


In the  
Supreme Court of the United States



AKEVA L.L.C.,

*Petitioner,*

v.

NIKE, INC., ADIDAS AMERICA, INC., NEW BALANCE  
ATHLETIC SHOE, INC., PUMA NORTH AMERICA, INC.,

*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Federal Circuit

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**PETITION FOR REHEARING**

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**RULE 29.6 STATEMENT**

Akeva L.L.C. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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## PETITION FOR REHEARING

### I. INTRODUCTION

In accordance with Part 2 of Supreme Court Rule 44, Petitioner Akeva L.L.C. (“Petitioner”) respectfully requests that the Court reconsider its order of February 22, 2021, denying Petitioner’s Petition for a Writ of Certiorari. Said Rule 44 Part 2 provides that the Court may do so if a petitioner, with respect to whom a writ of certiorari has been denied, is able to bring to the Court’s attention “substantial grounds not previously presented” that support reconsideration. Petitioner is of the belief that such grounds exist.

Petitioner is the owner of certain United States patents which it contends have been infringed by appellees. As a threshold matter, Petitioner believes that it may have been unfairly disadvantaged by a predisposition on the part of the Federal Circuit panel (the “Panel”) that the case before it—resulting in its July 16, 2020 ruling affirming the district court’s finding of non-infringement—was a regurgitation of an earlier appeal to the Federal Circuit by Petitioner in which another Federal Circuit panel affirmed a district court judgment finding non-infringement of another patent of Petitioner having a different specification, to wit: a continuation-in-part patent of the key patent-in-suit in the litigation below. That is not the case at all.

In this Rule 44 Part 2 petition, Petitioner will present three (3) fact-based arguments. The focus will be the two patents of Petitioner alluded to above, to wit: U.S. Patent No. 5,560,126, issued on October 1,

1996 (the “126 Patent”), and its continuation-in-part U.S. Patent No. 6,604,300 B2, issued on August 12, 2003 (the “300 Patent”). Given the applicable word limitation, the exacting nature of Part 2 of Rule 44 and the awareness the Court already has with respect to the instant case, Petitioner will present those arguments as succinctly as possible.<sup>1</sup>

## II. THE ’126 PATENT AND ’300 PATENTS’ INCLUSION OF CERTAIN IDENTICAL DRAWINGS THAT HAVE *DIFFERENT* WRITTEN DESCRIPTIONS ASSOCIATED THEREWITH.

The specifications of the parent ’126 Patent and its child continuation-in-part ’300 Patent have certain drawings in common. Most significantly, FIG. 22 (and FIG. 23) of the parent ’126 Patent (the key patent-in-suit in the litigation below) is identical (except for numbering) to FIG. 2 of the child ’300 Patent—itself a patent-in-suit in litigation that was resolved by the Federal Circuit years before the initiation of the current litigation. That said, the written description of said FIG. 22 of the ’126 Patent is very different from the written description of said FIG. 2 of the ’300 Patent, as explained below.

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<sup>1</sup> In its determination of the arguments that were appropriate for consideration by this Court in its petition for writ of certiorari (the “Cert Petition”), Petitioner did not believe that the arguments presented in this Rule 44 Part 2 motion—although of critical importance—were cert-worthy. Accordingly, Petitioner did not present them in the Cert Petition. However, such grounds are substantial, have not previously been presented and, accordingly, are the underlying basis of this motion.

As to the FIG. 22 embodiment of the '126 Patent, the written description states at column 11, lines 66-67:

Another manner of “attaching” the rear sole to the heel support is shown in FIGS. 22 and 23 (underscoring and quotation marks added).

The word “attaching” is not defined. However, in a similar context, that of “attaching” the forward sole and the heel support to the shoe upper, the '126 specification provides as follows at column 5, lines 7-9:

The forward sole and heel support are “attached” to the shoe upper in a conventional manner, typically by injection molding, stitching or gluing (underscoring and quotation marks added).

