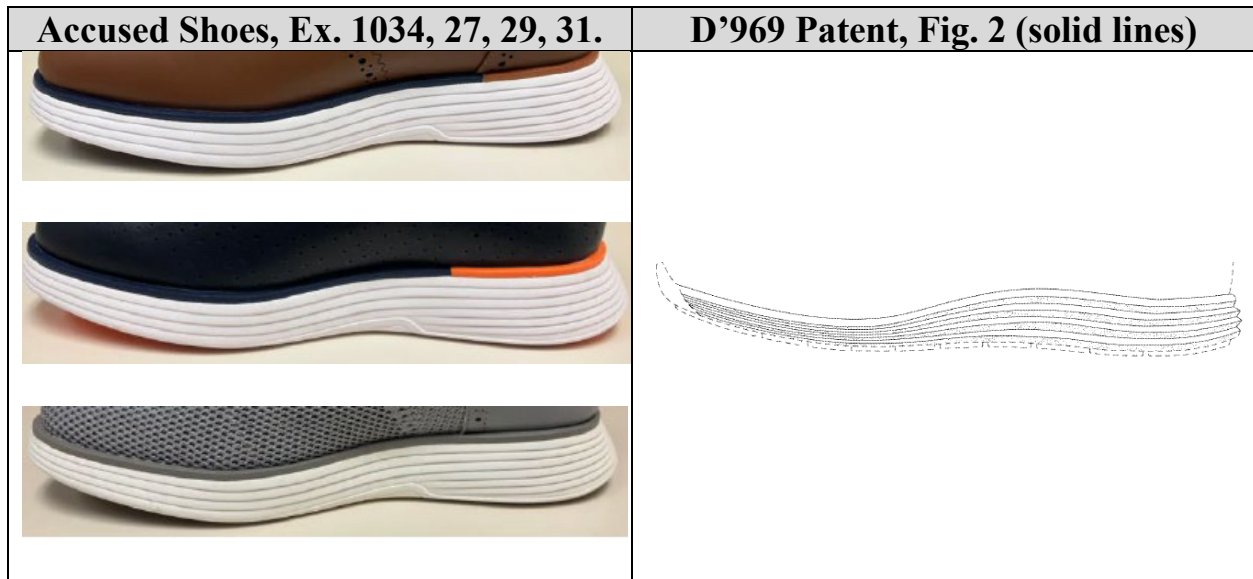
Accused Shoes, Ex. 1034, 27, 29, 31.



25. I understand that the Ordinary Observer Test is the sole test for both anticipation and infringement, and 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 supposing it to be the other. Delgatty Declaration, ¶29. I understand that the sole test for infringement is the same as the test for anticipation. Under this shared anticipation/infringement Ordinary Observer standard, I understand that claim scope cannot expand to capture Patent Owner’s marked

products and the Accused Shoes in District Court while simultaneously contracting to exclude prior art.

26. The Accused Shoes lack the very features that Patent Owner and Mr. Rake now claim are visually significant in the D’969 Patent. The Accused Shoes do not exhibit the heel “valley,” midfoot “peak,” slope-and-thickness characteristics, or monolithic rounded upper layer that Patent Owner and Mr. Rake now identify as claim-defining.¹ See the comparison below:



27. The Grounds I identified in my Declaration supporting the Petition show that the D’969 Patent is anticipated, or at least obvious. As discussed in further detail below, both the OriginalGrand shoes that Patent Owner asserts practice the

¹ Despite raising Patent Owner’s district court infringement claims in my Declaration (*e.g.*, Delgatty Declaration, ¶92), Mr. Rake never addressed or otherwise responded to this discrepancy in his declaration.

D'969 patent and Patent Owner's District Court infringement assertions are inconsistent with Patent Owner's and Mr. Rake's positions in this proceeding and confirm that Patent Owner's and Mr. Rake's proposed claim constructions are incorrect.

3. New Design Feature 1: Heel Valley

28. Contrary to Mr. Rake's opinion that the heel portion includes a claim-defining "valley" (*see* Rake, ¶¶102-105), the D'969 Patent figures depict, at most, an imperceptible inflection at the heel. Patent Owner's and Mr. Rake's attempt to elevate this negligible contour into a distinguishing feature finds no support in the figures and improperly asks to read precise geometric features into an ornamental design claim.

29. Such an argument would require assessing whether the prior art's heel profile geometry is sufficiently valley-like at precisely the right location, which is the kind of measurement an Ordinary Observer does not perform. Delgatty Declaration, ¶59; Patent Owner Response, 8. An Ordinary Observer is a retail shoe consumer who does not measure inflection depths or curvature radii. Instead, the Ordinary Observer perceives the overall visual impression and asks whether it creates the same impression as the D'969 Patent. An Ordinary Observer would neither notice nor assign significance to a negligible contour variation that Patent Owner and Mr. Rake emphasize. Delgatty Declaration, ¶59. To the extent any slight

downward slope exists, it merely reinforces the overall wave-like flow of the midsole. This wave-like design is equally present in each prior art reference. Delgatty Declaration, ¶90 (“a minor difference in sloping angle does not affect the design as a whole”).

30. ***The OriginalGrand Lacks A Heel Valley:*** As depicted below, the OriginalGrand has no discernible heel valley:



Ex. 1041.

31. ***The Accused Shoes Further Confirm My Position:*** I have reviewed the Accused Shoes. The Accused Shoes contain no curvature in the heel section. Thus, under Patent Owner’s infringement theory, any “heel valley” is not a defining feature impacting the overall visual impression:



Ex. 1034, 29.

4. New Design Feature 2: Peak at Midfoot

32. Patent Owner and Mr. Rake assert that one of the key features of the D’969 Patent is a peak at the midfoot that “together with the undulating contours and associated changes in thickness...create rolling curves (like a wave) that contribute to the wavy overall visual impression of the claimed D’969 design.”

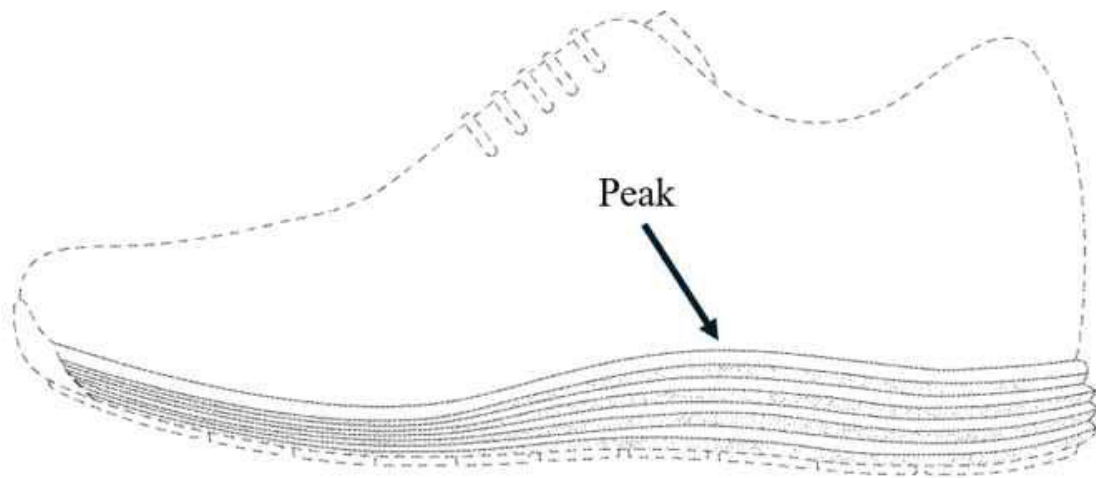


FIG. 2

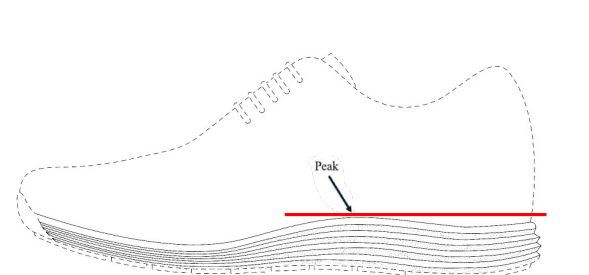
Patent Owner Response, 31 (Patent Owner's annotated D'969 Patent Fig. 2); Rake, ¶¶107-108. As explained below, I disagree with Mr. Rake's placing undue weight on the location of the curve's apex.

33. I described the compression feature as "a generally linear heel section, a downwardly sloped midsection in which the ridged edges are compressed (i.e., decrease in height), and an upwardly sloped section towards the toe section with compressed ridged edges." Delgatty Declaration, ¶¶62-66. Patent Owner and Mr. Rake argue that this description "fails to acknowledge the prominent peak at the midfoot." Patent Owner Response, 30; Rake, ¶¶106-108. But Patent Owner's and Mr. Rake's position places undue weight on the precise location of the curve's apex. The anatomical foot naturally creates a peak at the midfoot and a transition from the heel to the downwardly sloped midsection:



Ex. 1056. This arch, called the lateral or external longitudinal arch, plays a critical role in shock absorption and propulsion while walking. Ex. 1043. This arch is inherently a functional characteristic of the anatomical foot that the arch on footwear serves to support. Ex. 1044 (explaining, for example, how the arch in footwear limits excessive inward rolling of the foot to offload tension on tendons). I understand that functional characteristics are not entitled to patentable weight in a design patent claim.

34. ***The OriginalGrand Lacks A Midfoot Peak:*** As depicted below, the OriginalGrand has no midfoot peak; instead, the highest point is located at the rear of the shoe:

OriginalGrand	D'969 Patent
	 <p>FIG. 2</p>

Ex. 1041.

35. *The Accused Shoes Further Confirm My Position:* I have reviewed the Accused Shoes. The Accused Shoes' peak is at the rearmost portion of the sole, not at the midfoot. Thus, under Patent Owner's infringement theory, a midfoot peak is not a defining feature impacting the overall visual impression:



Ex. 1034, 27.

