

IN THE 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 No. IPR2025-01395

Patent No. D768,969

PATENT OWNER'S MOTION TO STRIKE

I. INTRODUCTION

As authorized by the Board on August 25, 2026 (EX3001), Patent Owner Cole Haan LLC (“Patent Owner”) moves to strike new and improper arguments and evidence in Petitioners’ Reply (Paper 25) and Mr. Delgatty’s Reply Declaration (EX1033) (“Delgatty-Reply”) filed therewith. The Trial Practice Guide (“TPG”) is clear: “Petitioner[s] may not submit new evidence or argument in reply that it could have presented earlier, *e.g.* to make out a *prima facie* case of unpatentability.” TPG at § II.I; *see also* 37 C.F.R. § 42.23(b); *Wasica Fin. GmbH v. Cont’l Auto. Sys.*, 853 F.3d 1272, 1285-87 (Fed. Cir. 2017) (shifting arguments that amount to “an entirely new theory of *prima facie* obviousness ... is foreclosed by statute, [Federal Circuit] precedent, and Board guidelines.”); *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1366, 1369-70 (Fed. Cir. 2016) (concluding that Board’s exclusion of petitioner’s reply brief and accompanying declaration was proper where the documents exceeded the scope of the reply under § 42.23(b) for, among other things, presenting new evidence to support new rationale and explain modifications to the prior art). But Petitioners do just that by including: (1) a new modification of three prior art designs (C11947, C12652, and Skechers) (Reply 30-34; EX1033 ¶¶75-81), (2) a new “obvious to try” argument for all four prior art designs (Reply 34; EX1033 ¶81), and (3) new arguments and evidence for combining C11947 and

C12652 with Nike (Reply 6, 36-37; EX1033 ¶¶87-89; EX1037-EX1040). Patent Owner requests that these new arguments and evidence be stricken.

II. PETITIONERS' NEW ARGUMENTS AND EVIDENCE SHOULD BE STRICKEN

A. New Top Contour Curvature Modification for Grounds 2, 4, and 7-9 (Reply 30-34; EX1033 ¶¶75-81)

The Petition purposed to modify *only Nike* (Ground 6) by “ever so slightly vary[ing] the degree of sloping and resulting change of curvature of the layers of the midsole.” Pet. 76 (citing Exs. 1026, 1027); EX1033 ¶75 (acknowledging EX1026 was cited only for Ground 6). Petitioners’ Reply expands on that proposed modification for Nike, Reply at 30-31, but now also proposes the same modification *for the other prior art designs*—C11947 (Grounds 2, 7), C12652 (Grounds 4, 8), and Skechers (Ground 9). Reply at 30-34; EX1033 ¶¶75-81.

Petitioners concede that these arguments were not included in the Petition as required by 37 C.F.R. § 42.104(b) but claim they “could not have anticipated Patent Owner’s claim construction argument, because the Primaries (aside from Nike) already displayed far more curvature than Patent Owner’s apparent interpretation of the Claim in the Litigation.” Reply at 32. This argument fails for two reasons. First, Patent Owner did not advance a new claim construction (or any claim construction at all). POR at 7-8 (“Patent Owner does not provide a claim construction as the D’969 figures speak for themselves.”). Rather, Patent Owner’s expert identified

various features of the claimed D’969 midsole design, including top contour curvature, that contribute to the design’s overall visual impression and that Petitioners’ four “key feature” analysis deliberately ignored. *Id.*, *see also id.* at 10-12. Thus, Petitioners’ reliance on *Axonics, Inc. v. Medtronic, Inc.*, 75 F.4th 1374, 1384 (Fed. Cir. 2023) is misplaced.

Second, the Petition acknowledged the very differences in top contour curvature between D’969 and the prior art designs that Petitioners now seek to modify for the first time in their Reply. *See, e.g.*, Pet. at 42-43, 58-59 (referring to “a minor difference in sloping angle” and “steeper downward slope”). Despite recognizing these differences, Petitioners chose not to address those differences in their obviousness grounds (Grounds 2, 4, and 7-9) at all, much less based on Exhibits 1026 and 1027 as in Ground 6. *See* Pet. at 50-51, 63-65, 79-81, 87-91 (addressing only pinching, rounded upper layer, and symmetry). Petitioners cannot credibly claim to have not anticipated the need for these belated and improper obviousness theories until after the POR, especially given Petitioners felt the need to include them in the Nike ground. Petitioners’ new modifications of C11947, C12652, and Skechers are improper. *See* TPG at § II.I (“‘Respond,’ in ... § 42.23(b), does not mean proceed in a new direction with a new approach as compared to the positions taken in a prior filing.”); *Wasica Fin.*, 853 F.3d at 1285-87 (Fed. Cir. 2017); *Intelligent Bio-Sys.*, 821 F.3d at 1366, 1369-70.