Notably, the potentially reciprocating words “detach,” “detaching” or “disassembly” do not appear in the FIG. 22/23 written description, as they do in other embodiments (*see*, for example, column 5, line 42; column 6, line 60; and column 8, line 55). Also, the term “press-fit” or “press-fitted,” utilized for the rear sole and heel support shown in FIG. 20A and FIG. 20B (*see* column 11, lines 58-59) was not utilized for the FIGS. 22/23 embodiment. In addition, the written description of the FIGS. 22/23 embodiment provides that the graphite insert (a/k/a “flexible member” and “flexible plate”) may either be permanently attached to the top of the heel support or removable through the top of the shoe (*see* column 12, lines 41-47), obviating the need to detach the rear sole in order to gain access to, or replace, the graphite insert.

In sharp contrast, with respect to identical FIG. 2 of the '300 Patent, its specification provides at column 4, lines 43-45 as follows:

Shoe 100 also includes a rear sole 150 that is detachably secured to and/or rotatably positionable relative to rear sole support 140 (underscoring added).

Petitioner submits that the only inference to be drawn from a comparison of the above-referenced portions of the '126 Patent and the '300 Patent is that the rear sole of the shoe depicted in FIG. 22 of the '126 Patent is permanently attached to the heel support of that embodiment and that it is non-rotatable; whereas, the identical rear sole of the shoe depicted in FIG. 2 of the '300 Patent is both detachable and rotatable—and that the Panel, in its affirmation of the district court, overlooked this critical point.

### III. THE '300 PATENT'S "LAZY SUSAN" SENTENCE—AND WHAT THE PANEL INCORRECTLY FOUND TO BE ITS SUBSTANTIVE EQUIVALENT IN THE '126 PATENT.

At column 7, lines 43-44, the '300 Patent recites what may be described as the “lazy susan” sentence. It reads as follows:

As another example, the rear sole may not be removable but only rotatably positionable (underscoring added).

However, the continuation-in-part '300 Patent includes such sentence based on a specification filed on September 30, 1996 that is not included in the '126 Patent specification—filed over two years earlier on August 17, 1994. Perhaps aware of this “chronology conundrum,” the Panel looked for and found what it



deemed to be the substantive equivalent of the '300 Patent's "lazy susan" sentence in the specification of the '126 Patent. It appears at column 3, lines 25-30 of the "Summary of the Invention" section of the '126 Patent and reads in pertinent part as follows:

To achieve these and other advantages and in accordance with the purpose of the invention . . . the shoe includes . . . a rear sole detachably secured or rotatably mounted to the heel support . . . (underscoring added).

However, the dictionary definition of the verb "mount" ("climb up;" "rise," "ascend") in no manner describes the rotation of a rear sole that has already been permanently affixed, as the Panel found. Rather, at least in this instance, it describes an installation process as depicted in FIGS. 9, 10, 11, 12, 24 and 27 of the '126 Patent, by which the detachable rear sole is inserted in a circular manner into the heel support, much the same way that a mason jar is twisted into its lid (or the lid is twisted onto the jar).

The fact that such term—"rotatably mounted"—clearly concerns installation of the rear sole and in no way suggests a "rear sole permanently attached but not fixed into position," as the Panel found, is plainly shown by the following paragraph, column 5, lines 47-60 of the '126 Patent, which reads in pertinent part as follows:

The rear sole 28 can also be rotatably mounted on the heel support 26. The rear sole can be rotated to a plurality of positions. . . . When the user determines that the wear is significant enough, the user detaches the

rear sole 28 from the heel support 26, and rotates the rear sole. (underscoring added).

Significantly, neither the '300 Patent specification's term "rotatably positionable" (column 4, line 44) nor its term "selectively positionable" (column 6, lines 46-47)—as those terms apply to the '300 Patent's rear soles—appear in the '126 Patent's specification. That is because the rear sole of the preferred embodiment of the '300 Patent (shown in FIG. 3) has a rear sole that is circular in shape, and the dominant embodiment of the '126 Patent (shown in FIGS. 1A, 1B and 2) has a non-rotatable, elliptically-shaped rear sole. Accordingly, the following sentence appears in the '300 Patent's specification, at column 6, lines 61-63, the equivalent of which appears nowhere in the specification of the '126 Patent:

For the embodiment in FIG. 3 discussed below, the rear sole may be rotated without separating it from the rear sole support (underscoring added).