5. New Design Feature 3: Speed of Central Slope / Change in Thickness

36. Patent Owner and Mr. Rake describe slope and thickness metrics. These are, at best, a forensic observer's measurements. Patent Owner Response, 32-33; Rake, ¶¶109-111. An Ordinary Observer purchasing shoes does not perform a forensic analysis like this. I understand that the Ordinary Observer test is deliberately non-technical. Thus, an Ordinary Observer would not measure slope or minor thickness variations. And the alleged slope and thickness are both encompassed in the "wave" design because waves are not uniform, but vary in slope and width. As I previously explained, to the extent any minor difference in sloping angle is even noticed by an Ordinary Observer, such a minor difference in sloping angle does not affect the design as a whole. Delgatty Declaration, ¶¶121, 150; *see also* Delgatty Declaration, ¶¶63-64.

37. As I described in my Declaration supporting the Petition, the contour of the midsole is functional and dictated by the shape of the anatomical foot. Delgatty Declaration, ¶¶163-64. The main reason to have varying widths is functional. *See* Delgatty Transcript, 204:14-18. Some feet are wider than others. Some feet are thinner than others. And many shoes have heels to accommodate the arched shape of the foot, visually translating as varying thickness at the heel versus the arch.

38. *The OriginalGrand Includes Sloping and Changes in Thickness:* As depicted below, the OriginalGrand's midsole slopes downward to match the shape of an anatomical foot and compresses as part of that sloping.



Ex. 1041.

39. *The Accused Shoes Further Confirm My Position:* I have reviewed the Accused Shoes. The Accused Shoes exhibit at most a minimal downward slope and no compression. Thus, under Patent Owner's infringement theory, sloping angle is not a defining feature impacting the overall visual impression:



Ex. 1034, 27.

40. My Declaration in support of the Petition raised this inconsistency and Patent Owner has not addressed it. Paper 20, at 11. Delgatty Declaration, ¶¶91-94, 125-28, 154-56.

6. New Design Feature 4: Monolithic Rounded Upper Layer

41. Patent Owner and Mr. Rake state that the rounded upper must be monolithic, uniform in color and material, and seamless. Patent Owner Response, 11, 18, 28-31, 83-85; Rake, ¶¶87, 100-101. These requirements impose a level of precision that is incompatible with the Ordinary Observer. As previously explained, an “Ordinary Observer would view a midsole from several feet away (not under high magnification) while considering a shoe for purchase, and any minor differences in the upper layer would be insubstantial from this viewpoint.” Delgatty Declaration,

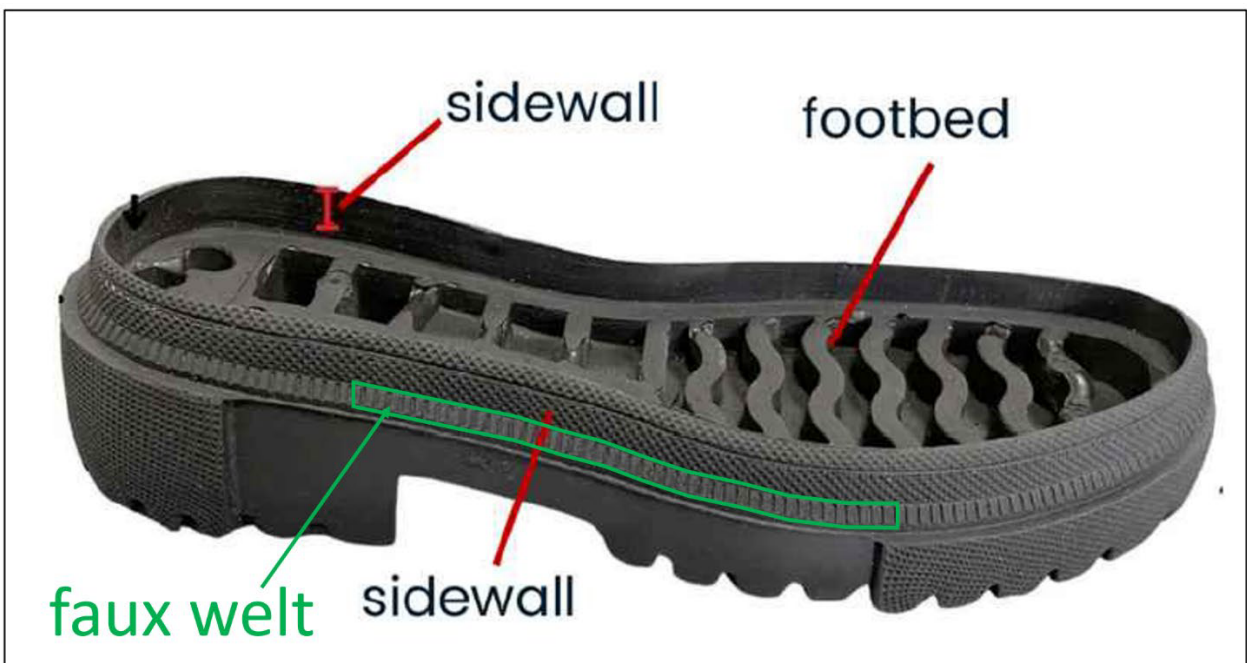
¶123. Even if an Ordinary Observer may zoom in to images online, the wave-like, layered, compressing midsole impression remains at any viewing distance. Delgatty Transcript, 62:1-21; 63:17-66:9; Patent Owner Response, 48. The dominant visual impression is a visually distinct top boundary above the three ridged lower layers. Delgatty Declaration, ¶¶92, 123; Delgatty Transcript, 145:7-17.

42. I also understand that the D’969 Patent claims an ornamental appearance only and not any color or material composition with respect to that ornamental appearance. And while I understand that the Claim is directed to an article of manufacture, the midsole is an article of manufacture even if multiple materials are used to make that article. Therefore, according to the Claim, a welt may be leather while the midsole is rubber. This is not a difference an Ordinary Observer would parse out. Delgatty Declaration, ¶¶59, 108.

43. The welt is part of the midsole’s visual presentation. *See* Patent Owner Response, 45 (recognizing that I stated that “[t]he welt can be attached to either the top perimeter edge of an outsole or the midsole.” (citing Delgatty Transcript, 106:1-18)); *see also* Delgatty Transcript, 122:19-20; *see* Patent Owner Response, 43 (citing Rake, ¶134 (stating without more that “a leather welt...is a separate component of the shoe and is definitely not part of the midsole.”)). The welt is not wholly distinct from the midsole. The welt may very well be a part of the midsole, depending on the design.

44. Mr. Rake has inconsistently stated which portion of the shoe he believes the welt belongs to. First, Mr. Rake says the “welt may be considered *part of the upper* assembly.” Rake, ¶46. Mr. Rake then claims that the welt is “generally considered *separate* from a midsole” and the upper. Rake, ¶57 (depicting the welt as a separate component from the midsole and upper). Then, Mr. Rake says the welt is “with[in] the junction *between* the upper and the sole assembly, which includes the midsole.” Rake, ¶58. Mr. Rake then concludes that “the welt still remains a separate *part of the midsole*.” Rake, ¶59.

45. Mr. Rake’s explanation of midsole sidewalls also admits that a welt is part of the midsole. As shown in Mr. Rake’s image below, which I further annotated in green, this midsole design includes a faux welt:



Rake, ¶53. A designer of ordinary skill in the art, therefore, would have understood

that a welt is part of the midsole. At the very least, a designer of ordinary skill in the art would have understood that a welt is part of the overall visual impression of the midsole.

46. Mr. Rake's inconsistent treatment of the welt is undermined by Patent Owner's own treatment of the welt as part of the midsole on its own patent list. *E.g.*, Ex. 2008 at 3 (Patent Owner identifying multiple welt patents under the "Shoe Midsole" category).

47. ***The OriginalGrand Midsole Includes a Rounded Welt:*** The OriginalGrand's rounded upper layer is comprised of a welt, with none of the elements Patent Owner and Mr. Rake mention. It is not monolithic, uniform in color and material, or seamless:



Ex. 1042. Indeed, the welt in the OriginalGrand is decorative and “not stitched to the upper:”



Ex. 1036 (“The ‘welt’ on the upper isn’t a functional one.... These are decorative or faux strips that mimic the aesthetics of a welted sole; the leather upper is merely glued to the midsole.”).

48. *The Accused Shoes Further Confirm Patent Owner’s Position Is Incorrect:* Patent Owner’s infringement allegations undermine its position that the Claim requires a monolithic, uniform-material rounded upper with a seamless transition to the lower ridged layers. In its District Court complaint, Patent Owner accuses shoes with an upper layer/flute formed by a welt—a component of a different color from the midsole and a visible seam between the two, as illustrated below:



Ex. 1034, 28 (front view of Accused Shoe)



Ex. 1034, 28 (rear view of Accused Shoe)



Ex. 1034, 30 (front view of Accused Shoe)



Ex. 1034, 30 (rear view of Accused Shoe)



Ex. 1034, 32 (front view of Accused Shoe)



Ex. 1034, 32 (rear view of Accused Shoe)

See Ex. 1034, 27-32; Delgatty Declaration, ¶¶92, 123.

49. Thus, under Patent Owner's infringement theory, Patent Owner's "monolithic rounded upper" argument is incorrect and not a defining feature of the Claim.

IV. THE D'969 PATENT IS ANTICIPATED BY THE PRIOR ART

50. It is my opinion that the Claim is invalid as anticipated by each of C11947, C12652, and Nike. For the reasons I outlined in Section III.B, Patent Owner's and Mr. Rake's alleged design differences are either not differences at all, or do not meaningfully contribute to the overall visual impression. Even if we were to credit Patent Owner's arguments, the Claim remains invalid as anticipated because Patent Owner's four alleged claim-defining features do not meaningfully impact the overall visual impression. The prior art discloses a substantially similar, if not an identical, design.

A. C11947 and C12652 Anticipate the D'969 Patent as Confirmed by Patent Owner's Patent-Practicing OriginalGrand

51. As I discussed above in Section III.B, Patent Owner's and Mr. Rake's anticipation-based arguments for C11947 and C12652 rest entirely on their incorrect claim construction.

