

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KEVIN LAWLOR,)
Plaintiff,)
)
v.) 02-CV-12262-MEL
)
NIKE, INC., and NIKE RETAIL)
SERVICES, INC.,)
Defendants.)

MEMORANDUM AND ORDER

LASKER, D.J.

This is an action for patent infringement. Plaintiff Kevin Lawlor ("Lawlor") alleges that a select line of athletic shoes produced by defendants Nike, Inc. and Nike Retail Services, Inc. (collectively "Nike"), infringes upon two patents owned by Lawlor. Nike now moves for summary judgment of non-infringement as to all accused shoe products.

The motion is GRANTED.

I. Background

Lawlor initiated this action on November 20, 2002, accusing defendants of patent infringement of U.S. Pat. No. 4,494,321 ("the '321 patent") and U.S. Pat. No. 5,653,046 ("the '046 patent") in violation of 35 U.S.C. § 271. Defendant Nike, Inc. is a global sports and fitness company, which designs a wide

range of athletic footwear, apparel, and equipment. Defendant Nike Retail Services, Inc., is wholly-owned subsidiary of Nike, Inc., and sells their athletic products through company-owned stores such as Niketown®.

A. The Claims at Issue:

The two patents-in-suit are directed toward shock absorbing athletic shoe soles having inverted cups. Lawlor alleges that defendants' athletic shoes that use an airbag assembly - known as the TUNED AIR® airbags - in their soles, infringe upon Lawlor's shock absorbing shoe soles detailed in the '321 and '046 patents. In particular, Lawlor contends that 157 of Nike's shoe models, which contain the TUNED AIR® airbag assemblies, infringe independent claim 1 of the '321 patent and independent claim 1 of the '046 patent.

The '321 patent, titled "Shock Resistant Shoe Sole", issued on January 22, 1985 and expired on November 15, 2002. The invention is directed at providing athletic footwear with a shock resistant shoe sole that enhances both impact shock absorption and stability control during foot to ground impact, and thereby reduces foot injuries which may occur during physical activities. The '321 patent teaches a shock absorbent shoe sole having a bottom sole that includes one or more inverted cups disposed therein. Each cup is located beneath a natural contact point of the human foot, for absorbing and dispersing shock generated at the natural contact point during a foot step. Claim 1 of the

'321 patent reads as follows:

1. A shock absorbent shoe sole comprising:
 - (a) an upper sole having a thickness; and
 - (b) a bottom sole attached to the bottom of said upper sole and including one or more inverted cups dispersed therein, each cup being located directly beneath and pointed convexly toward a natural contact of the human foot for absorbing and dispersing shock generated at said natural contact point during a foot step, each of said cups including a cup shaped cavity penetrating the thickness of the upper sole to such a degree that the upper sole plays essentially no part in absorbing shock at the natural contact point during a footstep.
(Id. at col. 4, ln. 65 - col. 5, ln. 9).

The '046 patent, titled "Durable, Lightweight Shock Resistant Shoe Sole", was filed over ten years after issuance of the '321 patent, and issued on August 5, 1997. The '046 patent is an improvement upon the '321 invention, and teaches in relevant part that the shock absorption provided by the inverted cup structures of the '321 patent can be enhanced for particular sports activities by altering the cups' positions and/or shapes, and strengthening the structural integrity of the inverted cups. Claim 1 of the '046 patent reads as follows:

1. A durable, lightweight shock absorbing shoe sole comprising:
an upper sole having a thickness, said upper sole further defining an outline of a last bottom, said outline of said last bottom being representative of a shoe last used in the manufacture of said shoe, with a back portion of said outline establishing a back point of said outline of said last bottom, said upper sole also having a longitudinal axis being representative of a sole axis of said shoe sole, said sole axis running substantially through said shoe sole midpoint with its back point begin said back point of said

outline of said last bottom; and
a bottom sole attached to the bottom of said upper sole
and including an angularly displaced inverted cup
dispersed therein,
said inverted cup having a preselected shape defining a
rear portion thereof and having a longitudinal
axis, said inverted cup being located directly
beneath and pointed convexly toward a natural
contact point of the human foot for absorbing and
dispersing shock generated at said natural contact
point during a footstep, and said back point of
said outline of said last bottom being located a
distance away from said rear portion of said
preselected shape,
said longitudinal axis of said inverted cup being
angularly displaced between approximately 6 and 15
degrees with respect to said sole axis, said
angular displacement of said inverted cup with
respect to said sole axis being measured from the
intersection of said sole axis and said
longitudinal axis of said inverted cup at said
back point of said outline of said last bottom;
and
said inverted cup penetrating into the thickness of
said upper sole to such a degree that said
inverted cup absorbs substantially all of the
shock at the natural contact point during a
footstep.
(Id. at col. 8, ln. 47 - col. 9, ln. 15).