The same would be true of the '300 Patent's embodiments depicted in FIGS. 19 through 26.

In contradistinction, it bears repeating that a non-rotatable, elliptically-shaped rear sole is dominant in the '126 Patent (*see* '126 Patent, column 6, line 3, and FIG. 2 of the '126 Patent). That is to say (a) that its rear sole, by definition, cannot be rotated without separating it from the rear sole and (b) that its attributes—including the shape of its rear sole—must be imputed to all other embodiments of the '126 Patent unless otherwise noted. In point of fact, the sentence located at column 8, lines 9-12 reads as follows:

The general features of the first embodiment, such as the shape of the rear sole and the material composition of the shoe elements, will apply to all embodiments unless otherwise noted. (underscoring added).

Further still, starting at column 5, line 60 and ending at column 5, line 64 of the '126 Patent, the following two sentences appear:

Rotation [of the rear sole] can occur in an axis aligned with the major axis of the shoe, so that the heel is in effect “flipped” or inverted. Rotation can also occur about an axis normal to the major axis of the shoe, or any combination of the above.

A “flipping” (*i.e.*, an inversion) of the rear sole—on an axis aligned with the major axis of the shoe—incontrovertibly precludes it from being a “permanently attached, rotatable rear sole,” as the Panel found it to be.

It follows that no embodiment of the '126 Patent discloses—nor does any verbiage in the '126 Patent’s written description describe—a permanently attached rotatable rear sole, as the Panel incorrectly found.

#### **IV. A THREE-STEP ANALYSIS OF THE '300 PATENT’S “LAZY SUSAN” SENTENCE, AND WHY ITS INCLUSION IN THE SPECIFICATION OF THE '300 PATENT BUT NOT THE '126 PATENT IS DISPOSITIVE OF THE INSTANT CASE IN PETITIONER’S FAVOR.**

1. At column 13, lines 59-61 of the '126 Patent, a critical sentence appears. It is broken down into two parts, as indicated by an inserted [a] and an inserted [b] and reads as follows:

[a] The graphite insert also need not be used only in conjunction with a detachable rear sole, [b] but can be used with permanently attached rear soles as well.

2. Substantially the same sentence also appears at column 10, lines 14-17 of the '300 Patent. It is likewise broken down into two parts, also indicated by an inserted [a] and an inserted [b] and reads as follows:

[a] The flexible region [a/k/a “graphite insert”] also need not be used only in conjunction with a detachable rear sole [b] but can be used with permanently attached rear soles as well.

3. In the case of the '300 Patent (paragraph no. 2 above), the “lazy susan” sentence could indeed be construed to be a limitation on said paragraph 2[b]; *i.e.* that the phrase “permanently attached rear soles as well” means a rear sole that is rotatable but not detachable. However, the '300 Patent’s “lazy susan” sentence, or its substantive equivalent, appears nowhere in the '126 Patent’s specification, which in turn mandates the following conclusion — *Nothing in the entire specification of the '126 Patent supports a distinction between “permanently attached rear soles” that rotate, in whole or in part, and “permanently attached rear soles” that do not.*

In this context it bears repeating that, for reasons discussed above, the phrase “rotatably mounted” as utilized in the '126 Patent’s specification, applies to the installation of a detachable rear sole—not to a permanently attached, rotatable rear sole.



## CONCLUSION

The rear sole of FIG. 22 of the '126 Patent—unlike the rear sole of FIG. 2 of the '300 Patent—is a permanently attached, non-rotatable rear sole—which includes a conventional rear sole.

Respectfully submitted,

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MARCH 19, 2021

**RULE 44 PART 2 CERTIFICATE**

I, David Farrer Meschan, Counsel for Petitioner, pursuant to Supreme Court Rule 44 Part 2, certify that (1) This petition for rehearing is presented in good faith and not for delay; and (2) The grounds of this petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

/s/ David Farrer Meschan

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