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17	MITCHELL G. WEATHERLY Administrative Patent Judges.	17	
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20	DEPONENT: VINCENT A. THOMAS	20	
21	DATE: August 22, 2014	21	
22		22	
23	REPORTER: ALLIE McRAE	23	
24		24	
25	VIDEOGRAPHER: JAMES DAVID	25	
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2	A P P E A R A N C E S:	2	S T I P U L A T I O N S
3		3	
4	COUNSEL FOR PETITIONER:	4	The deposition of VINCENT A. THOMAS, was
5	Daniel M. Lechleiter, Esq.	5	taken pursuant to Notice, in the law offices of
6	FAEGRE BAKER DANIELS LLP	6	Faegre Baker Daniels LLP, located at 300 N. Meridian
7	300 N. Meridian Street, Suite 2700	7	Street, Suite 2700, Indianapolis, Indiana
8	Indianapolis, Indiana 46204	8	46204-1750. Said deposition was taken for the
9	Telephone: 317.237.0300	9	purposes of discovery, to be used in accordance with
10	Facsimile: 317.237.1000	10	the Indiana Rules of Civil Procedure.
11		11	
12		12	
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2 PROCEEDINGS
3
4 THE VIDEOGRAPHER: Good morning.
5 This begins Disc No. 1 of the deposition
6 of Vincent A. Thomas, Volume 1, in the matter of
7 Target Corporation, Petitioner vs. Destination
8 Maternity Corporation, Patent Owner, that's been
9 heard in U.S. Patent and Trademark Office, Patent
10 Trial and Appeal Board, case No. IPR2013-00530 and
11 others, regarding patent No. RE43, 563E and others.
12 Today is August 22, 2014. Current local
13 time is 9:39 a.m.
14 This deposition is being held at the Law
15 Offices of Faegre Baker Daniels in Indianapolis,
16 Indiana.
17 My name is James David. I am a
18 certified legal video specialist, appearing on
19 behalf of Centext Legal Services, located in Tustin,
20 California.
21 Counselors, please state your appearance
22 for the record beginning with counselor for
23 Petitioner.
24 MR. LECHLEITER: Good morning. My name
25 is Dan Lechleiter. I'm here to represent Petitioner

1 Target Corporation.
2 MR. POLLACK: Stuart E. Pollack, DLA
3 Piper LLP U.S., on behalf of the Patent Owner,
4 destination Maternity.
5 THE VIDEOGRAPHER: The court reporter is
6 Allie McRae, appearing with Centext also, and she
7 shall now administer the oath.
8
9 * * *
10
11 VINCENT A. THOMAS, called by the Patent Owner,
12 Destination Maternity Corporation, having been first
13 duly sworn, was examined and deposed as follows:
14
15 * * *
16 EXAMINATION
17 BY MR. POLLACK:
18 Q. Good morning, Mr. Thomas.
19 A. Good morning.
20 Q. I know you've been deposed many times
21 before; is that right?
22 A. That is correct.
23 Q. Okay. Do you have an estimate about how
24 many times?
25 A. It's more than a hundred.

1 Q. Okay. About how many of those were
2 patent cases?
3 A. I would estimate that it's -- it's
4 certainly more than half of those cases. How much
5 more -- I haven't -- I haven't actually tracked. I
6 can go back and look.
7 Q. And you have also testified at trial
8 before?
9 A. Yes.
10 Q. About how many times?
11 A. More than sixty times.
12 Q. And about how many of those times were
13 patent cases?
14 A. Again, I would -- would estimate, as I
15 sit here, I did more than half of those. And the
16 specific number, I'd have to go back and look.
17 Q. How many times have you testified at
18 trial regarding commercial success?
19 A. Well, I do a lot of work with regard to,
20 and have testified on a number of, patent
21 infringement cases. And in many of those cases, the
22 issues related to the success of the product and the
23 impact that a patent, or a claimed feature of a
24 patent, would have on the product would be at issue.
25 So, in many of those cases, I think, the success of

1 the product is something that I would have addressed
2 and testified about.
3 Q. Sure, sure. But -- let me ask you this.
4 In how many of those cases did you testify about at
5 trial about commercial success in regard to the
6 secondary consideration of non-obviousness?
7 A. I don't believe that I -- I'd have to --
8 to double check this, but I don't recall a trial
9 where I have provided that testimony as it relates
10 to secondary considerations.
11 Q. What about in -- in deposition? How
12 many times have you testified at a deposition
13 concerning commercial success as it relates to the
14 issue of non-obviousness?
15 A. I recall one deposition.
16 Q. Do you recall what case that was?
17 A. It involved a company by the name of
18 VIIV.
19 Q. All right. What company is that?
20 A. It's a pharmaceutical company.
21 Q. And is VIIV -- is that a generic
22 pharmaceutical company or a brand name company?
23 A. I -- you know, I'm -- I'm not certain as
24 I sit here. I'd have to go back and look at that. I
25 know there was an affiliation with GSK in that -- in

1 that matter. So...

2 Q. By GSK -- that's GlaxoSmithKline?

3 A. That's correct.

4 Q. Do you remember what the product was in

5 that case?

6 A. It was a treatment for HIV.

7 Q. Was it a pharmaceutical for HIV?

8 A. Yes.

9 Q. Okay. Do you remember what drug?

10 A. I don't remember -- I don't recall the

11 specific name of the drug as I sit here. I'd have

12 to go back and look at that.

13 Q. Okay. Do you recall what kind of drug

14 it was? Was it a protease inhibitor or...

15 A. It sounds like you have some knowledge

16 of that area. It was a protease inhibitor to the

17 best of my recollection, yes.

18 Q. And do you recall if you were on the

19 side of the -- of the patent owner or the company

20 that was challenging the patent?

21 A. I believe I was representing the patent

22 owner in that case, or was retained by counsel who

23 was representing the patent owner.

24 Q. Did you testify at trial in that case?

25 A. No.

9

1 Q. Do you know why not?

2 A. It settled.

3 Q. What court was that case in?

4 A. It was in Delaware.

5 Q. What counsel were you working with?

6 A. The law firm was Mayer Brown.

7 Q. Is that Lisa Ferri, or who?

8 A. That's correct.

9 Q. So, what was it you were saying about

10 the commercial success of the drug in that case

11 involving VIIV?

12 A. It was VIIV.

13 Q. Sorry?

14 A. It's V --

15 Q. Okay.

16 A. It's V --

17 Q. -- VIIV.

18 A. Yes. To the best of my recollection, I

19 was analyzing the success of the product, and what

20 the success could be traced to.

21 Q. What did you trace the success to of the

22 protease inhibitor product?

23 A. It was the -- the claimed feature in

24 that case drove the success of the product.

25 Q. And what -- what was the claimed

10

1 feature?

2 A. Well, again, it's been a while since

3 I've dealt with that matter. But my -- my

4 recollection is that the -- the pill burden

5 associated with the protease inhibitor was something

6 that impacted a patient's ability to actually use

7 the product. The -- the claimed feature reduced the

8 pill burden, among other things, or was responsible

9 for that. And that resulted in increased sales and

10 market share of the product.

11 Q. So, was this a patent that concerned

12 combining more than one drug into one dosage form?

13 A. I -- I'd have to go back and -- I don't

14 remember. I don't specifically recall as I sit

15 here.

16 Q. In that case do you recall whether --

17 you're aware that there's a presumption of nexus

18 when the product being sold embodies the claims of

19 the patent, correct?

20 MR. LECHLEITER: Objection to form.

21 A. I'm not sure that I -- I don't -- I

22 don't have that understanding, I guess.

23 Q. I -- are you familiar with something

24 called the presumption of nexus?

25 A. I don't know that I am -- I don't know

11

1 if that's a legal issue or -- but I'm not -- as I

2 sit here, not aware of a presumption.

3 Q. Okay. But you're not -- you're not an

4 attorney, correct?

5 A. That's correct.

6 Q. Okay. You're not providing any legal

7 expertise in this case.

8 A. That's correct. I'm not here to provide

9 legal opinions.

10 MR. POLLACK: I am going to mark as

11 Thomas Deposition Exhibit 1 the Declaration of

12 Vincent A. Thomas. In this proceeding it's called

13 Exhibit 11-10. And I've also included in one of the

14 exhibits which are in this proceeding referred to as

15 Exhibits 11-11 through 11-15. We'll mark that.

16

17 (Thomas Deposition Exhibit 1, the Declaration of

18 Vincent A. Thomas, was marked for identification.)

19

20 Q. (BY MR. POLLACK:) If you could just

21 confirm for me that Thomas Deposition Exhibit 1 is

22 your declaration of exhibits.

23 A. Is this -- I -- I paged through this,

24 but -- and I have to look at this in absolute

25 detail, but this appears to be my report.

12

1 Q. Okay. As you sit here now, there is --
 2 there is nothing that you -- as far as you can tell
 3 that's missing or deficient?
 4 A. Not as I sit here, no.
 5 Q. If you could turn to Paragraph 21 of
 6 your declaration, that's Exhibit 11-10 in this file.
 7 A. Okay.
 8 Q. So on Page 15, Paragraph 21, let me ask
 9 you first, who -- who drafted Paragraph 21?
 10 A. Well, it would have been my paragraph,
 11 and I would have asked -- I believe I asked
 12 Ms. Distler to draft this paragraph.
 13 Q. Who -- who is Ms. Distler?
 14 A. She is a managing or -- excuse me, now
 15 senior managing director with FTI Consulting.
 16 Q. Can you tell me the names of all the
 17 people who were involved in -- in drafting this
 18 report, including the attorneys?
 19 A. Well, this report and the related
 20 exhibits in my report, I -- I participated in the
 21 drafting of this report and was provided assistance
 22 from Ms. Distler. It's Carrie Distler and
 23 Mr. Jeffrey Ihnow. His last name is spelled
 24 I-H-N-O-W.
 25 Q. And who is Mr. Jeffrey Ihnow?

13

1 A. He is a senior director with FTI
 2 Consulting.
 3 Q. Again, what was Ms. Distler's title?
 4 Senior managing --
 5 A. Senior managing director.
 6 Q. Senior managing director.
 7 And for my knowledge, what's the
 8 difference between a senior managing director and a
 9 senior director at FTI?
 10 A. The -- the title of senior managing
 11 director is more senior to a senior director. If
 12 that -- probably muddies it a little bit, but...
 13 Q. Okay. What -- what's your title now?
 14 A. Senior managing director.
 15 Q. Okay. Does Ms. Distler report to you in
 16 FTI?
 17 A. We don't have formal reporting in that
 18 regard. I -- I can guess, when you say "reporting,"
 19 can you be more specific in terms of what you are
 20 referring to?
 21 Q. Yeah. Are you her boss?
 22 A. You know, it -- it -- I guess that
 23 depends on, you know, what -- what particular
 24 situation you're referring to. I don't know if
 25 there's any formal lines of responsibility or -- or

14

1 formal -- formal reporting in our organization.
 2 I do lead the intellectual property
 3 practice for FTI. Ms. Distler is part of that
 4 practice. Certainly, in this case she assisted me
 5 and worked at my direction. But also, Ms. Distler
 6 works on other matters that I am not involved with
 7 and runs matters on her own as well.
 8 Q. Okay. And what -- what about Mr. Ihnow?
 9 Are you Mr. Ihnow's boss?
 10 A. I guess, I would give the same type of
 11 response. There are certain engagements where
 12 Mr. Ihnow assists me and works at my direction. He
 13 is part of the intellectual property practice as
 14 well, but there are certainly situations where
 15 Mr. Ihnow would work with other professionals within
 16 FTI also.
 17 Q. And just briefly, can you tell me what
 18 is Ms. Distler's and Mr. Ihnow's backgrounds?
 19 A. Ms. Distler graduated from the
 20 University of Missouri, has a degree in economics, I
 21 believe a master's in economics. She's been doing
 22 dispute in financial analysis type of work for, I
 23 believe, the better part of the last fifteen years.
 24 Mr. Ihnow, he is a graduate of the
 25 University of Michigan, has a, I guess, a similar

15

1 background to Ms. Distler. And he's been doing
 2 dispute analysis and financial analysis and data
 3 analysis work now for the better part of ten years.
 4 Q. Okay. Do you think he also has an M.S.
 5 in economics?
 6 A. Oh, I that -- that I don't believe so.
 7 Q. Okay. What about bachelor's or CPA?
 8 A. I believe he is a CPA, but I'd have to
 9 -- I'd have to double-check that.
 10 Q. You have a bachelor's in economics, and
 11 you are a CPA, correct?
 12 A. That's correct.
 13 Q. Okay. You don't have any other degrees
 14 in economics, master's or Ph.D.?
 15 A. I have a -- I am a master at business
 16 administration.
 17 Q. Okay. But no other degrees in
 18 economics, other than the bachelor's?
 19 A. I have bachelor of arts in economics,
 20 yes. And as I said, I have a master's in business
 21 administration. Within that curriculum, there would
 22 have been some economic courses and things of that
 23 nature.
 24 Q. Where's your MBA from?
 25 A. Indiana University.


16


1 Q. Is that down in Bloomington or...
2 A. Well, the -- the -- my diploma is from
3 Indiana University of Bloomington, although I -- I
4 took many courses or most of my courses here in
5 Indianapolis as I was getting my MBA while I was
6 working.
7 Q. Okay. Where were you working at the
8 time?
9 A. Coopers and Lybrand, which ultimately
10 became Pricewaterhouse Coopers.
11 Q. Okay. I remember them back when there
12 used to be more firms.
13 How long were you at Coopers and
14 Lybrand?
15 A. Well, I was at Coopers in total
16 approximately six years, but that would include not
17 only my time at Coopers but my time at
18 Pricewaterhouse Coopers as well.
19 Q. And what was it that you'd do at Coopers
20 and at -- at Pricewaterhouse?
21 A. I was a member of the financial advisory
22 services practice.
23 Q. Did you work at all with -- when you
24 were at Coopers or Pricewaterhouse, with either of
25 their IP analysis or litigation consulting groups?

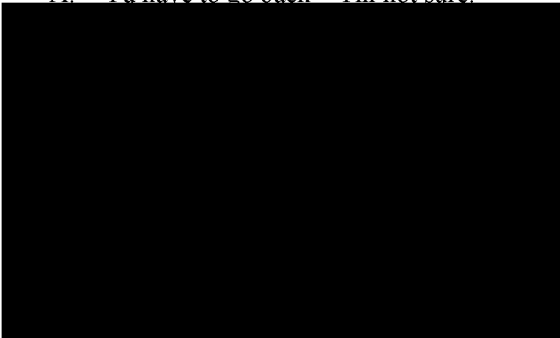
1 A. Well, within the financial advisory
2 service practice, we performed analysis and services
3 related to intellectual property. I was part of
4 that group.
5 Q. What -- what kind of services?
6 A. Damage analysis in matters involving
7 some form of the intellectual property, the
8 evaluation of intellectual property, and assistance
9 with licensing analysis and negotiations, as well
10 as -- as royalty audits also.
11 Q. Did you ever work with Corky Hoffman
12 when you were there?
13 A. When I was at Pricewaterhouse Cooper?
14 Q. Yes.
15 A. Not while I was -- not while I was
16 there.
17 Q. Okay. Did you know him?
18 A. I did know him, yes.
19 Q. And did you know Phil Green?
20 A. I have not met Mr. Green.
21 Q. Okay. Just out of curiosity, did you
22 know Al Hoffman by the way?
23 A. I -- I did not know him -- I know --
24 knew of him but did not know him personally.
25 Q. Turning for just a second to

1 Paragraph 21 again. So, at first sentence it says,
2 "It was my understanding that a prima facie case of
3 nexus is generally made out if the patent owner
4 shows that the commercially valuable product in
5 question embodies the features of the claims in
6 question."
7 Do you see that?
8 A. Yes.
9 Q. Okay. Do you agree with that statement?
10 A. I agree that I have an understanding of
11 that -- that's what I was asked to -- at least it's
12 -- it's my understanding for this matter.
13 Q. Before this -- before this case, were
14 you aware of this -- of this principle?
15 A. As a general matter, yes.
16 Q. And earlier, I was referring to a
17 presumption of nexus.
18 Are you familiar with the term
19 "presumption" generally?
20 MR. LECHLEITER: Objection to form.
21 A. Generally, you can presume something. I
22 guess, it doesn't necessarily mean that it's, in
23 fact, the case, but you could perhaps assume or
24 presume.
25 Q. Okay. When you are using the term of

1 "prima facie case of nexus," what -- what did you
2 mean by that?
3 A. Meaning that there is -- as I go on to
4 say that -- that there's some sufficient amount of
5 information in a relationship between the claimed
6 features, and that those claimed features -- the
7 relationship between the claimed features and the --
8 the success, if any, of a particular product.
9 Q. Did -- did you understand that the --
10 the law says that, if a patent owner can show that
11 the claims embody or that -- I'm sorry, that their
12 products embody the claims, that the law then says
13 that the patent owner has at least initially
14 satisfied its burden of proof that there is a nexus
15 between the claims and the invention with nothing --
16 sorry, the claims and the product with nothing
17 further needing to be done?
18 MR. LECHLEITER: Objection to form.
19 A. Again, I think you're -- you're probably
20 treading into legal areas, and I'm not here to give
21 legal opinions. That may or may not be the case,
22 but again, I'm not here to provide legal analysis or
23 opinions.
24 Q. Okay. Well, when you -- when you gave
25 your analysis of commercial success, did you

1 consider whether or not the products at issue here
 2 embody the claims?
 3 MR. LECHLEITER: Objection to form.
 4 A. Well, I -- I guess I would answer that a
 5 couple of ways. One is that I'm responding to what
 6 Mr. Green -- in the analysis he set forth. And I
 7 also understand from Mr. Green's analysis that he is
 8 relying on what Mr. Brookstein has done from a
 9 technical perspective. And I also understand that
 10 Mr. Brookstein has only analyzed four pairs of
 11 pants. And I understand there's more than 
 12 SKUs that are at issue and included in the sales
 13 information that Mr. Green has analyzed. So in that
 14 regard I think that, certainly, was something I took
 15 into consideration in responding to what Mr. Green
 16 has set forth.
 17 I think also I was asked, and I think,
 18 understand to be appropriate, is to assess the
 19 features associated with the dependent claims and
 20 whether those have an impact on the sales or success
 21 of any of -- of the products that are at issue. And
 22 that, certainly, would be something that I would
 23 take a look at as well.
 24 Q. Have -- have you dealt with analyzing
 25 the non-obviousness of or obviousness of dependent

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 19 Q. Okay. Prior to this case, did you have
 20 an understanding of that analysis?
 21 A. Understanding of what analysis?
 22 Q. Of how to look at a dependent claim?
 23 A. Well, I -- I guess I -- I had an -- I
 24 have an understanding that, typically, in performing
 25 economic analysis, you're looking at features of a

1 claims in any other cases you worked on?
 2 MR. LECHLEITER: Objection to form.
 3 A. I -- I'd have to go back and -- and take
 4 a look. That perhaps could be the case. I've
 5 worked on a number of cases. So, therefore, that
 6 may well be the case.
 7 Q. Right. Well, earlier we talked about
 8 the only case where you gave a deposition at least
 9 regarding commercial success. It was this case
 10 where I get the company name wrong, VIIV?
 11 A. Uh-huh.
 12 Q. In that case were you dealing with the
 13 dependent claims or independent claims?
 14 A. I'd have to go back -- I'm not sure.
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1 product and which features are covered by certain
 2 claims of a patent. That's an analysis that I
 3 performed in the past, and that's how I understand
 4 such analysis is to be performed. The legal
 5 ramifications is not something that I -- I would get
 6 involved with. I'm not a legal expert. I'm not an
 7 attorney. So...
 8 Q. Okay. You used the term "features"
 9 several times. In -- in patent law we often use the
 10 word "elements."
 11 Are you familiar with the word
 12 elements in patent law?
 13 A. Just -- just generally. Again, I'm not
 14 an attorney. So...
 15 Q. What's your general understanding of
 16 elements?
 17 A. Certain aspects, I guess.
 18 Q. Okay. Is -- when you are using the word
 19 "features," is that the same thing as elements?
 20 A. I don't -- again, I'm not an attorney.
 21 I'm not giving legal opinions. So, I don't know
 22 that it would necessarily be the same.
 23 Q. Okay. What -- what do you mean by a
 24 feature of a claim?
 25 A. Well, I -- I guess, to be clear, I'm --

1 I'm looking at -- for a particular product. You
 2 know, there are features to a product. In many
 3 cases you're assessing the impact of those features
 4 to the success or sales or the economic benefits of
 5 the product, whether that's in assessing the
 6 commercial success, assessing the reasonable
 7 royalty, or things of that nature. And so, that's
 8 what, as an economic expert, you typically do, or
 9 what I've typically done.
 10 Q. By the way, would you agree with me that
 11 the Secret Fit Belly product is a commercial
 12 success?
 13 MR. LECHLEITER: Objection. Form.
 14 A. Well, I -- I don't know that. I haven't
 15 arrived at that opinion, and I am not sure that you
 16 can ultimately conclude from Mr. Green's analysis
 17 that it is, in fact, commercial success.
 18 Q. Well, let me ask you this. You're not
 19 giving an opinion that's not -- I know -- I am
 20 asking too many dangerous...
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 Q. Well, how do you -- how do you determine
 12 if a product is a commercial success in patent law?
 13 A. Well, you could -- I mean, it depends on
 14 the facts and circumstances. I guess, there are
 15 certain ways that you can address the success.
 16 Again, it would depend on the situation.
 17 Q. Well, hasn't the Federal Circuit said
 18 that it determined whether a product is a commercial
 19 success based on its market share and sales revenue?
 20 MR. LECHLEITER: Objection. Form.
 21 A. Again, I don't -- I haven't memorized
 22 the case law. I just want to be clear I'm not
 23 giving legal opinions. There may be cases out there
 24 that discuss those issues, and those may be
 25 benchmarks that could apply to a particular case.

1 Q. Have you applied those benchmarks to
 2 this case?
 3 A. Well, what I can say is that Mr. Green
 4 has failed to apply, I think, those benchmarks. And
 5 so, in that regard I've concluded that he doesn't
 6 have the reasonable basis upon which to conclude
 7 that it's a commercial success. That's what I was
 8 asked to do, and that would be my opinion in this
 9 particular matter.
 10 Q. Am I correct in that your opinion in
 11 this case is simply that Mr. Green hasn't met his
 12 burden of proof in your view of commercial success?
 13 A. Well, I guess, you're -- you're giving
 14 -- you're asking a very general question. I think
 15 that certainly I don't believe Mr. Green has done
 16 the appropriate analysis in support of his opinions.
 17 I also believe that, in addition to that, there's
 18 evidence that would support findings contrary to Mr.
 19 Green's opinions.
 20 Q. What evidence -- what evidence shows
 21 that Secret Fit Belly is not a commercial success?
 22 A. Well, I --
 23 MR. LECHLEITER: Objection to form.
 24 A. -- I think that in response to what
 25 Mr. Green has set forth, and I think that I've

1 identified in my report he's looked at -- as far as
 2 I can tell what he's looked at is that there were
 3 roughly [REDACTED] in sales and -- and profits on
 4 those -- gross profits on those sales. And that
 5 there was a price differential and others have -- he
 6 claims that others have used the patent and
 7 technology. And that leads him to conclude that the
 8 Secret Fit Belly pants are commercial success.
 9 And he's also compared those sales in
 10 relation to non-Secret Fit Belly pants. I think
 11 that that analysis is deficient in being able to
 12 arrive to the conclusions that he has arrived at.
 13 Q. I think that in your statement you may
 14 have confused two different issues in the case. I
 15 want to make sure we're on the same page. There are
 16 two issues, I think, that are involved in your
 17 report and Mr. Green's report. One is whether the
 18 products are commercial success, and the other is
 19 whether there is a nexus between that commercial
 20 success and the claims.
 21 Is that -- is that fair?
 22 A. Well, I think that's -- those are the
 23 two opinions that Mr. Green has arrived at. And I
 24 believe I responded to those opinions.
 25 Q. Okay. Am I correct that the price

1 premium and -- well, let's start with the price
 2 premium. The price premium -- that actually connect
 3 -- that's actually associated with this issue about
 4 whether there's a nexus, correct?
 5 A. I -- I'd have to go back and look at
 6 Mr. Green's report. He may be attempting to use
 7 that as a reason to suggest that there's -- somehow
 8 there's a nexus.
 9 Q. Well, what did you think he was doing
 10 when you responded to him?
 11 A. Well, I -- I would say that, in certain
 12 respects of his report, it was unclear as to what he
 13 was doing, and he was deficient in describing what
 14 he was doing on many fronts. So, but in - in terms
 15 of what he did set forth, I -- I certainly concluded
 16 that it was not sufficient to support his findings
 17 or his opinions in this case.
 18 Q. Well, let me -- let me ask you this. In
 19 the economic analysis of commercial success, is it
 20 the -- the case that price premium is used to show
 21 that there's a nexus between the invention and the
 22 claims?
 23 MR. LECHLEITER: Objection. Form.
 24 A. Are you talking about Mr. Green's
 25 analysis?

1 Q. No, in general.
 2 A. Again, it depends on whether -- that --
 3 that depends on the facts and circumstances whether
 4 that's appropriate or it isn't, whether you look at
 5 a difference in price. And that somehow relates to
 6 the nexus of the -- the patents at issue in that
 7 case.
 8 Q. Well, what's your understanding?
 9 A. That's -- my understanding is that that
 10 could be something you take a look at. But whether
 11 that's relevant or not depends on the facts and
 12 circumstances of the case.
 13 Q. Well, what -- why do you look at the
 14 price premium in your economic analysis of
 15 commercial success?
 16 A. Again, it would depend on the situation,
 17 the facts and circumstances as to whether that would
 18 be something that would be relevant to assess in
 19 support of -- or in assessing whether there is a
 20 nexus or connection between the patents and the
 21 success of a product. It may or may not be the
 22 case. It depends on the situation.
 23 Q. Have you looked at a price premium in
 24 the past to examine whether there was a nexus
 25 between the claims and the products at issue in any

1 -- not in obviousness analysis that you've done in
 2 the past?
 3 MR. LECHLEITER: Objection. Form.
 4 A. I -- I don't recall if that's something
 5 we did. I'd have to go back and look. That may
 6 have been, that may not have been.
 7 Q. Well, what -- what things have -- have
 8 you looked at in the past to show that there was a
 9 nexus between the claimed invention and the product
 10 in any analyses you did of non-obviousness or
 11 obviousness in the past?
 12 MR. LECHLEITER: Objection. Form.
 13 A. Well, understanding the differences
 14 between the products and what -- in those
 15 differences what -- what is -- what those
 16 differences are, and whether those are covered by
 17 the patents or claims that are at issue. That would
 18 be part of the analysis.
 19 Q. You said "understanding the
 20 differences." What -- what differences are you
 21 referring to?
 22 A. Meaning you could look at a -- one
 23 product as a comparison to another product and see
 24 if the -- the differences between those products
 25 would be what's covered by the patent or would

1 include things other than what's covered by the
 2 patent.
 3 Q. And what would that tell you?
 4 A. Well, I would -- it would give you an
 5 indication as to whether making any other
 6 comparisons of those products would be relevant to
 7 the issue at hand. Or could be relevant.
 8 Q. You're aware that Mr. -- Mr. Brookstein
 9 did an analysis -- a comparison of Secret Fit Belly
 10 products to all the claims in this case. You're
 11 aware of that, correct?
 12 A. Well, I -- again I -- I'm not a
 13 technical expert. So, what all the details and
 14 things that he went through, I don't know that I
 15 could recite that verbatim. I understand that he
 16 has arrived at opinions that the four pants, pairs
 17 of pants, that he analyzed, that certain of those --
 18 certain of the claims are embodied -- at least it's
 19 his opinion -- are embodied in certain of those --
 20 those pants.
 21 Q. Uh-huh. And you're aware that Target
 22 has a technical expert in this case, Ms. Harder?
 23 A. Yes.
 24 Q. Did Ms. Harder give an opinion saying
 25 that Mr. Brookstein was incorrect or wrong in his

1 analysis?
 2 A. Well --
 3 MR. LECHLEITER: Objection to form.
 4 A. My understanding of Ms. Harder is that
 5 she was claiming that what is covered by the claims
 6 was -- was -- existed in the prior art. That's an
 7 understanding that I have. Now, whether that's in
 8 contrast to what Mr. Brookstein has come up with, I
 9 would -- I would defer it to the attorneys and those
 10 individuals on that front.
 11 Q. Okay. That's a different question. You
 12 don't have -- you're not aware of anyone saying that
 13 Mr. Brookstein was wrong in his comparison of
 14 comparing the claims to the Secret Fit Belly
 15 product?
 16 A. Well, I think that -- that counsel for
 17 Target would disagree with that. And I believe
 18 Target would disagree with that as well. That's my
 19 understanding.
 20 Q. What do you base that understanding on?
 21 A. Discussions with counsel.
 22 Q. What's -- what's counsel's basis for
 23 saying that the claims of the Secret Fit Belly
 24 product don't match -- the -- the claims of the
 25 patents in this case don't match the Secret Fit

1 Belly product?
 2 MR. LECHLEITER: I'm just going to
 3 object and caution not to reveal any attorney work
 4 product communication.
 5 A. Yeah, I can only say that as a general
 6 matter I have an understanding that it's the
 7 position of Target and counsel for Target that they
 8 would dispute the findings of Mr. Brookstein. That
 9 -- that's just a general understanding. I haven't
 10 gotten into the details. I'm not dealing with
 11 technical issues. So, that's all I know.
 12 Q. Okay. You're -- you're not giving an
 13 opinion in this case that the claims of the patent
 14 don't match or are not embodied by the Secret Fit
 15 Belly products?
 16 A. Well, I'm not giving a claim from a
 17 technical perspective, but I will say that I am
 18 responding to Mr. Green's assumption that he can use
 19 Mr. Brookstein's analysis and extrapolate it to the
 20 entire population. I would disagree with that, that
 21 that's appropriate.
 22 Q. Well, do you have any -- I know in your
 23 report you said, well, you only looked at certain --
 24 a certain number of pairs of pants. Do you have any
 25 reason to believe that a significant number of

1 Destination Maternity SKUs under the Secret Fit
 2 Belly designation do not match any of the claims in
 3 the patents in this case?
 4 MR. LECHLEITER: Objection. Form.
 5 A. Well, again, just to be clear, I'm not
 6 providing technical opinions. I'm not analyzing
 7 Secret Fit Belly and non-Secret Fit Belly pants from
 8 a technical perspective. What I can say is,
 9 responding to what I understand has been performed
 10 in this case and what I know, is that there were
 11 four pairs of pants that were provided to
 12 Mr. Brookstein. He doesn't know why they were
 13 provided other than that they were provided by
 14 counsel, which could lead one to conclude that that
 15 is a biased representation of what the population
 16 would reflect.
 17 I think also, even under his own
 18 analysis, he's -- he's concluded that several of
 19 those pants do not embody many of the claims that
 20 are at issue in this case. So, even if you wanted
 21 to use that as somehow a way to extrapolate it to
 22 the population, which I don't believe that that
 23 would be appropriate, but even if you wanted to do
 24 that, using that as a basis would indicate that many
 25 of the claims would not be resident in the

1 population at all.
 2 Q. Okay. You -- you haven't seen anyone
 3 come in -- come in in this case and give evidence
 4 that certain Secret Fit Belly SKUs do match -- do
 5 not match any of the dependent claims in the two
 6 patents involved in this case?
 7 MR. LECHLEITER: Objection. Form.
 8 A. Could you repeat that question?
 9 THE REPORTER: I can play it back for
 10 you.
 11 A. Okay.
 12
 13 (Record played.)
 14
 15 A. Mr. Brookstein has done an -- that
 16 Mr. Brookstein has performed an analysis. I'm not
 17 providing any technical response or opinions in that
 18 regard. But under his conclusions. There are
 19 several, even of the four that he analyzed, several
 20 of -- of the claims that are at issue in this case
 21 are -- were not present in many of the -- the pants
 22 that he analyzed.
 23 So, I guess in response to your
 24 question, that would be information that I
 25 understand has been put forth in this case.

