

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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adidas AG,  
Petitioner,

v.

NIKE, Inc.,  
Patent Owner.

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Case IPR2016-00922  
Patent 8,266,749 B2

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Before JOSIAH C. COCKS, MICHAEL J. FITZPATRICK, and  
JAMES B. ARPIN, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* ARPIN.

Opinion Concurring by *Administrative Patent Judge* FITZPATRICK.

ARPIN, *Administrative Patent Judge*.

FINAL WRITTEN DECISION  
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

## I. BACKGROUND

adidas AG (“Petitioner”) filed a Petition pursuant to 35 U.S.C. §§ 311–319 to institute an *inter partes* review of claims 1–9, 11–19, and 21 of U.S. Patent No. 8,266,749 B2 (Ex. 1001, “the ’749 patent”).<sup>1</sup> Paper 2 (“Pet.”). Nike, Inc. (“Patent Owner”) did not file a Preliminary Response.<sup>2</sup> Applying the standard set forth in 35 U.S.C. § 314(a), which requires demonstration of a reasonable likelihood that Petitioner would prevail with respect to at least one challenged claim, we instituted an *inter partes* review of claims 1–9, 11–19, and 21 of the ’749 patent. Paper 6 (“Inst. Dec.”), 23.

After institution, Patent Owner filed a Patent Owner Response to the Petition (Paper 9 (“PO Resp.”)), and Petitioner replied (Paper 10 (“Reply”)).<sup>3</sup> Each party requested an oral hearing (Papers 15 and 16); and

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<sup>1</sup> Petitioner identifies adidas International B.V.; adidas North America, Inc.; adidas America, Inc.; and adidas International, Inc., as real parties-in-interest. Pet. 1.

<sup>2</sup> Patent Owner identifies only itself, as a real party-in-interest. Paper 5, 2.

<sup>3</sup> Patent Owner filed objections to the admissibility of some of Petitioner’s evidence. Paper 12. Petitioner served – and improperly filed – supplemental evidence in response to Patent Owner’s objections. Paper 13; Ex. 1015; 37 C.F.R. § 42.64(c); *see* 37 C.F.R. § 42.64(b)(2) (“The party relying on evidence to which an objection is timely served may respond to the objection *by serving* supplemental evidence within ten business days of service of the objection.” (emphasis added)); *GoPro, Inc. v. Contour IP Holding LLC*, Case IPR2015-01078, slip op. at 2–3 (PTAB Apr. 7, 2016) (Paper 40) (“If the supplemental evidence does not cure the objection and the opposing party files a motion to exclude, the submitting party may file the supplemental evidence with its opposition to the motion to exclude.”). Ultimately, Patent Owner did not file a motion to exclude, and, therefore, Patent Owner did not preserve its objections. 37 C.F.R. § 42.64(c). Regardless, Exhibit 1015 is expunged because we did not authorize its filing.

we held a consolidated oral hearing with Case IPR2016-00921 on July 12, 2017. A transcript of that hearing is of record in this case. Paper 20 (“Tr.”).

We have jurisdiction under 35 U.S.C. § 6, and this Final Written Decision, issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73, addresses issues and arguments raised during the review. For the reasons discussed below, we determine that Petitioner has not met its burden to prove, by a preponderance of the evidence, that claims 1–9, 11–19, and 21 of the ’749 patent are unpatentable on the ground upon which we instituted *inter partes* review.