B. The Accused Products:

Nike has used airbag technology in its athletic shoes since 1979; and since 1998, Nike has developed seven different types of TUNED AIR® airbag assemblies. The accused products - the 157 Nike shoe models - each use one or more TUNED AIR® airbag assemblies in their midsole. The various TUNED AIR® airbag assemblies are positioned within the shoes' midsole either underneath the heel of the foot or underneath the forefoot, depending upon their configuration and type.

The airbag assemblies are filled with pressurized gas

and include several pairs of opposing hemispherical indentations ("Hemisphere Pairs") formed on the airbag surface. These Hemisphere Pairs function as mechanical springs when the airbag is compressed, for example, during running. For each of the Hemisphere Pairs, the top and bottom indentations make contact at their apex.

In addition, a colored, plastic hemispherical insert is inserted and attached to some or all of the Hemisphere Pairs in the airbag assemblies. These inserts are attached by a weld that connects the apex of each insert to the apex of each hemispherical indentation. The inserts provide the ability to further adjust or tune the stiffness of the airbag assembly.

II. Discussion

A patent infringement analysis is a two step process: the first step - claim construction - is to determine the meaning and scope of the patent claims asserted to be infringed; and the second step - determination of infringement - is to compare the properly constructed claims to the product accused of infringement. Markman v. Westview Instruments Inc., 52 F.3d 967, 976 (Fed. Cir. 1995) aff'd 517 U.S. 370 (1996). The construction of patent claims is a matter of law exclusively for the courts. ATD Corp. v. Lydall Inc., 159 F. 3d 534, 540-41 (Fed. Cir. 1998). The determination of infringement, whether literal or under the doctrine of equivalents, is a question of fact. Bai v. L & L

Wings Inc., 160 F.3d 1350, 1353 (Fed. Cir. 1998). Accordingly, the granting of summary judgment on non-infringement can occur only if, upon construction of the claims and with all reasonable factual inferences drawn in favor of the non-movant, there is no genuine issue as to whether the accused product is encompassed by the patent claims. Novartis Corp. v. Ben Venue Labs. Inc., 271 F.3d 1043, 1046 (Fed. Cir. 2001).

A. Claim Construction:

Claim 1 of the '321 patent requires "a bottom sole attached to the bottom of said upper sole and including one or more inverted cups dispersed therein...." (Id., col. 4, ln. 67 - col. 5, ln. 1). Similarly, Claim 1 of the '046 patent requires "a bottom sole attached to the bottom of said upper sole and including an angularly displaced inverted cup dispersed therein...." (Id., col. 8, lns. 60-62). The parties dispute the meaning and scope of the term "bottom sole." Construction of the common term "bottom sole" is addressed first because it applies to both of the asserted claims and all accused shoe models. Thus, disposition of this motion for summary judgment hinges upon the construction of this critical term.

Nike contends that the term "bottom sole" should be construed to mean "*the outsole, which is the part of the shoe that contacts the ground and is also the lowest part of the sole.*" Nike argues that the intrinsic evidence demonstrates that

the patentee uses "bottom sole" consistently with the accepted meaning of outsole in the shoe design art. In addition, Nike asserts that its proffered meaning is consistent with the ordinary dictionary definition of the term "bottom."

Lawlor counters that the term "bottom sole" is properly construed to mean "*a part of the shoe sole attached to the bottom of the upper sole.*" Lawlor argues that the term "bottom sole" is used in both patents in a relative manner, rather than in an absolute sense, and was deliberately created by the patentee as a relational term to describe a functional feature different from what existed in the prior art. According to Lawlor, the "bottom sole" of the inventions is unlike a traditional outsole which is just a thin layer of rubber that absorbs little shock during a running or walking footstep. While the "bottom sole" taught in both patents may include a traditional outsole, neither the specification or the knowledge of one of ordinary skill in the art limits the "bottom sole" only to the outsole. Rather, the term "bottom sole" is used to describe a functional feature that acts in concert with an upper sole to provided enhanced shock absorption and dispersion.