52. The substantial similarity of C11947 and C12652 to the Claim is confirmed when reviewing the OriginalGrand shoes, which I understand allegedly practice the D'969 Patent. The side-by-side comparison of the OriginalGrand to

C11947 and C12652 below reinforces that no meaningful distinction exists between the prior art and the claimed design:

Men's OriginalGrand Remastered Wingtip Oxfords (Ex. 1041-1042)	C11947 (Ex. 1005)	C12652 (Ex. 1011)
		
		
		

53. In my opinion, C11947 and C12652’s resemblance to the D’969 Patent (embodied as the OriginalGrand) would induce an Ordinary Observer to purchase an article having one design supposing it to be the other. Mr. Rake’s contrary conclusions (Rake, ¶¶122-163) are unsupported for the reasons set forth in this Declaration and my prior Declaration.

54. Mr. Rake also states that I “cherry-picked frames—freezing the video at moments most favorable to [my] position” at the “risk[] [of] presenting a misleading picture of the C11947 design.” Rake, ¶124. Mr. Rake contests the use of this video as prior art because a “video provides continuous footage from shifting angles, varying lighting conditions, and changing perspectives—it does not provide the static, controlled views of a patent drawing.” Rake, ¶123. I disagree with Mr. Rake for three reasons.

55. **First**, the images captured from this video were selected, because they depicted the same views as reflected in the D’969 Patent’s figures. I understand that Mr. Rake has access to the entire video. *See, e.g.*, Ex.1005. As such, Mr. Rake was free to capture his own images and highlight any alleged misrepresentations. He did not, though, because he cannot. The images captured are representative of the C11947.

56. ***Second***, Mr. Rake’s statement that a video shifts angles, varies lighting conditions, and does not provide “static, controlled views” of the C11947 misses the larger point. An Ordinary Observer does not have routine access to perfectly controlled views of the C11947, or any shoe, when making a purchase. The video, and the still images provided, better illustrate how an Ordinary Observer would view the C11947 when comparing it to the D’969 Patent. In fact, around the time of the D’969 Patent’s filing date, consumers across several generations relied on user-created content like this video when making purchasing decisions. Ex. 1045 (finding that user-generated content plays at least some role in 84% of millennials’ and 70% of boomers’ purchasing decisions). Mr. Rake’s complaint about the video is thus detached from an Ordinary Observer’s reality.

57. Mr. Rake also states that I intentionally color-coded annotations and chose verbal descriptions “to make the claimed D’969 design seem more similar to the C11947 design (and the other prior art designs) than it truly is.” Rake, ¶142. I disagree. Not only did I provide unannotated images of both the D’969 Patent (*see, e.g.*, Ex. 1003, ¶46) and C11947 (*see, e.g.*, Ex. 1003, ¶83), I used the annotations to highlight my analysis, not to deceive, and the unannotated source images are also available in the record for Mr. Rake to consider.

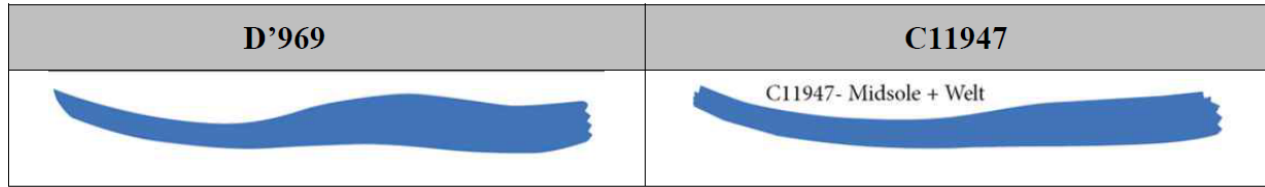
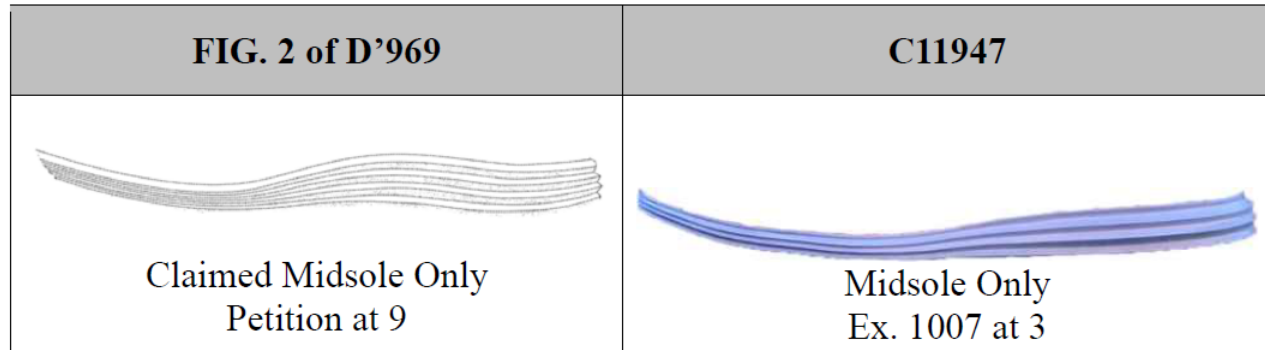
58. Even so, Mr. Rake provides his own verbal descriptions and colors his own images. For example, Mr. Rake substituted my “wave-like” descriptor with his “wavy” descriptor. Rake, ¶78.

59. Mr. Rake also selectively chooses which descriptors are allegedly “problematic.” For example, Mr. Rake disagrees with my use of “rounded upper layer” (Rake, ¶93) while calling this same feature the “rounded upper flute” (Rake, ¶87).

60. Mr. Rake also uses modified versions of my verbal descriptors while stating that no verbal description is necessary. For example, he incorrectly claims that “layer” insinuates an “unnatural boundary differentiator” (Rake, ¶93), but he then goes on to state that this same “‘rounded upper layer’ is not *rounded* at all.” Rake, ¶144.

61. In all, Mr. Rake does not explain how I violate the Gestalt principle when analyzing the top layer (or “flute”), while he somehow does not violate this same principle analyzing the same under a different name.

62. Mr. Rake further states that my use of colored annotations violates Gestalt. Using the same logic, Mr. Rake’s use of colored annotations may violate Gestalt. For example, Mr. Rake selectively adds color to otherwise colorless images, like the D’969 Patent figures, when comparing silhouettes (Rake, ¶¶130, 134):



Mr. Rake's images not only change the scope of the claim by omitting every solid line but also violate his own application of the Gestalt Principles.

63. To be clear, I do not agree with Mr. Rake that my analysis of pointing out distinct similarities between the D'969 Patent and the prior art violates the Gestalt Principles. This is because, in line with Gestalt Principles, I considered the overall visual impression when analyzing the D'969 Patent and the prior art. It is Mr. Rake's selective and incorrect application of the Gestalt Principles that I disagree with. The above analysis only highlights a handful of his inconsistent applications.

B. Nike Anticipates the D'969 Patent

64. Patent Owner's and Mr. Rake's other arguments related to Nike, beyond their claim construction arguments, are incorrect. *See* Rake, ¶¶173-182. First, the images of Nike plainly demonstrate more rounding on the upper layer,

contrary to Patent Owner's and Mr. Rake's argument that Nike's upper layer is uniform with the remaining layers. Delgatty Declaration, ¶¶151-152; Ex. 1014.

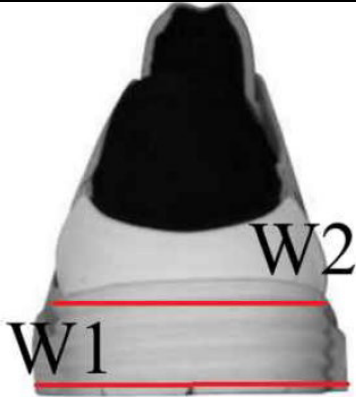
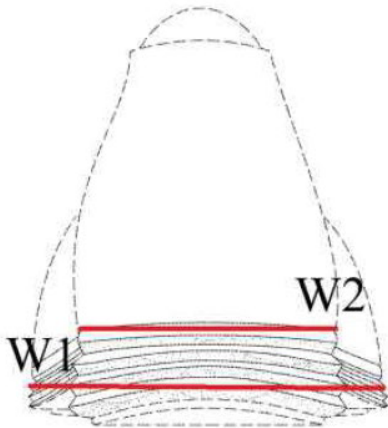