1 Q. Sure. You haven't -- the question may
 2 have been unclear.
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1 contends is obvious, correct?
 2 A. I'm -- I'm -- I believe so, but let me
 3 double-check that.
 4 Q. Yep. If you want to look at Paragraph 6
 5 of your report. Or Paragraph 15 might be -- be
 6 easier.
 7 A. Yes. I believe that's the case, in
 8 answer to your question.
 9 Q. Okay. Now, earlier we were talking
 10 about the features of the patent and claims; do you
 11 recall we were having that discussion?
 12 A. Yes.
 13 Q. Is it your understanding that where it
 14 says in Claim 1, "a garment upper portion having a
 15 belly panel that is expandable to cover and fit over
 16 a growing abdomen during different stages of
 17 pregnancy."
 18 Is it your understanding that that is a
 19 feature of Claim 6?
 20 MR. LECHLEITER: Objection. Form.
 21 A. That -- could you repeat the portion
 22 before?
 23 Q. Sure, sure.
 24 A. Are you reading from Claim 1?
 25 Q. So, I'm -- I'm looking at Claim 6, but

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 9 MR. POLLACK: Let me mark as Thomas
 10 Deposition Exhibit 2, U.S. Patent No. Reissue 43531,
 11 one of the two patents at -- at issue.
 12
 13 (Thomas Deposition Exhibit 2, U.S. Patent
 14 No. Reissue 43531, was marked for identification.)
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 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 Q. I'm sorry. In giving your answer,
 18 did you just say you would include it or would not
 19 include it?
 20 A. You would not.
 21 Q. You would not include it?
 22 A. You would not.
 23 Q. Right. Okay.
 24 So when you -- when you did your
 25 analysis, you didn't include the various

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1 paragraphs of Claim 1?
 2 A. Well, let me just say that I'm
 3 responding to what Mr. Green has set forth, and I
 4 understand that the way in which he performed his
 5 analysis, not only doesn't it differentiate between
 6 the independent and dependent claims, but it doesn't
 7 account for certain other aspects of the sales of
 8 the products. So, whether --
 9 So, on the one hand, the fact that he
 10 hasn't assessed the dependent claims separate, or at
 11 least the impact of the dependent, separate from the
 12 impact of the independent claim is one issue that
 13 I've addressed. And in addition to that, even if
 14 you want to assume -- to analyze it in a way that
 15 he's analyzed it, he's failed to consider many other
 16 factors, as well.
 17 Q. Let me ask you, though, on -- let's take
 18 a look, for example, at Claim 6.
 19 Do you have any reason to believe that
 20 the additional element recited in Claim 6 is not
 21 present in a significant percentage of Secret Fit
 22 products?
 23 MR. LECHLEITER: Objection. Form.
 24 A. Well, I guess I would -- would -- I'd
 25 have to refer back to -- well, I guess a couple of

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1 things. One is that I -- I would have that
 2 understanding because there's been no information to
 3 suggest that it -- it does exist. And I would also
 4 say that in certain respects -- and I don't recall
 5 if this specific claim is one of those, but even
 6 under Mr. Brookstein's analysis of the four pairs
 7 that he analyzed, many of the dependent claims were
 8 not -- did not exist -- were not covered or embodied
 9 within the pants that he analyzed.
 10 Q. Let's talk about Claim -- Claim 6. Was
 11 -- was Claim 6 embodied in the pants that
 12 Mr. Brookstein analyzed and that Mr. Green relied
 13 upon?
 14 MR. LECHLEITER: Objection. Form.
 15 A. Again, I'm not here to -- to comment on
 16 the specific analysis set forth by Mr. Brookstein
 17 and whether it's -- it is or it isn't embodied in a
 18 particular pair of pants. I'd have to refer back to
 19 his report, though, in terms he's put -- he's
 20 provided information and hasn't given an indication
 21 as to whether a particular dependent claim is
 22 embodied in some of the pants or in -- within the
 23 pants that he has analyzed.
 24 I'd have to go back and look at that. I
 25 don't -- I just don't recall specifically. Never

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1 having memorized that, but certainly would -- would
 2 want to refer back to his analysis and report.
 3 Q. If his report showed that all the pants
 4 that he analyzed met that additional element of
 5 Claim 6, how would that affect your analysis?
 6 A. Well, I don't know that it affects -- it
 7 doesn't change my analysis. It doesn't change my
 8 opinions.
 9 Q. Why not?
 10 A. Because I -- I understood that -- would
 11 have understood that in performing my analysis if,
 12 in fact, that's the case. I'd have to go back again
 13 and look at his report, but either way, my analysis
 14 is what it is, and it doesn't change.
 15 Q. So, even if all the pants that were
 16 analyzed met Claim 6, and there's no evidence that
 17 there were pants sold by Destination Maternity of
 18 the Secret Fit label that don't meet the Claim --
 19 Claim 6, even so, you would still give the same
 20 opinion?
 21 A. Well --
 22 MR. LECHLEITER: Objection. Form.
 23 A. I think that you're -- now you're sort
 24 of -- with all due respect, I think you're
 25 mischaracterizing the record and providing a

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1 hypothetical --
 2 Q. Well, I'm giving you a hypothetical.
 3 A. Well, a hypothetical that I don't
 4 understand to be the case. I understand
 5 Mr. Brookstein analyzed four pairs of pants. I also
 6 understand that, even under his own analysis, many
 7 of the dependent claims did not exist within those
 8 pairs of pants. I don't know of any other analysis
 9 associated with the remaining portion of the
 10 population.
 11 And as I've stated previously, I don't
 12 believe it would be appropriate to use what he's
 13 done and extrapolate it to the rest of the
 14 population, but even if you wanted to do that, it
 15 would suggest that the rest of the population, and
 16 those pairs of pants within the rest of the
 17 population, would not contain certain -- or would
 18 not embody certain of the dependent claims.
 19 Q. I think earlier you had mentioned that
 20 there was about [REDACTED] in sales, the number
 21 you gave.
 22 A. Well, in terms of the -- the data that
 23 was provided over -- a little over a five-year
 24 period, I believe the -- the number -- the dollar
 25 sales were -- for Secret Fit Belly pants were

1 Q. Well, what -- what are those factors?
 2 A. Again, you're asking me to -- to now
 3 name factors in a -- in a hypothetical that I don't
 4 have an understand of the specifics of what you're
 5 referring to. I don't know that you could
 6 automatically say that there's a laundry list. I
 7 think you have to assess each situation on its own
 8 merits and the appropriate facts and circumstances.
 9 Q. Well, when you assess the situation,
 10 what are you looking for?
 11 A. I'm -- I'm looking for what would be
 12 appropriate, depending on those facts and
 13 circumstances.
 14 Q. Well, you're -- you are presented here
 15 as an expert. As an expert, what -- what things
 16 would you want to assess?
 17 MR. LECHLEITER: Objection to form.
 18 A. Again, I'm -- I'm -- you're asking me a
 19 very general hypothetical. I certainly am willing
 20 to respond and answer questions relative to the
 21 analysis I've set forth here, and what I think
 22 Mr. Green has failed to do. Happy to do that.
 23 Outside of that, again, you're -- you're -- you're
 24 painting a very general hypothetical that I don't
 25 know it would be appropriate to respond, that it's

1 approximately somewhere in the vicinity of
 2 [REDACTED]
 3 Q. But what I want to ask you is by that
 4 [REDACTED] did you mean annually or was that over
 5 -- over five years?
 6 A. It was over the five-plus years.
 7 Q. Would you agree that normally a product
 8 that sold [REDACTED] over five years would be
 9 considered a commercial success?
 10 MR. LECHLEITER: Objection to form.
 11 A. I -- I don't know that you could
 12 automatically conclude that to be the case, just
 13 given the information you just provided as a general
 14 matter.
 15 [REDACTED]
 16 [REDACTED]
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 13 [REDACTED]
 14 Q. Let's talk about the -- what analysis
 15 you've done before, the one for VIIV.
 16 What factors did you assess in doing
 17 that analysis?
 18 A. Well, I --
 19 MR. LECHLEITER: Objection to form.
 20 A. I guess, that I -- I don't know if this
 21 is -- if -- if what I -- the analysis I perform is
 22 confidential. I would say that the work that I
 23 perform is confidential. I could say that certainly
 24 as a general matter I would want to understand the
 25 product at issue, the features of the product, and

1 which of those features are impacting the ability
 2 for the product to be sold, as an example. It could
 3 be one -- one thing you would look at.
 4 Q. What else?
 5 A. There could be other things. Again,
 6 what is -- what other features? What's -- what's
 7 driving sales of the product? And then whether
 8 those sales have been significant in -- in some
 9 fashion or form. And again, there could be other
 10 things that you might take into consideration.
 11 Q. Okay. You said, you know, whether the
 12 sales would be significant. What would make the
 13 sales significant?
 14 A. Depends.
 15 Q. That's what I'm asking you. On what?
 16 A. Well, you know -- and I'm -- again, I'm
 17 not trying to be difficult, but you're asking me
 18 very general questions that would -- would require
 19 specific assessment of a specific industry or a
 20 specific situation. So, there could be things that
 21 one might look at to assess whether those sales were
 22 significant or not. It just depends on the
 23 situation.
 24 Q. All right. Well, here -- here you're
 25 critiquing -- critiquing Mr. Green's analysis.


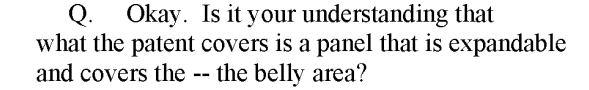
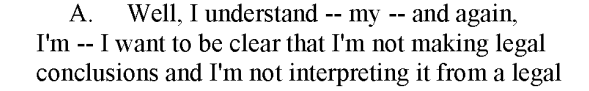
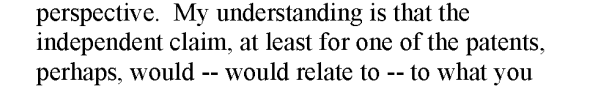
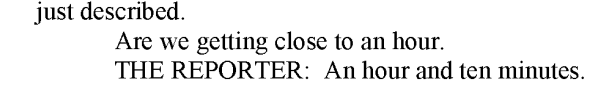
1 How would you have done the analysis in
 2 this case?
 3 MR. LECHLEITER: Objection. Form.
 4 A. Well, I guess that -- again, that there
 5 are various elements to the analysis. Not only are
 6 you looking at the products at issue, the features
 7 of the products, how they're sold, and the amount at
 8 which they're sold, but you're looking to see if
 9 there's a connection between those sales and what
 10 are -- what's claimed in the -- in the patents -- or
 11 the claims that are at issue in this case.
 12 So, I think certainly I would have
 13 wanted to understand and would understand what those
 14 claimed features were and attempt to understand what
 15 impact, if any, they have on the sales of the
 16 product. And I think that's certainly something
 17 that Mr. Green has -- has failed to do.
 18 And not only those features or other
 19 aspects of what drives the sales of the product, and
 20 have an understanding of whether hose can be
 21 connected or are as a result of what's claimed in
 22 the patents. I think that's something Mr. Green --
 23 Mr. Green clearly has failed to do.
 24 Q. Let me make sure we're -- we're all on
 25 the same page here and how the -- the legal analysis

1 is done.
 2 Do you understand, that since you are an
 3 expert, there are two prongs to this legal analysis:
 4 One is is the product a commercial success, and then
 5 the other one is is that commercial success
 6 connected to the claims?
 7 Do you -- do you understand that?
 8 MR. LECHLEITER: Objection. Form.
 9 A. I understand that those are the two
 10 analyses that Mr. Green has set forth and I
 11 responded to, yes.
 12 Q. Do you -- do you think that Mr. Green
 13 did that the wrong way, that it's not really a
 14 two-prong test?
 15 A. I -- again, I'm not here to provide
 16 legal opinions. I'm here to respond to what Mr.
 17 Green has set forth. And I would conclude that what
 18 he has done is deficient, and the basis upon which
 19 he's arrived in his opinions is deficient.
 20 Q. Let's assume, for the sake of argument,
 21 that is -- that Mr. Green is correct that it's a
 22 two-prong analysis needed to determine if it's a
 23 commercial success and then whether or not it's a
 24 nexus. Let's just focus on the commercial success
 25 part of that. We'll get to the nexus later.

1 What would you do to show that the
 2 Secret Fit Belly product -- what would satisfy you
 3 that the Secret Fit Belly product was a commercial
 4 success?
 5 MR. LECHLEITER: Objection. Form.
 6 A. Well, I think that, while you could look
 7 at the sales of the product, you have to put them in
 8 proper context.
 9 Q. Let me step back for a second. So, the
 10 first thing you would look at would be the sales of
 11 the product?
 12 A. That certainly could be one thing you
 13 look at.
 14 Q. And -- and what -- what are you looking
 15 for in the sales of the product?
 16 A. How the products are sold, the level of
 17 sales.
 18 Q. So, you've identified two things. How
 19 they're sold; what do you mean by that?
 20 A. Well, in terms of what is -- what is
 21 driving the sale of those products.
 22 Q. What -- why does that matter?
 23 A. Well, it could be that you -- you have a
 24 certain level of sales, but those sales were
 25 generated at the expense of, perhaps, other products

1 in a very direct and concerted effort.
 2 Q. Okay. What -- what -- and then you also
 3 said "the level sold."
 4 A. That could be -- again, you'd -- you
 5 have -- I think you -- you could look at that, but
 6 you need to put it in a proper context as well. And
 7 you would -- you would also, I think, put it in the
 8 context of not only just the level on how they are
 9 sold, but how that compares to the marketplace; and
 10 one thing you could look at would be market share.
 11 Q. Sure. Did you look at market share in
 12 this case?
 13 A. I responded to what Mr. Green did and he
 14 failed to look at market share and said there was no
 15 such thing available.
 16 Q. Isn't one of the things that's normally
 17 done in a commercial success analysis, on the
 18 commercial success part, isn't it typical to take a
 19 look at sales of the patented product versus sales
 20 of non-patented product?
 21 MR. LECHLEITER: Objection. Form.
 22 A. You know, that -- that's something that
 23 can be done. Whether that's appropriate, depends on
 24 the situation. It can -- like I said, it can be
 25 done. It may be appropriate. It very well may not

1 be appropriate. Depends.
 2 Q. When is it appropriate and when is it
 3 not appropriate?
 4 A. Well, I think that it -- while you can
 5 take a look at that, you need to analyze it in the
 6 context in which the sales were made as I've said.
 7 And when you say patented versus non-patented, you
 8 need to be more specific about the features of the
 9 patented versus the features of the non-patented and
 10 the difference is and what accounts for those
 11 differences.
 12 Q. What -- what do you mean by that?
 13 A. Well, on the one hand, you could say I'm
 14 going to compare a patented product to,
 15 quote/unquote, non-patented product, but the
 16 differences between those products could be in a
 17 number of areas, so making that comparison may be
 18 wholly irrelevant to the issue at hand.
 19 Q. Well, now, in this case we have Secret
 20 Fit Belly products and non-Secret Fit Belly
 21 products. Is that fair?
 22 A. Well, I think that's what Mr. Green has
 23 made a comparison to.
 24 Q. Okay. Do you have any -- any reason to
 25 believe that there are not Secret Fit Belly products

1 and not Secret Fit Belly products?
 2 MR. LECHLEITER: Objection. Form.
 3 A. I don't have any reason to believe that
 4 there are -- that to be the case -- or that not --
 5 that that's not the case.
 6 
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 10 
 11 Q. Okay. Is it your understanding that
 12 what the patent covers is a panel that is expandable
 13 and covers the -- the belly area?
 14 A. Well, I understand -- my -- and again,
 15 I'm -- I want to be clear that I'm not making legal
 16 conclusions and I'm not interpreting it from a legal
 17 perspective. My understanding is that the
 18 independent claim, at least for one of the patents,
 19 perhaps, would -- would relate to -- to what you
 20 just described.
 21 Are we getting close to an hour.
 22 THE REPORTER: An hour and ten minutes.
 23
 24
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1 THE WITNESS: All right. Can we take a
2 break?
3 MR. POLLACK: All right.
4 THE VIDEOGRAPHER: This closes Disc
5 No. 1. We're off the record. It's 10:50.
6
7 (Brief break taken.)
8
9 THE VIDEOGRAPHER: Back on the record at
10 10:58. This begins Disk No. 2 of the deposition of
11 Vincent A. Thomas.
12 MR. LECHLEITER: Mr. Pollack, if I
13 could, let's put our agreement briefly on the
14 record. I understand we have an agreement in this
15 deposition, the parties have a running agreement
16 that will apply here as well, that counsel may speak
17 with the witness during breaks and that no questions
18 will be asked about that conversation following the
19 break unless the witness comes in and changes an
20 answer.
21 Is that correct? Do we have an
22 agreement?
23 MR. POLLACK: Yes.
24 MR. LECHLEITER: Okay. Thank you.
25 MR. POLLACK: I'm going to mark as

1 Thomas Deposition Exhibit 3, article entitled "The
2 Economics of Commercial Success in Pharmaceutical
3 Patent Litigation" by Rhuli Guha, Jian Li, and
4 Andrea Scott.
5
6 (Thomas Deposition Exhibit 3, article entitled
7 "The Economics of Commercial Success in
8 Pharmaceutical Patent Litigation," was marked for
9 identification.)
10
11 Q. (BY MR. POLLACK) Let me ask you first
12 whether or not you read or have ever read the
13 literature in the field regarding the economics of
14 commercial success?
15 A. From time to time, I would read certain
16 things that would relate to commercial success and
17 -- and other issues involving the evaluation and
18 damage analysis, also in patent, in intellectual
19 property litigation.
20 Q. Do you recall specifically whether you
21 read any articles about the economics of commercial
22 success in patent litigation?
23 A. I very well may have. I've just -- I've
24 reviewed a lot of articles over time. I'd have to
25 go back and -- again, and look to see --

1 Q. Okay.
2 A. -- specifically whether that's the case
3 or not.
4 Q. Do you know, by any chance, whether --
5 whether you've reviewed this particular article?
6 MR. LECHLEITER: I'm going to place a
7 running objection to Exhibit 3 on the record as
8 being outside the scope of the witness's direct
9 testimony.
10 A. I -- it -- this -- it's -- I guess it's
11 possible. I don't recall as I sit here, but that's
12 -- it could be a possibility.
13 Q. Okay. Do you know any of the authors?
14 A. I do not.
15 Q. Are you familiar with Cornerstone
16 Research?
17 A. I am, yes.
18 Q. Okay. Are they a competitor of yours,
19 effectively, in what you do?
20 A. My understanding is that they are an
21 entity that has experts that provide economic
22 analysis, if that's your question.
23 Q. Similar to what your firm does?
24 A. In -- in certain respects, yes.
25 Q. And is it your understanding they do so

1 in -- in patent cases?
2 A. That's my understanding, yes.
3 Q. I just wanted to look at -- on this
4 first page, look down at the third paragraph.
5 The first sentence of the third
6 paragraph says, "From an economic perspective,
7 commercial success supports the conclusion of
8 non-obviousness because it suggests that an economic
9 incentive existed to produce the invention?"
10 Do you see that?
11 A. I'm sorry, what -- what -- what
12 paragraph? I -- I was not keeping up with you.
13 Q. No problem.
14 A. Which -- which paragraph?
15 Q. It's the third paragraph on the first
16 page.
17 A. On the first --
18 Q. Third paragraph of the article.
19 A. Okay. I'm sorry.
20 Okay. I see that sentence, yes.
21 Q. Okay. Do you agree or disagree with
22 that sentence?
23 MR. LECHLEITER: Objection. Form.
24 A. Well, I guess that depends on what
25 context -- I haven't read this entire article. It


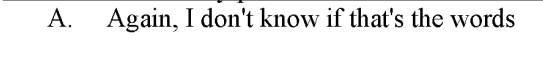
1 depends on what context that sentence is used, so I
 2 -- I perhaps could agree, but -- but depends on the
 3 set -- the circumstances and the situation whether I
 4 would agree or disagree.
 5 Q. What's your understanding of why we look
 6 at commercial success in connection with
 7 obviousness?
 8 A. I guess that, as a general matter, if a
 9 product is deemed to be commercially successful that
 10 -- that -- and that there -- there has been some
 11 incentive in some way to produce the product, or
 12 that economic incentive has driven the desire to
 13 want to produce the product.
 14 Q. Look at the third sentence of that --
 15 that same paragraph, which begins with the word
 16 "some." Do you see where I'm reading?
 17 A. Yes.
 18 Q. It says, "Some of the economic
 19 indicators that have traditionally been accepted
 20 by the courts as proof of commercial success include
 21 significant levels of and rapid growth in sales and
 22 market share of the patented product."
 23 Did I read that correctly?
 24 A. Yes.
 25 Q. Okay. Do you agree with that sentence?

1 A. Just based on my general understanding,
 2 I -- I -- I understand that that -- that to be the
 3 case, that in some instances those have been
 4 indicators.
 5 Q. Let's take a look at the next page where
 6 it says "indicators of commercial success." If you
 7 could -- if you could turn to the next page in
 8 Deposition Exhibit 3. So we're looking for the
 9 second page of the document.
 10 And do you see there's a heading,
 11 "Indicators of Commercial Success"?
 12 A. Yes.
 13 Q. Do you see the first sentence says,
 14 "Commonly used indicators of commercial success
 15 include significant sales levels"? Do you agree
 16 that significant sales levels are an indicator
 17 of commercial success?
 18 MR. LECHLEITER: Objection. Form.
 19 A. I -- I agree that -- that in the
 20 appropriate situation, they can be an indicator.
 21 Q. In the maternity pants market, what
 22 would you consider to be significant sales levels?
 23 MR. LECHLEITER: Objection. Form.
 24 A. Well, I guess it depends on the
 25 benchmark upon which you apply whatever sales level

1 has been achieved. So, significance, I think, needs
 2 to be measured against some -- some benchmark.
 3 Q. Well, what -- what would the benchmark
 4 be?
 5 A. Market share could be an example. Levels
 6 as compared to competitors. That could be certain
 7 ways of viewing sales levels.
 8 Q. By the way, is Destination Maternity the
 9 market leader in maternity pants?
 10 MR. LECHLEITER: Objection. Form.
 11 A. I -- I'd have to -- I'd have to go back
 12 and look. I'm not sure if that's how they tout
 13 themselves or not. I'd have to -- I'd have to
 14 double-check that. That may or may not be the case.
 15 Q. Okay. Are they the market leader in
 16 maternity products?
 17 MR. LECHLEITER: Objection. Form.
 18 A. Again, I -- I -- in terms of the entire
 19 market, that's not something that's been analyzed by
 20 Mr. Green. And whether, in fact, they -- they are
 21 -- it's -- I guess I can't say, as I sit here. They
 22 may tout themselves as being that, but I'd -- I'd
 23 have to go back and look.
 24 Q. Did you see that they did, in fact; they
 25 did tout -- they do tout themselves as that?

1 A. Again, I -- I haven't -- I haven't
 2 memorized every aspect of my report. They may have
 3 indicated that via their web site or something to
 4 that effect. I'd have to look at that.
 5 Q. And are you aware that you've cited some
 6 of Ms. Piccone's deposition, right?
 7 I think you're aware that she testified
 8 that the maternity pants are what drives sales for
 9 their entire product line of products.
 10 A. I'd have to go back and look at the
 11 specific -- you'd have to give me the specific
 12 testimony. She may have alluded to something to
 13 that effect, but I'd have to look at the specific
 14 testimony to give a specific answer to your
 15 question.
 16 Q. You don't -- you don't recall reading
 17 that in the portions of her deposition that you
 18 actually referred to in your report?
 19 A. Well, again, I -- I haven't memorized
 20 all the testimony. She may have, in fact, alluded
 21 to that. Again, I would just be more comfortable if
 22 I could actually look at the testimony to be
 23 responsive to your question, but that may be the
 24 case.
 25 Q. Okay. And what is -- what affect does

1 that have in determining whether there are
 2 significant sales levels of Secret Fit Belly pants?
 3 A. I'm not sure I understand your question.
 4 Q. Well, let's say that Destination
 5 Maternity is the market leader in maternity products
 6 and that Secret Fit drives sales of all Destinations
 7 -- Destination Maternity's products. Under that
 8 hypothetical, would you agree that there would be
 9 significant sales levels as described in this
 10 paper --
 11 MR. LECHLEITER: Objection. Form.
 12 Q. (BY MR. POLLACK) -- of Secret Fit
 13 products?
 14 A. Well, again, I -- I -- I would have to
 15 understand more about the makeup of the entirety of
 16 what has been sold by Destination Maternity and how
 17 they're assessing the market, more specifically.
 18 That may be an indication, though, having said that.
 19 Q. The next thing in the paper -- if we
 20 could go back to the paper for a second, in that
 21 sentence. After significant sales levels, it says,
 22 "significant sales growth."
 23 Do you agree that significant sales
 24 growth would be an indicator of commercial success?
 25 A. It could be. Again, it depends on the

1 situation.
 2 Q. When is it not?
 3 A. Well, it could be that there's -- there
 4 is significant sales growth, but that growth is
 5 significantly less than other competitors in the
 6 market, as an example. That may be contrary to an
 7 opinion that it's been a commercial success.
 8 Again, I'd -- I'd have to understand all
 9 of the facts and circumstances. It may be an
 10 indicator, but I guess, there -- depending on the
 11 facts and circumstances, there could be situations
 12 where -- where it's not an indicator.
 13 Q. Now, in this case, I think Mr. Green has
 14 shown that there was significant sales growth of the
 15 Secret Fit Belly product, correct?
 16 MR. LECHLEITER: Objection. Form.
 17 A. Well, I don't know that he has
 18 necessarily shown significant sales growth. And
 19 you'd have to refer me to his report where he says
 20 that.
 21 Q. Do you -- do you recall that he showed
 22 that sales of Secret Fit Belly products started from
 23 
 24 
 25 A. Again, I don't know if that's the words

1 he used. And I would be happy to -- if you want to
 2 provide me with his report, I could respond more
 3 specifically.
 4 MR. POLLACK: I will mark as Thomas
 5 Deposition Exhibit 4 the declaration of Phillip
 6 Green regarding commercial success, including
 7 Exhibits A through D.
 8
 9 (Thomas Deposition Exhibit 4, Declaration of
 10 Phillip Green, was marked for identification.)
 11
 12 Q. (BY MR. POLLACK) When you were
 13 referring to his report, were you -- were you
 14 referring to this document, Thomas 4, the
 15 declaration of Phillip Green regarding commercial
 16 success?
 17 A. Well, I -- just to be clear, you were
 18 are asking a question as to whether he said that,
 19 and I said that if -- if, in fact, you're -- you're
 20 claiming that to be the case, I'm assuming you're
 21 referring to what he's included in his disclosure in
 22 this matter.
 23 Q. Yeah. No, you had used the term you
 24 wanted to see his "report," and I just wanted to
 25 confirm that by that you meant --

1 A. Oh, I meant his --
 2 Q. -- declaration of Phillip Green --
 3 A. Yes. I'm sorry, yes. I apologize.
 4 Yeah, that's what I was referring to. I'm sorry.
 5 Yes.
 6 Q. And if you would look at -- of course,
 7 you're free to look through the report. But if you
 8 would -- if I could focus you on some of the figures
 9 that are appearing at Pages, like, 16 and 17.
 10 Let's focus at 16, on net sales.
 11 Included in that net sales is one of the things that
 12 the literature suggests one should look at in
 13 determining commercial success?
 14 MR. LECHLEITER: Objection. Form.
 15 A. Well, you're -- if you're asking, the
 16 article that you put before me, if that indicates
 17 that sales growth is something that you might look
 18 at, I would agree that the article does -- is
 19 reflective of that.
 20 Q. Okay. I mean, do you agree with what
 21 the article is saying or is it --
 22 A. Well, I agree that you could look at
 23 sales growth; that could be one indicator that you
 24 might analyze, but you have to analyze it in the
 25 context of all the facts and circumstances, as well.