In construing the scope and meaning of patent claim terms, a court looks first to the evidence intrinsic to the patent such as the claims, the specification, and the prosecution history. Astrazeneca v. Mutual Pharmaceutical, 384 F.3d 1333,

1336-37 (Fed. Cir. 2004). Of course at the onset, a court considers "the claim language itself to define the scope of the patented invention", and thereafter, the patent's specification "[w]hen the claim language itself lacks sufficient clarity to ascertain the scope of the claims." Chimie v. PPG Indus. Inc., 402 F.3d 1371, 1377 (Fed. Cir. 2005). The specification is also consulted "to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning." Id. Further, to give proper effect to disputed technical terms, the terms are interpreted as having the meaning that they would be given by a person of ordinary skill in the relevant art. Astrazeneca, 384 F.3d at 1336-37. Finally, the prosecution history, if in evidence, is examined "to discern the applicant's express acquiescence with or distinction of the prior art as further indication of the scope of the claims." Id.

Upon a review of the intrinsic evidence I conclude that the disputed term "bottom sole" should be construed in accordance with the definition proposed by Nike. The reasons for my conclusion follow:

First: in the '046 patent's "Background of the Invention" and "Detailed Description of Preferred Embodiments", the term "bottom sole" (numbered 14) is consistently described alternatively as either the "outersole" or "outsole". (See '046 patent, col. 2, lns. 47-50; col. 3, lns. 34-35; col. 4, lns. 63-66; col. 6, lns. 63-66; col. 7, lns. 5-9; and col. 8, lns. 34-

36). For example, the Background of the Invention states that "[t]he present invention has overcome the basic shortcomings of the prior art by providing [a] ... shoe sole which utilizes one or more inverted cups dispersed within the outersole or bottom sole." (Id., col. 1, lns. 37-41). In the Detailed Description of the Preferred Embodiments, the "rubber bottom sole" of the present invention is again described alternatively as the outsole, and further narrates that "ribs or other patterns" may be "provided on the bottom surface of the outsole" to "enhance gripping contact between the shoe sole and the ground". (Id., col. 4, lns. 43-59).

Second: the reciprocal use of "bottom sole" and "outsole" in the '046 patent does not support the proposition that the "bottom sole" functions alternatively as an outsole and that therefore "bottom sole" should be construed as different from an outsole. Rather, the two terms are synonymous, and are used to describe and define the same structure numbered 14 in the '046 patent and its Figures. It is readily evident that the terms "bottom sole" and "outsole" are used interchangeably throughout the specification, and thus should be construed in the same manner. See Tate Access Floors Inc. et al., v. Maxcess Tech. Inc., 222 F.3d 958, 967-969 (Fed. Cir. 2000) (construing disputed claim terms in the same manner because the terms are readily used interchangeably in the specification).

Third: Figures 15-16 and 19-24 of the '046 patent each

depict the bottom sole or outsole 14 as the ground-engaging part of the shoe sole. Further, in The Running Shoe Book, the outsole is described as the portion of the sole making contact with the ground. See Peter R. Cavanagh, The Running Shoe Book, p. 98; Figures 5.1a, 5.1b.¹

Fourth: the specification of the '321 patent describes "bottom sole" (numbered 12) as being the ground-engaging part of the shoe. The specification refers to bottom sole 12 as "a rubber bottom sole" or a "hard rubber bottom sole." (See e.g. '321 patent, col. 3, ln. 8; col. 4, ln. 15, ln. 38). In particular, Figures 3, 4 and 6 of the '321 patent each depict the bottom sole as the part of the shoe sole contacting the ground.

Fifth: the '321 patent describes the bottom surface (numbered 26) of bottom sole 12 as being "primarily flat", and states that "[a]lternatively, however, ribs or other patterns for enhancing gripping contact between the shoe and the ground may be provided on surface 26." ('321 patent, col. 3, lns. 46-49). Contrary to Lawlor's assertion, this phrase does not support the construction that bottom sole 12 can act either as an outsole or as a flat surface to which a treaded outsole could be affixed. The phrase, read in the context of the entire specification, does not lend itself to providing for such a broad reading of the term

¹ References cited during prosecution, like The Running Shoe Book, are part of the intrinsic evidence considered in claim construction. Tate Access Floors, 279 F.3d at 1371-2 n.4 ("Prior art cited in the prosecution history falls within the category of intrinsic evidence.").