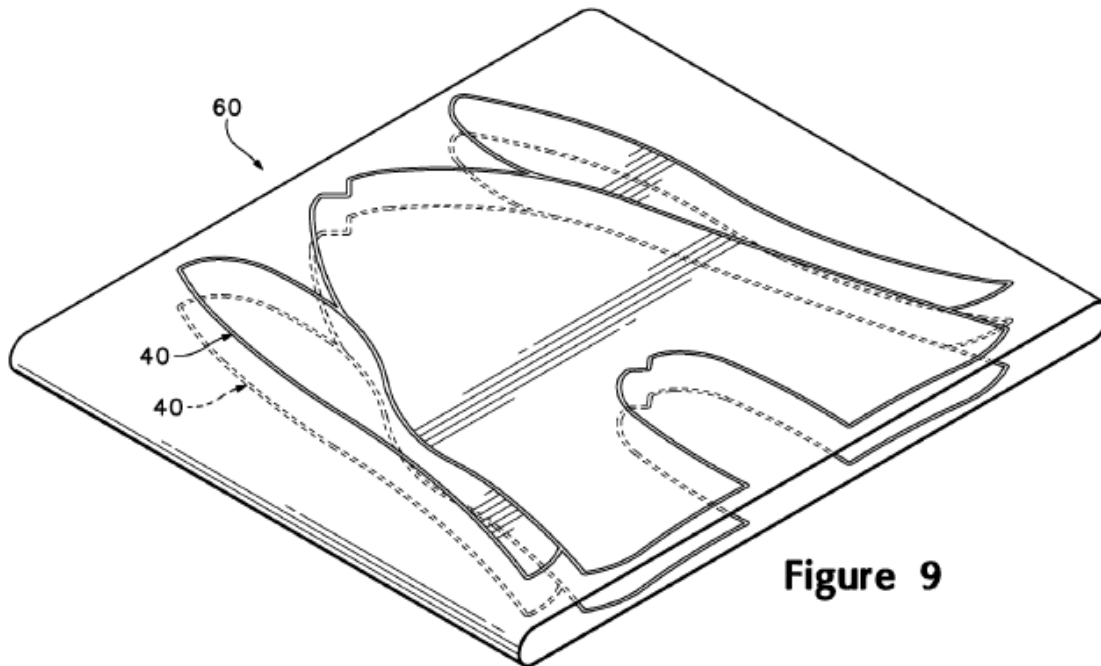
*A. The ’749 Patent*

The ’749 patent claims priority from U.S. Patent Application No. 10/791,289, filed on March 3, 2004, now issued as U.S. Patent No. 7,347,011 B2 (“the ’011 patent”) (Ex. 1001 at (60)) and relates to articles of footwear incorporating an upper that is at least partially formed from a textile material (*id.* at 1:20–23). Conventional articles of athletic footwear may include two primary elements: an upper and a sole structure. *Id.* at 1:25–28. The upper may form a void in the interior of the footwear for receiving a wearer’s foot, and the upper may extend over the instep and toe areas, along the medial and lateral sides, and around the heel area of the wearer’s foot. *Id.* at 1:42–47.

In particular, the Specification describes articles of footwear having an upper incorporating a knitted textile element and having a sole structure secured to the upper. *Id.* at 3:27–33. Methods for manufacturing an article of footwear include “mechanically-manipulating a yarn with a circular knitting machine, for example, to form a cylindrical textile structure. In addition, the method involves removing at least one textile element from the

textile structure, and incorporating the textile element into an upper of the article of footwear.” *Id.* at 3:41–46.

Figure 9 of the ’749 patent is reproduced below.



**Figure 9**

Figure 9 depicts textile structure 60 formed on a circular knitting machine. *Id.* at 7:38–39. For example,

[a] suitable knitting machine for forming textile element 40 is a wide-tube circular knitting machine that is produced in the Lonati Group by Santoni S.p.A. of Italy under the SM8 TOP1 model number. This Santoni S.p.A. wide-tube circular knitting machine may form a textile structure having a diameter that ranges from 10 inches to 20 inches, with 8 feeds for each diameter.

*Id.* at 7:14–20. As discussed below, the types of stitches that form textile structure 60 may be varied to form an outline of one or more textile elements 40 on textile structure 60. *Id.* at 7:64–8:3. In particular, as depicted in Figure 9, the outlines for at least two textile elements 40 may be formed on textile structure 60. *Id.* at 7:53–54.

Figure 8 of the '749 patent is reproduced below.

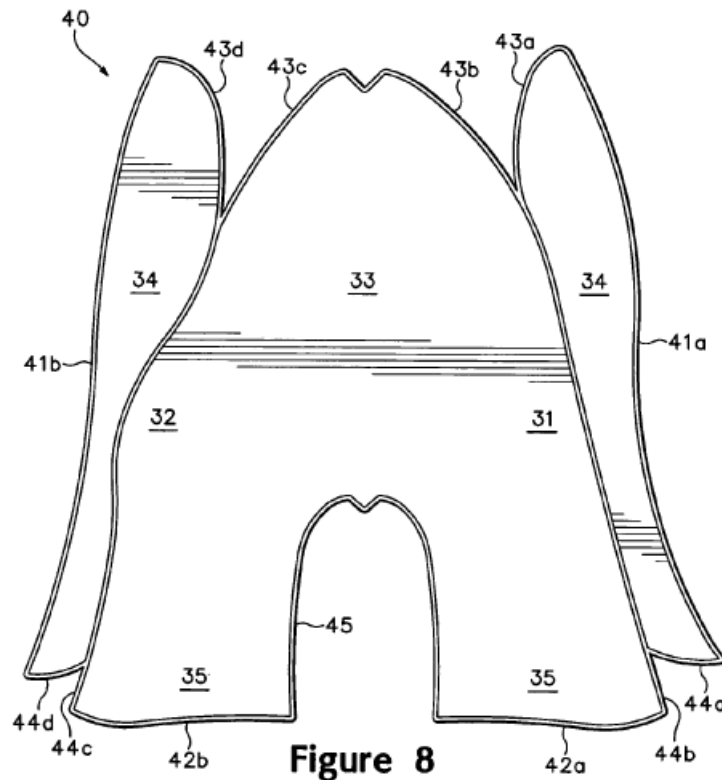


Figure 8 depicts an embodiment of an upper according to the '749 patent. *Id.* at 5:59–6:64. “Textile element 40 is a single material element that is formed to exhibit a unitary (i.e., one-piece) construction, and textile element 40 is formed or otherwise shaped to extend around the foot.” *Id.* at 5:40–43; *see also id.* at Figs. 10 (depicting textile element 40'), 11 (depicting textile element 40"). In particular,

Textile element 40 is a single material element with a unitary construction, as discussed above. *As defined for purposes of the present invention, unitary construction is intended to express a configuration wherein portions of a textile element are not joined together by seams or other connections, as depicted with textile element 40 in FIG. 8.* Although the various edges 41a-44d are joined together to form seams 51-54,

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