1 Q. Okay. Well, let me just ask you, just
 2 on the fact of sales growth --
 3 A. Okay.
 4 Q. -- would you agree with me that that
 5 factor is met based on what's shown on Page 16 of
 6 Mr. Green's declaration, Thomas Deposition
 7 Exhibit 4?
 8 MR. LECHLEITER: Objection. Form.
 9 A. Well, I -- I don't know that he's -- he
 10 just shows sales comparing Secret Fit to non- -- to
 11 all other sales.
 12 Q. Uh-huh.
 13 A. I don't know that if he's concluding
 14 what you're suggesting.
 15 Q. You don't think he's concluding that
 16 there's a sales growth?
 17 A. Look -- I'm looking at his disclosure
 18 and what he said.
 19 Q. Uh-huh.
 20 A. He's making a comparison, but he's not
 21 saying anything about the growth and sales of the
 22 product. And he also doesn't have all of the sales
 23 information. So, I don't see that he stated -- or a
 24 conclusion he has reached in that regard.
 25 Q. You don't see his conclusion in his

1 title "Secret Fit Belly Bottoms Sales Have
 2 Increased"?
 3 A. Okay. I see that --
 4 Q. On Page 16.
 5 A. I see that it says they have increased,
 6 but --
 7 Q. Okay.
 8 A. -- you -- but that's not --
 9 Q. So, you don't --
 10 A. -- that's not the same opinion that you
 11 have just described or have characterized in your
 12 question. He's comparing Secret Fit, I think,
 13 increases to non-patented products decreasing.
 14 Q. Yes. But do you see that the -- in 2008
 15 the total market was, what, about [REDACTED]?
 16 MR. LECHLEITER: Objection. Form.
 17 A. I'm not sure where -- where do you --
 18 where is that reflected?
 19 Q. On Page 16, Figure 2.
 20 A. Okay. Where does it say that the total
 21 market is [REDACTED]?
 22 Q. Well, I'm simply adding up the two
 23 figures that are there in my head if you --
 24 A. Which --
 25 Q. -- those individually.

1 A. Which two figures are you referring to?
 2 Q. So, we have Secret Fit sales. Do you
 3 see that, the curve?
 4 A. Okay. So, you are defining -- if I
 5 understand you correctly, you're defining the market
 6 as Secret Fit and all other as being the total
 7 market of sales made by DMC?
 8 Q. Yes. That's right.
 9 A. Okay. I just wanted to be clear for the
 10 record --
 11 Q. Okay. Okay.
 12 A. -- what you're referring to.
 13 And you're saying that -- that in the
 14 third quarter of 2008, that that's reflective of the
 15 total market, as you've described it?
 16 Q. Yep.
 17 A. And I would agree, that if you add those
 18 numbers, that you -- you come to roughly [REDACTED] -- I
 19 can't -- I can't tell specifically because the
 20 chart's not clear as to where those -- what the
 21 amounts are for those numbers, but that could very
 22 well be --
 23 Q. Okay.
 24 A. -- a reasonable approximation based on
 25 how you're defining the situation.

1 Q. And am I correct that the total market
 2 in fourth quarter of 2013 is closer to about [REDACTED]
 3 [REDACTED]?
 4 A. As you've described it, would -- would
 5 -- just to clarify it for the record, DMC's bottom's
 6 net sales, which is Secret Fit and all other, if you
 7 add those two numbers together, you -- that are on
 8 this chart, that may approximate the number that you
 9 just described.
 10 Q. Would you -- would you agree with me
 11 that the Secret Fit product took away or
 12 cannibalized -- you're familiar with the term
 13 "cannibalized"?
 14 A. Yes.
 15 Q. Okay. What -- what does it mean?
 16 A. It means to take away sales that would
 17 have otherwise been made.
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 Q. Well, actually, the sales -- the total
 3 sales exceeded those that have been made by
 4 non-Secret Fit, correct?
 5 A. Well, as it's defined as Secret Fit and
 6 all other. And again, I'd have to go back and look
 7 at the details, but there certainly is continued
 8 sales, but those -- the decline in the all other
 9 category could be as a result of things associated
 10 with the Secret Fit Belly and -- and one of those
 11 things could be just lack of attention to the
 12 non-Secret Fit. And that -- and that -- in lieu of
 13 that, all others may have been higher and Secret Fit
 14 may have been lower.
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 demand as opposed to demand -- consumers wanting
 2 that and that driving the change in the SKUs. I
 3 think you'd have to assess that further.
 4 Q. You've seen the marketing for the Secret
 5 Fit product, right?
 6 A. Well, I've seen what Ms. Piccone has
 7 testified to and the one document that Mr. Green
 8 relies upon, as well as any other information that
 9 I've reviewed as part of that.
 10 Q. I'm correct, though, that in the way
 11 that Destination Maternity markets Secret Fit
 12 products is that it touts that the products are
 13 patented and it touts the feature of reaching up to
 14 the breasts, if you will?
 15 MR. LECHLEITER: Objection. Form.
 16 A. Well, I -- you know, the -- in terms of
 17 the -- of that aspect, I think you'd have to be more
 18 specific in terms of what marketing is reflective of
 19 that, but I think, also, there are other things that
 20 are -- exist within the marketing of these products
 21 as well. Are they placed in the store, the
 22 branding, there's celebrity personalities associated
 23 with these products, the color, the style. You
 24 know, all those things can go into how the product
 25 is marketed.

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 Q. Let me ask you this. When a
 6 company gives more attention to one product
 7 versus another, isn't that consistent with
 8 product-match consumer demand for the products?
 9 MR. LECHLEITER: Objection. Form.
 10 A. It may and it may not.
 11 Q. Isn't the economics -- isn't it economic
 12 thinking and economic logic that sellers try to
 13 match buyers' demands for a product?
 14 MR. LECHLEITER: Objection. Form.
 15 A. I think, as a general matter, that's --
 16 that's correct.
 17 Q. Okay. And doesn't the fact that the
 18 number of SKUs shifted to Secret Fit actually --
 19 isn't that consistent with being reflective --
 20 reflective of greater consumer demand for Secret
 21 Fit?
 22 A. Well, I don't -- I guess that may be the
 23 case. It may not be. It may be that the choice to
 24 promote a product to try to drive that demand, but
 25 it may not be -- it may be that that drives the

1 So, and just to be clear, when you say
 2 "touting," can you be more specific in terms of what
 3 you're referring to?
 4 Q. Sure. Maybe I can, but I...
 5 THE VIDEOGRAPHER: Something is wrong.
 6 MR. POLLACK: Yes.
 7 THE VIDEOGRAPHER: If you could put...
 8 the microphone... I think it's wrapped around your
 9 throat.
 10 MR. POLLACK: Here you go.
 11 THE VIDEOGRAPHER: This is fine enough
 12 correction. This is top of the line.
 13 MR. POLLACK: I'm going to mark as
 14 Thomas Deposition Exhibit 5, what's been referred to
 15 as Exhibit 205-1 in the proceeding.
 16
 17 (Thomas Deposition Exhibit 5 was marked for
 18 identification.)
 19
 20 Q. (BY MR. POLLACK) You've seen this piece
 21 of marketing before, I assume?
 22 A. I believe so, yes.
 23 Q. Okay. And the marketing -- am I
 24 correct, just looking at this, the marketing is
 25 directed at the genius behind Secret Fit Belly?

1 MR. LECHLEITER: Objection. Form.
 2 A. Those words are identified here on
 3 the -- on the web site.
 4 Q. Right. And right under that, it says
 5 U.S. patent numbers. I'm not going to read all the
 6 numbers, but those are some of the patents we're
 7 dealing with in this -- in this case?
 8 A. I can't -- I can't read those numbers.
 9 They are -- it looks like they are the two reissued
 10 patents that are at issue in this case, as well as
 11 two other patents.
 12 Q. The two original patents?
 13 A. I'm sorry, I can't --
 14 MR. LECHLEITER: You can't read it?
 15 A. I can't.
 16 Q. (BY MR. POLLACK) It's okay. But
 17 there's at least the two reissued patents?
 18 A. Yes. I have to -- and that may be the
 19 case --
 20 Q. Okay.
 21 A. -- as you referenced, yes.
 22 Q. Right. And it -- you were aware, before
 23 you came here today, that in the Destination
 24 Maternity's marketing of Secret Fit Belly, they've
 25 been touting the patents that are -- that are at

1 issue, correct?
 2 A. Well, if what you're referring to is
 3 this web site, they do identify the patents that are
 4 at issue in this case.
 5 Q. Right. And in other marketing as well?
 6 A. I haven't memorized all of the marketing
 7 materials. That perhaps could be the case. I'd
 8 have to go back and look.
 9 Q. Okay. And just to look at one part of
 10 the marketing that's at least in larger print, so
 11 that the three of us older gentlemen, can read it
 12 more easily, looking at the -- the woman in the
 13 center, do you see it says in regard to her, "Grows
 14 with you. Smooths and contours. So unique, it's
 15 patented."
 16 A. I see those words, yes.
 17 Q. Okay. And would it be fair to say that
 18 they are pushing this product based on the idea that
 19 it has some kind of patented features?
 20 MR. LECHLEITER: Objection. Form.
 21 A. It would appear that, at least in part,
 22 they are referencing something that it's -- that is
 23 patented.
 24 Q. And given the fact that we have the
 25 patent numbers that are on -- in this proceeding on

1 the document itself, you'd agree with me that is
 2 referring to these patents that we're dealing with
 3 in this case?
 4 A. I would agree that the patents we're
 5 dealing with in this case appear to be listed here
 6 on the web site.
 7 Q. Okay. And isn't it consistent with the
 8 commercial success of a product being due to
 9 patented features that the product is marketed to
 10 the public on the basis of those patented features?
 11 MR. LECHLEITER: Objection. Form.
 12 A. Well, again, you're -- you have to be
 13 more specific about the features you're referring
 14 to, but that -- that may be the case. It may not be
 15 the case. You -- you'd have to assess the entirety
 16 of the facts and circumstances.
 17 Q. What other things would you need to look
 18 at?
 19 A. Again, how -- how is it marketed; is --
 20 are there some other factors that would -- that
 21 would drive sales of the product, aside from
 22 features covered by a patent; and then, with regard
 23 to features covered by the patent, what are those
 24 specific features that are being referred to, and
 25 whether those, as opposed to others, would be

1 indicative or responsible for driving sales of the
 2 product. And there could be other factors.
 3 Q. Okay. You say how the product is being
 4 marketed. You agree with me, though, that this
 5 piece of sales literature and the sales literature
 6 that I've seen -- maybe you've seen something that
 7 I'm not aware of -- but these are some that I've
 8 seen, the way the product is marketed is that it has
 9 the belly feature that is patented?
 10 MR. LECHLEITER: Objection. Form.
 11 A. Well, I think you're being very
 12 simplistic. And in at least your view in that
 13 regard, I mean, it is true that they have identified
 14 patents and have used the term "patent" in -- on
 15 their web site. They have also stated other things.
 16 And I think that, while this may provide
 17 an indication, I don't know that you can
 18 automatically draw that conclusion. If you're --
 19 what you're suggesting is that it's appropriate to
 20 just look at this web site and say the sales are
 21 driven by the patent, I would disagree with that.
 22 Now, could this be an indication? Perhaps.
 23 Q. I just wanted you to help me out with a
 24 little bit of math here. It'll be simple, though.
 25 Page 16 of Mr. Green's report.

1 A. Okay.
 2 Q. Do you see there are four quarters
 3 listed there for 2013?
 4 A. Yes.
 5 Q. In Figure 2.
 6 A. Yes.
 7 Q. Would you agree with me that this
 8 reflects approximately [REDACTED] in Secret Fit
 9 sales annually in -- for 2013?
 10 MR. LECHLEITER: Objection. Form.
 11 A. Again, I -- I'd have to do the math, but
 12 it looks like each of -- if I'm reading this
 13 correctly, it looks like each of those four
 14 quarters, based on his assessment, have sales north
 15 of [REDACTED]. You'd have to multiply [REDACTED] by
 16 four. It's -- it -- just based on my view of this,
 17 it looks like it's -- it's in excess of [REDACTED].
 18 Q. Okay.
 19 A. If that's your question.
 20 Q. Yeah.
 21 A. I'm not trying to be difficult, but --
 22 Q. Yeah.
 23 A. -- that appears to be the case.
 24 Q. Yes. Okay.
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 Q. Prior to this case, have you analyzed
 15 the apparel market before?
 16 A. Well, I would say I've analyzed the
 17 market for the jeans market in other cases.
 18 Q. Okay.
 19 A. But -- and there may be other products
 20 that I've analyzed.
 21 Q. You did a case involving Levi's, right?
 22 A. That's correct.
 23 Q. Okay. Were you on the Levi's side or
 24 the other side of it?
 25 A. I was retained by counsel representing

1 Levi's.
 2 Q. They were the plaintiff in that case?
 3 A. No, I don't -- I don't believe so.
 4 Q. Okay.
 5 A. Well, they -- well, I believe they were
 6 the -- the plaintiff and counter-defendant, I guess,
 7 maybe the -- the best way to describe it. So...
 8 Q. Okay. Was that a patent case or a
 9 trademark case?
 10 A. It was not a patent case. I believe
 11 there may have been some elements relative to the
 12 use of the trademark in that case.
 13 Q. Do you recall what the heart was?
 14 A. Well, it was -- it was the use by a
 15 retailer of the Levi's brand in some fashion or
 16 form. I don't -- again, I don't recall if it was
 17 the trademark, if it was the brand, the way they
 18 were touting Levi's on their web site. I -- I'd
 19 have to go back and look at that. I don't recall as
 20 I sit here.
 21 Q. As part of the analysis in that -- in
 22 that Levi's case, did you have to do any kind of
 23 analysis of commercial success in some context to
 24 the trademarks?
 25 A. No.

1 Q. Is that all -- was there a reasonable
 2 royalty?
 3 A. It was not. It was not a reasonable
 4 royalty.
 5 Q. Okay. Well, what was the analysis based
 6 on?
 7 A. It was a -- I don't recall specifically
 8 the claims, but it was a breach of the agreement
 9 between the retailer and Levi's, and -- and
 10 responding, also, to claims set forth by the
 11 retailer in terms of their losses.
 12 Q. What kind of sales were you dealing with
 13 in that case? What was the sales level?
 14 A. I don't recall.
 15 Q. Was it in the rage of [REDACTED]
 16 annually?
 17 MR. LECHLEITER: Objection. Form.
 18 A. I -- I -- again, I don't recall.
 19 Q. Other than that case, were there any
 20 other cases you worked on that dealt with apparel?
 21 A. I -- I don't recall. I don't recall any
 22 as I sit here. Well, I -- I did -- well, I do
 23 recall years ago working on a matter involving the
 24 connector for shoes that were sold by Kohl's and
 25 other retailers, the device that actually connects

1 the shoes as opposed to the shoes being placed in
 2 the shoe box. I just recall working on a matter
 3 related to that. I don't recall many of the
 4 details.
 5 Q. Okay.
 6 A. Outside of that, I don't -- I don't
 7 recall anything, but I've worked on a number of
 8 cases. I'd have to go back and double-check that.
 9 Q. Would it be -- would it be fair to say
 10 that this is the first case where you've done an
 11 economic analysis in a patent case concerning
 12 apparel?
 13 A. It's -- as I sit here, I don't recall --
 14 well, the -- the patent case involving the connector
 15 for shoes sold by those retailers, that was a patent
 16 case.
 17 Q. But did you give the opinion in that
 18 case, or were you assisting with someone else?
 19 A. I was doing work on that case as a
 20 consulting expert, so I don't think any opinions
 21 were provided in that case.
 22 And I'm trying to recall if there are --
 23 I -- I don't recall anything else as I sit here, but
 24 that doesn't mean that's not the case. Again, I've
 25 worked on hundred of cases over the course of my

1 career and I would just have to go back and refresh
 2 my recollection --
 3 Q. All right.
 4 A. -- as to whether there are other cases.
 5 Q. Okay. As you sit here today, you don't
 6 recall working on a patent case?
 7 A. Yeah, as I sit here, I don't recall, but
 8 I would have to double-check.
 9 Q. Having now looked in this -- in this
 10 case a little bit at the -- at the apparel and in
 11 particularly the maternity garment industry, what
 12 would you say is a significant sales level in that
 13 industry?
 14 MR. LECHLEITER: Objection. Form.
 15 A. Well, I guess it -- it's -- it needs to
 16 be put into -- you know, I don't dispute that [REDACTED]
 17 [REDACTED] a year could be considered a sizable number,
 18 but I also think that it would be appropriate to put
 19 it in the context of what that meant in terms of
 20 whether that number was at the expense of other
 21 sales, is it a reflection of the share -- a certain
 22 share of the market. I think those would be things
 23 that, perhaps, could be considered. And I think --
 24 again, I don't know that -- well, I think those
 25 would be the things you would consider.

1 Q. What about [REDACTED] would
 2 \$30 million be a significant sales level --
 3 MR. LECHLEITER: Objection.
 4 Q. -- in the maternity garment market?
 5 MR. LECHLEITER: Objection. Form.
 6 A. And again, I think that depends on what
 7 context you're looking at it.
 8 I'm responding to what Mr. Green has
 9 done, and I don't believe he has put it really in --
 10 in the context in comparison to anything other than
 11 -- in comparison to his all other category of sales.
 12 Q. So, all he has done is he has compared
 13 sales of Destination Maternity of patented product
 14 versus unpatented product and otherwise has not done
 15 any other analysis?
 16 A. As I understand from his disclosure,
 17 what he's said is that there's a certain level of
 18 sales [REDACTED] over the past six years is what
 19 he says in his report of sales. And he's made a
 20 comparison between sales having increased as
 21 non-patented products have decreased. That's the
 22 sum total of his analysis as I see it.
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 Q. Let's go back to the article for a
 15 second, Thomas Deposition Exhibit 3.
 16 A. Okay.
 17 Q. The second sentence under indicators of
 18 commercial success.
 19 A. I'm sorry, what page are you on?
 20 Q. Oh, I'm sorry. It's the second page of
 21 the document.
 22 A. Okay.
 23 Q. The second sentence reads,
 24 "Pharmaceutical sales can be measured by dollars
 25 of sales revenue, prescriptions, or daily doses."

1 I recognize this refers to -- to
2 pharmaceutical sales, but would you agree that for
3 maternity patent sales that those sales also could
4 be measured by these three indicators of sales
5 revenue, prescription -- well, not prescription. Or
6 -- well, is there a similar analysis?
7 A. If your question is can sales be
8 measured by revenue or units, I would agree with
9 that. I don't agree that they can be -- at least in
10 this situation, you could measure by prescription.
11 Q. Yes. Okay.
12 And in the third sentence, they're
13 talking about pharmaceuticals having low production
14 costs. And it says, therefore, sales revenue is a
15 good profit -- is a good proxy for gross
16 profitability.
17 Have you looked at the production costs
18 here and would you agree that for maternity products
19 that there are low production costs and high margins
20 and that the revenue would be a good -- would be a
21 good proxy for gross profitability?
22 A. I --
23 MR. LECHLEITER: Objection. Form.
24 A. I think -- I guess I would tend to
25 disagree with that assessment as you've described

1 it.
2 Q. Okay. Why?
3 A. Well, I think that the sales of these
4 products can differ based on how they're marketed,
5 based on the costs associated with those products,
6 and the costs of the marketing of those products.
7 So, I don't know that sales, in and of itself, could
8 be a relevant indicator because there's other
9 considerations you would have to make, and those
10 consideration went beyond just the costs of goods
11 sold and beyond the gross profitability. And I
12 would also add that that's -- those are things that
13 Mr. Green has failed to take into consideration.
14 Q. Well, let me just slow you down a little
15 bit. Let's try to just go step by step here.
16 Would you agree, though, that there are
17 low costs and high margins for the Destination
18 Maternity products?
19 MR. LECHLEITER: Objection. Form.
20 A. Well, I -- again, I -- the -- the gross
21 profit information that has been provided is what it
22 is. Whether that is low, it depends on the context
23 of to what.
24 Q. Sure. I'm asking you as an expert --
25 A. Or high gross profit, I mean, you're --

1 you can -- in comparison to what?
2 Q. Well, based on your -- whatever analysis
3 you may have done on the market, would you consider
4 this to be a low-cost-high-margin set of products or
5 -- or something else?
6 A. Which products?
7 Q. The Destination Maternity Secret Fit
8 products?
9 A. Okay. Well, I -- I've compared Exhibit
10 11-13, I've compared the mar- -- the gross margin as
11 example of Secret Fit versus non-Secret Fit.
12 Q. Uh-huh.
13 A. Those margins are not dramatically
14 different in certain instances. So, I don't know
15 that you can -- I just want to be clear for the
16 record that you're somehow suggesting in isolation
17 that something is of low cost and high margin. I --
18 I don't know that -- that you can necessarily
19 conclude that from the information that's been
20 provided.
21 Q. Well, let me ask you this. I'm looking
22 on your Chart 11-13. You have a [REDACTED]
23 margin.
24 A. Let me --
25 Q. Yeah.

1 A. I'm sorry. I was going to say that I
2 would also add that you have been referencing this
3 document relative to pharmaceutical costs. I can
4 tell you that in comparison to pharmaceuticals these
5 margins are much lower than what would be expected
6 for a pharmaceutical product.
7 Q. Okay. Would you still say, though, that
8 a [REDACTED] -- margin, gross margin, would
9 that be considered a high margin in economics?
10 MR. LECHLEITER: Object. Objection.
11 Form.
12 A. It, you know, depends on what -- what
13 that margin needs to cover. So, I -- you know,
14 without further information, I don't know that you
15 can conclude it's, quote/unquote, a high margin.
16 And I would, again, add that the article
17 that you have been referring to refers to
18 pharmaceutical products, and I can tell you
19 pharmaceutical products certainly have a much higher
20 gross margin than what's reflected here.
21 Q. Unlike the pharmaceutical market, the
22 apparel market is an extremely competitive market;
23 would that be fair?
24 MR. LECHLEITER: Objection. Form.
25 A. Well, I guess -- I don't --

1 Q. You just looked at it. From your
 2 knowledge, would that be fair?
 3 A. I don't know that I would characterize
 4 the pharmaceutical market as not being competitive
 5 either. So, I -- I'm not sure I can answer your
 6 question.
 7 Q. But the pharmaceutical market is
 8 characterized by blockbuster drugs being the sole
 9 treatments for a particular condition, correct?
 10 MR. LECHLEITER: Objection. Form.
 11 A. Well, in certain instances you can have
 12 products that are blockbuster products, but you can
 13 have also other instances where there's significant
 14 competition amongst various types of products. So,
 15 I don't know that that's a fair characterization.
 16 Q. Okay. But would it be fair to say that
 17 the -- the apparel market is one which is highly
 18 competitive in which margins are very small, in a
 19 few percent ranges typically?
 20 A. You know, if you are talking about net
 21 margin --
 22 Q. Uh-huh.
 23 A. -- that -- that very well could be the
 24 case.
 25 Q. We looked at net margins here and I

1 have --
 2 A. And I think, in fact, the net margins
 3 that Destination Maternity generates on a net income
 4 basis is [REDACTED] and on operating income is
 5 [REDACTED].
 6 So, again, I would say that to maybe
 7 suggest that what -- what you're trying to suggest
 8 is a, quote/unquote, high margin may not necessarily
 9 be a high margin in relation to the other expenses
 10 that that gross margin needs to cover.
 11 Q. Okay. The revenue numbers you just
 12 quoted me were for the entire company and its
 13 products, correct?
 14 A. That's -- that's the analysis that
 15 Mr. Green had set forth in his report or his
 16 declaration.
 17 Q. But I think he has also given the
 18 margins for the Secret Fit products, which are
 19 similar to yours, in the [REDACTED]?
 20 A. He has given numbers that are in the [REDACTED]
 21 [REDACTED] and I believe my analysis -- I have
 22 to -- let me see -- in the [REDACTED]
 23 range. That's correct.
 24 Q. Okay. Let me ask you. When you do
 25 economic analysis and you're looking at a market, do

1 you look at the -- do you look at wholesale and
 2 retail markets differently?
 3 A. You could, yes.
 4 Q. You said, "You could." What I would
 5 like to know is, would you need to in order to do a
 6 reasonable comparison?
 7 MR. LECHLEITER: Objection. Form.
 8 A. You -- you may need to consider the
 9 differences between those two markets to understand
 10 how the information you're relying upon impacts your
 11 analysis. That could be the case.
 12 Q. I mean, it would be fair to say the --
 13 when you do an economic analysis, you look at
 14 sellers and buyers, correct?
 15 A. That can be something you look at, yes.
 16 Q. And the characteristics of wholesale
 17 buyers be very different from the characteristics of
 18 the ultimate consumers in the market so that
 19 comparing that wouldn't be a fair comparison?
 20 MR. LECHLEITER: Objection. Form.
 21 A. Well, that -- that may -- that may be
 22 the case. It may not be the case. I mean, I guess
 23 you'd have to give me more facts and circumstances.
 24 But that might be the case.
 25 Q. Okay. Let's take a look at the

1 maternity apparel market. Would it be fair to
 2 say that you wouldn't want to compare the retail
 3 market of maternity products to consumers to the
 4 market of a company selling maternity products
 5 to wholesalers?
 6 A. Well, that depends. I mean, that
 7 comparison may -- may provide indications of certain
 8 important factors. So, that could be something you
 9 could take into consideration.
 10 Q. What -- what important factors?
 11 A. Whether what's you're analyzing or
 12 included in your analysis -- it -- it could draw the
 13 distinction between things that are unrelated to
 14 what you are trying to assess as opposed to things
 15 that are related to what you are trying to assess.
 16 Q. How does it do that?
 17 A. You -- you -- there could be certain
 18 things you do at the retail market in order to drive
 19 a sale --
 20 Q. Uh-huh.
 21 A. -- that maybe you don't do at a
 22 wholesale level.
 23 Q. Uh-huh.
 24 A. And the drives of sales at the retail
 25 level may be impacted more so by those things that

1 are unrelated to what it is you're trying to assess.
 2 Q. I'm not an economist, so maybe you can
 3 -- you can help me here. But I vaguely remember
 4 from -- from economics that there's a -- kind of an
 5 idea that --
 6 A. By the way, you -- you strike me as
 7 somebody that's fairly knowledgeable about
 8 economics, so --
 9 Q. Oh, no, no. I --
 10 A. -- with all due respect.
 11 Q. I promise you I'm not. I never even
 12 took it in college.
 13 I understand that there's a -- there's a
 14 concept in economics that margins tend to over time,
 15 all the things being equal, to go to zero. Would
 16 that be fair?
 17 MR. LECHLEITER: Objection. Form.
 18 A. I -- I think that somewhere way back in
 19 the -- in the day in my undergraduate studies I
 20 believe there is -- there are certain concepts and
 21 theories that may point in that direction, depending
 22 on certain other facts and circumstances. That may
 23 be a particular theory.
 24 Q. It's actually one of, like, the base
 25 theories that goes back to the days of Adam Smith,

1 the early economist of the 19th century?
 2 MR. LECHLEITER: Objection. Form.
 3 A. Yeah. I think that -- that under that
 4 theory, though, there are certain assumptions you
 5 take into consideration, but that's my recollection,
 6 yes.
 7 Q. Right. And that theory doesn't work
 8 sometimes in a market which is, you know, very small
 9 or doesn't have a lot of competitors or that has
 10 intellectual property involved in it?
 11 A. Those can be factors that can impact
 12 that, yes.
 13 Q. Okay. But in a market with a large
 14 number of players and low barriers to entry, the
 15 principle that margins tend to zero -- tend to --
 16 tends to be true?
 17 MR. LECHLEITER: Objection. Form.
 18 A. When you -- it, say, with the increased
 19 competition depresses margins, that -- that can be
 20 the case, yes.
 21 Q. In fact, I think it's the cases, you've
 22 worked with pharmaceuticals, you might be aware that
 23 as the number of generic entrants increases, those
 24 huge margins that the first filer has for six months
 25 drop to zero once a large number of generic

1 competitors enters the market. Would that be fair?
 2 A. I think that you can see that phenomenon
 3 occur in the generic market.
 4 Q. In the -- would it be fair to say that
 5 the maternity apparel market is -- is a market which
 6 has low barriers to entry and has a very substantial
 7 number of competitors?
 8 MR. LECHLEITER: Objection to form.
 9 A. Well, I guess it depends on what aspect
 10 of the market you're referring to. I -- you know,
 11 that could be the case, it may not be the case,
 12 depending on what aspect of the market you're
 13 referring to.
 14 Q. Well, let's focus on the maternity pants
 15 aspect of the market.
 16 A. Okay.
 17 Q. Would you say there's a substantial
 18 number of competitors in the maternity pants market?
 19 MR. LECHLEITER: Objection. Form.
 20 A. I -- I can't name verbatim all of the
 21 competitors in the maternity apparel market, but
 22 certainly there are competitors in that marketplace.
 23 Q. Essentially, all of the major clothes
 24 retailers are -- are in that market: Macy's,
 25 Penney's...

1 A. If you -- if you broadly define it in
 2 that fashion, yeah, I think so.
 3 Q. If I broadly define it in that fashion,
 4 would you agree, then, there are a substantial
 5 number of the competitors in the maternity pants
 6 market?
 7 MR. LECHLEITER: Objection to form.
 8 A. And again, I -- I mean, certainly there
 9 are competitors in the market. Whether it's
 10 substantial or not, I guess I would have to study
 11 that further, but, yeah, certainly there are
 12 competitors in this marketplace.
 13 Q. And would you agree with me that there
 14 -- that there are low barriers to entry into the
 15 maternity pants market?
 16 MR. LECHLEITER: Objection. Form.
 17 A. You know, in comparison -- I guess you'd
 18 have to say in comparison to what, but there could
 19 be -- that could be the case.
 20 Q. Would you agree with me, also, that all
 21 of the competitors -- I don't want to say "all" --
 22 many of the competitors in the maternity pants
 23 market are substantial companies, like Target for
 24 example, that have significant marketing capability?
 25 MR. LECHLEITER: Objection. Form.