"bottom sole". Indeed, the specification does not teach, even by way of implication, that another sole could be affixed to the bottom surface 26 of bottom sole 12. It is apparent that the invention of the '321 patent contemplates bottom sole 12 as being the ground-contacting sole, which may either be flat or contain patterns for enhancing ground gripping.

Sixth: as argued by Nike, during prosecution of the '321 patent, it is evident that both the patent examiner and Lawlor understood that bottom sole 12 referred to the outsole of a shoe. For example, when rejecting all the original claims as obvious under 35 U.S.C. § 103, the examiner equated bottom sole 12 to the combined outsoles of prior art references Hogg, U.S. Pat. No. 2,424,463 and Denu, U.S. Pat. No. 4,130,947. [See '321 Patent Prosecution History, Office Action dated 10/12/83 at pp. 2-3; and Office Action dated 04/19/84 at pp. 3-4]. The Hogg reference shows an outer sole of a shoe having rubber suction cups and skid-resisting ribs; and the Denu reference describes a hard rubber outsole containing ribs on its underside for gripping, with spaces between them. In attempting to distinguish these references in subsequent responses, Lawlor similarly characterized the Hogg and Denu outsoles as the "bottom sole layer" and "bottom outer sole layer", respectively, in comparing them to his claimed bottom sole.

Seventh: construing the term "bottom sole" as outsole is consistent with the ordinary meaning of the term "bottom".

"When examining a claim, a court must presume that the terms in a claim mean what they say, and unless otherwise compelled, give full effect to the ordinary and accustomed meaning of claim terms." Johnson Worldwide Assoc. Inc. v. Zebco Corp., 175 F.3d 985, 989 (Fed. Cir. 1999). To do so, the Federal Circuit cases "emphasize the use of technical and general usage dictionaries in determining the ordinary meaning." Astrazenca, 384 F.3d at 1337. Further, if patent claim language has an ordinary and accustomed meaning in the art, there is a heavy presumption that the inventor intended that meaning to apply. Bell Alt. Network Servs v. Covad Commun. Group Inc., 262 F.3d 1258, 1269-70 (Fed. Cir. 2001). Thus, unless the inventor has manifested an express intent to depart from that meaning, the ordinary meaning applies. Teleflex Inc. v. Ficosa N. Am. Corp., 299 F.3d 1313, 1325 (Fed. Cir. 2002); see also Optical Disc Corp. v. Del Mar Avionics, 208 F.3d 1324, 1334 (Fed. Cir. 2000) ("Without evidence in the patent specification of an express intent to import a novel meaning to a claim term, the term takes on its ordinary meaning.").

The accepted meaning in the shoe design art denotes the term "bottoms" as: "the underface of the shoe sole which extends from the toe to the heel breast." American Society for Testing and Materials (ASTM), Standard Definitions of Terms Relating to Athletic Shoes and Biomechanics F 869-86 (Re-approved 1994). The term "outsole" is described in ASTM as: "the bottom sole thickness. The surface of which is exposed to wear." Id. In

Merriam-Webster's Collegiate Dictionary, (11th ed. 2003), the term "bottom" is characterized as: "the underside of something" and "the lowest part or place."

Nothing in the '321 patent and the '046 patent, or the patents' prosecution history, demonstrates that Lawlor intended to deviate from the ordinary and accustomed meaning of "bottom sole". Nor is there any express language showing that Lawlor, in using the term "bottom sole", intended to refer to anything other than the lowest part of a shoe sole.

Hence, in the instant case, "bottom sole" is properly construed as "outsole" which refers to the part of a shoe sole that engages and contacts the ground. Accordingly, "bottom sole" as used in the asserted Claim 1 of the '321 patent and asserted Claim 1 of the '046 patent is construed to mean *the outsole of a shoe, which is the part of the shoe that contacts the ground and is also the lowest part of the sole.*

B. Infringement:

To determine the issue of infringement, the properly construed claims of the '321 patent and the '046 patent must be compared with the 157 accused shoe models. An accused device may infringe a patent either literally or under the doctrine of equivalents. See e.g. Bai, 160 F.3d at 1353-54.