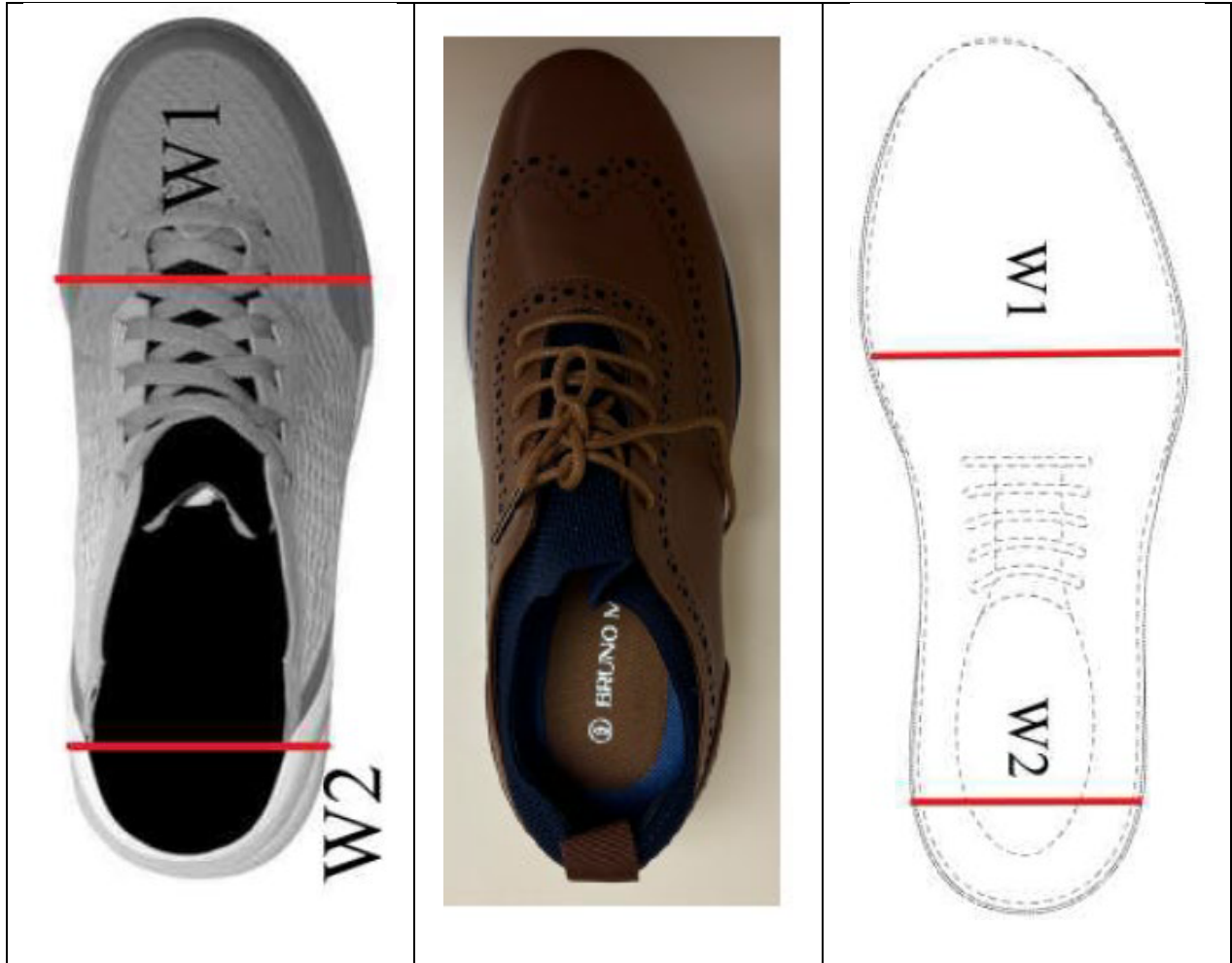
65. The uppermost layer of Nike is visually distinct because it does not include a sharp, ridged edge like the layers beneath it. To the extent Patent Owner and Mr. Rake argue this distinction is less pronounced than in the D'969 Patent, it is a minor, insubstantial difference that does not change the overall visual impression. An Ordinary Observer would perceive both midsoles as presenting a layered, ridged-edge design with a visually differentiated upper layer. Delgatty Declaration, ¶¶157-59.

66. Second, Patent Owner and Mr. Rake attempt to dismiss the similarity with completely irrelevant width measurements "W1" and "W2." Rake, ¶181. But these are measurements an Ordinary Observer would never undertake as part of a purchasing decision.

67. Further, Patent Owner fails to reconcile these measurements with the Accused Shoes. For example, see the Accused Shoes as compared to the D'969

Patent and Nike (W1 in Patent Owner's annotation) compared to the rear width (W2 in Patent Owner's annotation) is even smaller than that of Nike:

Nike (Patent Owner Response, 69)	Accused Shoe (Ex. 1034, 27-28)	D'969 Patent (Patent Owner Response, 69)
		 FIG. 7



68. Indeed, the toe box of the Accused Shoes, as depicted in Patent Owner's images from its District Court Complaint, is not visible from the rear view. Further, the upper view further demonstrates that the Accused Shoes do not exhibit the disparity in widths that Patent Owner and Mr. Rake argue distinguish the D'969 Patent from Nike.

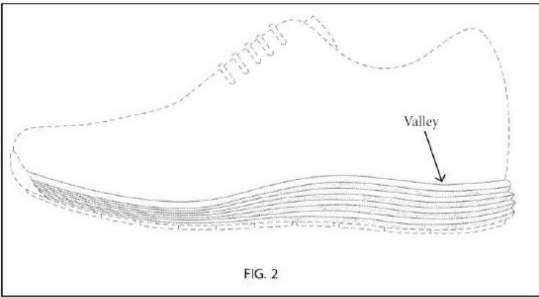
V. THE D'969 PATENT IS RENDERED OBVIOUS BY THE PRIOR ART

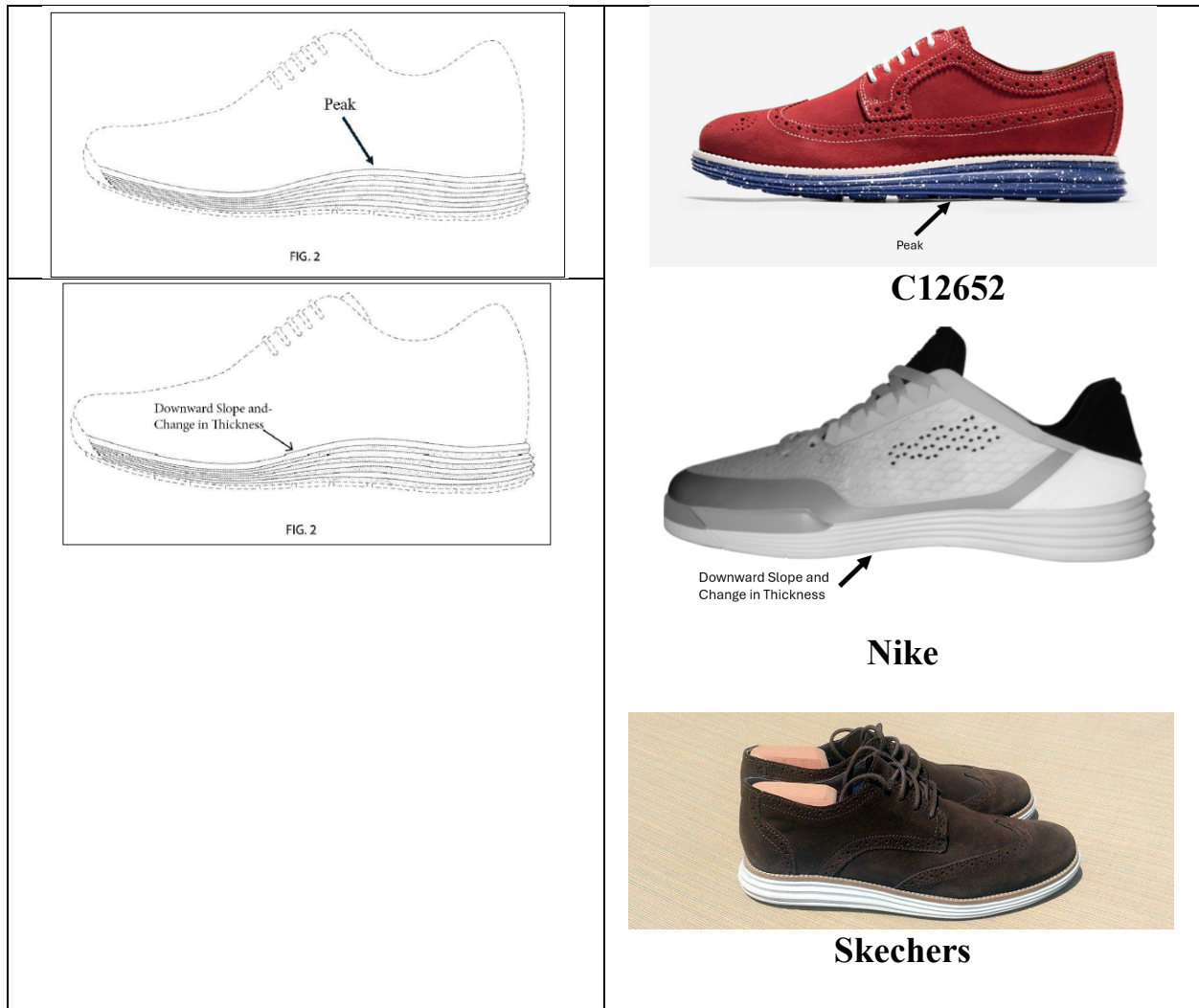
69. As I explained in my Declaration in support of the Petition, the Claim is rendered obvious by each of C11947, C12652, and Nike; C11947 in view of Nike;

C12652 in view of Nike; and Skechers in view of Nike. Delgatty Declaration, ¶¶77-205. For the reasons outlined above in Section III.B, Patent Owner’s and Mr. Rake’s alleged design differences are either not differences at all, or do not meaningfully contribute to the overall visual impression of the Claim. I focus on the design as a whole, and I address Patent Owner’s and Mr. Rake’s identified features below in that context. Delgatty Declaration, ¶¶77-205.

A. C11947, C12652, Nike, and Skechers Are Suitable Primary References (Grounds 2, 4, 6-9)

70. As I explained in my Declaration supporting the Petition, C11947, C12652, Nike, Skechers (the “Primary References”), and the D’969 Patent all disclose a wave-like midsole design that compresses and slopes around the foot and pinches at the midsection. The dominant visual features (three stacked, ridged layers compressing from heel to toe and an upward toe section) are unmistakably present in C11947, C12652, Nike, and Skechers. Delgatty Declaration, ¶¶115-28, ¶¶183-96.