1 A. I think certainly there are competitors
 2 in the market that have marketing capability.
 3 Target certainly perhaps may have marketing
 4 capability. Macy's is another example.
 5 Q. Is -- there's no reason here to think
 6 that Destination Maternity is -- has more resources
 7 or is better at marketing than Target or its other
 8 competitors?
 9 MR. LECHLEITER: Objection. Form.
 10 A. Well, I guess that depends in what
 11 respect.
 12 Q. Do you think there is some respect in
 13 which Destination Maternity has --
 14 A. Well, just because -- I guess I would
 15 say that just because an organization is large
 16 doesn't necessarily mean that a smaller organization
 17 could do better in certain respects at marketing or
 18 touting or promoting a particular product in a
 19 particular aspect of the market. You'd have to look
 20 at the facts and circumstances.
 21 Q. Have you seen any facts and
 22 circumstances that suggest that Destination
 23 Maternity has better marketing or better marketing
 24 resources in maternity pants?
 25 MR. LECHLEITER: Objection. Form.

1 A. Well, the -- I guess what I can say is
 2 that of their -- they -- [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 I haven't made that comparison
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 That's what I know.
 14 Q. Why do you think they do that? Why do
 15 they push the Secret Fit Belly pants over Non-Secret
 16 fit?
 17 MR. LECHLEITER: Objection. Form.
 18 A. They made a decision to do that.
 19 Q. Yeah. But what -- what drives the
 20 decisions like that?
 21 MR. LECHLEITER: Objection. Form.
 22 A. Well, there can be, you know, certainly
 23 a number of things that could drive that decision.
 24 They want a particular product to succeed.
 25 Q. Consumer demand, is it often driven by

1 consumer demand?
 2 MR. LECHLEITER: Objection. Form.
 3 A. Again, it -- it could be, but again, it
 4 -- it may instead of being driven by demand, it
 5 could be creating demand, as well, in lieu of,
 6 perhaps, other products.
 7 Q. Let me ask you this. In the area of
 8 maternity pants, unlike some other articles of
 9 clothing, would you agree with me that there's a --
 10 at a particular point in time, there's kind of a
 11 limited customer base and that -- well, other than
 12 perhaps me, as I start to grow -- that there's
 13 basically a limited customer base that is -- is not
 14 going to, generally speaking, increase and certainly
 15 hasn't increased over the period that -- that we're
 16 dealing with?
 17 MR. LECHLEITER: Objection. Form.
 18 A. You know, again, I don't -- I don't know
 19 -- it depends on who it's directed to. If it's --
 20 it's pregnant women versus women who just, perhaps,
 21 have a need for an expandable product. That could
 22 determine whether something is expanding or it's
 23 not, per market -- particular facet of the market.
 24 Q. Okay. Is there any evidence in -- in
 25 any sales literature, marketing, anything else

1 you've seen, that these products are marketed to
 2 anyone else other than pregnant women?
 3 MR. LECHLEITER: Objection. Form.
 4 A. I -- I don't recall anything, but that
 5 doesn't mean that doesn't exist. I'd -- again, I
 6 haven't memorized every document that I've reviewed,
 7 but that doesn't mean that something doesn't exist
 8 in the record.
 9 Q. Okay. As far as you -- you recall
 10 sitting here now, you don't recall anything either
 11 -- anything said by any of the witnesses or anyone
 12 else suggesting that Destination Maternity markets
 13 to anyone other than pregnant women?
 14 A. Again, I don't -- I don't recall
 15 anything as I -- as I sit here, but, again, I would
 16 have to look at the record to -- to be sure on that
 17 point. It doesn't mean something doesn't exist.
 18 Q. Something can always exist.
 19 A. I'm not sure that that's the case.
 20 Q. Okay. Why not? Because you keep saying
 21 something can always -- can exist.
 22 A. Well, I'm just saying that you're asking
 23 me to interpret and respond to the entirety of the
 24 record that I've reviewed as to whether in any way,
 25 shape, or form the product's been promoted to

1 somebody other than a pregnant female. And what I'm
 2 saying is that that may be the case. I can't say
 3 for certain as I sit here. I don't recall anything,
 4 but that doesn't mean that it doesn't exist. And
 5 I'd have to go back and -- as I understand, this is
 6 not a memory test and, you know, certainly I want to
 7 be responsive to your questions.
 8 Q. Okay. You'd agree with me, though, that
 9 if the market consists entirely of pregnant women,
 10 unlike other markets that you've probably dealt
 11 with, assuming that the market consists entirely of
 12 pregnant women, there's a limit to the effect
 13 marketing can have because you can't expand beyond a
 14 certain customer base?
 15 MR. LECHLEITER: Objection. Form.
 16 A. If you're saying that -- that you have
 17 no intention of marketing to anyone other than
 18 pregnant women, I would say that there's a finite
 19 number, if you will, of those women. And depending
 20 on what market you're referring to, whether it's
 21 U.S., international, or whatever the case may be.
 22 Q. In this case --
 23 A. And it may be women who are pregnant,
 24 but it also, I guess, can include women who intend
 25 to get pregnant and may have a need at some future

1 point.
 2 Q. That's a finite number of people within
 3 a particular time period as well?
 4 A. I guess, I -- you, perhaps, could
 5 analyze it in that fashion.
 6 Q. So, that's different from many other
 7 markets where marketing and marketing's effect has
 8 been analyzed where one of the key goals of
 9 marketing, except in the pharmaceutical market, is
 10 to expand the customer base beyond the number of
 11 customers that are currently in the base?
 12 MR. LECHLEITER: Objection. Form.
 13 A. I think -- I think that's a -- I would,
 14 I guess, tend to disagree with that -- that
 15 characterization because you're somehow suggesting
 16 that marketing is only meant to increase the size of
 17 a market. Marketing, in my mind, is meant to
 18 increase your share of a particular market, is one
 19 thing that it could do. So, I think that I would
 20 disagree, respectfully, with how you characterized
 21 that last question.
 22 Q. Perhaps I put my question inartfully.
 23 So, in most markets marketing has two
 24 goals: To increase market share and to increase
 25 overall market size. Is that fair?

1 A. Those can be goals of marketing a
 2 product and, I guess, that from my perspective and
 3 my experience, the primary goal would it -- to be to
 4 increase your share in a particular market. I don't
 5 know that marketing is necessarily intended to
 6 increase the size of a market, typically, but --
 7 while that could be the case, but I think in terms
 8 of just in my experience and the impact of
 9 marketing, what you're attempting to accomplish, the
 10 primary goal would have to be to increase your size
 11 of the share of the market.
 12 Q. So you're not aware that -- for example,
 13 you've worked in a pharmaceutical market -- you're
 14 not aware that in the pharmaceutical market usually
 15 the main goal is to increase the market size to make
 16 doctors aware that the treatment exists?
 17 MR. LECHLEITER: Objection. Form.
 18 A. Well, again, that -- that -- that might
 19 be an objective. To be fair, that might be an
 20 objective of marketing, but it also can be the case
 21 that certain treatments only affect a certain
 22 population that has a particular disease or -- or
 23 condition. And the goal can also be to increase
 24 treating patients within that population or that
 25 market.

1 So, even if you're trying to reach
 2 physicians, there is, in many cases, only a certain
 3 finite number of patients that would actually have a
 4 need for a particular treatment. So, the goal would
 5 be to increase the share of those patients that are
 6 being treated with that particular product.
 7 Q. You would agree with me, though, that in
 8 the maternity pants market there isn't an issue that
 9 customers are unaware of the existence and
 10 availability of maternity pants?
 11 MR. LECHLEITER: Objection. Form.
 12 A. I don't know that that necessarily is
 13 the case. I don't know that you can draw that
 14 conclusion.
 15 Q. Okay. So you think that certain
 16 pregnant women in the United States are not aware
 17 that there's a product called maternity pants that
 18 they could buy for their pregnancy?
 19 A. They may not.
 20 Q. Let's go back to the -- to the article,
 21 Thomas Deposition Exhibit 3. I'm not -- I'm, again,
 22 going to look at the second page under indicators of
 23 commercial success.
 24 A. Okay.
 25 Q. And I'm going to move one sentence

1 further. I'm going to be reading from the one, two,
 2 three, four, five, sixth line, where it says "the
 3 level and growth of sales."
 4 Do you see that?
 5 A. Yes.
 6 Q. Okay. And it's -- and it's -- right
 7 there it says, "The level and growth of sales as the
 8 share of sales by competing drugs is another
 9 important indicator of commercial success because it
 10 speaks to the success of the product relative to its
 11 competitors."
 12 Did I read that correctly?
 13 A. Yes.
 14 Q. If I replace the word "drugs" with
 15 "Maternity pants," would you agree with the
 16 statement that the level and growth of sales as
 17 a share of sales by competing maternity pants is
 18 another important indicator of commercial success
 19 because it speaks to the success of the product
 20 relative to its competitors?
 21 MR. LECHLEITER: Objection. Form.
 22 A. I would agree that that could be the
 23 case.
 24 Q. Now, let's start, first, with the case
 25 of drugs. When a pharmaceutical company, like

1 GlaxoSmithKline, let's say, comes out with a new
 2 drug product with the same indication and that new
 3 drug product cannibalizes the sales of their other
 4 drug product for a prior treatment, would it be fair
 5 to say that that shows that there's a commercial
 6 success due to the advantages of the new drug
 7 product?
 8 MR. LECHLEITER: Objection. Form.
 9 A. It may be, and it may not.
 10 Q. Let's go back to your VIIIV case, and
 11 there you said that they had a new HIV treatment
 12 that, if I understand correctly, increased patient
 13 compliance. Would that be fair?
 14 A. I think that's part of what the -- yes.
 15 Q. Well, how would you describe it?
 16 A. I -- I believe that's part of what the
 17 drug accomplished, if you will.
 18 Q. Okay. And I assume before that, there
 19 was a prior treatment, also, being sold by
 20 GlaxoSmithKline?
 21 A. Yes.
 22 Q. Okay. And I assume it was also the case
 23 that the sales of the new product that increased
 24 patient compliance cannibalized the sales of the old
 25 GSK product?

1 MR. LECHLEITER: Objection. Form.
 2 A. I don't -- I don't believe that
 3 necessarily was the case.
 4 Q. How did you know that the sales of the
 5 new GSK product were a commercial success compared
 6 to the prior treatment for the same condition?
 7 A. Well, the first thing I did was I looked
 8 at -- at least as a general matter, I looked at the
 9 difference between the products and what that
 10 difference was. And then that difference was
 11 entirely covered by the patent at issue in the case.
 12 So, I --
 13 Q. You said that it --
 14 A. So, I --
 15 Q. I'm sorry. You said --
 16 A. So, I --
 17 Q. Oh --
 18 A. So I knew that that comparative could
 19 make sense because it was entirely -- the entire
 20 difference was associated with the patent at issue
 21 in the case.
 22 Q. When you said the difference between the
 23 products, were you referring there to the GSK
 24 product that provided this additional compliance and
 25 the prior GSK product?

1 A. That's correct.
 2 Q. So, in this case Mr. Green has looked at
 3 the difference between the new Destination Maternity
 4 product that provided the Secret Fit Belly and he
 5 compared that to the prior Destination Maternity
 6 product that didn't have that feature. Is that
 7 fair?
 8 A. Well, he --
 9 MR. LECHLEITER: Objection. Form.
 10 A. I think he's compared two products, but
 11 I don't know that he's compared two products that
 12 the only difference is what he's -- what needs to be
 13 addressed or at least analyzed in this situation.
 14 Q. Let me ask you this. You said there
 15 might be some other features that are -- that are
 16 different. Other than the Secret Fit feature, did
 17 you see any evidence in this case that the kinds of
 18 styles and styling of the non-Secret Fit product was
 19 in any way different from the styling and styles of
 20 the Secret Fit products?
 21 MR. LECHLEITER: Objection. Form.
 22 A. I -- I would have to go back and look at
 23 that. That may have been the case. Relative to --
 24 I -- I'd have to go back and look. That may have
 25 been the case.

1 Q. So, you're saying that Ms. Harder said
 2 that there were differences between the styles of
 3 the non-Secret Fit product and the Secret Fit
 4 product?
 5 MR. LECHLEITER: Objection. Form.
 6 A. I'm not speaking for Ms. Harder. I'm
 7 just saying that that may have been the case.
 8 Q. What evidence would you look at that
 9 would suggest that was the case?
 10 A. Well, there were certain SKUs that would
 11 describe a particular product from the data that we
 12 looked at. Again, I'd have to go back and look to
 13 see if there were differences in the styles of the
 14 Secret Fit versus the non-Secret Fit.
 15 Q. Well, for example, one of the, I know,
 16 stylings that Destination Maternity sells are these
 17 shorts, where they are both, denim pants and denim
 18 shorts, non-Secret Fit and Secret Fit?
 19 A. I think that might be the case, yeah.
 20 Q. Okay. I think there are yoga pants is
 21 another styling that they do. Are there, in fact,
 22 even now, I believe, non-Secret Fit yoga pants and
 23 Secret Fit fit yoga pants available?
 24 A. I believe so.
 25 Q. Okay. So, is there some style that you

1 could point to that came in Secret Fit only and
 2 didn't exist in a non-Secret Fit?
 3 A. Again, I -- I can't say as I sit here,
 4 but certainly there was a rather large data set that
 5 we were provided with.
 6 Q. Uh-huh.
 7 A. I'd have to go back and look and make
 8 that comparison to see if that -- those differences
 9 existed.
 10 Q. What -- let me put this way, and maybe
 11 you can -- you can agree with this. In non-Secret
 12 Fit there were a large number of stylings. Would
 13 that be fair?
 14 A. I believe so.
 15 Q. Okay. And in Secret Fit, whether they
 16 completely overlap with non-Secret Fit or not, there
 17 were a large number of styles.
 18 A. I think that's -- that's fair. Again,
 19 I'd have to go back and -- and look at the data to
 20 be more -- to be more precise.
 21 Q. And so, in both Secret Fit and
 22 non-Secret Fit clothing, would it be fair to say
 23 that both types of clothing offered the consumer a
 24 large variety of styling choices --
 25 MR. LECHLEITER: Objection. Form.

1 Q. -- if they weren't identical?
 2 A. Again, I think that -- that the data
 3 speaks for itself, and there can be different styles
 4 that are afforded or offered by the Secret Fit and
 5 the non-Secret Fit.
 6 Q. In fact, the data we've looked at -- not
 7 today, but the data that Mr. Green has provided that
 8 you've seen shows there are a very large number of
 9 non-Secret Fit SKUs?
 10 A. I believe so. I don't know the specific
 11 number, but I believe so.
 12 But I will say that, to be clear, that
 13 the number of SKUs have declined as I've analyzed in
 14 my analysis over time, so in terms of what was
 15 originally offered and subsequently was offered has
 16 changed, and so, it very well could be the case.
 17 That's why I said it very well could be the case
 18 that the stylings and what was offered for the
 19 non-Secret Fit changed dramatically and they
 20 wouldn't have offered those same styles as they did
 21 for the -- for the Secret Fit.
 22 Q. Right. But at one time, when Secret Fit
 23 was first introduced into the market, there were
 24 quite a very large number of non-Secret Fit
 25 offerings?

1 A. Well, that -- that -- that could be --
 2 I've analyzed the number of SKUs. So, at some -- at
 3 some point there's a certain number of SKUs for
 4 Secret Fit and non-Secret Fit, and that changes over
 5 time. And some -- certainly a number were added for
 6 the Secret Fit while the number of SKUs offered by
 7 the non-Secret Fit diminished dramatically.
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 21 Q. But as you sit here today, you're not
 22 aware of that?
 23 A. Again, I haven't memorized each number
 24 on the spreadsheets and the information that was
 25 provided. What I do know is that the number of SKUs

1 for non-Secret Fit has declined dramatically while
 2 the SKUs for Secret Fit has increased which would
 3 tend to indicate that there's a difference in the
 4 products that are offered between those two styles
 5 -- or at least between the Secret Fit and the
 6 non-Secret Fit. And it could be that what's not
 7 offered in the non-Secret Fit is a significant
 8 portion of the sales of the Secret Fit pant.
 9 Q. But as you sit here today, you don't
 10 have any evidence to support that statement?
 11 A. Well, I think that I have the -- the
 12 data within the spreadsheets and information that
 13 were provided, and I've certainly analyzed the
 14 number of SKUs that -- as it's changed over time.
 15 So, I think that, in and of itself, could be support
 16 of that.
 17 Q. Sure. But you're not -- as you sit here
 18 today, you're not offering an opinion that there is
 19 some style that's unique to Secret Fit, other than
 20 the Secret Fit part of it, that wasn't available in
 21 non-Secret Fit that's driving sales?
 22 A. Well, I am saying that I've analyzed the
 23 number of SKUs between those two types of products
 24 and that one has increased dramatically while one
 25 has decreased which would indicate that there are

1 certain products that are offered by -- as a Secret
 2 Fit pant that are not offered by non-Secret Fit and
 3 could very well account for the difference in the
 4 sales. And it may not be one product and it may be
 5 several products that are not offered by Secret Fit,
 6 and I think that's reflective in the
 7 analysis that I provided in support of my opinions
 8 in this case.
 9 Q. Sure. Let's -- let's go back to my
 10 question which is whether you're offering an opinion
 11 that there was a style of Secret Fit that was never
 12 available as non-Secret Fit and the style is driving
 13 sales; are you offering that opinion?
 14 MR. LECHLEITER: Objection. Form.
 15 A. And a specific style?
 16 Q. Yes.
 17 A. I'm not offering an opinion as to a
 18 specific style that does that. I would, again, go
 19 back to the analysis that I've done on the number of
 20 SKUs.
 21 Q. Let me ask you about that number of
 22 SKUs. Economically, as an economist, when the
 23 market demands, let's say, the Secret Fit feature,
 24 wouldn't it then make sense, economically, for a
 25 seller to reduce the number of SKUs of the

1 non-Secret Fit products that don't have the desired
 2 feature? Isn't that how economics works and isn't
 3 that how the economic divers would look?
 4 MR. LECHLEITER: Objection. Form.
 5 A. Not necessarily. I mean, styles change
 6 over time. That may or may not be the case.
 7 Q. You have any evidence that the style has
 8 changed over the time period in this case than on
 9 the styles available before?
 10 A. Well, I understand that the styles in
 11 the apparel do change and change each year. And I
 12 understand that the number of SKUs offered for the
 13 non-Secret Fit has diminished while the number of
 14 SKUs for the Secret Fit has increased.
 15 Q. Uh-huh.
 16 A. And it could very well be that those
 17 SKUs for the Secret Fit are different styles that
 18 were never offered for the non-Secret Fit or weren't
 19 available in the marketplace for the non-Secret Fit.
 20 Q. Okay. You said --
 21 A. And those styles may have been promoted
 22 heavily by Destination Maternity.
 23 Q. Okay. You said it very well might be
 24 the case, but as you sit here today, do you have an
 25 opinion or are you aware of any styles for which

1 that is, in fact, the case?
 2 MR. LECHLEITER: Objection. Form.
 3 A. Not specifically a style, but I'm -- I'm
 4 certainly aware of the information I've reviewed and
 5 included as part of my report.
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 11 Q. Okay. And let me see if I'm correct
 12 about economics.
 13 Wouldn't it be the case that if the
 14 market demand was for the Secret Fit pant, that it
 15 would be consistent with commercial success and the
 16 nexus to the Secret Fit feature that the number of
 17 SKUs, then, of non-Secret Fit would be expected to
 18 go down --
 19 MR. LECHLEITER: Objection.
 20 Q. (BY MR. POLLACK) -- just because of
 21 market demand?
 22 MR. LECHLEITER: Objection. Form.
 23 A. Again, you're -- you're asking a
 24 hypothetical that my or may very well not be the
 25 case. I mean --

1 Q. Why would it not be the case? Why would
 2 a seller continue to sell products which are less in
 3 demand and continue to maintain the same number of
 4 SKUs or increase the number of SKUs?
 5 MR. LECHLEITER: Objection. Form.
 6 A. I guess I'm not -- that question, I'm
 7 not sure I understand.
 8 Q. Well, it seems to me, just based on
 9 logic, if I'm selling two products, one with a
 10 feature that customers really want and another one
 11 -- another type of product with a feature that the
 12 customers are less interested in, that once I see
 13 that over time, what I will do, as a rational actor,
 14 is I would decrease the number of styles I have
 15 available that don't have that feature that seems to
 16 be driving demand and would increase the number of
 17 styles that have the desired feature; wouldn't that
 18 -- isn't that what a rational actor would do?
 19 MR. LECHLEITER: Objection. Form.
 20 A. But you're assuming that it's that
 21 feature that's driving demand and driving the change
 22 in the number of SKUs. Again, I don't know that you
 23 can ultimately conclude from the information that's
 24 been provided that that's the case. So, I -- you're
 25 asking a hypothetical that may or may not be the

1 I'm not -- don't understand to be in the record, and
 2 you're surmising and speculating, and I'm merely
 3 trying to respond to your question.
 4 Q. Well, I don't think I was surmising and
 5 speculating here. I think we -- we can both agree
 6 that there are non-Secret Fit and Secret Fit,
 7 though, panel SKUs, correct?
 8 A. That's correct.
 9 Q. And I think we can both agree that
 10 economics must drive -- whether the people at
 11 Destination Maternity understand that or not,
 12 economics fundamentally must drive the reasons that
 13 Destination Maternity has reduced non-Secret Fit
 14 SKUs and has increased Secret Fit SKUs?
 15 MR. LECHLEITER: Objection. Form.
 16 A. Again, that -- that -- that perhaps
 17 could be the case that economics is driving that.
 18 Q. Right. Isn't economics what drives all
 19 commercial transactions? It's the science of that.
 20 A. I mean, it -- I guess you could also say
 21 that there can be situations where it's not
 22 economically -- maybe not in the economic interest
 23 but for other strategic purposes or other reasons
 24 why you may do something.
 25 Q. Sure. But the -- when we're talking

1 case, I mean.
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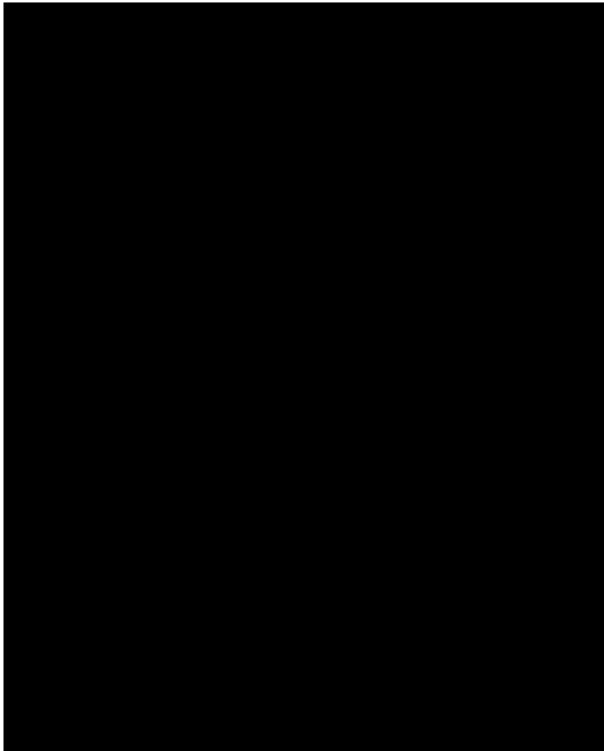
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	[REDACTED]	125	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	[REDACTED]	127
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	[REDACTED]	126	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	[REDACTED]	128

32 (Pages 125 to 128)

CENTEXT LEGAL SERVICES
855.CENTEXT

DMC Exhibit 2100_032
Target v. DMC
IPR2013-00530, 531, 532, 533

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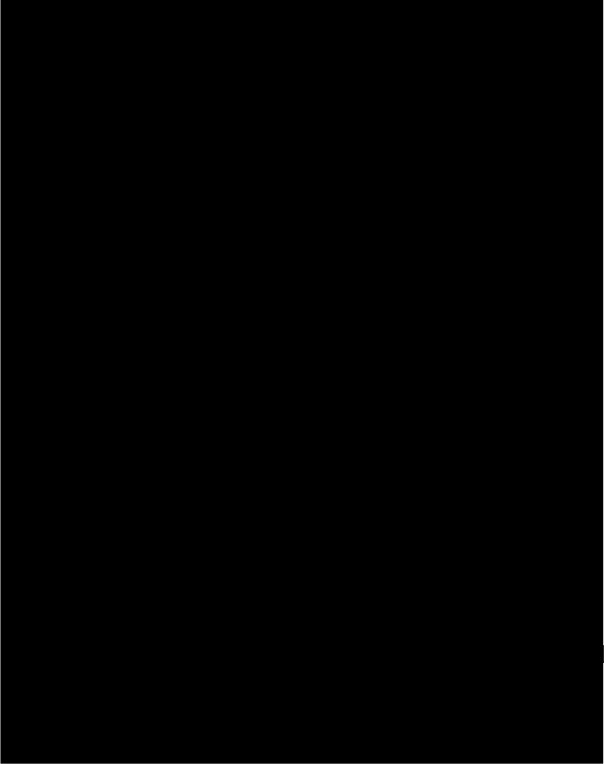


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1 Q. Let me ask you about -- we were talking
2 about --
3 A. Are we -- are we at a point where we can
4 take a break.
5 Q. Oh, sure.
6 A. I think we have been going for about an
7 hour and a half, so...
8 Q. Yes. That's fine.
9 A. Maybe we could break for lunch.
10 Q. Yeah, that's fine.
11 VIDEOGRAPHER: This concludes Disc
12 2. We're off the record. It's 12:33.
13
14 (Lunch break taken.)
15
16 THE VIDEOGRAPHER: We are back on the
17 record at 1:25. This begins Disc No. 3 of the
18 deposition of Vincent A. Thomas.
19 Q. (By MR. POLLACK) I just want to go back
20 to my favorite article, the Thomas Deposition
21 Exhibit 3, the article -- the article by Guha and
22 coauthors.
23 And we're back again at Page 2 under
24 indicators of commercial success. I want to look at
25 the last sentence of the first paragraph.

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1 A. On Page 2?
2 Q. Yep, under indicators of the commercial
3 success.
4 A. Okay.
5 Q. It's the sentence beginning with the
6 word "courts."
7 A. Okay.
8 Q. Do you see where I'm reading? "Courts
9 consider sales data to be even more convincing if
10 the patented invention has displaced or surpassed
11 sales of competing drugs developed with prior art."
12 Do you see where I'm reading?
13 A. I read that, yes.
14 Q. Okay. Do you -- do you have any reason
15 the disagree with that sentence?
16 MR. LECHLEITER: Objection. Form.
17 A. Again, I'd have to understand more about
18 what's specifically being referred to. You're
19 putting this article -- article in front of me in
20 this deposition, and I'm reading those words. I
21 have no reason to disagree or -- but, again, it
22 depends on what context you want to put those words
23 in.
24 Q. Let me ask you this. If I replace the
25 word "drugs" with "maternity pants," would the

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1 sentence still be true?
 2 MR. LECHLEITER: Objection. Form.
 3 A. It may be. It may not be.
 4 Q. When you're saying "it may be," I just
 5 want to make sure -- make sure I'm understanding
 6 what -- what you are saying. In this sentence it's
 7 not saying that courts find that there's commercial
 8 success. It's simply saying that courts consider
 9 sales data to be even more convincing if the
 10 patented invention has displaced or surpassed sales
 11 of, in this case, competing maternity pants
 12 developed with -- with prior art.
 13 Would it be fair to say that that's
 14 something that could be convincing, although not
 15 necessarily responsive?
 16 A. It could be. It depends on the facts
 17 and circumstances.
 18 Q. Okay. It's the kind of evidence that
 19 courts and, presuming, the patent office should look
 20 at?
 21 MR. LECHLEITER: Objection. Form.
 22 A. Well, I'm -- again, I'm not going to --
 23 I mean, the patent office, the courts can look at
 24 what they deem to be appropriate. I'm not going to
 25 suggest that -- that I should dictate to them what

1 they should look at. And -- and as a general
 2 matter, perhaps, it may be appropriate and perhaps
 3 it may not. It depends on the situation.
 4 Q. Okay. I mean, it's one thing that the
 5 board should look at in this case although it may
 6 come to its own conclusion. It's one that it should
 7 look at and it's fair to look at a comparison of
 8 patented maternity pants with non-patented maternity
 9 pants in regard to sales data?
 10 MR. LECHLEITER: Objection. Form.
 11 A. Well, again, I don't -- when you say
 12 patented versus non-patented, I think in this
 13 instance you could have maternity pants that in some
 14 ways are covered by the patent and make the
 15 comparison of certain aspects of the patent that are
 16 resident in one and not resident in the other.
 17 So --
 18 Q. Sure.
 19 A. -- I don't know that I would agree with
 20 that general depiction as you described it.
 21 Q. I'm not sure I understood your answer.
 22 THE REPORTER: Do you want me play it
 23 back? You won't be able to --
 24 MR. POLLACK: I won't.
 25 REPORTER: Do you want me to play it

1 back?
 2 MR. POLLACK: No.
 3 Q. (BY MR. POLLACK) Would it be fair to
 4 say that one thing that should be looked at -- I
 5 mean be weighed however one wants to weigh it -- is
 6 a comparison of sales data for the patented
 7 invention and seeing if the patented invention has
 8 displaced sales of a prior art version of a product?
 9 MR. LECHLEITER: Objection. Form.
 10 A. Well, it depends on what you're
 11 referring to as the prior art version, I guess. And
 12 it also depends on the reason a sale was made and
 13 what caused one product to be sold in lieu of
 14 another and making that connection. All those
 15 factors would come into play.
 16 Q. Sure. But --
 17 A. But you're -- you're asking very general
 18 hypotheticals and, you know, again, I'm not trying
 19 to be difficult, but I don't think you can answer
 20 those in the absolute either. And so, as I've
 21 stated previously to many of your other questions,
 22 it may or may not be the case. You just got to look
 23 at the specific situation.
 24 Q. Okay. But it -- I'm not -- I'm not
 25 asking whether that shows definitively whether there

1 is commercial success. I'm -- I'm simply asking is
 2 that something you should look at. So, should you
 3 look at -- let me make it a little more concrete.
 4 In analyzing commercial success in this
 5 case -- and I'm not saying how that analysis should
 6 come out -- but in analyzing commercial success in
 7 this case, is one thing I should do is compare sales
 8 data of Secret Fit products and see if those have
 9 displaced sales of non-Secret Fit products?
 10 A. Well, I don't know that that necessarily
 11 would provide an indication of the impact of what's
 12 covered by the depending claims, so I'm not sure
 13 that would be appropriate. And I think you have to
 14 have an understanding of the comparisons you're
 15 making and what the differences is -- are between
 16 the products that -- that all the differences are
 17 accounted for as well.
 18 Q. Have you seen any evidence, any
 19 affirmative evidence -- I'm not saying -- I don't
 20 want to go to whether there's an absence of
 21 evidence. But have you seen any affirmative
 22 evidence that you can point to that says the most
 23 important reason for -- well, let me step back a
 24 second.
 25 What you -- would it be fair to say,

1 looking at this record and the sales data we've
 2 seen, would it be fair to say that Secret Fit sales
 3 have displaced and surpassed competing non-Secret
 4 Fit sales?
 5 MR. LECHLEITER: Objection. Form.
 6 A. I -- I don't know that -- you perhaps
 7 could -- at least in terms of the sales that
 8 Mr. Green has looked at, you could perhaps infer
 9 that sales of Secret Fit have been made perhaps in
 10 lieu of non-Secret Fit pants. But the question is
 11 that you have to obviously address why, if, in fact
 12 that's the case, which I don't see that he's
 13 necessarily done that. And certainly he hasn't
 14 addressed why that would have been the case
 15 appropriately.
 16 Q. Let me -- let me break down your answer.
 17 Maybe I'm not -- I'm not following it. Let's just
 18 focus on whether or not -- I'm not -- I'm not going
 19 to ask you why here. Has Mr. Green shown that
 20 Secret Fit sales have displaced non-Secret Fit sales
 21 for any reason?
 22 A. Given what he has disclosed in his
 23 declaration, no.
 24 Q. No?
 25 A. No. I don't think he's shown that.