1. Literal Infringement:

"Literal infringement of a claim exists when every limitation recited in the claim is found in the accused device, i.e., when the properly construed claim reads on the accused device exactly." Cole v. Kimberly-Clark Corp., 102 F.3d 524, 532 (Fed. Cir. 1996).

The asserted Claim 1 of both the '321 patent and the '046 patent each recite a limitation requiring that the shoe sole of the invention comprise "a bottom sole ... including ... inverted cup(s) dispersed therein." ('321 patent, col. 4, ln. 67 - col. 5, ln. 1; '046 patent, col. 8, lns. 60-62). As stated *supra*, the term "bottom sole" has been construed to mean the "outsole" of a shoe, the part of the shoe that contacts the ground. Examination of the record reveals that none of the 157 accused shoe models have a bottom sole, i.e., an outsole, that includes at least one inverted cup dispersed therein. Specifically, the shoe soles of the accused models are comprised of a thin rubber outsole that is the lowest part of the shoe sole and makes contact with the ground; and a midsole, consisting of compressible foam, that is situated between the outsole and the padding for the shoe upper. Embedded within the midsole are the TUNED AIR® airbag assemblies. Consequently, it is clear that the Hemisphere Pairs of the TUNED AIR® airbag assemblies, which Lawlor analogizes to the inverted cups of the claimed bottom sole, are not part of the accused shoes' outsole. Rather, the

Hemisphere Pairs are located within the midsole, above the outsole. Hence, the outsoles of Nike's shoe models do not contain inverted cups dispersed therein, and thus, none of Nike's shoe models comprise the bottom sole described in Claim 1 of each of the patents-in-suit.

Accordingly, summary judgment of no literal infringement is proper since no reasonable jury could find that the 157 accused shoe models meet every limitation recited in the asserted claims of the '321 patent or the '046 patent.

2. *Doctrine of Equivalents:*

Lawlor argues that even when construing the bottom sole disclosed in the patents-in-suit as being simply a thin rubber outsole contacting the ground, the accused shoe models nevertheless satisfy this limitation under the doctrine of equivalents.²

"A device that does not literally infringe a claim may nonetheless infringe under the doctrine of equivalents if every element in the claim is literally or equivalently present in the

² Nike vigorously argued that the Court should decline to consider Lawlor's doctrine of equivalents arguments, under Fed. R. Civ. P. 37(c)(1). Nike contended that there was no substantial justification for Lawlor failing to seasonably articulate his equivalents positions in response to an interrogatory served on him at the beginning of discovery. However, I am unwilling to ignore Lawlor's doctrine of equivalents positions. During discovery Lawlor raised the possibility of relying on the doctrine by stating in his response to an interrogatory that each limitation in the two asserted claims is met literally and/or under doctrine of equivalents. While Lawlor did present his doctrine of equivalents arguments in a very generalized manner, consideration of his positions at this stage, and in this instance, is harmless. Moreover, it is well understood in the arena of patent litigation that the doctrine of equivalents is commonly an issue in patent infringement.

accused device. A claim element is equivalently present in an accused device if only insubstantial differences distinguish the missing claim element from the corresponding aspects of the accused device." Sage Prods. Inc. v. Devon Indus. Inc., 126 F.3d 1420, 1423 (Fed. Cir. 1997) (citations omitted). However, the doctrine of equivalents is an exception to the literal infringement requirement, and is to be applied narrowly. See Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 29 (1997). Thus, courts must "ensure that the application of the doctrine, even as to an individual element, is not allowed such broad play as to effectively eliminate that element in its entirety." Id.

Lawlor contends that the Hemisphere Pairs of the TUNED AIR[®] airbag assemblies of the accused shoe models, taken in combination with the shoes' thin rubber outsole and an optional column of foam, is equivalent to the claimed bottom sole of the patents-in-suit. In support, Lawlor relies on the case of Sun Studs, Inc., v. ATA Equip. Leasing, Inc., 872 F.2d 978.989 (Fed. Cir. 1989), for the proposition that the doctrine of equivalents does not require a one-to-one correspondence between each claim element and separate, distinct structures of the accused infringing product.