Patent Owner Response, 29, 31, 32	Primary References
 <p>FIG. 2</p>	 <p>C11947</p>



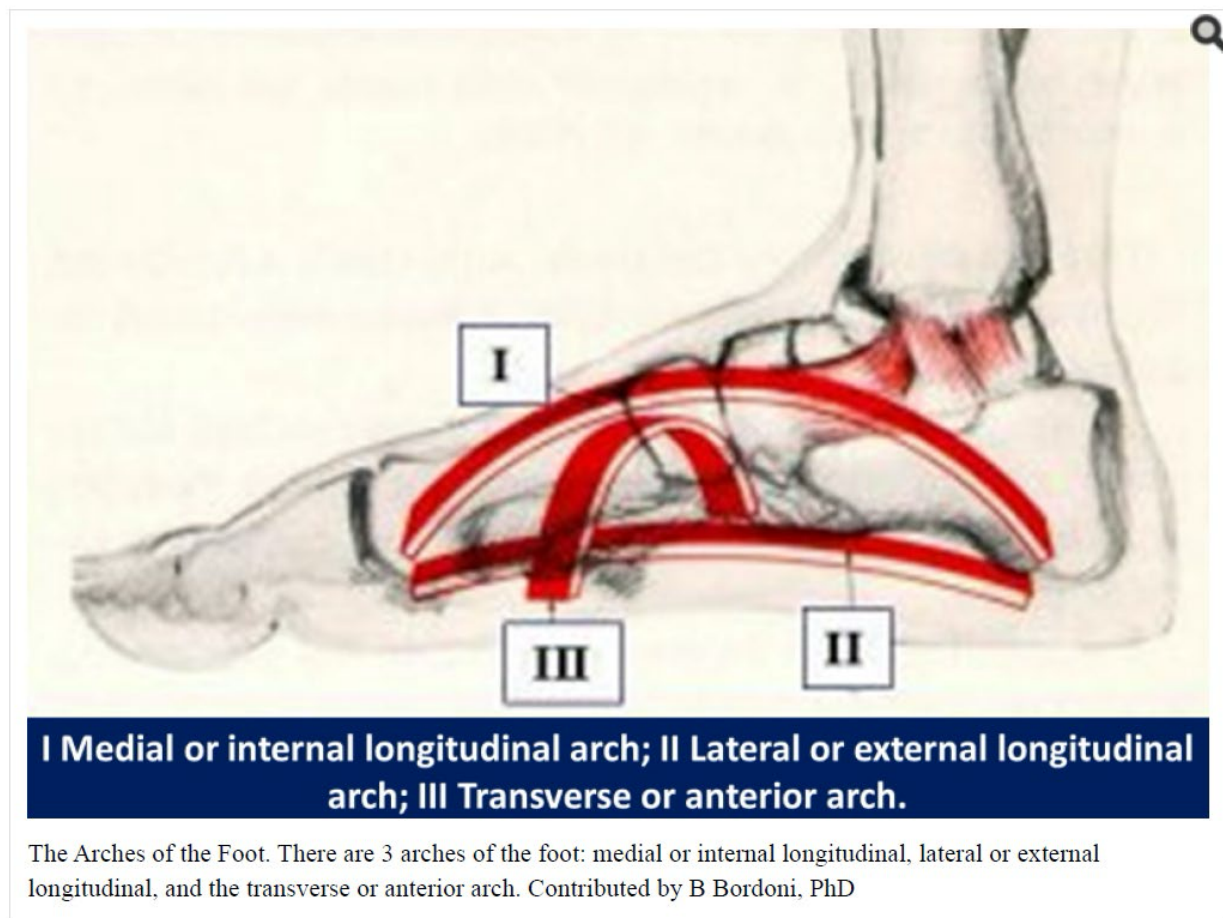
71. As I discuss below, to the extent Patent Owner and Mr. Rake allege slight variations between the Claim and the Primary References, such minor, insubstantial differences would have been obvious to a designer of ordinary skill in the art for the reasons set forth in my Declaration supporting the Petition and below.

B. A Designer of Ordinary Skill In The Art Would Have Been Motivated to Further Curve the Sole (Grounds 2, 4, 6-9)

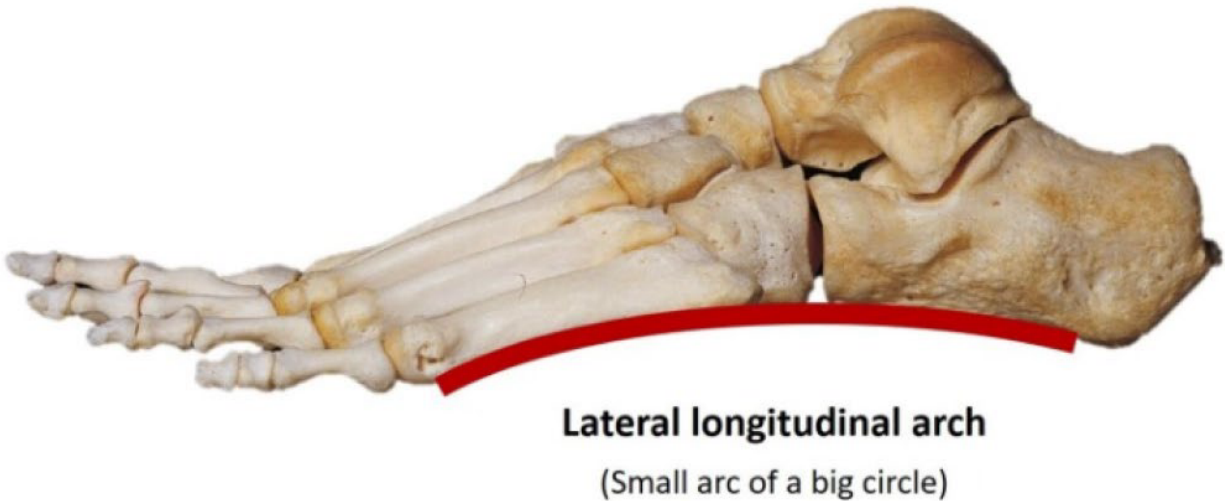
72. Patent Owner's and Mr. Rake's claim construction requiring the New Features is incorrect, as I explained above in Section III.

73. To the extent that Patent Owner's and Mr. Rake's incorrect claim construction positions are adopted, Patent Owner's Litigation infringement allegations confirm that the Primary References are substantially similar to the Claim, and any minor variation would have been a straightforward design choice. *See* Patent Owner Response, 38-74; Rake, ¶¶122-193.

74. Even if Patent Owner argues the slope of any of the Primary References is substantially different from the alleged scope of the Claim, such slope variations are a functional element that account for the shape of the anatomical foot:

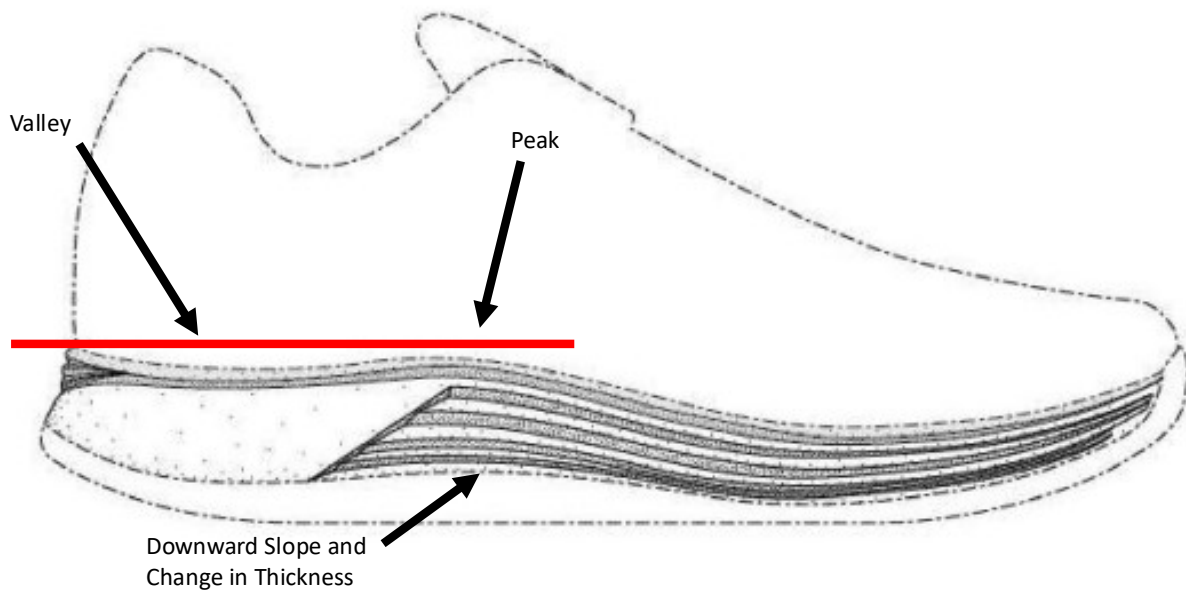


Ex. 1043, 7.



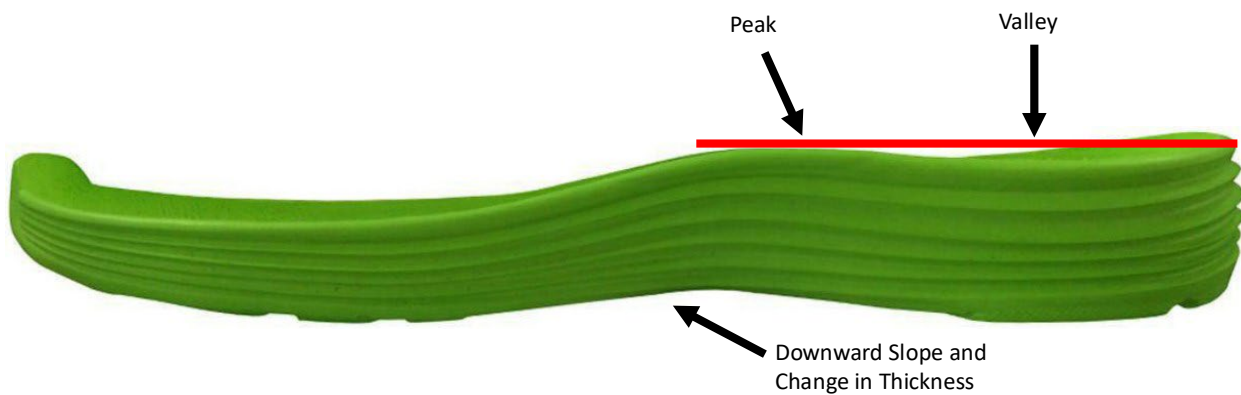
Ex. 1056, 1; Ex. 1044. I understand functional elements such as these are not entitled to any weight in a design patent claim. *See* Section III.B.4.