1 Q. Okay. So, even though when you look
 2 back at this declaration, at Figure 2 that were
 3 looking at before, on Page 16, 2008 to the end of
 4 2013, Secret Fit facts -- let me -- let me confirm
 5 this with you.
 6 Looking at this, would it be fair to say
 7 that from third quarter of 2008 to fourth quarter
 8 2013 Secret Fit sales have gone from approximately
 9 [REDACTED] to approximately [REDACTED] a quarter?
 10 A. Per quarter.
 11 Q. Would that be fair?
 12 A. I think that his chart reflects that.
 13 Q. Okay. And you have no reason to
 14 disagree with the figures in his chart?
 15 A. I don't.
 16 Q. Okay. And would it also be fair to say
 17 that per quarter non-Secret Fit sales went from
 18 [REDACTED] in the third quarter of 2008, per
 19 quarter, to, in the fourth quarter of 2013, only [REDACTED]
 20 [REDACTED] per quarter?
 21 A. I think that's roughly fair, based on
 22 this chart.
 23 Q. And so, based on the --
 24 A. And I guess just to clarify, are you
 25 asking -- your question was has Mr. Green done this.

1 Mr. Green has put a chart together that reflects
 2 sales of one product and another. It's your
 3 inference and your conclusion I think that you are
 4 trying to set forth here. Mr. Green nowhere in his
 5 declaration says that Secret Fit pants took sales
 6 away from other products. He doesn't assess that
 7 and doesn't come to that conclusion. Nowhere that
 8 I've seen he's done that.
 9 Q. Well, let me ask you. What would your
 10 conclusion be? Would you -- looking at Figure 2,
 11 would you opine that Secret Fit -- Secret Fit sales
 12 have displaced non-Secret Fit sales?
 13 MR. LECHLEITER: Objection. Form.
 14 A. I don't know that you can -- there's
 15 enough information to be able to come to an absolute
 16 conclusion on that, given on what he has set forth.
 17 I would also say that, even if that were
 18 to be the case, there are -- there are -- there is
 19 information that suggests such displacement may be
 20 -- may have very well been as a result of something
 21 other than what's at issue in this case.
 22 Q. What other explanation would you give
 23 for a figure to other than a displacement of sales
 24 of non-Secret Fit by Secret Fit?
 25 A. That -- I mean, one explanation could be

1 that they focused their marketing and investment
 2 efforts on the non- -- on the Secret Fit pant and
 3 chose not to do that on the non-Secret Fit pant.
 4 Q. Okay.
 5 A. And in the -- in the alternative it
 6 perhaps might be the case that those sales could
 7 have been generated in the alternative by non- -- for
 8 non-Secret Fit pants had the same marketing efforts
 9 or other things being applied.
 10 Q. Have you seen any affirmative evidence
 11 -- let me -- let's go to marketing.
 12 Am I correct that the way one analyzes a
 13 market budget for a product -- the correct way to do
 14 it is to look at the overall marketing budget for
 15 that product and then divide by the number of units,
 16 or that's a -- you get the average amount. That's a
 17 correct way to do this, isn't it?
 18 MR. LECHLEITER: Objection. Form.
 19 A. Again -- and I'm -- with all due
 20 respect, you continue to ask very general
 21 hypothetical questions as to what's right and what's
 22 wrong.
 23 Q. Uh-huh.
 24 A. I don't think you can answer that
 25 generally, that it's right or it's wrong. It may

1 be, and it may not be.
 2 Q. Well, which is more commonly the way
 3 it's done? Is it, in fact, the case that usually --
 4 if you want to talk about marketing budget, you
 5 don't take the overall number, but you take the
 6 number and you need to divide that by the number of
 7 units sold?
 8 A. That could be an approach you apply. It
 9 may not. I mean, I don't know that it's prevalent
 10 one way or the other.
 11 Q. Well, what --
 12 A. It depends on the situation.
 13 Q. In the one case you were involved in,
 14 what approach did you apply?
 15 A. I don't recall. I don't know what the
 16 specifics were surrounding the marketing in that
 17 situation. Or I don't recall as I sit here.
 18 Q. Well, let me ask you. Have you made any
 19 effort to take the marketing budget and divide it by
 20 the number of units of the Secret Fit and non-Secret
 21 Fit products and made -- made a comparison?
 22 MR. LECHLEITER: Objection. Form.
 23 A. What marketing budget are you referring
 24 to?
 25 Q. Any marketing budget. Have you done

1 anything?
 2 A. Well, Mr. Green has not -- has stated
 3 that there wasn't a marketing budget albeit based
 4 on, I think, inappropriate assessment or analysis
 5 and the failure to ask anybody about the marketing
 6 of these products. But I don't know what budget.
 7 If you can be specific about the budget you're
 8 referring to, I can answer your question.
 9 Q. Well, you're the one who raised this
 10 issue of marketing. I'm asking you what evidence do
 11 you have that marketing played any role?
 12 A. I -- well, we can -- if you'd like, we
 13 could walk through my report and I can -- I can go
 14 through the things that I identify.
 15 Q. Sure. Why don't with do that.
 16 A. Okay.
 17 Q. If you'd let me know where you're
 18 pointing to.
 19 A. Sure. Okay. Yeah, I comment on
 20 Mr. Green's analysis beginning on Page thirty -- or
 21 excuse me, Page 28 of my declaration, Paragraph 37.
 22 Q. Uh-huh.
 23 A. I talk about his insufficient analysis
 24 of what his claim is. And essentially, it's
 25 effectively one sentence in his report that Secret

1 Fit Belly pants is not due to extensive marketing or
 2 advertising with no other support that I can see.
 3 He --
 4 Q. Well, doesn't Mr. Green point to the
 5 amount spent on marketing and advertising, both
 6 before and after the introduction of the Secret Fit
 7 product?
 8 A. No. He looks at SG&A.
 9 Q. Well, SG&A includes advertising?
 10 A. That's not advertising, with all due
 11 respect. It includes many other things.
 12 Q. It includes many other things, but it
 13 includes marketing and advertising, correct?
 14 A. But to be fair, that, to me, is wholly
 15 inappropriate to say I look at SG&A and that tells
 16 me what marketing and advertising is. SG&A includes
 17 a number of things.
 18 Q. Sure.
 19 A. And the fact that it doesn't fluctuate
 20 is -- to me means nothing as to whether marketing
 21 has increased for a particular product or not.
 22 Q. In these kind -- in this industry, the
 23 apparel industry, would it be fair to say -- I don't
 24 know how much you know about the apparel industry.
 25 But would it be fair to say that this is an industry

1 where, if you look at SG&A, the main component of
 2 SG&A, principal component is advertising and
 3 marketing?
 4 MR. LECHLEITER: Objection. Form.
 5 A. Well, I -- I -- again, I don't know that
 6 you can automatically come to that conclusion. And
 7 within the information that Mr. Green has reviewed,
 8 it doesn't identify what portion is advertising or
 9 marketing. And he's talked to nobody and has no
 10 insight into that. And I can tell you from an
 11 accounting perspective that there can be many other
 12 things that are included in SG&A that are -- that
 13 are unrelated to marketing.
 14 Q. Sure.
 15 A. I -- I don't think you can draw that
 16 conclusion.
 17 Q. I'm asking you to use any knowledge you
 18 may have, if you have any, of the apparel industry,
 19 and based on that, can you draw a conclusion about
 20 SG&A and what percentage of that is marketing and
 21 advertising?
 22 A. I can tell you I haven't --
 23 MR. LECHLEITER: Objection. Form.
 24 A. -- I haven't done an exhaustive analysis
 25 of all the entities within the marketing -- or

1 within the apparel industry to see what portion of
 2 their SG&A is marketing.
 3 I would also say that if Mr. Green is
 4 using this as the basis for his analysis, it would
 5 have been incumbent upon him to analyze and to
 6 assess the components of SG&A to determine
 7 specifically whether that was the case or not. He
 8 failed to do that.
 9 Q. Now, you don't think he can reasonably
 10 conclude based on his knowledge of this industry and
 11 others' knowledge of this industry that SG&A here
 12 reflects or at least would need to reflect some
 13 change in amount between the two periods, before and
 14 after the introduction of the Secret Fit product?
 15 A. No. I think that for him to do what he
 16 did is completely inappropriate and unsubstantiated.
 17 And if he were to do something to that effect in a,
 18 say, federal court action, then I think that would
 19 be subject to not being under generally accepted
 20 principles and standards of performing a
 21 calculation.
 22 And I can tell you as a former CFO and
 23 as a former controller and somebody that's prepared
 24 hundreds of analyses relative to analyzing operating
 25 and SG&A expenses that you can get the information

1 if you ask for it, and he failed to do that. And I
 2 think his failure to do that renders his analysis
 3 inappropriate, not -- not withstanding the fact
 4 that, on its face, it's just not appropriate as well
 5 and it doesn't say anything.
 6 Q. Well, you are aware in this case Target
 7 took some, quote, discovery, correct?
 8 A. Yes.
 9 Q. Okay. Have you looked through all that
 10 discovery to see what the marketing expenses were
 11 during this period?
 12 A. So, if I'm -- I just want to understand
 13 correctly. That you're suggesting that I should
 14 have -- and I don't know sitting here what those
 15 marketing expenses are, but I just want to be clear
 16 for the record.
 17 Q. Uh-huh.
 18 A. You're suggesting because Mr. Green has
 19 failed to do that, that that's somehow something I
 20 was supposed to do when Mr. Green had access to the
 21 DMC, their employees, and information had he asked
 22 for it. I don't understand why it would be my
 23 responsibility to do that if Mr. Green has failed to
 24 do so.
 25 Q. Well, you're -- you're asserting --

1 you're the person asserting here that market is what
 2 -- rather than the patent invention, is what counts
 3 for the difference in sales between the products,
 4 correct?
 5 MR. LECHLEITER: Objection. Form.
 6 A. Well, what I'm -- what I'm asserting is
 7 that Mr. Green's analysis is wholly deficient. And
 8 not only is it deficient on its face, but he had the
 9 opportunity to try to gain additional information
 10 and failed to do so and failed to consider it.
 11 I, in terms of trying to understand what
 12 occurred at DMC, asked for and was provided with
 13 deposition testimony from a 30(b)(6) witness that
 14 talked about the marketing efforts for the Secret
 15 Fit Belly pant. Mr. Green failed to even look at
 16 that information, and I think that information
 17 provides evidence that's contrary to Mr. Green's
 18 opinion.
 19 Q. You're referring to Ms. Piccone's
 20 deposition?
 21 A. Yes.
 22 Q. All right. So why don't we look at --
 23 why don't we look at that deposition and also what
 24 you say about it. Is that the only evidence you are
 25 relying on, is Ms. Piccone's deposition?

1 A. Well, I think that -- that the document
 2 that Mr. Green relies upon to somehow conclude there
 3 weren't any specific marketing efforts for Secret
 4 Fit Belly pants. I would conclude that that
 5 document says just the opposite or would provide an
 6 indication that there were concerted marketing
 7 efforts toward Secret Fit Belly pant -- pants and
 8 that Ms. Piccone's deposition, in several respects,
 9 indicates an effort and the focus on marketing these
 10 pants.
 11 Q. So, when you said "the document," are
 12 you referring to the -- to the 10Ks?
 13 A. I'm referring to the document that
 14 Mr. Green -- that appears to be the only document
 15 that -- and we can go to his report or I may -- or
 16 excuse me, the declaration.
 17 Under his -- in his report the only
 18 information that I've seen --
 19 Q. Where, where?
 20 A. This is on Page 19 where he talks about
 21 marketing of the product. On -- under Paragraph 39,
 22 under the Title No. 1, it says, "Success is not due
 23 to marketing or other promotional activities." And
 24 the sum total of his analysis in that regard is, and
 25 I quote, "DMC has not allocated a budget

<p>1 specifically for Secret Fit Belly bottoms and has 2 relied primarily on internal salespeople and 3 customer testimonials to promote these bottoms, 4 using its web site and internal e-mail communication 5 as integral portals for marketing. The commercial 6 success of the Secret Fit Belly bottoms is not due 7 to extensive or marketing or advertising efforts." 8 That is all that I see he has disclosed 9 as the basis for his opinion. And he's failed to 10 acknowledge or analyze any additional information 11 that would tend to indicate to the contrary. 12 Q. Let me ask you two questions. First, 13 you said DMC -- he says here DMC has not allocated a 14 budget specifically for Secret Fit Belly bottoms. 15 Isn't that true? 16 MR. LECHLEITER: Objection. Form. 17 A. I -- I -- I would say that I don't 18 believe Mr. Green knows whether that's true or not. 19 I think he is assuming that to be the case. And he 20 -- because he hasn't looked at information or sought 21 out additional communication with DMC to determine 22 specifically what that may be. And I think the 23 documents that I reviewed would tend to indicate 24 that they certainly had concerted in specific 25 marketed efforts towards Secret Fit Belly pants.</p> <p style="text-align: right;">149</p>	<p>1 A. I'm sorry? 2 Q. In Paragraph 41 in your declaration, you 3 referred to Exhibit 20-43. You said the only 4 marketing document that Mr. Green was aware of that 5 related to the Secret Fit Belly products was Exhibit 6 20-43? 7 A. I'm sorry, where -- 8 Q. Oh, in Paragraph 41 of your report. 9 A. Of my -- 10 Q. Of your declaration. 11 A. Okay. I'm sorry. Yes, I believe that 12 was the case. 13 Q. And you said that document doesn't 14 contain any financial information. 15 A. Right. 16 Q. What -- what kind of document was that, 17 do you recall? 18 A. I have to refresh my memory. I think it 19 outlines some of the efforts towards marketing for 20 the Secret Fit Belly pants. But I -- 21 Q. And what was it -- you said there's 22 something in that document, which is now -- as you 23 sit here at your deposition, you think showed that 24 there was a separate budget for Secret Fit? 25 A. No. I -- that's not --</p> <p style="text-align: right;">151</p>
<p>1 Q. My second question, you said that this 2 would show the document which he reviewed. Is that 3 the document in Footnote 35 or some other -- 4 A. Footnote -- Footnote 35, yes. 5 Q. Okay. I'm going to take look back -- 6 let me take a look at -- so, besides this document 7 in Footnote 35, which is called DMC 2838, other than 8 that, the only other thing you're relying upon is 9 Ms. Piccone's deposition? 10 A. Well, I -- I've outlined in my report 11 the basis for my opinions. And as I mentioned, I 12 discussed Mr. Green's failure to support his 13 opinions. And I talk about the marketing document 14 in Paragraph 41. I talk about the fact that he did 15 not confer with anyone about -- at DMC about 16 marketing, advertising, distribution, availability, 17 or other aspects of the Secret Fit Belly products. 18 And he didn't review the deposition testimony of Ms. 19 Piccone, and Ms. Piccone in her deposition 20 referenced certain information relative to the 21 marketing that contributed to the success of the 22 Secret Fit Belly pants. 23 Q. Well, let me -- just to make sure I'm -- 24 I'm clear here about the documents. You referred to 25 Paragraph 41 to Exhibit 20-43?</p> <p style="text-align: right;">150</p>	<p>1 Q. Oh, okay. 2 A. -- that's not my testimony. 3 I was saying that he -- as far as I 4 understand from Mr. Green's perspective, he looked 5 at a document. That's all he understood to be 6 related to the marketing of the Secret Fit Belly 7 pants. He didn't inquire of anybody at Destination 8 Maternity, didn't attempt to gather additional 9 information, failed to review the deposition 10 testimony of Ms. Piccone. And because he wasn't 11 aware that a budget existed, he somehow concluded, 12 then, that it doesn't exist. 13 Q. Okay. So you think he didn't speak to 14 anyone. I recognize he didn't read the deposition 15 of Ms. Piccone. But you think he didn't speak to 16 anyone at -- at Destination Maternity? 17 A. I believe that was his testimony at his 18 deposition. Let me just make -- just make sure I 19 get the right -- the correct cite. 20 I believe that was his testimony. 21 Q. Okay. All right. Let's go to the other 22 thing, then, which is Ms. Piccone's deposition. 23 MR. POLLACK: And, you know, why don't I 24 mark her -- her deposition so we all have that. I'm 25 going to mark as Thomas Deposition Exhibit 6 the</p> <p style="text-align: right;">152</p>

1 deposition transcript of Ms. Rebecca Piccone.
 2 And I would just state for the record
 3 when that was taken, taken on October 18, 2013.
 4 MR. LECHLEITER: Does that have an IPR
 5 or exhibit number?
 6 MR. POLLACK: Oh, yes. I should read in
 7 that for the record. Thank you.
 8 And that is -- in the proceeding,
 9 it's Exhibit 1093.
 10
 11 (Thomas Deposition Exhibit 6, the deposition
 12 transcript of Ms. Rebecca Piccone, was marked for
 13 identification.)
 14
 15 Q. (BY MR. POLLACK) So is this
 16 Ms. Piccone's deposition transcript that you were
 17 referring to?
 18 A. I believe so, yes.
 19 Q. Did you read the entirety of this
 20 deposition transcript or just certain portions?
 21 A. I did. I read the entirety.
 22 Q. Let's take a look at your declaration,
 23 Paragraph 43. And you say that -- that -- let me
 24 ask you this. Does Paragraph 43 and its footnotes
 25 reflect all of the information in Ms. Piccone's

1 deposition that you -- that you are relying upon for
 2 your statement that there's evidence that
 3 Destination Maternity had a special marketing drive
 4 for Secret Fit?
 5 MR. LECHLEITER: Objection. Form.
 6 A. Well, I've certainly reviewed her
 7 deposition, and I've cited examples from the
 8 deposition. I don't know that that would -- I don't
 9 know that that would be the entirety, but certainly
 10 I've cited examples from her deposition and
 11 indicated that there was a focus on the marketing on
 12 the Secret Fit Belly pants.
 13 Q. Well, as you sit -- as you sit here
 14 today, in your opinion, are you relying on any
 15 portions of her deposition for your statement
 16 that the special marketing of Secret Fit other
 17 than the cites shown in Paragraph 43?
 18 A. Well, I -- again, I certainly reviewed
 19 the deposition in its entirety, and I would, I
 20 guess, include that as something that -- as a
 21 document that I've relied upon.
 22 Q. Uh-huh.
 23 A. And I've cited examples from that
 24 document. I don't know that that -- that these
 25 examples is the entirety of everything that I would

1 look to or rely upon. There may be other things.
 2 Q. Sure. But as you sit here today, is
 3 there anything else that you can think of?
 4 A. As I sit here today, I -- it's the
 5 document I reviewed, but there may be -- there may
 6 be other things. And I've certainly cited examples,
 7 but I haven't memorized her deposition verbatim.
 8 Q. Sure. What would the other things be?
 9 A. Again, I can't say as I sit here, but I
 10 think, again, you're -- it's a document that I
 11 looked at in its entirety, and I've cited examples
 12 from the document. So, I guess --
 13 Q. Yeah. I know. I'm just wondering that,
 14 since you've written this declaration, is there some
 15 other example you want to add?
 16 A. Not as I sit here, no.
 17 Q. Okay. Let's go to your first example.
 18 And is it fair to say that each of your examples is
 19 marked off by a bullet point here?
 20 A. That's correct.
 21 Q. [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 A. Yes.
 2 Q. Okay. [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 Do you see that?
 7 A. Yes.
 8 Q. Okay. Wouldn't it be -- isn't it
 9 correct under economic analysis -- you already know
 10 what I'm going to ask -- that a -- sorry -- company
 11 would focus its efforts on the product it's actually
 12 selling and, so, one would expect that the
 13 percentage of efforts would correspond with the
 14 percentage of products in the category that are
 15 being sold?
 16 MR. LECHLEITER: Objection. Form.
 17 A. Again, you're -- you have to consider
 18 the facts and circumstances. And it could be that
 19 those marketing efforts are the reason that they are
 20 selling so many pants. That may or may not be the
 21 case.
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 Q. Okay. But it would be consistent -- it
 9 wouldn't be inconsistent with commercial success?
 10 A. Again, I -- I don't know that that would
 11 be the case. But, again, I -- like I said, you're
 12 asking a very general question and trying to apply
 13 it to a very specific situation. And I don't know
 14 that that would be appropriate to do that.
 15 Q. Let's take a look at what -- what she
 16 actually said -- let me begin with your Cite 111,
 17 Footnote 111. And there you cite Pages 140 to 141.
 18 So, if we can take a look at that in the transcript,
 19 Exhibit 1093 in the proceeding. And you cite 140 to
 20 141 of -- I think the portion that you are focused
 21 on is mostly on 141. Feel free to read whatever --
 22 whatever you need to.
 23 Doesn't Ms. Piccone here say that close
 24 to [REDACTED] percent of her assortment is Secret Fit
 25 because it's -- that's their most important

1 category. So simply from the fact that it's
 2 [REDACTED] percent of our -- of their assortment that's
 3 what gives rise to the large number of sales of
 4 Secret Fit at -- Buy Buy Baby?
 5 A. I'm sorry, is that a question or I --
 6 Q. Yea. That's what I'm asking.
 7 A. Then I don't -- I don't understand your
 8 question. I'm sorry.
 9 Q. Let me ask this. You say -- [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 Can you tell me where that quote -- can
 14 you show me where that quote came from?
 15 A. I don't see that specific quote.
 16 Q. You have it as a quote in your report,
 17 in your declaration.
 18 A. Yeah. I'd have to look to see if
 19 perhaps that was another quote within her -- her
 20 deposition.
 21 Q. Okay. You would agree with me it's not
 22 at Pages 140 to 141 as you contain in your
 23 declaration?
 24 A. That does not appear to be the case.
 25 Q. She talks about [REDACTED] percent, that's

1 simply the percentage of sales that Secret Fit has,
 2 right?
 3 A. She does discuss that. That's correct.
 4 Q. Okay. But she doesn't say anything even
 5 close to what you accorded to here on Pages 140 to
 6 141?
 7 A. That quote is not -- is not in here, on
 8 those pages, if you will.
 9 Q. And you also cite -- in this particular
 10 bullet point, you cite Pages 68 to 69. That's in
 11 your Footnote 110.
 12 A. Okay.
 13 Q. And looking at Pages 68 to 69, do you
 14 agree with me that the -- the quote that you have
 15 doesn't appear there either?
 16 A. I don't see that quote there either.
 17 Q. Okay. And on -- on Page 69, am I
 18 correct that Ms. Piccone says that the significance
 19 of Secret Fit is that it changed a woman's options.
 20 Prior to getting the Secret Fit to market, women
 21 were not able to wear the same types of bottoms that
 22 they wore pre-pregnancy, and now women can wear the
 23 same types of bottoms that they wore before they
 24 were -- before they got pregnant.
 25 Did I -- did I read that correctly?

1 A. That's -- those -- those are the words
 2 that are on Page 69 of her deposition. That's
 3 correct.
 4 Q. Okay. And that's -- and that's what
 5 you've cited in -- in your first bullet point,
 6 correct?
 7 A. I've cited those pages in -- in
 8 Footnote 110 of my report. If that's your question.
 9 Q. Okay. Am I correct what she's
 10 explaining in the pages that you cited is that she
 11 knows the product as it provides this new feature,
 12 which is patented.
 13 Isn't that her point?
 14 MR. LECHLEITER: Objection. Form.
 15 A. I don't know that it's specifically
 16 stating that.
 17 Q. Right on Page 68, Line 22. They have a
 18 patented trademark item that was put into existence
 19 prior to my starting. That we've built the entire
 20 strategy, entire assortment. We're redefining our
 21 selling space. It has redefined our assortment, our
 22 apparel. It's changed a woman's options. Prior to
 23 getting the Secret Fit to market, women were not
 24 able to wear the same types of bottoms that they
 25 wore pre-pregnancy, and now a woman can wear the

1 same types of bottoms that they wore before they got
 2 pregnant.
 3 Isn't it her point that, given the
 4 feature of the product, women are buying the
 5 product?
 6 A. I don't --
 7 MR. LECHLEITER: Objection. Form.
 8 A. I don't believe that you can glean that
 9 from -- from that testimony.
 10 Q. I'm not saying that that's correct. I'm
 11 just saying isn't that what she is saying?
 12 A. I don't believe that's what she's
 13 necessarily saying.
 14 Q. Okay.
 15 A. She's just mentioning the patented and
 16 trademarked item. She's not talking specifically
 17 about a particular feature that's patented.
 18 Q. You are aware that the -- that the
 19 specific feature of being able to wear it through
 20 the different stages of -- of pregnancy, that's a
 21 feature that's actually found in the claims of the
 22 patent?
 23 MR. LECHLEITER: Objection. Form.
 24 A. Well, again, I'm not -- whether it is or
 25 it isn't I think is a legal issue as to whether it's

1 in the claims. I understand it's alleged that Claim
 2 1 or the independent claim would cover that feature.
 3 Q. All right. Okay.
 4 A. Perhaps cover that feature. But, again,
 5 I'm not saying whether it does or doesn't.
 6 Q. Understood. Let's take a look at your
 7 -- your next cite from her deposition 111 to 114.
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 A. I don't see that specific quote on those
 13 pages.
 14 Q. And why don't we go to the last citation
 15 you have in that bullet point, Pages 308 to 309.
 16 And would you agree with me that on
 17 Pages 308 to 309 Ms. Piccone does not make the
 18 statement that you contend she does on -- in
 19 Paragraph 43?
 20 A. I don't see that specific quote on
 21 Pages 308 or 309.
 22 Q. Do you see even anything that seems to
 23 correspond to that quote on Pages 308 and 309?
 24 A. I don't -- I do not.
 25 Q. Sitting here now, would you agree with

1 me that you made a mistake in the first bullet point
 2 in Paragraph 43?
 3 A. I would agree that -- that the pages I
 4 have cited in her deposition do not contain the
 5 quotes that I've cited in the first bullet point in
 6 Paragraph 43. I would have to go back through her
 7 deposition to see where that -- where -- where that
 8 quote was made.
 9 Q. If that quote wasn't made, how does that
 10 change your opinion?
 11 A. I don't believe it changes -- it
 12 certainly doesn't change my opinion. It would
 13 change the way that I would -- would reference this
 14 bullet point. And I -- I clearly -- there are --
 15 there is information within the -- the cites that
 16 I've identified that I think is supportive of the
 17 opinions that I've set forth. I would just depict
 18 it differently in bullet point 1.
 19 Q. Well, would it be fair --
 20 A. If, in fact, that's the case.
 21 Q. Uh-huh. Well, if that's the case that
 22 she never said that, would it be fair to say that
 23 you should probably just cross off much of what's in
 24 the first bullet point in Paragraph 43?
 25 A. No. I would say that it -- she does

1 indicate that it's [REDACTED]
 2 It is [REDACTED] percent of their sales. And I -- I believe
 3 she alludes to spending a fair amount of time
 4 throughout her deposition or at certain points in
 5 her deposition on this initiative. So, I don't
 6 think it's appropriate to just cross it out. I
 7 think you could depict it slightly differently, and
 8 you would -- I think that the information is still
 9 appropriate in support of my opinion.
 10 Q. But given that she never actually said
 11 this, this can't possibly support -- support your
 12 opinion that -- that marketing -- assuming you have
 13 that opinion, assuming you have the opinion that
 14 marketing is the reason that the patented Secret Fit
 15 product displaced sales or far exceeded sales of the
 16 non-patented products. Assuming that's your opinion
 17 that marketing is the reason for that, certainly
 18 what you wrote in this bullet point couldn't support
 19 that opinion?
 20 A. Again, in the bullet point I'm talking
 21 about it being the number one key initiative, and it
 22 being [REDACTED] percent of their pant -- of -- of their
 23 sales. And that clearly is indicated in the cites
 24 that I've identified in support of this bullet
 25 point. And if -- the one piece that I can't -- at

1 least in terms of the cite that I've identified,
 2 where it says that she focuses █ percent of her
 3 effort on the Secret Fit Belly may be contained
 4 elsewhere or alluded to elsewhere in her deposition.
 5 I would need to confirm that, but I don't think that
 6 the other aspects of what I've identified here would
 7 be inappropriate and not in support of the opinions
 8 that I've set forth.
 9 Q. Let me ask you this. It seems like your
 10 opinion is circular because the █ percent of the
 11 sales are Secret Fit. Is Secret Fit commercially
 12 successful. And then you conclude from that that
 13 because that's the case Secret Fit can't be
 14 commercially successful?
 15 MR. LECHLEITER: Objection. Form.
 16 A. I don't --
 17 Q. That makes no sense whatsoever. Can you
 18 explain that?
 19 A. I think you've mischaracterized my
 20 testimony. That's how, that's how I would explain it.
 21 Q. I mean, the fact that █ percent of the
 22 sales are Secret Fit indicates that the economic
 23 drivers are pushing the market to Secret Fit, right?
 24 MR. LECHLEITER: Objection. Form.
 25 Q. (BY MR. POLLACK) That's basic

1 economics.
 2 A. Again --
 3 MR. LECHLEITER: Objection. Form.
 4 A. -- you're -- you're -- and I think I've
 5 answered this question on several occasions, but you
 6 -- you continue to take general economic principles
 7 and try to apply them specifically to this
 8 situation, and I don't think that's appropriate.
 9 And I also think that I'm identifying things that
 10 Mr. Green has failed to acknowledge, recognize, or
 11 assess and, therefore, his -- his opinions are
 12 unsupported.
 13 Q. Let me take a look -- take a look at a
 14 few of the other bullet points that -- that you have
 15 here. Let's talk about the denim and visual
 16 initiatives regarding Secret Fit Belly.
 17 Do you see that?
 18 A. I see --
 19 Q. In your second bullet point?
 20 A. I'm looking at my report. If you'd like
 21 me to look at a particular bullet point, I'm happy
 22 to do that.
 23 Q. That's what I'm referring to --
 24 A. The second --
 25 Q. -- the second bullet point in your

1 report.
 2 A. Okay. Sure.
 3 Q. First off, if Secret Fit is commercially
 4 successful and its success is connected to the
 5 invention, wouldn't that be consistent with Secret
 6 Fit being dominant in the stores simply because the
 7 sales are higher?
 8 MR. LECHLEITER: Objection. Form.
 9 Q. (BY MR. POLLACK) If you are selling
 10 more, then you're going to need more product,
 11 correct?
 12 MR. LECHLEITER: Objection. Form.
 13 A. I -- you're making some pretty dramatic
 14 leaps, with all due respect. You're basically
 15 saying, because they're successful --
 16 Q. Uh-huh.
 17 A. The whole point of the analysis is to
 18 show that they're successful and there's a nexus to
 19 the claimed features --
 20 Q. Uh-huh.
 21 A. -- or claimed invention. That's what
 22 Mr. Green has failed to do. You're asking -- you're
 23 saying, well, assume that's the case.
 24 Q. Yes. I'm asking you to assume that's
 25 the case.