However, Lawlor's contentions are unpersuasive. The Federal Circuit has subsequently limited the holding of Sun Studs, stating that while "the doctrine of equivalents does not

require a one-to-one correspondence between components of the accused device and the claimed invention ... [t]he accused device must nevertheless contain every limitation or its equivalent." Dolly, Inc., v. Spalding & Evenflo Cos., 16 F.3d 394, 398 (Fed. Cir. 1994); see also Bicon Inc. et al., v. The Straumann Company, 2004 WL 2387277 *4 (D. Mass. 2004) ("one-to-one correspondence between the location of a structure described in a limitation and its location on an infringing device is required when the limitation indicates a specific location and distinguishes it from others."). The Federal Circuit has further noted that the application of the doctrine requires a case-specific inquiry and that "two physical components of an accused device may be viewed in combination to serve as an equivalent of one element of a claimed invention, as long as no claim limitation is thereby wholly vitiated." Ethicon Endo-Surgery Inc., v. U.S. Surgical Corp., 149 F.3d 1309, 1320 (Fed. Cir. 1998); see also Warner-Jenkinson Co., 520 U.S. at 39 n.8 (If a theory of equivalence would vitiate a claim limitation, there can be no infringement under the doctrine of equivalents as a matter of law).

Here, adopting Lawlor's equivalence theory would effectively vitiate a claim limitation. Specifically, I have already found that the asserted claims comprise a limitation defining that the outsole of a shoe have inverted cup(s) located therein. As explained *supra*, the Hemisphere Pairs of the TUNED

AIR® airbag assemblies, which have been equated to the inverted cups of the claimed invention, are located within the midsole of the accused shoe models. Lawlor's equivalence position indiscriminately groups together the Hemisphere Pairs and any portions of midsole material that is beneath them with the outsole, and maintains that this combination is the equivalent of the claimed bottom sole. However, this theory ignores the actual structural boundaries of the various shoe sole components, and gives no regard as to where an inverted cup or its equivalent is located. Thus, Lawlor's equivalence argument fails as matter of law because it eliminates the claim limitation requiring that an inverted cup or its equivalent be located in the bottom sole, i.e., the outsole of a shoe.

Lawlor's equivalence theory in relation to the claimed bottom sole also fails because it is barred by prosecution history estoppel. "Prosecution history estoppel can prevent a patentee from relying on the doctrine of equivalents when the patent relinquishes subject matter during the prosecution of the patent, either by amendment or argument." DeMarini Sports, Inc. v. Worth, Inc., 239 F.3d 1314, 1332 (Fed. Cir. 2001); see also Dolly, 16 F.3d at 400 ("the concept of equivalency cannot embrace a structure that is specifically excluded from the scope of the claims").

During prosecution of the '321 patent, the patent examiner rejected Lawlor's claims as unpatentable under 35 U.S.C.

§ 103. The examiner argued that it would have been obvious to a person of ordinary skill of the art to include an inverted cup into the thickened interrupted zone portion 11 of the outsole shown in Figures 3 and 4 of the Denu patent. In response, Lawlor argued that "there would be absolutely no reason to dispose inverse cups in the interrupted zone portion of the bottom layer of Denu because such portion is recessed from and never contacts the ground." ['321 Prosecution History, Response dated 1/11/84 at p.8]. Moreover, in the same response, Lawlor also stated that disposing an inverted cup in the interrupted zone 11 of Denu "would be useless as such a cup would be spaced from the ground and would absorb absolutely no impact shock." [Id. at p.6]. Nike correctly contends that, Lawlor, by making these arguments, expressly disclaimed configurations in which cups are "spaced from the ground." Accordingly, Lawlor is barred from arguing that the Hemisphere Pairs of the TUNED AIR® airbag assemblies located in the midsole of the accused shoe models, and spaced from the ground, are equivalent to the inverted cups located in the claimed bottom sole, i.e., outsole, and which contact the ground.

Accordingly, summary judgment of non-infringement under the doctrine of equivalents is appropriate: no reasonable jury could find that the shoe soles of the 157 accused shoe models are equivalent to the bottom sole claimed in the '321 patent and the '046 patent.

* * * * *

Because there is no genuine issue of material fact that the accused products are not encompassed by the patents-in-suit, either literally or under the doctrine of equivalents, the Defendants' motion for summary judgment is GRANTED, and the complaint is dismissed.

It is so ordered.

Dated: June 20, 2005
Boston, Massachusetts

Morris E. Lasker
U.S.D.J.