75. To the extent that the design elements extend beyond the functional aspects, a designer of ordinary skill in the art would have been motivated to modify the curvature of the Primary References to be slightly curvier or flatter while maintaining the same overall wave-like visual impression. Delgatty Declaration, ¶164. Curvier soles exhibiting the New Features were already well-known to a designer of ordinary skill in the art, and would have been trivial to implement. Delgatty Declaration, ¶¶163-164. For example, I cited Exhibit 1026 in my previous declaration for Ground 6 to establish that a curvier sole was well-known, supporting that a designer of ordinary skill in the art would have found it obvious to vary the degree of Nike's midsole curvature to match the curvature of the sole. Delgatty Declaration, ¶163.



Ex. 1026; Delgatty Declaration, ¶163.

76. I also cited Exhibit 1027 in my previous declaration for Ground 6 to establish the state of the art at the time of the D'969's filing and the motivations of a designer of ordinary skill in the art to make an even curvier sole.

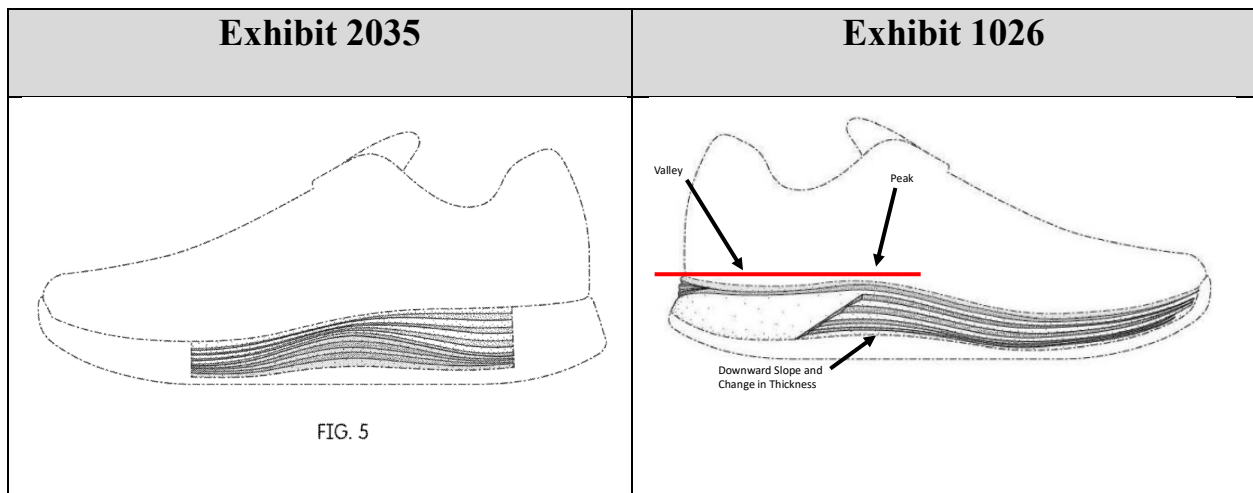


Ex. 1027; Delgatty Declaration, ¶163.

77. Collectively, Exhibits 1026-1027 demonstrate that even curvier soles were known to designers of ordinary skill in the art before Patent Owner filed the

application leading to the D'969 patent and that designers of ordinary skill in the art would have been motivated to curve soles to create a more prominent midfoot peak, deeper heel valley, and adjust the downward slope and change in thickness. *See Delgatty Declaration*, ¶¶163-164.

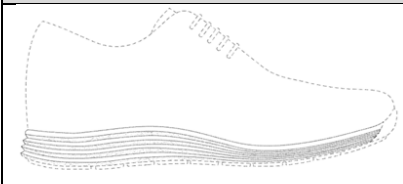
78. Patent Owner takes issue with my use of Exhibits 1026 and 1027. First, Patent Owner states that Exhibit 1026 is substantially similar to Exhibit 2035, which was cited during prosecution of the D'969 Patent, and therefore should not be considered here. Patent Owner Response, 73 n.7. Patent Owner is incorrect, at least because Exhibit 1026 discloses the New Features identified for the first time by Patent Owner in this IPR proceeding.



79. Second, Patent Owner states that Exhibit 1027 does not qualify as prior art and should not be considered here. But I am not using Exhibit 1027 as prior art. Instead, as I explained in the Delgatty Declaration, I am offering Exhibit 1027 as evidence of a designer of ordinary skill in the art's motivation to create an even

curvier sole with the New Features as of September 17, 2015, and to demonstrate the state of the art before the D’969 patent’s filing date. Ex. 1027; Delgatty Declaration, ¶163. I understand Exhibit 1027 is a foreign patent application that was filed on September 17, 2015, before the application leading to the D’969 patent on October 13, 2015. Exhibit 1027 thus represents both a motivation of a designer of ordinary skill in the art and the state of the art prior to the filing date of the D’969 patent on October 13, 2015.

80. To directly rebut Patent Owner’s new arguments regarding the New Features, I apply these disclosures which illustrate the New Features (a heel valley, midfoot peak, downward slope, and change in thickness) across all obviousness grounds. Considering that the Primary References, aside from Nike, display far more curvature than Patent Owner’s interpretation of the Claim in the Litigation, I could not have anticipated Patent Owner’s claim construction argument incorporating the New Features. Even the Accused Shoes do not have any discernible wave-like structure, and include far less curvature than Nike:

D’969	Prior Art	Accused Shoes (Ex.1034, 31)
 FIG. 3	 C11947	



See Delgatty Declaration, ¶164. A designer of ordinary skill in the art would have been aware of curvier midsoles, as demonstrated by Exhibits 1026 and 1027, and would have been motivated to apply those designs to accommodate different foot types and heel heights, and differing consumer impressions regarding the comfort and support provided by the midsole. Delgatty Declaration, ¶¶163-164; Exs. 1026-27. For example, a designer of ordinary skill in the art would have been motivated to accentuate the appearance of support provided by the midsole by exaggerating the curvature to suggest a highly supportive design.

81. I also understand that if a design would have been “obvious to try,” particularly where there is a design need or market pressure and a finite number of

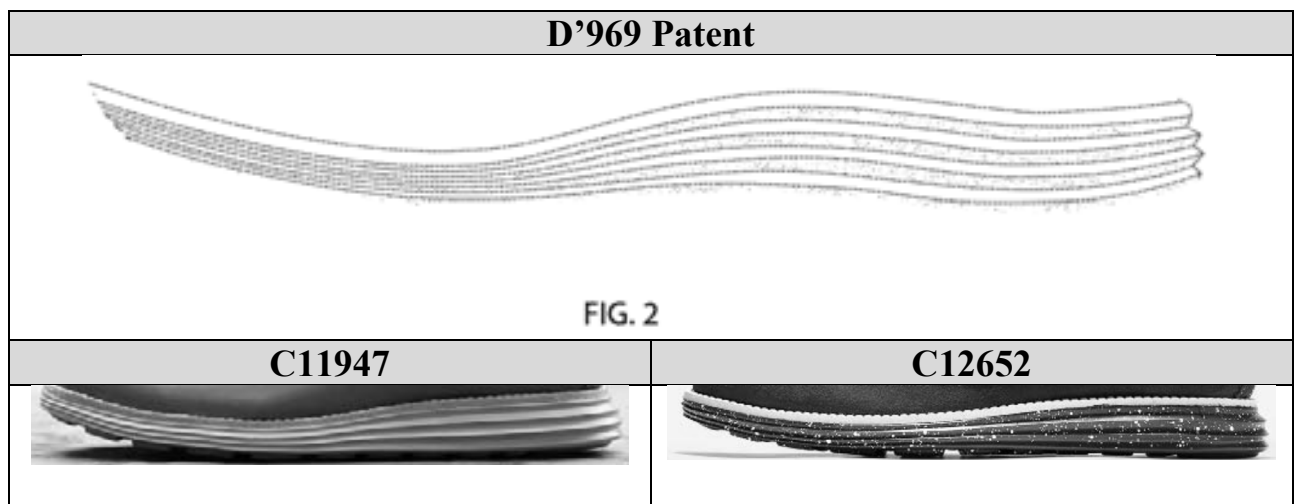
identified, predictable solutions such that a designer of ordinary skill in the art would have had good reason to pursue the known options within his or her capabilities, this supports a finding that the Claim is obvious. Here, a designer of ordinary skill in the art would have found it obvious to try placing peaks of the midsole at the toe, arch, and/or heel and to adjust the slope between those peaks to either follow the contour of the anatomical foot or depart from it. A designer of ordinary skill in the art “would have found slightly changing the sloping of the midsole to be trivial,” Delgatty Declaration, ¶163, and would have had an expectation of success in doing so. Mr. Rake agrees that a designer of ordinary skill in the art would have had the freedom to modify the external midsole curvature independent of the footbed because the midsole does not need to “align with the internal footbed.” Rake, ¶188.

C. A Designer of Ordinary Skill in the Art Would Have Been Motivated to Further Round the Welt (Grounds 2, 4, 6-9)

82. Patent Owner and Mr. Rake argue that the roundedness of the upper layer in the Primary References is a meaningful distinction from the D’969 Patent. Patent Owner Response, 47-48; Rake, ¶¶131-138, 158-163, 180, 194-204. This is incorrect for at least the reasons I discuss above in Sections III – IV. Even so, and to the extent this alleged distinction has any relevance, a designer of ordinary skill in the art would have found it obvious to further round the welt. Delgatty Declaration, ¶107. Modifying the already more rounded layer, as compared to the other ridged layers, would be a straightforward design change. The rounded layer is already

round. Making the rounded layer more round would have been obvious. Indeed, a designer of ordinary skill in the art “would have found softening of the curve of the upper layer of the midsole to be trivial.” Delgatty Transcript, 262:17-263:6. A designer of ordinary skill in the art would have been motivated to do so to create further continuity between the welt material and the rubber material for a design that was more cohesive. A designer of ordinary skill in the art would have looked to different types of shoes for such motivation. Delgatty Declaration, ¶108.