1 A. Okay.
 2 Q. But wouldn't that be consistent with
 3 then the product being dominant in the store?
 4 A. I don't -- again, you're -- I'm -- I'm
 5 here to respond to what Mr. Green has set forth
 6 about whether there's the success and whether that
 7 success can be connected to the patents. And you're
 8 asking me to assume that and then say that that's
 9 consistent with something else. I don't --
 10 candidly, I'm not sure how to answer that question.
 11 And I -- I -- I don't know why that would be --
 12 you're asking me to assume something that Mr. Green
 13 has failed to address and acknowledge and accurately
 14 support, and I've responded in that regard. But
 15 then you're asking me to assume that's the case.
 16 I'm -- I guess I'm confused by your question.
 17 Q. Yeah. You're here as an expert in
 18 economic analysis. I'm asking you, as a matter of
 19 economics, based on the fact that -- let me -- I'll
 20 -- I'll stay away from the word commercial success.
 21 Based on the fact that the market has decided that
 22 it wants to buy mostly Secret Fit products with the
 23 patented feature, wouldn't that -- wouldn't that
 24 then be consistent with -- with most of the stores
 25 showing Secret Fit product?

1 MR. LECHLEITER: Objection. Form.
 2 A. You're trying to make a connection for
 3 which I don't think you have a basis to necessarily
 4 make that connection. You're just asking one thing.
 5 Can you assume it leads to another?
 6 Q. Yeah.
 7 A. I don't -- I don't -- I guess, I don't
 8 -- maybe I just don't understand your question. But
 9 you're asking to make a leap without any further
 10 information or connection being made between the two
 11 things you're asking me to compare.
 12 Q. Okay. So, what you're saying is there
 13 really isn't a connection between customer
 14 preferences and the volume of sales for a product
 15 and the amount of product inventory that would be in
 16 the store?
 17 A. I mean, that -- that -- that could --
 18 could -- I'm not -- first of all, you're
 19 mischaracterizing my testimony. And secondly, that
 20 could be the case in the abstract as a general
 21 matter. But you're trying to take that and
 22 specifically apply it to the situation in this case,
 23 and that's where I'm -- I'm -- the disconnect is.
 24 And you're asking me to make leaps based on some
 25 general theory without specific information. I

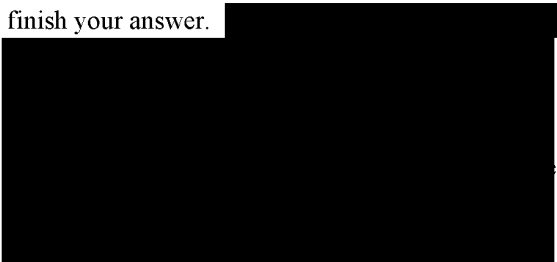
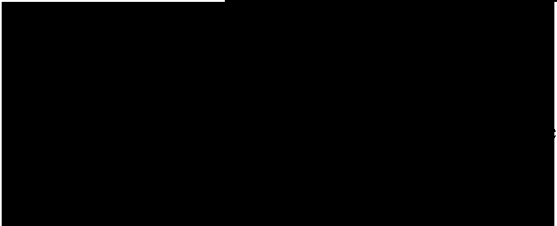
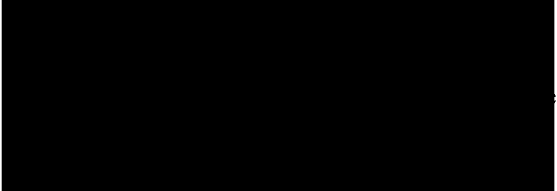
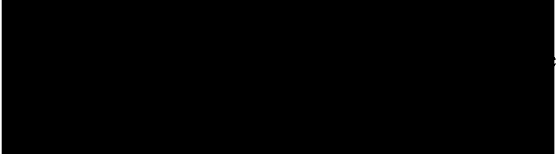
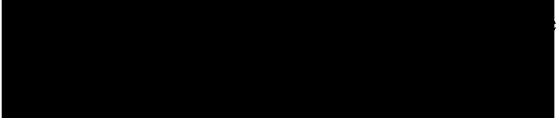
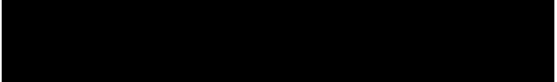
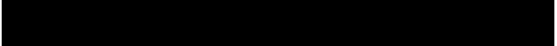
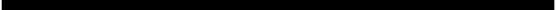
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1 don't know if that's appropriate.
 2 Q. Okay. So, what you're saying is
 3 economic analysis doesn't work by -- starting from
 4 theories that are taught in the textbooks and then
 5 trying to apply that to the real world; instead,
 6 there's something else you're supposed to do?
 7 MR. LECHLEITER: Objection. Form.
 8 A. I would say that what you're attempting
 9 to do is to make general observations and somehow
 10 use that to support a specific instance or
 11 circumstance. I think it's dangerous and likely
 12 inappropriate because every situation is different,
 13 and the facts and circumstances are different in
 14 every situation. It's not a one size fits all, and
 15 I think to do that is inappropriate and to form a
 16 basis based on that is inappropriate as well.
 17 Q. What about logic? I mean, doesn't logic
 18 dictate -- just basic logic, that consumers are
 19 demanding and purchasing one kind of product in much
 20 higher quantity and, therefore, the store selling
 21 that product is going to have a lot more of the
 22 product that the consumers want?
 23 MR. LECHLEITER: Objection. Form.
 24 A. It -- it -- it could -- that could be
 25 the case, and that could be that the store has

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1 decided that's what they want to push and sell. So,
 2 they have more of that product to push and sell and
 3 offer to their customers and make sure that their
 4 customers see that product.
 5 Q. I guess, in order to make that
 6 conclusion, I'd guess, you would have to conclude
 7 that stores make decisions about what products to
 8 sell that are disconnected from customer demand?
 9 MR. LECHLEITER: Objection. Form.
 10 A. I don't know that you have to come to
 11 that conclusion either.
 12 Q. I mean, isn't it the case as a matter of
 13 logic, nevermind economics, that the store is going
 14 to stock more of the products that consumers want?
 15 A. That may be the case. And it may be
 16 that they're stocking product that ultimately they
 17 want to sell. And maybe customers won't desire
 18 those. Or maybe they're only desiring them because
 19 they're doing more to push those products to the
 20 consumer and not offering other products.
 21 Q. Let's take a look at your quote of 309.
 22 So, in your bullet point, your second bullet point
 23 in Paragraph 43, you cite to 309 to suggest that
 24 something special is done about Secret Fit Belly?
 25 A. Okay. I'm sorry. Where are you

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1 referring?
 2 Q. Yep. If you look at your quote at 112.
 3 A. Okay.
 4 Q. You cite 309. Okay. So, let's turn to
 5 309 and, perhaps, you can read with me. I'm going
 6 to start at Line 8 and read down to Line 17 to
 7 finish your answer. 
 8 
 9 
 10 
 11 
 12 
 13 
 14 
 15
 16 Did I read that correctly?
 17 A. You did.
 18 Q. Okay. And isn't it what she's saying
 19 there, that maternity pants, bottoms are the key
 20 initiative, correct?
 21 MR. LECHLEITER: Objection. Form.
 22 A. She's saying how bottoms is our number
 23 one key initiative at Destination Maternity. That's
 24 her testimony.
 25 Q. Yes. She's not differentiating between

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1 Secret Fit, non-Secret Fit. She's saying bottoms
 2 are the key to the maternity store sales?
 3 A. It -- she does allude to Secret Fit
 4 earlier in her testimony --
 5 Q. Uh-huh.
 6 A. -- where she's talking about how
 7 important Secret Fit pants is to us.
 8 Q. Sure.
 9 A. In that specific line, she does not
 10 include the word "Secret Fit" as it relates to
 11 bottoms. I would agree with that --
 12 Q. Okay.
 13 A. -- in that line of her testimony.
 14 Q. Right. And in fact, her -- her
 15 testimony is that bottoms is what's driving sales
 16 for the entire maternity store?
 17 MR. LECHLEITER: Objection. Form.
 18 A. In -- it says -- in -- I would agree
 19 that the words in her deposition say, [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED] And she alludes to Secret Fit bottoms
 24 as being a key initiative earlier in her testimony,
 25 and how important Secret Fit pants is to us.

1 Q. Okay. But she's not saying -- in what
 2 we just read what she's pointing out is that
 3 maternity pants are key to the store's overall
 4 success?
 5 A. Well, she's doing -- she's doing it in
 6 the context of a discussion about Secret Fit pants
 7 and how important they are.
 8 Q. But in the -- in the -- in the part
 9 we're reading, she's not referring to the Secret Fit
 10 pant. Fair?
 11 MR. LECHLEITER: Objection. Form.
 12 A. Well, you're looking at the actual words
 13 on the page. Secret Fit is not included on those
 14 lines, but certainly it's alluded to in her answer.
 15 And she clearly states how important the Secret Fit
 16 pant is to us.
 17 Q. Okay. But she doesn't say what you
 18 quote here, in your bullet point?
 19 A. Well, I didn't use a quote from her
 20 testimony.
 21 Q. She doesn't say what you write here, in
 22 your -- in your bullet point?
 23 A. Well, if -- I believe that this
 24 testimony is further in support of what I've
 25 identified here, in that bullet point.

1 Q. Okay. But she doesn't say that. You
 2 came up with that on your own? That -- that --
 3 A. I came with -- with that language, and I
 4 used her testimony in support of that. And clearly
 5 her testimony alludes to how important the Secret
 6 Fit pant is to -- to us.
 7 Q. Sure. But it doesn't say DMC is denim
 8 and visual initiative is to ensure that Secret Fit
 9 Belly bottoms were the first thing and the most
 10 dominant thing that a customer sees when she walks
 11 in the store and future marketing intentions of
 12 continuing to maximize the success of the Secret Fit
 13 Belly bottoms. Nothing like that is in the
 14 testimony you cite?
 15 A. I --
 16 MR. LECHLEITER: Objection. Form.
 17 A. I think that if you look at the
 18 information that I've cited, that you can come to
 19 the conclusion that that's what she's referring to.
 20 That specific quote is not in her testimony, but I
 21 think her testimony alludes to that.
 22 Q. You somehow inferred that?
 23 A. I inferred that from my read of her
 24 deposition.
 25 Q. Okay. But she doesn't actually say

1 that?
 2 A. She doesn't use these specific words
 3 that are in my report, but I think she did the -- in
 4 support of that, that's what she's saying here.
 5 Q. [REDACTED]
 6 [REDACTED]
 7 A. Okay.
 8 Q. Okay. And there you say, yourself, that
 9 the mark down promotions are for both Secret Fit
 10 Belly bottoms and/or bottoms. I assume that you
 11 mean by that that they're marking down both types of
 12 pants?
 13 A. Yes.
 14 Q. Okay. How does that -- I understand
 15 that how that would show that maybe pants are very
 16 important to their store. But how does that show a
 17 distinction between Secret Fit marketing and
 18 non-Secret Fit marketing?
 19 A. Well, to the extent that the promotions
 20 are directed toward Secret Fit Belly products, that
 21 could be an indication of why sales are increasing
 22 for those products. And I have -- I would -- well,
 23 we'd need to look at the documents. I've cited
 24 several documents in this footnote.
 25 Q. What do you want? To take a look at the

1 deposition testimony that you cite, 254-256?
 2 And can you tell me where in there she
 3 distinguishes between markdowns of Secret Fit versus
 4 non-Secret Fit.
 5 A. I think that she is referring to Jessica
 6 -- Jessica Simpson pants, which I think is the only
 7 Secret Fit.
 8 Q. You're talking about in just that
 9 portion of answer, beginning at 254. But let's take
 10 a look where she is talking about markdowns. It's
 11 on 256.
 12 A. Okay.
 13 Q. And when they are -- in that question
 14 about markdowns, does it mention anything about
 15 Jessica Simpson?
 16 A. Well, it -- it -- it talks about it on
 17 54, running every [REDACTED] days promotions.
 18 Q. Yes. It says their bottoms are so
 19 important to us every [REDACTED] days. It doesn't say
 20 Jessica Simpson's bottoms, does it?
 21 A. In -- she says the one may or may not be
 22 Jessica.
 23 Q. All right. There's no -- no distinction
 24 here being made between Secret Fit and non-Secret
 25 Fit?

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1 A. Well, to the excellent that it's Jessica
 2 Simpson, my understanding is that that's only Secret
 3 Fit and not non-Secret Fit.
 4 Q. It says here, on 254, if that's where
 5 you're reading. [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 Q. Okay. Well, let me ask you this. If
 17 you're doing markdown promotions on both Secret Fit
 18 and non-Secret Fit products, how does that in any
 19 way help you, if at all, in showing that there's
 20 some difference in marketing between Secret Fit and
 21 non-Secret Fit products?
 22 MR. LECHLEITER: Objection. Form.
 23 A. Well, I guess the issue is what is --
 24 what ultimately is driving the sales. And there
 25 appear to be initiatives, markdowns that are

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1 unrelated to the patented feature. And the point is
 2 that Mr. Green failed to acknowledge or recognize or
 3 review this testimony or further investigate that
 4 issue. So, the point I'm making is that that --
 5 this -- this initiative could be driving sales, and
 6 it's unrelated to the claims that are at issue in
 7 this case.
 8 Q. I understand it could be driving sales.
 9 But how is it driving sales toward Secret Fit and
 10 away from non-Secret Fit? That's what I'm asking.
 11 MR. LECHLEITER: Objection. Form.
 12 A. Well, I guess that it would -- I'm using
 13 this in terms of showing the -- the success -- in
 14 terms of Mr. Green's opinion as to the level of
 15 sales of Secret Fit Belly products, which he uses as
 16 the basis, not to say that the Secret Fit Belly
 17 products are a commercial success. And I'm merely
 18 pointing out that there are certain marketing events
 19 or impacts. He says that there's nothing based on
 20 one sentence and one document, that there's nothing
 21 going on. And what I'm acknowledging and
 22 identifying is that within Ms. Piccone's deposition
 23 she's identified instances and events that could
 24 affect those sales. And that's something Mr. Green
 25 has failed to acknowledge.

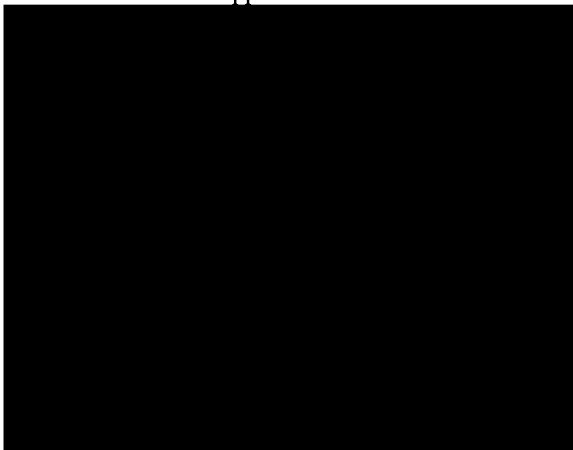
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1 Q. Well, I understand how this could affect
 2 maybe overall sales of pants, but I don't understand
 3 as how could it affect or make a distinction between
 4 Secret Fit and non-Secret Fit pants?
 5 MR. LECHLEITER: Objection. Form.
 6 A. Well, I think that -- that it could, to
 7 the extent that such promotions apply more so to
 8 Secret Fit versus non-Secret Fit, and I think that's
 9 something that Mr. Green should have investigated or
 10 at least inquired about. But certainly, Ms. Piccone
 11 acknowledges that those things exist, and those
 12 things can affect the level of sales of the Secret
 13 Fit product.
 14 Q. Sure. You don't have any evidence that
 15 there was greater promotions -- you mention this is
 16 a possibility, but you don't have any evidence that
 17 there were promotional differences between the
 18 Secret Fit and non-Secret Fit products?
 19 A. Well, what I'm saying is that I'm using
 20 this to show that there are things that affected or
 21 could have affected the sales of Secret Fit Belly
 22 pants as part of my declaration. If you're asking
 23 me whether it affected it more so for Secret Fit
 24 Belly or non-Secret Fit, that may have been the
 25 case.


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1 What I can also say is that Mr. Green in
2 roughly two sentences in his report concludes that
3 there's nothing from the marketing perspective that
4 affects these products. I think this provides an
5 indication as to something he should have
6 investigated further based on the point that you are
7 raising now.
8 Q. But you didn't investigate it?
9 A. I have the access to these employees
10 through deposition testimony. Mr. Green, on the
11 other hand, I would understand, would have access
12 and be able to actually discuss these issues with
13 those employees.
14 Q. Okay. But my question was did you
15 investigate it?
16 A. Oh, well, I investigated what I could
17 through the depositions that have been provided in
18 this case.
19 Q. Did you ask for any further discovery
20 from your -- your counsel other than these
21 depositions?
22 A. Well, I asked for information and
23 deposition testimony from witnesses that may have
24 discussed the marketing of these products. This is
25 one of those items that I've been provided with.

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1 I've also been provided with other documents and the
2 records that I'm using in support of my analysis.
3 I'm not aware, outside of what I've reviewed and
4 what I've relied upon, of other information. But
5 that doesn't mean it doesn't exist and wouldn't be
6 available. And to the extent a discussion was held
7 with Ms. Piccone or other individuals at Destination
8 Maternity, other information could be gleaned to
9 further support -- at least further identify these
10 issues and further support these issues.
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1 would look at?
2 A. Well, the request was made to produce
3 information on a number of fronts, the background of
4 the case, any information on the claims at issue,
5 information on perhaps the marketing and selling of
6 these products. And counsel had identified these
7 individuals as perhaps providing commentary on this
8 issue. Some of these individuals were not -- their
9 deposition testimony was not cited in my report,
10 although I've reviewed it. I don't know that I
11 gleaned anything that was necessarily something
12 I'd cite directly in support of my opinions. But
13 certainly -- certain of these depositions I have
14 cited and were helpful and being in support of my
15 analysis.
16 Q. Let me ask you about your one, two,
17 three, four, fifth bullet point, the DMC web site
18 has a section devoted to Secret Fit Belly bottoms.
19 I think we were looking at that earlier.
20 Yes?
21 A. Yes.
22 Q. Okay. Wouldn't that be consistent --
23 the fact that it has a separate section -- wouldn't
24 that be consistent with the commercial success of
25 the product being associated with the patented

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46 (Pages 181 to 184)

1 features?
 2 A. I don't think you can make that -- that
 3 leap.
 4 Q. I mean, this is what's confusing. This
 5 is what -- maybe I'm wrong. This is what I would
 6 expect to happen. If the patented features were
 7 important to demand for the invention, then what I
 8 would expect is that Destination Maternity would
 9 tout the patented features on its web site. I would
 10 think those things would be consistent.
 11 Does that make sense to you?
 12 MR. LECHLEITER: Objection. Form.
 13 A. Well, you're -- you're talking patented
 14 features. It -- it could be that there are certain
 15 features that are touted on the web site. Whether
 16 those are covered by the patent or not is one issue.
 17 Certainly that -- you know, whatever is touted could
 18 be an important aspect to the product. But whether
 19 it's covered and whether -- what is covered is
 20 relevant to the analysis is another story.
 21 Q. Well, here I think, we were looking at
 22 that website earlier. And not only did they talk
 23 about features, which I think we -- we both
 24 recognize are in the claims. But they actually say
 25 and we patented this.

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1 Is that fair?
 2 MR. LECHLEITER: Objection. Form.
 3 A. It -- it talks about -- and I guess, are
 4 you -- just to be clear, are you referring to
 5 Exhibit 5 to my deposition?
 6 Q. I --
 7 A. And it talks about something that grows
 8 with you, smooth and contours. And then so unique
 9 it's patented. But it's unclear as to what
 10 specifically is covered and whether technically it
 11 would be covered by the patent.
 12 Q. Okay. Would it be fair -- whoever wrote
 13 this things that the features are showing are
 14 covered by the patent?
 15 MR. LECHLEITER: Objection. Form.
 16 A. That appears to be the case.
 17 Q. Okay. One thing I wanted to ask you
 18 about is in your --
 19 A. And I would say covered in some fashion
 20 by the patent. That doesn't mean all the claims and
 21 everything about the patent is covered here.
 22 Q. Let me go back to your Paragraph 21 in
 23 your declaration. It's on Page 15, Exhibit 11-10 as
 24 it's called in the proceeding.
 25 And you have a second sentence here. We

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1 looked at the first sentence earlier about a prima
 2 facia case of nexus. Well, you know what, let me go
 3 to that first sentence again to make sure that I
 4 understand it. See you write here, is my
 5 understanding that a prima facia case of nexus is
 6 generally made out if the patent owner shows that
 7 the commercially available product in question
 8 embodies the features of the claims in question, and
 9 that those features are not just components or
 10 portions of the overall product.
 11 Do you see that?
 12 A. Yes.
 13 Q. Okay. If you -- if you could go back to
 14 the -- to the patent for me, reissue of 43531. And
 15 if we could go to, let's say, Claim 6, which is one
 16 of the dependent claims here?
 17 MR. LECHLEITER: Just for the record,
 18 Exhibit 2?
 19 MR. POLLACK: Exhibit 2. Thank you.
 20 You wouldn't happen to know proceeding exhibit
 21 number, would you?
 22 MR. LECHLEITER: Actually, I do. It
 23 is IPR proceeding Exhibit Number 1018.
 24 MR. POLLACK: Okay. Thank you.
 25 Q. (BY MR. POLLACK) So looking at Claim 6

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1 on proceeding No. 1018, Thomas Deposition Exhibit 2,
 2 at Column 5.
 3 Would you agree with me that Claim 6 is
 4 the claim for a maternity garment?
 5 A. I'm not going to make opinions as to
 6 what the claims are or are not from a legal
 7 perspective. I'm not here to make those opinions.
 8
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1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 Q. Okay.
 5 A. But from an economic perspective and how
 6 I would assess the impact of the dependent claim, I
 7 think that may be different.
 8 Are we at about an hour?
 9 Q. Yeah. Let me just ask you one -- one
 10 more question about components.
 11 You wrote here in Paragraph 21, this
 12 paragraph about components. In the case of this
 13 maternity garment, which -- I guess you wrote this
 14 Paragraph 21 in connection with our analyzing the
 15 maternity garment.
 16 Did you have an understanding that in
 17 this case the claim is for the entirety of the
 18 product which is sold?
 19 MR. LECHLEITER: Objection. Form.
 20 A. I guess, in terms of what needs to be
 21 analyzed as driving the commercial success, it would
 22 be something less than the entire product, and it
 23 would be a particular feature. That's my
 24 understanding of what would need to be assessed as
 25 part of this analysis.

1 Q. So in your view, you don't -- when
 2 you're an obviousness analysis, you don't look at
 3 the claims at all?
 4 A. I didn't say that. I'm -- I'm not here
 5 to make legal opinions. I'm here to gain an
 6 understanding of what features are covered by the
 7 claims and then prepare an economic analysis or
 8 assess economically what the impact is of those
 9 claims.
 10 Q. Okay. But when you wrote here in 21 --
 11 and I recognize that you wrote it to your
 12 understanding. When I said it's your understanding,
 13 does that mean that came from counsel?
 14 A. Yes.
 15 Q. Okay. To the extent you understood what
 16 was written here, did you understand that, if the
 17 claim as a whole corresponds to the overall product,
 18 disregarding what features you might think are
 19 important, if the claim as a whole corresponds to
 20 the overall product, then the law says that nexus is
 21 established?
 22 MR. LECHLEITER: Objection. Form.
 23 A. Again, I'm not here to make legal
 24 opinions. I don't know the laws or the legal aspect
 25 as it relates to that. All I know is that, from an

1 economic perspective, it's possible. And in several
 2 cases what you do in assessing the value of a patent
 3 or claims of a patent is to assess the specific
 4 feature that's covered by the patent and not the
 5 entire product. And that's what I've -- my
 6 understanding in this case is that's what you do.
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 MR. LECHLEITER: Why don't we take a
 6 break.
 7
 8 (Brief break taken.)
 9
 10 Q. (BY MR. POLLACK) Mr. Thomas, if you
 11 could turn to a Paragraph 33 of your declaration. I
 12 had to look down at mine as well.
 13 Mr. Thomas, if you could look at
 14 Paragraph 33 of your declaration, Page 25. And am I
 15 correct there you're doing an analysis of the price
 16 premium between Secret Fit and non-Secret Fit
 17 products?
 18 A. Well, I'm -- I'm identifying the
 19 components, if you will, of the analysis that
 20 Mr. Green has set forth.
 21 Q. And, in fact, your numbers, at least for
 22 the analysis, essentially agree with Mr. Green's; is
 23 that fair?
 24 A. Well, the weighted average numbers, I
 25 believe, agree with what he's included or relied

1 upon.
 2 Q. What -- what disagreement is there, if
 3 any?
 4 A. I don't know that he -- he didn't depict
 5 everything that I've included in this table in his
 6 report.
 7 Q. Okay.
 8 A. I don't believe so. I'd have to
 9 double-check that, but --
 10 Q. Let me for a second ignore, well go
 11 ahead.
 12 A. Let me... Well, just to clarify for the
 13 record, he's only depicted the weighted average for
 14 Secret Fit and the non-Secret Fit. He didn't depict
 15 the components by brand as my table reflects.
 16 Q. Okay. And in responding -- what section
 17 of his declaration were you looking at?
 18 A. He cites on Page -- Page 17, beginning
 19 on Paragraph 35. He cites the average price per
 20 unit of Secret Fit as [REDACTED] And the price -- per
 21 unit price of bottoms not practicing the patented
 22 design where he alleges don't practice the patent
 23 design of 2223. And he cites to Exhibits D and D1.
 24 And Exhibit D and Exhibit D1 include just that
 25 weighted average price and not the components by

1 brand.
 2 Q. Okay. Okay. And, in fact, you found --
 3 when you did your calculation that you got the same
 4 weighted average across all brands?
 5 A. I did.
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 Q. Okay. And that's what experts in the
 23 commercial success economic analysis area refer to
 24 as a price premium, right, is that difference in
 25 price?