B. New “Obvious to Try” Motivation (Reply 34; EX1033 ¶81)

Petitioners’ Reply also advances another entirely new rationale for modifying the top contour curvature of *all* prior art designs, including Nike: “[a] DOSITA would have also found it obvious to try a finite number of predictable alternatives—placing peaks of the midsole at the toe, arch, and/or heel—and adjusting the slope between those peaks.” Reply, 34; EX1033 ¶81 (also asserting, for the first time, that a DOSITA “would have had an expectation of success” in changing the sloping). The only “obvious to try” argument in the Petition is for an entirely different modification of Nike’s midsole—namely, the degree of curvature *along the sole relative to the midsole* (i.e., pinching or overhang), which the POR does not even address Pet. at 80, 89-90. This new theory fails for the same reasons as Petitioners’ newly proposed top contour modification of C11947, C12652, and Skechers—Petitioners appreciated differences between D’969 and the prior art designs and should have raised all proposed modifications of D’969 and all motivations in the Petition. *See* TPG at § II.I; *Wasica Fin.*, 853 F.3d at 1285-87 (Fed. Cir. 2017); *Intelligent Bio-Sys.*, 821 F.3d at 1366, 1369-70.

C. New Arguments and Evidence for Combination of C11947 / C12652 With Nike (Reply 6, 36-37; EX1033 ¶¶87-89; EX1037-EX1040)

The Petition provided a single rationale for modifying C11947 and C12652 in view of Nike (Grounds 7 and 8)—“because the shoe manufacturer Nike was famous, and well-known for making shoes.” Pet. at 80. After the POR pointed out the

insufficiency of this motivation, POR at 75-76, Petitioners' Reply shifted to entirely new motivations. Relying on new Exhibits 1037-1040, Petitioners assert for the first time that "the similarity in appearances [between C11947/C12652 and Nike] provides a motivation to combine" and further that a DOSITA "would have been motivated to apply the interrelated designs to arrive at" D'969 because C11947 and C12652 as well as Nike's Lunaracer both used Nike Lunarlon and Nike's ownership of Cole Haan. Reply at 6, 36-37; EX1003 at ¶¶ 87-89. These arguments and evidence should have been included in the Petition. *See* TPG at § II.I; *Wasica Fin.*, 853 F.3d at 1285-87 (Fed. Cir. 2017); *Intelligent Bio-Sys.*, 821 F.3d at 1366, 1369-70. Indeed, the relationship between Cole Haan and Nike was noted elsewhere in the Petition but not asserted as motivation in Grounds 7 and 8. Pet. at 3 ("Nike (Cole Haan's former owner)").

III. CONCLUSION

Patent Owner respectfully requests that the Board strike the above-mentioned new arguments and evidence.

Dated: September 3, 2026

Respectfully submitted,

/Chad C. Walters/

Chad C. Walters

Reg. No. 48,022

BAKER BOTTS L.L.P.

2001 Ross Ave., Suite 900

Dallas, TX 75201-2980

Phone: (214) 953-6511

Fax: (214) 661-4511

chad.walters@bakerbotts.com

Lindsay Volpenhein Cutié

Reg. No. 75,474

BAKER BOTTS L.L.P.

910 Louisiana Street

Houston, TX 77002

Phone: (713) 229-1234

lindsay.cutie@bakerbotts.com

Justine A. Gozzi

Reg. No. 60,513

BAKER BOTTS L.L.P.

30 Rockefeller Plaza

New York, NY 10112

Phone: (212) 408-2500

justine.gozzi@bakerbotts.com

Attorneys for Patent Owner

Cole Haan LLC

CERTIFICATE OF SERVICE

In accordance with 37 CFR §§ 42.6(e), the undersigned certifies that on September 3, 2026, a complete and entire copy of this **PATENT OWNER'S MOTION TO STRIKE** was served on Petitioners via electronic mail to counsel for Petitioners at the following addresses:

- CT-TopGlory-ColeHaan@sheppard.com
- jdavis@sheppard.com
- mshapiro@sheppard.com
- nattalla@sheppard.com
- jhealy@sheppard.com

Dated: September 3, 2026

/Chad C. Walters/

Chad C. Walters (Reg. No. 48,022)

*Attorney for Patent Owner
Cole Haan LLC*