83. Patent Owner’s and Mr. Rake’s argument that the welt is “intended to stand out” (Patent Owner Response, 76-77; Rake, ¶¶194-204) unjustifiably equates the motivation of a designer of ordinary skill in the art with Patent Owner’s unclaimed color choices for its prior art shoes. Nothing about the figures in the D’969 Patent suggest that the top layer is meant to stand out, compared to the rest of the layers. This is particularly evident when the colors of C11947 and C12652 are removed, as demonstrated by the grayscale images below:



84. The motivation of a designer of ordinary skill in the art is assessed from the perspective of an ordinary designer, not Patent Owner. Patent Owner even concedes that different types of welts “give the impression of a traditional welt.” Patent Owner Response, 85.

85. Patent Owner and Mr. Rake argue that a designer of ordinary skill in the art would not have been motivated to remove the welt because doing so would alter the shoe’s aesthetic character. *E.g.*, Patent Owner Response, 76-78; Rake, ¶¶197-204. While an Ordinary Observer “would not know the difference” between a molded and attached welt, a designer of ordinary skill in the art, by contrast, “would be able to achieve [the targeted] overall visual appearance in both.” Delgatty Transcript, 130:4-22; Delgatty Declaration, ¶57. For example, a designer of ordinary skill in the art aiming to create a slightly more formal shoe may incorporate the welt, while a designer of ordinary skill in the art aiming to create a more casual midsole may remove it. A designer of ordinary skill in the art, having had professional experience in designing shoes, would understand different aesthetic characters of a shoe, and be motivated to revise such aesthetic characters depending on what kind of shoe they were trying to design.

86. Mr. Rake’s assumption that the welt gives a “more expensive” appearance while the absence of a welt gives a “more streamlined” aesthetic confirms that a designer of ordinary skill in the art would understand different

aesthetics and designs, and would have been motivated to explore both designs. Thus, a designer of ordinary skill in the art would be motivated to remove or add a welt, depending on the type of aesthetic they were designing for. Delgatty Transcript, 132:9-133:18.

87. Patent Owner's and Mr. Rake's Nike brand awareness argument (Patent Owner Response, 86; Rake, ¶¶194-204) also misses the mark. Nike was well-known for making shoes, and its design elements would have been well-known to a designer of ordinary skill in the art. A designer of ordinary skill in the art would have understood Nike's design appeal and strong market presence and would have been motivated to consider Nike's design elements when designing an even more streamlined aesthetic for a midsole. Delgatty Declaration, ¶¶160-65. Thus, a designer of ordinary skill in the art would have been familiar with and considered Nike's designs when designing a shoe. Thus, a designer of ordinary skill in the art would have been motivated to apply Nike's rounded upper layer on a layered/fluted midsole, as a known and practiced design choice in the relevant art at the time of the D'969 Patent to further streamline the aesthetic of the C11947 and C12652. Delgatty Declaration, ¶143.

88. Indeed, this motivation is supported by the fact that it was well-known in the industry that Patent Owner's LunarGrand shoes (including the C11947 and C12652 prior art) and Nike's LunaRacer shoe (similar to the Nike reference) both

used Nike Lunarlon technology and originated from Nike's development of new sole materials. *See, e.g.*, Section III.B.1. Thus, a designer of ordinary skill in the art would have been aware of the connection between Nike's athletic shoes, including those related to the LunaRacer shoe, Nike's ownership of Cole Haan, and the close collaboration between Nike and Cole Haan related to the design of midsoles and would have been motivated to apply the interrelated designs from Cole Haan and Nike to arrive at the Claim. Ex. 1037 ("We have a very close working relationship with Nike's design and innovation teams in Beaverton, Oregon. Cole Haan has been part of Nike Inc. since 1988, launching footwear featuring Nike Air technology in 2000. Now, Nike Air technology is utilized throughout Cole Haan's footwear, enhancing the functionality of our products. For the development of the LunarGrand, we combined the insights, experience and expertise of both teams to harness this Nike-invented ultra-lightweight cushioning system."); *see also* Exs. 1037-1040. Implementing the additional rounding, including the application of these related teachings, would have been straightforward to a designer of ordinary skill in the art, as demonstrated by the actual collaborations between Nike and Cole Haan to create midsoles in the relevant time period. *Id.*

89. Mr. Rake's contention that a designer of ordinary skill in the art "would not have been motivated to remove the welt from the C11947 and C12652 designs at all, much less 'to create a design that was more cohesive' because the welt (and

associated stitching) contributes to their overall ‘dress’ appearance that blends a traditional, professional silhouette with modern, athletic-inspired comfort technology, and distinguishes them from an athletic shoe” is inaccurate. Rake, ¶200. Mr. Rake recognizes that C11947 and C12652 have “athletic-inspired comfort technology” but omits the fact that, in 2015, workplace dress codes became more casual and the presence of a more casual style like Athleisure grew in popularity. Ex. 1046. Thus, prior to the filing date of the D’969 Patent, the rise of more athletic-inspired comfort *and* style dominated the workplace, transitioning from more formal to more casual. Ex. 1046. A designer of ordinary skill in the art, therefore, would have been motivated to achieve a more casual-styled shoe without a welt rather than a more traditional “dress” appearance.

D. A Designer of Ordinary Skill in the Art Would Have Been Motivated to Apply Bilateral Symmetry to C12652 (Ground 4)

90. As I explained in my Declaration supporting the Petition, a designer of ordinary skill in the art would have understood the design as a whole from the images available and, given the frequent usage of symmetry in design, would have found it obvious to continue the design from the lateral side to the medial side for bilateral symmetry. Delgatty Declaration, ¶136; Exs. 1028, 1029.

91. Mr. Rake opines that asymmetry in shoes “indicates a particular design choice by a designer, and it is not clear to me why a designer of ordinary skill in the art would have been motivated to modify such a design to be symmetrical.” Rake,

¶169. However, Mr. Rake’s opinion here fails to appreciate that the default assumption for a designer of ordinary skill in the art in midsole design is symmetry. Delgatty Declaration, ¶136; Ex. 1028, 8 (“Western preference for bi-lateral mirror reflection...”); Ex. 1029, 2 (“Symmetrical composition in clothing is this one which is based on reflection or bilateral symmetry, because of this type of symmetry in the human body.”). “[A] designer of ordinary skill would assume that [the midsoles] would be symmetrical.” Delgatty Transcript, 291:22-292:3. Thus, the expectation of a designer of ordinary skill in the art would be that a shoe midsole is bilaterally symmetrical. A designer of ordinary skill in the art working from the lateral view of C12652 would therefore expect that the medial side mirrors it. This is a basic principle in design that is typical in many parts of the world, including Western fashion. *See* Ex. 1028, 8. This is because principles of symmetry are rooted in the human body’s innate symmetry. *See* Ex. 1029, 2; Delgatty Transcript, 291:22-292:3. Symmetry is thus commonplace and natural, not hindsight.

92. Despite Mr. Rake’s contention that it is unclear why a designer would default to symmetrical designs, Mr. Rake’s own citations to Gestalt principles recognize that “[w]e prefer balanced, symmetrical arrangements and organized structures in visual design.” Rake, ¶66. Bilateral symmetry is similarly desirable in this field. *See* Exs. 1028 and 1029. Patent Owner is incorrect in stating that Exs. 1028 and 1029 do not relate to shoe design. These references concern design

principles generally, which apply broadly throughout design, and the common knowledge of a designer of ordinary skill in the art encompasses such foundational principles. Further, while I agree that the lateral and medial sides of Nike were “[n]ot completely” symmetrical, they “have very minimal differences, [and] the overall impression that they both have is that they are symmetrical.” Delgatty Transcript, 293:7-13. That the Nike designer chose to deviate from the default of bilateral symmetry has no impact on the fact that bilateral symmetry remains the default in midsole design, and a designer of ordinary skill in the art would have been motivated to apply bilateral symmetry to the C12652 because “[s]ymmetry plays an indispensable role in footwear design, profoundly influencing its innovation and diversity.” *See, e.g.*, Ex. 1047.

E. Skechers in view of Nike Renders the Claim Obvious (Ground 9)

93. The available views of Skechers are sufficient to establish visual similarity despite Patent Owner’s contention that “there are too many aspects of Skechers that are not adequately disclosed in the images submitted.” Patent Owner Response, 78; Delgatty Declaration, ¶¶187-205. Notably, Patent Owner argues that one cannot make a comparison between Skechers and the D’969 Patent due to lack of visuals, yet compares Skechers to the D’969 Patent. Patent Owner Response, 82; *see also* Rake, ¶¶205-223. Mr. Rake goes further to say that “[w]ithout at least orthographic views, I cannot assess the overall visual impression of the design” and

that it is “impossible to compare three dimensional curves of one design against another design, unless the designs are evaluated from nearly the same viewpoints.” Rake, ¶¶209, 211. Mr. Rake’s hyperboles are unavailing. A designer of ordinary skill in the art would not have found the slightly pitched Skechers image to be so ill-suited that no opinion can be formed. Skechers shows a three ridged edge layers, a rounded upper layer, and a compression pattern substantially the same as the D’969 Patent. The image prominently displays the midsole such that a designer of ordinary skill in the art would have considered Skechers as a primary reference, and found it obvious to implement Nike’s other design features to arrive at the midsole of the D’969 Patent as explained in my Declaration. Delgatty Declaration, ¶¶195-196. Mr. Rake’s “impossible” arguments fail to consider that a designer of ordinary skill in the art would have found it obvious to try multiple finite alternatives for implementing a wave-like midsole design as explained in Section V.B. Delgatty Declaration, ¶195. Skechers in view of Nike renders D’969 obvious for the reasons in Sections V.A-C.

VI. PATENT OWNER’S OTHER ARGUMENTS

A. My Annotated Figures Are Proper

94. Patent Owner’s argument that my annotations are improper is wrong. *See* Patent Owner Response, 26-27; Rake, ¶¶90-98, 117-118. My annotations are expressly described as exemplary (*see, e.g.*, Delgatty Declaration, ¶83), and the unannotated materials are provided in the exhibits to the Petition for full

consideration. As previously explained, I considered the designs as a whole based on the original images and used annotations to further illustrate the design elements impacting the overall visual impression.