1 A. In -- yes, effectively.
 2 Q. And the reason for that is the -- the
 3 standard economic analysis says that two products,
 4 everything about them being essentially equal,
 5 should, at least over the long term, sell at
 6 approximately the same price?
 7 A. I think that -- if you're using the term
 8 of everything being equal amongst those products, I
 9 think that's a pretty important factor. But as a
 10 general matter, that certainly could be the case in
 11 certain situations. But again, I would caution, the
 12 fact that they're both roughly the same, that
 13 assumption is pretty critical as well.
 14 Q. But the way -- the way that -- and the
 15 reason why economic analysis -- an analysts looking
 16 at commercial success use price premiums is starting
 17 from this principle that the price should be the
 18 same. When they see that the price of one is higher
 19 than the other, that there's a price premium, that
 20 indicates to them that there is something else going
 21 on, which creates the price premium, that they're
 22 not equal for some reason?
 23 A. That could be the case, yes. And the
 24 question is what causes that differential.
 25 Q. Right. One of the things that's

1 believed to have caused that differential and the
 2 reason why economic analysts look to a price premium
 3 to show commercial success is that a patented
 4 feature, the command of a patented feature is
 5 something that causes a price premium?
 6 MR. LECHLEITER: Objection. Form.
 7 A. Well, I -- it -- the patented feature
 8 could be something driving a price differential, but
 9 it may not. And that price differential for two
 10 comparat -- two products that you are comparing
 11 could be driven by something completely unrelated to
 12 the patented feature. And again, it's also
 13 important to point out that, while there may be a
 14 price premium, ultimately the profitability of the
 15 product could be lower even though the price is
 16 higher.
 17 Q. Have you seen any evidence -- could
 18 there possibly be any reason why are these products,
 19 Secret Fit Belly panel versus non-Secret Fit, that
 20 the Secret Fit panels would have a lower
 21 profitability than the non-Secret Fit panel?
 22 MR. LECHLEITER: Objection. Form.
 23 A. They could, yes, because the -- the only
 24 thing that Mr. Green has analyzed is gross profit,
 25 but certainly there are expenditures including

1 marketing and selling that need to be devoted to
 2 sales of the Secret Fit Belly pant that could
 3 outweigh and could account for all the margin --
 4 gross margin as being generated by those products.
 5 Q. Let's talk about some of the -- some of
 6 the costs that -- that might differ between the
 7 Secret Fit and non-Secret Fit product, in terms of
 8 cost of goods sold.
 9 Would you agree with me, based on
 10 whatever knowledge you may have of the apparel
 11 market, that likely cost of good sold is not
 12 differentiating factor between Secret Fit and
 13 non-Secret Fit products?
 14 MR. LECHLEITER: Objection. Form.
 15 A. Well, the -- the labor and materials for
 16 a Secret Fit could be greater than those for a
 17 non-Secret Fit.
 18 Q. Would you think that would be a
 19 significant cost?
 20 A. It depends on the situation. It could
 21 be, but it may not be. I mean...
 22 Q. You don't know one way or the other?
 23 A. Well, there could very well be more
 24 material in a Secret Fit Belly pant. It could be
 25 better quality. It could be a different type of a

1 product that you're comparing to a non-Secret Fit.
 2 So, that could -- depending on the comparison, it
 3 could be a significant difference.
 4 Q. Okay. But across all of the SKUs of
 5 non-Secret Fit versus Secret Fit, do you think it
 6 would be fair to say that the cost of good sold on
 7 average would be comparable between non-Secret Fit
 8 and Secret Fit?
 9 MR. LECHLEITER: Objection. Form.
 10 A. Again, I don't know that you could
 11 automatically come to that conclusion.
 12 Q. You haven't looked into that?
 13 A. I haven't addressed that specifically,
 14 no. And I don't believe Mr. Green has done that
 15 either. And I don't think that you can make -- just
 16 as a general matter make that blanket statement.
 17 You'd have to -- you'd have to do further analysis.
 18 Q. Although, if you look, Mr. Green did
 19 look at cost of good sold, per se, in his report.
 20 Did you see any differences when you looked at this?
 21 A. Well, he's looking at costs of good sold
 22 for -- as a percentage of sales for certain
 23 products. And he's making comparisons between
 24 products that could be very different as well given
 25 that the SKUs for non-Secret Fit have declined, and

1 the SKUs for Secret Fit have increased.
 2 Q. Well, if you look at this Exhibit D,
 3 would it be fair to say that he has looked at costs
 4 of good sold across Secret Fit products? If that's
 5 where he gets his gross margin?
 6 A. If that's your question, that's a
 7 different question that you just asked. You're
 8 saying has he looked at cost of goods sold for
 9 Secret Fit Belly bottoms based on the information
 10 that was provided to him. His -- this analysis
 11 reflects that. But that's a different question than
 12 what you were previously asking.
 13 Q. Okay. And looking at these numbers,
 14 assuming you crunched them, have you seen any
 15 significant difference in cost of goods sold --
 16 costs of goods sold per unit between Secret Fit and
 17 the non-Secret Fit products?
 18 A. Well, given the information he's
 19 provided, he hasn't done that on a per unit basis.
 20 Q. Right. It's the matter of division,
 21 though, right?
 22 A. Well, if you wanted to divide -- I mean,
 23 he hasn't depicted it here. And again, you're
 24 talking about -- there could be differences between
 25 specific non-Secret Fit products and specific Secret

1 Fit products.
 2 Q. Sure. But I'm not talking about the
 3 aggregate.
 4 A. And again, that analysis hasn't been
 5 prepared and disclosed in his report.
 6 Q. Do you agree with me that all the tools
 7 for that analysis have been disclosed, all the
 8 information you would need to do that?
 9 MR. LECHLEITER: Objection. Form.
 10 A. To do what?
 11 Q. To compare the cost of goods sold per
 12 unit across the Secret Fit and non-Secret Fit
 13 products?
 14 MR. LECHLEITER: Objection. Form.
 15 A. If -- tools have been disclosed where?
 16 Q. In his Exhibit D, for example?
 17 A. Okay. So, in Exhibit D, you're -- I
 18 don't know that you would have the ability to do
 19 that in Exhibit D. You have overall sales, but you
 20 haven't distinguished between particular types of
 21 units and what those costs are for particular
 22 brands.
 23 Q. Well, no, it says Secret Fit Belly
 24 bottoms. That's one type.
 25 A. Right. But just to be clear, within

1 Secret Fit Belly, there are different brands,
 2 Motherhood, Oh Baby, so on and so forth. And those
 3 -- there can be differences amongst those products.
 4 And he is taking those products and comparing them
 5 to non-Secret Fit, and there can be differences in
 6 styles and just -- certainly there's difference in
 7 the number of SKUs between the two products. So,
 8 there could be, within the details of the
 9 information that's been produced in this case, there
 10 could be -- that could reflect significant
 11 differences in the cost per unit of one product
 12 versus another.
 13 Q. But in the aggregate --
 14 A. Right.
 15 Q. You can look at the aggregates of these
 16 units and get information that I'm speaking about,
 17 correct?
 18 MR. LECHLEITER: Objection. Form.
 19 A. I would disagree. I mean, if you want
 20 to re-ask the question --
 21 Q. Uh-huh.
 22 A. But you've asked the question, and now
 23 you're trying to say that somehow generally taking a
 24 number on his Exhibit D and dividing numbers and
 25 getting per unit amounts is relevant in answering

1 your prior questions, I would disagree with that.
 2 Can you take what he didn't -- he didn't take the
 3 cost of goods sold and divide it by the number of
 4 units and show a per-unit amount to my knowledge.
 5 Q. Right. That's something -- that's
 6 something he could -- anyone could do. You're
 7 talking about trivial arithmetic here.
 8 MR. LECHLEITER: Objection. Form.
 9 A. Well, are you -- if you're suggesting
 10 could it be done, yes. But also he didn't do that.
 11 And he certainly didn't do it by brand or
 12 specifically by product. And in answer to your
 13 question, I think you would need to do that to get
 14 comfortable as to how you could answer the questions
 15 that you're requesting.
 16 Q. Okay. Let me go back to my first
 17 question. I think we are in agreement, though, that
 18 there's a price premium between the Secret Fit and
 19 the non-Secret Fit products?
 20 A. Well, I would -- I think we could agree
 21 that there's a -- based on the analysis that he has
 22 performed in the aggregate, there's a difference of
 23 a per-unit price aggregate for Secret Fit versus the
 24 aggregate average for non-Secret Fit.
 25 Q. And that aggregate difference is

1 [REDACTED] percent, correct?
 2 A. If you look at the averages across all
 3 the different brands, yes.
 4 Q. Okay. Now, one thing you point to in --
 5 in your declaration, and I wasn't sure why, this is
 6 particularly in Paragraph 34, is the amounts for
 7 Kohl's Oh Baby. Let me ask you, first. Why did --
 8 why are you calling out the difference between
 9 Secret Fit and non-Secret Fit for Kohl's Oh Baby?
 10 What does that matter?
 11 A. Well, I guess, a couple of things. One
 12 is that he has done a very general analysis and
 13 concluded that the difference between the price of
 14 the average of the Secret Fit brands that he's
 15 analyzed versus the non-Secret Fit without any
 16 further detail allows him to automatically conclude
 17 that there's commercial success for the product, and
 18 I would disagree with that.
 19 I provided more details as to what makes
 20 up that analysis and also would -- would show that
 21 as it relates to the Kohl's Oh Baby product that
 22 it's not the [REDACTED] percent that he depicts. And I
 23 wanted him to make that point.
 24 And I would also point out that the
 25 prices of these -- and the differential of these

1 other products could be driven perhaps by aspects or
 2 events that would be unrelated to the patent as
 3 evidenced by the fact that the Kohl's differential
 4 is different.
 5 Q. Let me ask you this, other than the
 6 Kohl's differential, the differentials for all of
 7 the other brands that are sold at Destination
 8 Maternity retail stores, are essentially in the
 9 [REDACTED] percent range, they're relatively
 10 consistent. Would that be fair?
 11 A. Well, I would say that this calculation
 12 that he's prepared in terms of the components of
 13 each of the brands. Those percentage differentials
 14 are in the [REDACTED] percent range. That's correct.
 15 Q. Okay. And now, you're aware -- and I
 16 think you pointed out how even at [REDACTED] that the Kohl's
 17 pricing we're looking at here, we're talking about
 18 Kohl's as a wholesaler. Is that true?
 19 A. Yes.
 20 Q. Retail reseller for Destination
 21 Maternity?
 22 A. Yes.
 23 Q. Okay. And here we're looking at the
 24 wholesale pricing that Destination Maternity is
 25 selling to Kohl's, correct?

1 A. Yes.
 2 Q. Okay. And that's a very different
 3 market and very different analysis in looking at
 4 retail. And I recognize Mr. Green included it,
 5 maybe he shouldn't have, in his numbers. But that
 6 -- that wholesale market is a very different market
 7 from the retail. Is that fair?
 8 A. Well, I would say that there are
 9 differences between the wholesale and retail market,
 10 first. And I would say, secondly, that if you are
 11 suggesting that he's made an error then as it
 12 relates to the Kohl's product, he can't use that as
 13 a price differential as the basis to conclude that
 14 there's commercial success that's associated with
 15 the sales of those products. If that's what you --
 16 Q. If we took out the Kohl's products, you
 17 recognize that the price premium is only going to
 18 increase from the numbers he provided?
 19 A. If we're looking at overall averages,
 20 that those numbers would change, that's correct.
 21 But I'm not sure that that's a relevant way of -- of
 22 viewing the world as it relates to commercial
 23 success.
 24 Q. Let's take a look back at Deposition
 25 Exhibit 3, again, my article.

1 A. Okay.
 2 Q. If we look at the first sentence, again
 3 under indicators of commercial success. Do you see
 4 that it says commonly used indicators of commercial
 5 success include and the third one is price premiums,
 6 right?
 7 A. That that word -- those words are on
 8 this page on this exhibit.
 9 Q. Okay. So am I correct that price
 10 premiums is an indicator of commercial success?
 11 MR. LECHLEITER: Objection. Form.
 12 A. Again, I think we went round and around
 13 perhaps on this issue or maybe others. Again,
 14 you're asking a very general question. It may or
 15 may not be an indication. And it could very well be
 16 in this case it's not an indication of commercial
 17 success.
 18 Q. Well, what's -- the thing I see you're
 19 doing here is -- we've gone through a pretty large
 20 number of these -- of these indicators -- well, it
 21 may not be an indicator of commercial success, but
 22 we've gone through sales, sales growth, price
 23 premiums, displacement of product. If we were to
 24 look at these, all in the aggregate though, and say,
 25 well, every one of these is present, and perhaps it

1 may be the case that any one in isolation is not an
 2 indication of commercial success. Would you agree
 3 with me that having a number of these factors would
 4 then tend to show commercial success?
 5 MR. LECHLEITER: Objection. Form.
 6 A. Again, you're asking a very -- I mean,
 7 that, perhaps, could be the case, but it's very well
 8 that it would not be the case as well. You have to
 9 understand the facts and circumstances and why
 10 differences exist. And I think it's inappropriate
 11 to make those generalizations and arrive at an
 12 opinion based on those generalizations.
 13 Q. Let me just get back to the Kohl's
 14 point, though. Let me ask a couple of other
 15 questions with the Kohl's one. First of all, even
 16 in the wholesale market you'll agree with me that
 17 Kohl's pays a price premium of [REDACTED]
 18 percent, effectively?
 19 A. Well, I would agree that on average
 20 across all the pants that are sold, which could be
 21 differing brands for Secret Fit Belly, that there is
 22 a difference in the average price. I don't know
 23 that it necessarily equates to the price premium
 24 because you would need to look at the specific
 25 brands that you are comparing. But on average,

1 using this data, there is a differential in the
 2 price of [REDACTED] which is [REDACTED]
 3 percent.
 4 Q. Maybe I'm misunderstanding how price
 5 premiums are done. In all the cases that I've been
 6 in, the way you do a price premium is you look at
 7 all products sold with the feature. And then you
 8 look at all the products sold without the feature.
 9 And then you take the difference between those
 10 average prices. Is -- has that been done in a wrong
 11 way in the cases I've been in?
 12 MR. LECHLEITER: Objection. Form.
 13 A. Well, again, I think you're being very
 14 general in your approach in assuming that generally
 15 speaking that would apply in every situation. You
 16 can have a product that is alleged to embody the
 17 patent and one that's not alleged to embody the
 18 patent. But there could be dramatic differences
 19 otherwise or in addition to those products. And
 20 making that comparison would be inappropriate. And
 21 to say and conclude that that's a price premium
 22 associated with the patented feature I think would
 23 be inappropriate.
 24 Q. Okay. But here what we have is two
 25 kinds of products, non-Secret Fit Belly products

1 which came in an enormous panoply of styles, and
 2 Secret Fit products which came in a very similar and
 3 fairly overlapping enormous panoply of styles.
 4 Would it be fair to say that it would be appropriate
 5 in that kind of situation to take an aggregate of
 6 all the products that are Secret Fit or the patented
 7 products and then compare them to all the products
 8 across the board that are non-Secret Fit and see if
 9 they are -- if on average there's a price premium?
 10 A. Again, you're presenting a hypothetical
 11 that I don't -- I don't understand to be the case
 12 when you talk about a panoply of styles. And it's
 13 clear that the number of SKUs for non-Secret Fit has
 14 declined over time, and Secret Fit has increased.
 15 Generalizing and taking averages based on some
 16 general theory or understanding I think is
 17 inappropriate without digging into the details and
 18 understanding what it all means. So, I would
 19 disagree with the premise of your question.
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 7 Q. Let me ask you this. Am I correct that
 8 effectively what you're saying is -- well, Mr. Green
 9 has shown significant sales levels -- significant
 10 sales growth, price premiums, and that Secret Fit
 11 products went way up in sales between '08 and 2013,
 12 while non-Secret Fit products went way down in sales
 13 during the same period. But given -- despite
 14 showing all those factors, he needed to show --
 15 prove the following negatives that it could not have
 16 been done due to other factors, such as marketing
 17 promotion, some other unspecified feature of the
 18 product that no one in this case has never mentioned
 19 or something else that none of us has never thought
 20 of?
 21 MR. LECHLEITER: Objection. Form.
 22 A. With all due respect, and it's getting
 23 late in the day, that was a very lengthy question,
 24 and I think an attempt to mischaracterize all the
 25 testimony I've given previously in this deposition

1 as to what I'm trying to say.
 2 Q. Uh-huh. So why don't you explain it to
 3 me, then.
 4 A. I don't understand your question, and I
 5 -- my testimony is what it is. But certainly I
 6 think you've mischaracterized or attempted to
 7 mischaracterize what I've testified to. And --
 8 Q. Well, how have I mischaracterized it?
 9 MR. LECHLEITER: Objection. Form.
 10 A. I don't know. You asked a very, very
 11 lengthy question that I honestly just don't
 12 understand.
 13 Q. Let me break it down. So, in his
 14 report Mr. Green pointed to significant sales
 15 levels, significant sales growth, price premiums,
 16 increase in sales of Secret Fit products from 2008
 17 to 2013, decrease of sales of non-Secret Fit
 18 products from 2008 to 2013. Is that fair?
 19 A. I don't think that's fair. I mean, if
 20 you look at his disclosure, he identifies sales --
 21 Q. Uh-huh.
 22 A. -- and he puts a graph in to the report
 23 of sales of Secret Fit. And he identifies sales of
 24 non-Secret Fit. He doesn't do and conclude what you
 25 say he's concluding. That's not included in his

1 declaration.
 2 Q. You're saying that when he plots a graph
 3 on Page 16 of Secret Fit sales going from, I don't
 4 know, about [REDACTED], that doesn't
 5 show sales growth?
 6 A. Well, it -- it -- he hasn't said there's
 7 -- you said significant sales growth.
 8 Q. Yes.
 9 A. There's a starting point to these sales.
 10 And he hasn't been provided with all the details of
 11 all the sales. And I think I've testified to this
 12 previously. And all the information hasn't been
 13 provided to him. So, you're -- you're
 14 characterizing his testimony in a way that's not
 15 disclosed in what he has in his declaration.
 16 Q. Let me read what he writes. "Secret Fit
 17 Belly bottom sales have increased as non-patented
 18 product sales have decreased."
 19 A. Okay. That's what he says.
 20 Q. Okay. So doesn't that -- isn't that the
 21 same thing, unless my understanding of English has
 22 somehow deteriorated, as showing significant sales
 23 growth of Secret Fit Belly bottoms and decrease of
 24 non-Secret Fit Belly bottoms?
 25 MR. LECHLEITER: Objection. Form.

1 A. It -- it -- it just shows that the
 2 Secret Fit Belly products -- he just shows they
 3 increase, and the others decrease. He doesn't use
 4 the word significant. He doesn't use the word
 5 significant sales growth. He doesn't say any of
 6 that.
 7 Q. Okay. Let me ask you this. Is an
 8 increase -- in your view, is an increase of
 9 [REDACTED] a quarter, is that
 10 a significant sales increase?
 11 MR. LECHLEITER: Objection. Form.
 12 A. It depends, in terms of the data that's
 13 been provided, what that data tells us, and the
 14 details surrounding that data, I need more
 15 information. You're making the leap that that's
 16 significant sales growth. I don't have enough
 17 details about why they haven't produced all their
 18 sales data. And whether it's -- this includes all
 19 of their sales data.
 20 Q. Well, did you ask counsel to send us a
 21 letter or demand to get more sales data?
 22 A. I'm responding to what Mr. Green has
 23 disclosed, and I'm responding to that disclosure.
 24 You're making the leap and suggesting that somehow
 25 there's something in here that I don't see reflected

1 and documented in his report or his disclosure.
 2 That's the problem I have with the basis of your
 3 question or the premise of your question.
 4 Q. When you read this report, you didn't
 5 think he was saying that there was significant sales
 6 increase?
 7 A. I don't see those words in his report,
 8 and I don't see that he's indicated that to be the
 9 case. And most certainly that whatever growth in
 10 sales was -- was connected to the claims that are at
 11 issue in this case.
 12 Q. I didn't ask that. I just asked did he
 13 say that there was a significant growth in sales.
 14 Is he showing that?
 15 A. I didn't -- I didn't see that in his
 16 report.
 17 Q. You weren't able to infer that either?
 18 A. Look, with all due respect to Mr. Green,
 19 what he's disclosed here is in many ways deficient
 20 as I've documented in my report. And all I can go
 21 on is what he puts in his declaration. And he
 22 didn't use those words or indicate that to be the
 23 case, then I don't have enough information to draw
 24 that conclusion either.
 25 Q. Well, you've read his deposition.

1 A. Yes.
 2 Q. In his deposition did he say that there
 3 was a significant sales growth?
 4 MR. LECHLEITER: Objection. Form.
 5 A. I would have to go back and look to see
 6 if those were the words that he used.
 7 Q. You don't recall?
 8 A. I don't recall as I sit here, no.
 9 Q. How would that change your opinion if he
 10 said that -- if he said that, well, yes, I'm
 11 testifying there was a significant sales growth?
 12 A. Well, I guess I would say that he hasn't
 13 documented that in his declaration, one. And I
 14 would want to understand what the basis is to say
 15 that it's significant. What's his benchmark? What
 16 he's comparing it to? And, have a better
 17 understanding of that.
 18 Q. Let me -- let me ask you just to make --
 19 I think I asked you this already, but I just want to
 20 make sure we're on the same page. Do you agree as
 21 this article says that factors like significant
 22 sales levels, significant sales growth, price
 23 premiums, and the patented product displacing prior
 24 non-patented product, do you agree that those
 25 indicate, though they might not be dispositive, but

1 they indicate commercial success?
 2 MR. LECHLEITER: Objection. Form.
 3 A. Again, they could be indicators, but
 4 they may not be indicators. That's just to be
 5 clear. So, I don't -- again, each case or each
 6 situation stands on its own. And I don't think you
 7 can do in a very simplistic analysis automatically
 8 conclude that there's commercial success and more
 9 importantly that it's connected somehow to the
 10 claimed inventions that are at issue in this case.
 11 Q. So, what you're saying is that, when
 12 this article says that those are indicators of
 13 commercial success, that that's wrong as they only
 14 might be?
 15 A. That -- and with all due respect, that's
 16 unfair and a mischaracterization.
 17 Q. I'm just repeating what you said.
 18 A. I -- I didn't say that, with all due
 19 respect.
 20 Q. All right. So, what are you saying?
 21 A. You're trying to put words in my mouth
 22 and say that somehow I disagree that as a general
 23 matter these can be indicators. I've said that they
 24 could.
 25 Q. Okay.

1 A. But I also say that -- that they may
 2 not, and that you have to look at facts and
 3 circumstances. You can't just make a general
 4 observation and make a conclusion. And I
 5 respectfully disagree with the premise of your
 6 question. And again, that's not my testimony.
 7 That's a mischaracterization, with all due respect.
 8 Q. Let me just get back to the Kohl's price
 9 premium. I want to just ask, in the general case,
 10 would a price premium of [REDACTED] percent, is that the
 11 kind of price premium, assuming that's a price
 12 premium for patented versus non-patented products,
 13 would a [REDACTED] percent price premium be the kind of
 14 price premium that shows commercial success?
 15 MR. LECHLEITER: Objection. Form.
 16 A. It may be as a general matter, but it
 17 may not be. And again, in these situations not only
 18 are you looking at the success of the product but
 19 what drives that success. And additionally, that
 20 [REDACTED] percent may be an indication of success, but
 21 perhaps the costs associated with getting that [REDACTED]
 22 percent price increase may outweigh any benefit you
 23 get from that increase. So I -- you can't come to a
 24 general -- you can't make that general observation
 25 and come to that conclusion.

1 Q. Okay. But typically, in these kinds of
 2 analyses, do you have a price premium of [REDACTED]
 3 percent? Am I correct that economic analysis says
 4 that shouldn't be there unless there's something
 5 significantly different between the products?
 6 A. I'm sorry. It's getting late.
 7 MR. LECHLEITER: Objection. Form.
 8 A. But that -- I mean, again, I would give
 9 give the same answer. That's -- you can't say
 10 typically either. I mean, that's just a different
 11 way of asking the same question. You need more
 12 information that would say that that is or isn't
 13 a price premium that indicates commercial
 14 success.
 15 Q. Assuming everything else is equal
 16 though, all right, between the two products, a [REDACTED]
 17 percent price premium would be an indicator of
 18 commercial success?
 19 A. Again, I don't think you can -- you're
 20 saying everything is equal? I mean in what respect?
 21 I mean, again, the costs associated with the product
 22 that's sold at a higher price may be so much higher
 23 that --
 24 Q. Well, that's why --
 25 A. -- the company loses money.

1 Q. Well, that's why I'm setting all things
 2 equal. It's a hypothetical. I'm setting them all
 3 equal.
 4 A. Hypothetically, I mean, that may be the
 5 case. I mean, you're -- you're asking a very
 6 general question and saying that there's some
 7 threshold that automatically there's commercial
 8 success. And I don't think that's the appropriate
 9 way of looking at it. I don't think you can draw
 10 that conclusion.
 11 Q. Well, how would you do it?
 12 A. How would I do what?
 13 Q. How would you use a price premium to
 14 show commercial success?
 15 A. Well --
 16 MR. LECHLEITER: Objection. Form.
 17 A. I would, A -- understand whether the
 18 comparison I'm making is a relevant comparison.
 19 And then whatever that comparative reflects, I would
 20 want to understand what drives that comparison or
 21 that difference and whether that it's reflective of
 22 the claims that are at issue in the case.
 23 Q. Let me ask you this. Would you agree
 24 with me though that really wholesale pricing
 25 shouldn't be compared to retail pricing in this

1 analysis?
 2 A. I would -- no, I think that -- that
 3 probably is a relevant comparison.
 4 Q. Why?
 5 A. Because in the realm of the wholesale
 6 pricing, you're not having to cover expenditures
 7 related to marketing and distribution as you would
 8 under the retail level. So, it could be reflective
 9 of the difference between what expenditures are
 10 being covered from a marketing and distribution
 11 perspective as opposed to those that aren't.
 12 Q. Doesn't that make the comparison unequal
 13 to the comparison of the retail level?
 14 A. Well, I don't know that it makes it
 15 unequal. I think it may distinguish or identify
 16 certain elements of the comparison that are
 17 unrelated to what the claimed inventions are, at
 18 least the claims that are at issue in this case.
 19 Q. But it could also work in the other
 20 direction, correct?
 21 A. It -- it -- it could draw a distinction,
 22 and it could draw a distinction that shows that
 23 there are certain elements to -- and the comparison
 24 and the difference that are associated with things
 25 unrelated to the patented features or the claimed

<p>1 inventions that are at issue in this case. 2 Q. For example, one of the problems with 3 looking at the wholesale versus a retail market is 4 often that at the wholesale market you have 5 long-term contracts which obviously consumers don't 6 sign? 7 MR. LECHLEITER: Objection. Form. 8 A. It -- it -- that perhaps could be the 9 case. It may not. 10 Q. Isn't that one reason why you wouldn't 11 want to compare a wholesale and a retail market? 12 MR. LECHLEITER: Objection. Form. 13 A. Well, it also -- well, I don't know that 14 it would necessarily indicate that you wouldn't want 15 to make that comparison. I think also that in the 16 wholesale market the wholesaler is the entity that's 17 incurring the marketing and distribution costs. And 18 so, the difference that's reflective in the 19 wholesale realm as compared to the retail realm 20 could be indicative of factors that are unrelated to 21 the claimed inventions. 22 Q. You're expert -- expert testimony on 23 economics has been excluded in some cases, correct? 24 A. No. I don't -- I don't believe that's 25 the case.</p> <p style="text-align: right;">221</p>	<p>1 hypothetical negotiation date. 2 Q. Okay. And the date the other two 3 analyses you -- other two dates you provided, those 4 were excluded? 5 A. Well, the analysis I prepared was not 6 excluded. It was just I couldn't provide analysis 7 associated with a particular date. But the 8 substance of my analysis was not excluded. 9 Q. Okay. But the amount of damages changed 10 significantly based on what date was chosen? 11 A. Well, I don't know that it changed 12 significantly. And I don't know that the rate 13 changed significantly. I'd have to go back and 14 look. But I will tell you that the substance of my 15 analysis and the economic principles that I set 16 forth was not impacted or excluded on those grounds. 17 It was just the date that was chosen as I understand 18 from a legal perspective. There was one appropriate 19 date, and I testified to that appropriate date. 20 Q. Ultimately in trial you testified -- 21 A. At trial, yes. 22 Q. But it was your job as the economic 23 expert to select which -- which was the correct 24 date? 25 A. Well, I -- I -- as in many cases I rely</p> <p style="text-align: right;">223</p>
<p>1 Q. You didn't provide an analysis once 2 where you decided you'd select a different date for 3 the hypothetical negotiation than the court found 4 appropriate, and your testimony was excluded? 5 A. Well, I would -- I would clarify that 6 and say that I prepared an analysis of three 7 different hypothetical negotiation dates that I was 8 instructed by counsel could be legally appropriate. 9 I understand the court concluded that one of those 10 dates would be the legally appropriate date. I 11 provided testimony on the economic analysis I 12 performed relative to that hypothetical negotiation 13 date. And I would also add the jury agreed with my 14 assessment of that reasonable royalty. 15 Q. Okay. But the date you were -- you were 16 advocating of pushing forward is one which the court 17 rejected as your preferred date? 18 A. I don't know -- I don't know that I 19 necessarily advocated that as my preferred date as I 20 have three different alternatives that I set forth. 21 And I understand that from a legal perspective the 22 court concluded that there was one particular date 23 that would hold in terms of the hypothetical 24 negotiation. And I provided an analysis and 25 testified to the analysis associated with that</p> <p style="text-align: right;">222</p>	<p>1 on counsel from a legal perspective as to whether 2 certain factors hold or not. And to a certain 3 extent, the correct hypothetical negotiation date is 4 a legal issue on the eve of first infringement. So, 5 I'm not -- I don't opine on when an infringement or 6 if infringement occurs. I rely on counsel for that 7 issue. 8 Q. Certain parts of date selection are 9 economic analysis that you performed? 10 A. Again, I don't know that it would -- 11 that would necessarily be the case. Certainly, the 12 economics that I analyze can be driven from the 13 particular date that's chosen as the hypothetical 14 negotiation date. But what that date specifically 15 is in many ways, is a legal issue because it's 16 contingent on whether infringement actually occurs 17 or it doesn't. And that's not my job to make that 18 determination. I rely on others for that. 19 Q. In the particular instance we're -- 20 we're talking about, you picked the date which -- 21 you picked two dates what were much earlier than the 22 date which the court found, correct? 23 A. I believe so, yes. 24 Q. All right. You were representing the 25 defendant, the person who was being accused of --</p> <p style="text-align: right;">224</p>

1 company that was being accused of infringement?
 2 A. That's correct.
 3 Q. Okay. By picking an earlier date the
 4 markup would be smaller at that time, and so your
 5 royalties would -- would go down?
 6 A. Well, I think that's a candidly is a
 7 mischaracterization.
 8 Q. Why don't you explain it to me?
 9 MR. LECHLEITER: I'd object to this line
 10 of questioning. It's outside the scope of the
 11 direct testimony given by Mr. Thomas.
 12 A. I'm -- I prepared an analysis under
 13 three different scenarios. And whether a particular
 14 hypothetical negotiation date would hold is based on
 15 certain assumptions that were provided to me that
 16 are legal in nature or technical in nature that I
 17 don't provide opinions on. So, based on those
 18 assumptions I analyzed certain economic factors
 19 associated with those assumptions, which I did in
 20 all three instances. And I ultimately testified to
 21 the date that the judge held would be appropriate.
 22 And I would add that the jury agreed with my
 23 analysis in that regard.
 24 Q. Are there any other instances you want
 25 to recall?