95. My use of color-coded annotations is also consistent with the Gestalt principles that Mr. Rake incorrectly invokes. The Gestalt principle of “Emergence,” that “we perceive a whole image first rather than analyzing individual parts,” supports my approach: the analysis first begins with the whole image, then I include annotations to identify component features to demonstrate how those features, taken as a whole, create the same overall wave-like impression in both the D’969 Patent and the prior art. Rake, ¶¶63-68. I explained that I was “breaking the midsole up into areas to focus on” to streamline the verbal description, while addressing the overall visual impression as a whole. Delgatty Transcript, 247:6-248:5; 54:15-55:2; 246:20-21. Mr. Rake similarly annotated the D’969 Patent and the prior art with labels and color-coded features. Rake, ¶¶79, 82, 103, 107, 109. Patent Owner relies on annotated comparisons in Mr. Rake’s declaration while arguing my annotations are improper.

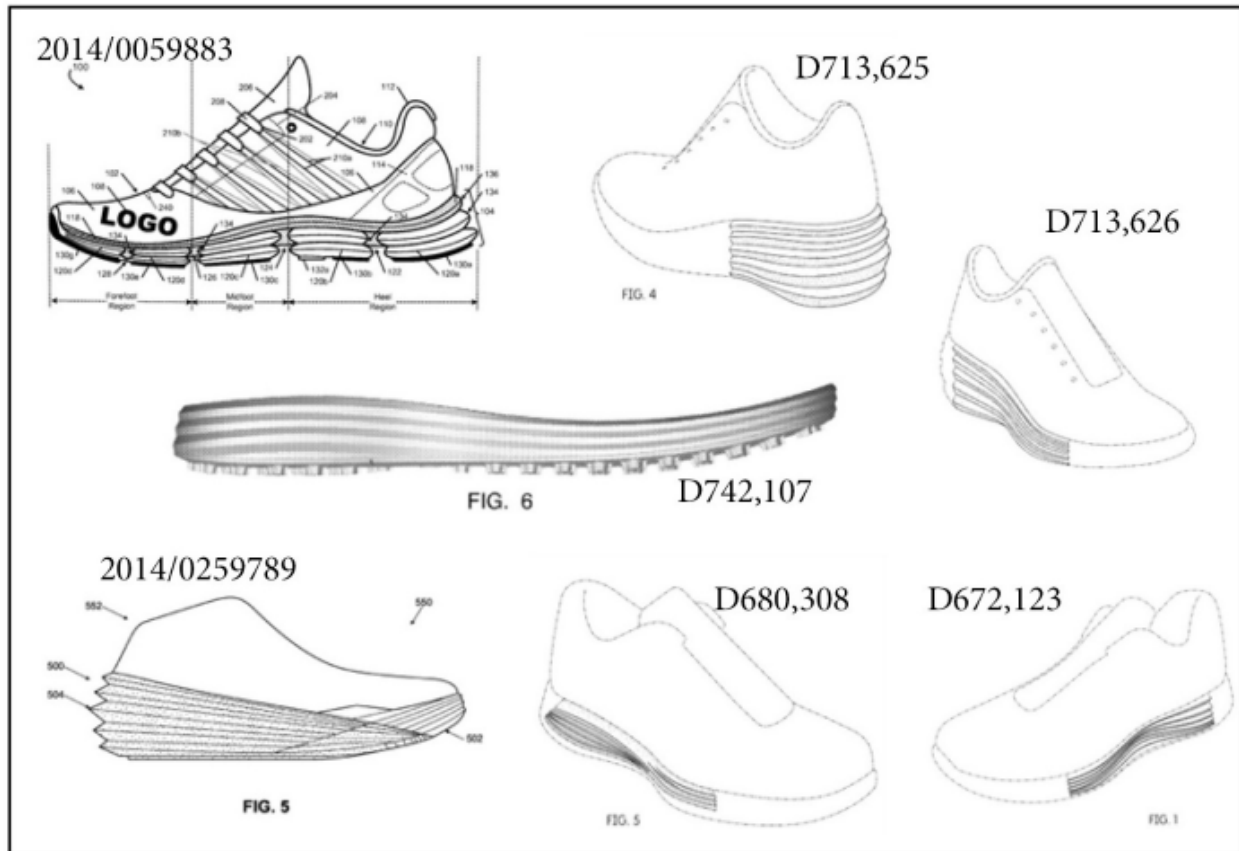
96. Further, Mr. Rake’s understanding that “humans...perceive objects as organized, unified wholes rather than separate, discrete parts” (Rake, ¶69) further supports the idea that an Ordinary Observer would consider the welt as part of the midsole, as I explained above. *See* Section III.B.6. Thus, unlike Mr. Rake’s

silhouette annotations that remove the welt from the midsole (*See, e.g.*, Rake, ¶134; Section IV.A), an Ordinary Observer considering the design as a whole would analyze what Mr. Rake calls the “midsole + welt” (Rake, ¶130), not the “midsole only” (Rake, ¶134).

B. Shoe Midsole Design Is Not A Crowded Field

97. The field of shoe midsole design is not crowded. The mere seven references from the face of the D’969 Patent (three of which are sole structures rather than midsoles) do not represent the field appropriately. *See also* Rake, ¶51 (“Each of these design feature fluted embellishments on the sidewalls of the midsole”). A designer of ordinary skill in the art would understand the difference between a design patent directed to a shoe and one directed to a midsole, such that the seven references on the face of the D’969 Patent do not imply that the field of shoe midsoles is crowded.

98. Mr. Rake’s crowded field analysis only cites these seven references from the face of the D’969 Patent and states that “not every midsole is afforded its own design or utility patent.” Rake, ¶51. But Mr. Rake does not perform any further analysis to show that these cited midsoles are similar, such that minor differences between them would be apparent to an Ordinary Observer. For example, Mr. Rake provides the following graphic but no further analysis:



Rake, ¶51. Mr. Rake does not explain how these seven designs are all similar to one another, or how they relate to midsole designs. And Mr. Rake cannot do so because these designs are not similar to each other. For example, U.S. Pat. Pubs. 2014/0059883 and 2014/0259789 relate to an entire shoe, not just the midsole. This is shown by the solid lines around the entire shoe, not just around the midsole. Mr. Rake's reference to design patents that concern an entire shoe does not show that the field of shoe *midsole* design is a crowded field. And Mr. Rake's remaining design patent references that claim midsole designs are not so similar to each other that an Ordinary Observer would recognize only minor differences between them. Compare D713,625, D713,626 (Family 1), and D680,308, D672,123 (Family 2): Family 1

features several ridged edge layers that create a larger heel presence, whereas Family 2 features far fewer ridged edge layers that create a more muted heel presence. And neither Family 1 nor Family 2 claim a midsole from the heel region to the toe region like D742,107. An Ordinary Observer, when viewing these seven designs, would notice several differences between each of these designs because these designs are in stark contrast to each other. This is evidence directly contrary to Mr. Rake's position that the field of midsole designs is a crowded field. The mere fact that design patents for shoes, midsoles and soles, and midsoles only were cited on the face of the D'969 Patent does not prove that the midsole field is crowded.

C. I Have Applied the Ordinary Observer Test Correctly

99. Patent Owner and Mr. Rake argue that I misunderstand the Ordinary Observer test (Patent Owner Response, 35-37; Rake, ¶¶28-31, 63-68), yet Patent Owner and Mr. Rake do “not dispute the Petition's description of an ordinary observer in the art” as a retail consumer, which I apply. Rake, ¶30; Patent Owner Response, 8. I understand that the Ordinary Observer is not required to be an expert in shoe design. “Familiarity” with prior art means general exposure to the field, not the ability to dissect every component of a shoe. *See id.* As I confirmed, the Ordinary Observer would be familiar with “a good amount” of shoes and “would not understand very small, insignificant differences between one shoe and another.” Delgatty Transcript, 67:30-68:11; 70:4-8.

100. I understand that the three-way comparison, which involves viewing differences between the patented design and an accused product in the context of prior art, applies to infringement, not anticipation. As I understand it, Patent Owner and Mr. Rake incorrectly conflate a three-way comparison with the anticipation analysis. *Cf.* Patent Owner Response, 35; Rake, ¶¶29-31.

101. Further, Patent Owner and Mr. Rake rely on the “crowded field” principle to argue that “differences in small details will have more weight” (Patent Owner Response, 37; Rake, ¶51), but the alleged “small details” here require forensic measurement to detect and are differences that an Ordinary Observer would not appreciate. Delgatty Declaration, ¶92. Moreover, as I explain above in Section VI.B, the shoe midsole design field is not a “crowded field.”

102. Patent Owner appears to argue that “sneaker freaks” should be the Ordinary Observer. Patent Owner Response, 35-36. I understand that Patent Owner agrees that an Ordinary Observer is a retail consumer, not a specialized collector of sneakers. A “sneaker freak” is someone who is deeply passionate about sneakers and possesses far more knowledge and experience purchasing, collecting, and trading sneakers than a typical retail consumer. As such, this would be an incorrect definition of an Ordinary Observer.

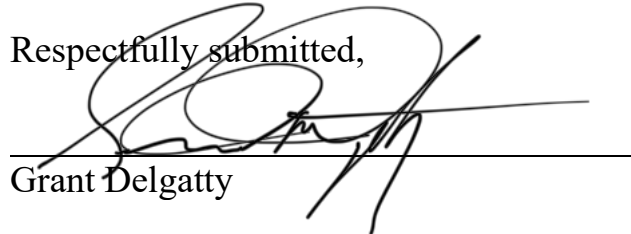
VII. CONCLUSION

103. In summary, and as I outlined in my Declaration and set forth above, I have concluded that Claim 1 of U.S. Patent No. D768,969 is anticipated and/or rendered obvious over the prior art references discussed in my Declaration and herein.

104. I hereby declare that all statements made herein are true, of my own knowledge, made on information believed to be true, and made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

105. Executed this 11th day of August 2026, in Glendale, California.

Respectfully submitted,


Grant Delgatty