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1 A. Recall about what?
 2 Q. Where some of your -- not all of your
 3 testimony, but some of your testimony was excluded?
 4 A. Well, I -- there's only two other
 5 instances, in the interest of full disclosure. In a
 6 case involving a copyright infringement, a motion
 7 was filed, and the judge agreed with every aspect of
 8 my economic analysis and only limited the analysis
 9 relative to the time frame over which damages could
 10 be computed, which I understood was as a result of a
 11 legal conclusion. And also, an affidavit several
 12 years ago that I've filed -- or that I filed with
 13 counsel representing a particular client because my
 14 expert report was unattached to the affidavit, the
 15 judge excluded the affidavit. I understand the
 16 counsel subsequently attempted to attach the expert
 17 report, and the judge concluded it was too late.
 18 Q. Other than that are there any other
 19 instances?
 20 A. Not that I'm aware of.

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1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 Q. As far as you know, there isn't an
 8 allocation of specific dollars to a budget?
 9 A. Well, I -- and again, you're talking
 10 about whether you allocate money to a budget.
 11 [REDACTED]
 12 [REDACTED] So whether it's allocated to a
 13 budget or not, certainly funds and investment was
 14 made to market these products.
 15 Q. Okay. But there's -- there wasn't an
 16 allo -- as far as you know, there wasn't an
 17 allocation of a number done by Destination
 18 Maternity --
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED] But I would also
 25 add that Mr. Green failed to inquire or investigate

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1 that issue. And all I have available is the
 2 deposition testimony of Ms. Piccone, [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 Q. And not non-Secret Fit pants?
 6 A. Well, I guess, we could agree to
 7 disagree on that issue. There are -- there
 8 certainly could be efforts to market non-Secret Fit,
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 Q. Okay. You have -- you haven't done any
 13 kind of per-unit analysis of the amounts spent on
 14 Secret Fit versus non-Secret Fit?
 15 A. I don't believe the information has been
 16 provided specifically to be able to conduct that
 17 analysis.
 18 Q. You haven't seen any information that
 19 would make that analysis possible?
 20 A. Again, I haven't seen any specific
 21 information to that effect other than the
 22 information that I've identified in support of my
 23 opinions.
 24 Q. Have you -- assuming though there is
 25 enough information provided where you can take the

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1 marketing spend of -- you could compare the total
 2 SG&A of Destination Maternity and divide that by
 3 Secret Fit and non-Secret Fit units and get some
 4 kind of an SG&A cost per unit, correct?
 5 MR. LECHLEITER: Objection. Form.
 6 A. Well, you could do that math. I'm not
 7 sure how relevant or indicative that would be of
 8 anything that's being analyzed in this situation.
 9 Q. It's not something you've tried to do
 10 though?
 11 A. It's not -- not only is it not something
 12 I did, but I don't see how -- what the relevance of
 13 that would be.
 14 Q. Paragraph 36 of your declaration. Are
 15 you aware that a large number of the competitors now
 16 sell a Secret Fit Belly type of maternity pants?
 17 MR. LECHLEITER: Objection. Form.
 18 A. I don't -- I don't know that necessarily
 19 to be the case. I mean, there certainly could be
 20 competitors that sell similar types of pants, but
 21 whether they are Secret Fit Belly type pants and
 22 whether they embody a features of the patent is a
 23 different question.
 24 Q. Okay. You haven't looked into that?
 25 A. I'm not aware that -- well, first of

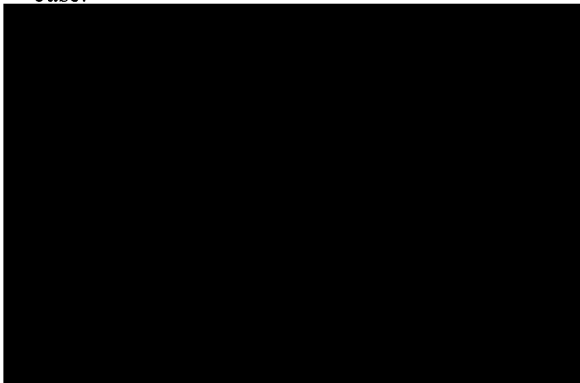
1 all, Mr. Green has -- I'm responding to Mr. Green's
 2 assessment and what disclosed in his declaration.
 3 And he doesn't disclose anything to that effect in
 4 his declaration nor can he name any competitors or
 5 was able to name any competitors in his deposition
 6 and has no evidence that I'm aware of that any --
 7 any other competitor is using the patented features
 8 or -- or has a product that embodies the patented
 9 claims that are at issue in this case.
 10 Q. Are you aware of other companies, other
 11 than Target, that have been accused of infringement?
 12 MR. LECHLEITER: Objection. Form.
 13 A. I'm not aware specifically of other
 14 companies in that regard.
 15 Q. You see here, in Paragraph 36, you
 16 referred to Mr. Green's referenced to the -- I think
 17 it comes from the 10K that the U.S. market share of
 18 maternity power -- power for Destination Maternity
 19 is between [redacted] and [redacted] percent?
 20 A. I see that.
 21 Q. Okay. And would you agree that that's a
 22 very significant percentage of what is a relatively
 23 fragmented market?
 24 MR. LECHLEITER: Objection. Form.
 25 A. Well, I guess, a -- whether it's

1 fragmented or not, I need more information to be
 2 able to draw that conclusion. But having said that,
 3 it is a market share of maternity apparel, and it
 4 doesn't specify what type of apparel or segment of a
 5 market any further than that.
 6 [redacted]
 7 [redacted]
 8 [redacted]
 9 [redacted]
 10 [redacted]
 11 [redacted]
 12 [redacted]
 13 [redacted]
 14 Q. Okay. And I think you've been relying
 15 on that idea in giving your opinion, right?
 16 A. Well, in response to Mr. Green's failure
 17 to acknowledge or consider other information and to
 18 fully support his opinions.
 19 Q. Let me ask you this, if Mr. Green shows,
 20 hypothetically, that the claims match the invention
 21 through looking at someone else's technical
 22 analysis. Let's say that's true. I'm sorry, that
 23 the claims -- that the Secret Fit products embody
 24 the claims?
 25 A. Which claims?
 Q. Let's pick one claim, Claim 6 that we

1 were looking at earlier?
 2 A. Okay.
 3 Q. If he shows that that is the case, and
 4 he shows that there are significant sales of
 5 products that match Claim 6 -- okay, so, you have
 6 those two assumptions or not?
 7 A. Well, first of all, I guess, I --
 8 Mr. Green is not the one that's going to say whether
 9 a particular product embodies Claim 6. So, you're
 10 assuming that somehow that is proven, I guess.
 11 Q. Yes.
 12 A. And that the pants that are identified
 13 as having been -- having embodied Claim 6 -- what's
 14 the next part of your question. -- I'm sorry.
 15 Q. Yes. So, let's -- let's have those two
 16 assumptions. Okay? That the pants embody Claim 6,
 17 and the significant sales of the pants that embodies
 18 -- that embodies Claim 6, whose job is it yours or
 19 Mr. Green's based on your knowledge of commercial
 20 success analysis, whose job is it to show that other
 21 factors did or did not create a commercial success
 22 and a nexus.
 23 A. Well, it's my understanding that
 24 Mr. Green needs to show that the Claim 6 drove sales
 25 and accounted for the success of the product. And

1 in doing so accounting for and acknowledging other
 2 things that would also have accounted for -- or
 3 perhaps could have accounted for that commercial
 4 success. That's my understanding of what he needs
 5 to do.
 6 Q. So, when you did your analysis, you were
 7 using that understanding?
 8 A. Well, when I did my analysis, I was
 9 responding to what Mr. Green did and what he failed
 10 to do. And you're asking a hypothetical that I
 11 don't understand to be the case. So, when you start
 12 weighing into my analysis, I did this or I did that,
 13 you're painting a hypothetical that I don't
 14 understand to be the case. Not only do I -- I don't
 15 understand that it's necessarily proven that
 16 Claim 6 is embodied in the Secret Fit pants that Mr.
 17 Green has analyzed. But even under Destination
 18 Maternity's Mr. Brookstein's analysis, he's only --
 19 he's only analyzed four pairs of pants. And that --
 20 those four pairs of pants were provided to him. He
 21 has no idea how they were selected, which indicates
 22 the sample that he is looking at could be a biased
 23 sample and not representative of a population. And
 24 in any event, even what he analyzed, most of those
 25 pants do not embody many of the dependent claims

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1 that are at issue in this case. So, I don't --
 2 again, you're -- you're painting a hypothetical that
 3 I don't understand to be the case and that the
 4 information that's been produced or identified in
 5 this case wouldn't support. So, I don't want
 6 necessarily my testimony on your hypothetical to
 7 somehow be connected to something I did in this
 8 case.
 9 
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 22 Q. It's never came up in any of your cases?
 23 A. I'd have to think back. That may or may
 24 not be the case.
 25 Q. Have you done a lot of cases where the

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1 -- have you done cases where the products are sold
 2 under a large number of SKUs?
 3 A. The products are sold what?
 4 Q. Under a large number of SKUs.
 5 A. Yes.
 6 Q. What -- what cases have you done?
 7 A. Well, I've worked -- I've done a lot of
 8 work with Amway.
 9 Q. Okay.
 10 A. As an example.
 11 Q. What kind of products for Amway?
 12 A. Amway sells a lot of things, vitamins,
 13 energy drinks, candidly, you name it, they sell it.
 14 Q. In the cases you did though, what kind
 15 of products were they?
 16 A. Oh, it would -- it would have been most
 17 if not all the products they sell. We were
 18 analyzing information from their -- their -- each of
 19 their independent business operators.
 20 Q. Was that for patent case or was it for a
 21 different kind of analysis?
 22 A. It was -- it was not a patent case.
 23 Q. Have you ever done damages or any other
 24 economic analysis for a patent case where the
 25 product had a very -- was sold under a large number

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1 of SKUs?
 2 A. I would have to -- I'd have to think
 3 about that. It might be the case. I'd -- I'd have
 4 to think about that.
 5 Q. If we look at your CV 11 - 11, there you
 6 list the cases -- would that help you recall any
 7 cases, patent cases involving a large number of
 8 SKUs?
 9 A. Oh, patent cases. Keep in mind that
 10 these are the cases that I provided deposition
 11 and/or trial testimony only in the past four years.
 12 Q. Okay.
 13 A. There's certainly would -- could be
 14 other cases for which I have not provided either
 15 deposition or trial testimony either in the last
 16 four years or that I've provided such testimony
 17 in the periods prior to the last four years. And we
 18 talked about -- we talked about the Levi's Strauss
 19 case, which would include a number of SKUs, but that
 20 was not a patent case. The Pergo, Inc. Case may
 21 have included a number of SKUs. That was a flooring
 22 case. Sofpool v. Intex Recreation involved a number
 23 of inflatable swimming pools that could have
 24 included a number of SKUs. Joovy v. Baby Trend,
 25 Inc. And Target was reflective of baby strollers and

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1 that could have included a number of SKUs. I'd have
 2 to look at that. And it was a patent case. The
 3 Boston Scientific v. Cordis-Corp.
 4 Q. That was stents?
 5 A. Those were stents. I don't know, again,
 6 if those were SKUs or significant number. I'd have
 7 to -- I'd have to look at that. And the same holds
 8 true with -- in all the Cordis cases, as well as the
 9 Medtronic Sofamor Danek v. Globus Medical. I don't
 10 know if in the Nokia v. Apple or X2Y v. Intel -- if
 11 I was looking at products that were -- involved a
 12 number of different SKUs. Those were patent cases.
 13 The Patent Harbor v. Hunai Corporation reflect --
 14 was an analysis of DVD recorders. Again, I'd have to
 15 look back. I just don't recall. It may; it may
 16 not. And the Eastman Kodak v. Ricoh involved a
 17 number of cameras and camera phones and -- I'm
 18 sorry, involved cameras that may have also involved
 19 a number of SKUs. And then the Tela Corporation v.
 20 Nokia matter was a case involving smart phones that
 21 could have involved a number of SKUs as well.
 22 Q. Okay. There's no -- as you sit here now
 23 you can't...
 24 A. I would have to, again, that's just the
 25 list of cases I've provided deposition and/or trial

1 testimony in the past four years. There could be
 2 others. I've worked on a lot of cases. I -- I'd
 3 have to go back and look at the details to see if
 4 that was in fact was the case or not.
 5 Q. Well, let's take a break for five
 6 minutes. And I will see if I have anything else.
 7 A. Sure.
 8
 9 (Brief break taken.)
 10
 11 THE VIDEOGRAPHER: Back on the record,
 12 4:10.
 13 Q. (By MR. POLLACK) Let me -- let me just
 14 ask you, during any -- any of the breaks today, did
 15 you and counsel prepare for any kind of direct
 16 testimony between you and counsel for Target?
 17 A. Well, I did inquire as to the quotes
 18 that appear to be -- that the cites appear to be
 19 incorrect. And I inquired and looked to see where
 20 the correct cite would have been, and I've discussed
 21 that with counsel. I presume he may ask me
 22 questions on direct on that issue, but that's the
 23 only thing we discussed.
 24 Q. Did you find a -- a quote that
 25 corresponded?

1 A. I did, yes.
 2 Q. Can you tell me where that is?
 3 A. Sure. It's on Page 159 in Ms. Piccone's
 4 deposition. And it's under her answer where it
 5 says, "so I focus close to [REDACTED] of my
 6 efforts on the Secret Fit Belly because it's
 7 [REDACTED] percent of my pants."
 8 Q. This is in reference to something called
 9 Half Belly?
 10 A. Well, this says, "So, like I said, by
 11 the time I started, we were no longer carrying these
 12 half bellies. So I focus close to [REDACTED]
 13 [REDACTED] of my efforts on the Secret Fit Belly
 14 because it's [REDACTED] percent of my pants."
 15 Q. Okay. But this is in the context -- if
 16 you look at Page 158. She's discussing sales at Old
 17 Navy; is that correct?
 18 A. Yes.
 19 Q. Okay. So this is all just about her
 20 efforts with Old Navy, correct?
 21 MR. LECHLEITER: Objection. Form.
 22 A. It -- it's -- let me see here. Again, I
 23 don't -- I don't know that it really is in reference
 24 specifically to Old Navy. It says, "like I said, by
 25 the time I started, we were no longer carrying half

1 bellies." And I think the Old Navy reference was --
 2 the Old Navy part was in reference to half belly.
 3 And she is then going on to say "I focus close to [REDACTED]
 4 [REDACTED] of my efforts on the Secret Fit
 5 Belly because it's [REDACTED] percent of my pants.
 6 That's -- that's what she is saying in
 7 that that's -- at least I read it that she's not
 8 wanting to discuss half bellies which is the
 9 reference to Old Navy. She's talking about the fact
 10 she's now focusing her efforts on Secret Fit Belly,
 11 which is [REDACTED] percent of her pants.
 12 Q. Just to be clear though -- I think you'd
 13 expect, as just as a matter of common sense that if
 14 they're selling [REDACTED] percent of their pants as Secret
 15 Fit Belly, you would expect that she's at least
 16 focusing [REDACTED] percent of her time on the Secret Fit
 17 Belly.
 18 MR. LECHLEITER: Objection. Form.
 19 A. Well, she says she's focusing [REDACTED]
 20 [REDACTED] of her time. And [REDACTED] of her
 21 time could be directed towards efforts to increase
 22 the sales of the Secret Fit Belly which could result
 23 in [REDACTED] percent of these pants being Secret Fit Belly
 24 pants.
 25 Q. But this could also be consistent with

<p>1 a large percentage of the pants that are -- that 2 customers purchase are Secret Fit Belly, then one 3 would expect the company's efforts to be focused on 4 what customers want, right? 5 MR. LECHLEITER: Objection. Form. 6 A. Again, you're asking a general question, 7 which perhaps could be the case. I'm responding 8 with her deposition testimony as a way to respond to 9 what Mr. Green has failed to do, acknowledge, and 10 support his opinion. 11 Q. Asking you -- one that you've discussed 12 earlier. If you look at Paragraph 39 of your 13 report, you -- of your declaration, you complained 14 about Mr. Green using the SG&A, correct? 15 We discussed this earlier. 16 A. Yes. 17 Q. But you also say here, on Page 31, that 18 even if he had used just the advertising budget? 19 A. Okay. Where are you? 20 Q. This is -- beginnings with the word 21 "moreover." It is one, two, three, four, five, six, 22 seven lines from the bottom of the page. 23 A. Okay. I'm sorry. 24 Q. You say there "moreover, even if 25 Mr. Green had access to the company -- company-wide</p> <p style="text-align: right;">241</p>	<p>1 that he should have delved into the details to 2 determine the relevance of that conclusion. And I 3 don't think it provides any relevance or any support 4 for what he is attempting to do. But I'm also 5 saying that, even if you had the overall marketing 6 spent, and it may not have fluctuated from year to 7 year, that in itself also doesn't indicate that 8 there was a significant effort to direct it toward 9 Secret Fit. Even though that the spend in overall 10 may not have changed, the amount directed toward 11 Secret Fit could have increased dramatically even 12 under that scenario. That's the point I'm making 13 with this -- in this paragraph. 14 Q. Right. Okay. In our opinion it 15 wouldn't have mattered anyway if he had shown that 16 the advertising spent was flat over this period? 17 A. Well, in -- in isolation, without 18 additional context, it likely would have -- wouldn't 19 have -- would not have been meaningful. 20 Q. Even if Secret Fit sales went way up 21 over the period and advertising spending was flat, 22 in your view, that doesn't show commercial success? 23 MR. LECHLEITER: Objection. Form. 24 A. Again, just to clarify and not 25 mischaracterize the record, what you're trying to do</p> <p style="text-align: right;">243</p>
<p>1 spend on advertising and marketing, that information 2 still would not provide him with the information 3 necessary to assess the advertising and marketing 4 spend. 5 Do you see that? 6 A. Yes. For a -- any particular DMC brand 7 or product, let alone the Secret Fit Belly bottoms 8 at issue here. 9 Q. Right. So, would it be fair to say 10 that, even if we saw -- in your opinion, even if we 11 saw that the advertising budget alone was flat 12 comparing to the period before Secret Fit was 13 introduced to the market and after Secret Fit was 14 introduced to the market, you would -- you would 15 have still concluded that it was a significant 16 marketing effort that may have created the 17 commercial success of Secret Fit rather than the 18 patented feature? 19 MR. LECHLEITER: Objection. Form. 20 A. What I'm saying is that Mr. Green is 21 looking at SG&A and concluding that it remains 22 constant, and so, therefore, that means there is no 23 increased marketing expenditures. 24 Q. Right? 25 A. And what I'm saying, first of all, is</p> <p style="text-align: right;">242</p>	<p>1 is determine -- it could be overall for the company 2 that advertising remain constant. But it could also 3 mean that the majority of those advertising 4 expenditures were directed towards Secret Fit where 5 before Secret Fit they weren't, which could be an 6 indication that those marketing expenditures -- or 7 there was increased marketing focus on the Secret 8 Fit Belly pant. I'm saying that just looking at 9 general numbers wouldn't necessarily provide that 10 without additional context. 11 Q. And in your view that would be true even 12 if the total sales of Secret Fit product succeeded 13 total sales of non-Secret Fit product prior to the 14 introduction of Secret Fit? 15 A. I'm not sure I follow you. 16 Q. So -- so, you're saying -- let's compare 17 2013 sales of Secret Fit product, Secret Fit alone, 18 and sales of -- total sales of non-Secret Fit 19 product back in 2006, 2007 before Secret Fit was 20 introduced. Even if the Secret Fit sales were 21 larger than non-Secret Fit sales had ever been. I 22 mean, advertising budget was flat, you would still 23 say that doesn't show anything about commercial 24 success? 25 MR. LECHLEITER: Objection. Form.</p> <p style="text-align: right;">244</p>

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1 A. That -- that, again, with all due
 2 respect, I think you've just now twisted the
 3 scenario that you're -- you have been questioning me
 4 about and then trying to make assumptions and
 5 conclusions based on those answers. I'm talking
 6 about advertising expenditures and SG&A expenditures
 7 and his misuse of this data to arrive at his
 8 conclusions. And I'm saying even if he had the
 9 marketing expenditures, he still needs to understand
 10 how those are comprised and what efforts were
 11 directed toward Secret Fit Belly pants. He didn't
 12 endeavor to do either one of those things. And
 13 that's what the issue is here. You then have made a
 14 leap to somehow equate that to commercial success.
 15 And I'm, candidly, I don't understand why you're
 16 asking the question and what the relevance of the
 17 question is. But I don't want it to be connected to
 18 my prior answers, which clearly are in relation to
 19 what he has failed to do in this case.
 20 Q. Let me ask you this. Let me give you a
 21 hypothetical. Let's say the -- let's say the
 22 advertising spend is flat from 2006 to 2013?
 23 A. Okay. When you say advertising is flat,
 24 what are you talking about? Are you talking about
 25 the whole company? Or are you talking about for --

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1 Q. Whole company.
 2 A. Okay. So, the whole company.
 3 Q. That's all we have.
 4 A. So, the expense level for advertising is
 5 flat for the whole company.
 6 Q. For the whole company. No change. Let
 7 me -- let me change the hypothetical. Let's say the
 8 -- I think this will make it easier, let's say the
 9 advertising spent for maternity pants, maternity
 10 pants but not of any kind, maternity pants in
 11 general is flat from 2006 to 2013.
 12 A. Okay.
 13 Q. But overall sales of maternity pants
 14 from 2006 to 2013 increase. Can we then draw any
 15 conclusions, either supporting or not supporting
 16 commercial success from those facts?
 17 MR. LECHLEITER: Objection. Form.
 18 A. I don't think you can draw any
 19 conclusions to suggest that there's commercial
 20 success of the product, nor can you discount the
 21 fact that marketing could have impacted the -- the
 22 increase in the sales. You're -- you're not giving
 23 me a complete -- complete information to be able to
 24 address that hypothetical.
 25 Q. So, you're saying, even -- even if the

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1 total marketing on maternity pants is flat, a
 2 certain amount of dollars across that period,
 3 certain amount of real dollars and even if the total
 4 sales of maternity pants increases, there's no way
 5 we could attribute that to the patented feature?
 6 A. You -- you couldn't conclude that --
 7 from that analysis -- simplistic analysis that you
 8 set forth that the maternity pants are -- are
 9 commercial -- commercially successful because of the
 10 patent and nor could you conclude that it wasn't due
 11 to the additional marketing efforts based on the
 12 information you provided. It could very well be due
 13 to the marketing efforts even under the scenario you
 14 painted.
 15 Q. That's because you feel that if they
 16 change the percentage of marketing in each kind of
 17 product even if total market is flat and even though
 18 total sales have increased, you still can't make any
 19 kind of conclusion?
 20 A. Well, I think that you need to
 21 understand the facts as they relate to marketing and
 22 how those dollars were spent to see what impact
 23 those -- would potentially have on the sales and how
 24 they have increased. And the information you're
 25 providing in your hypothetical doesn't provide a

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1 full compliment of what you would need to have and
 2 understand in order to make that assessment.
 3 Q. What other information would you need?
 4 A. You'd need to know the makeup of those
 5 marketing expenditures and how they were -- how it
 6 was spent and on what it was spent.
 7 Q. Okay. Besides there -- is there anything
 8 else you would need or would that be enough?
 9 A. The level, the impact. And there could
 10 be certain other factors you would consider as well.
 11 Q. You said the impact. What do you mean
 12 by that?
 13 A. Meaning, if I market -- if my marketing
 14 has a direct correlation to an increase in sales and
 15 then you could conclude that marketing has an
 16 impact.
 17 Q. Have you ever seen studies showing that
 18 marketing has a direct correlation to the increase
 19 in sales?
 20 A. Yes.
 21 MR. LECHLEITER: Objection. Form.
 22 Q. (BY MR. POLLACK) In the apparel
 23 industry?
 24 A. No -- I don't -- well, I'd have to think
 25 if we did anything in the Levi's case or other

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1 cases, but certainly in the course of my career in
 2 the work that I've done, I've certainly seen the
 3 instances where marketing clearly impacts the level
 4 of sales.
 5 Q. In pharmaceuticals?
 6 A. In those cases, yes.
 7 Q. I just wanted to ask you about
 8 Paragraph 35 in your declaration. So here Mr. Green
 9 did a comparison between Secret Fit black capri
 10 legging and a non-Secret Fit black capri legging,
 11 right?
 12 A. Yes.
 13 Q. Okay. If I understand your criticism,
 14 the issue is that that's not a good comparison
 15 because the non-Secret Fit legging was sold during
 16 an earlier time where -- if I understand you -- in
 17 some of the things you've said today, correctly --
 18 Destination Maternity would still have some focus on
 19 non-Secret Fit, while the black Secret Fit legging
 20 was sold in the 2011 to 2013 period where, according
 21 to you, Destination Maternity had a focus on -- on
 22 Secret Fit. I'm just not understanding why given --
 23 given those facts the comparisons aren't fair?
 24 MR. LECHLEITER: Objection. Form.
 25 A. Well, I think that my point here is that

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1 he had -- he claims based on his testimony he was
 2 wanting to get products in the same time period as a
 3 comparison, and he didn't do that. And there could
 4 be certain events, certain characteristics in the
 5 marketplace, certain characteristics associated with
 6 the product that could be much different in one
 7 period versus another. And he hasn't identified or
 8 accounted for what those potential differences could
 9 be.
 10 Q. Well, I mean, during the periods at
 11 issue that we're looking at, have you seen any --
 12 any evidence of significant changes in the sale
 13 prices during the 2008 to 2013 period?
 14 A. Well, I think, in -- I mean, if you are
 15 to look at the overall analysis he performed, I think
 16 prices were decreased and then increased. But I
 17 don't know that that in and of itself is something
 18 that tells the whole story because you're looking at
 19 different points in time and there could be
 20 different factors affecting each of those products
 21 at a different point in time.
 22 So, I don't know that you're really --
 23 he's accounted for what those potential differences
 24 could be, and his own testimony is that he wanted to
 25 get them in the same time period. So, that's the --

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1 that's the point of my critique in Paragraph --
 2 Q. All right. I mean, as far as you know
 3 and you've probably seen marketing in general where
 4 people are wearing -- both of us were alive during
 5 the period that is occurring from 2009 to 2013 --
 6 are you aware of any particular styling trend,
 7 marketing trend, or pricing trend involving black
 8 capri leggings?
 9 MR. LECHLEITER: Objection. Form.
 10 A. Not as I sit here. But I would also say
 11 that styles do change and do change from year to
 12 year. And I think Mr. Green has acknowledged that
 13 his -- his goal was to try to find something in the
 14 same time period, and he hasn't accounted for the
 15 potential differences that could exist between those
 16 time periods.
 17 Q. But if I'm understanding correctly,
 18 these aren't largely different time periods that
 19 we're talking about, just a couple of years here,
 20 correct?
 21 A. We were talking about 2008 and 2009
 22 versus 2011 and 2013.
 23 Q. Right?
 24 A. Just my understanding -- my general
 25 understanding of the apparel industry is that

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1 fashion trends and preferences can change
 2 dramatically from one period to the next.
 3 Q. Have you seen any evidence that there
 4 was a change in the trend for black capri leggings?
 5 A. Well, I don't -- I can't say as I sit
 6 here, but I also said Mr. Green wanted to identify
 7 something in the same time period and didn't do that
 8 and didn't account for the potential that there
 9 could be a difference.
 10 Q. Did you really think there was a
 11 difference?
 12 MR. LECHLEITER: Objection. Form.
 13 A. Again, I -- I can't say as I sit here
 14 whether there was or there wasn't. What I can say
 15 is that trends do change and change fairly rapidly.
 16 So, it would be reasonable to investigate whether
 17 that had an impact one way or the other, and Mr.
 18 Green has failed to do that.
 19 Q. Are there any parts in Mr. Green's
 20 declaration that you didn't have a problem with?
 21 A. Well, I think as I said that in terms of
 22 the sales data that he summarized I don't know that
 23 I had a problem with summarization of the data and
 24 the way in which he used it. I mean, I have no
 25 reason to dispute his background and experiences as

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<p>1 I sit here. I would agree that he's not to provide 2 legal opinions. 3 Q. What about his Paragraph 27? Would you 4 disagree with that? 5 A. I -- I don't -- I don't know that I -- I 6 guess, I'd have to look at the case that he's 7 referring to. But he's saying a prima facie case of 8 nexus that the patent product is commercially 9 successful due to the patent technology as opposed 10 to other features, I would -- I would agree. It's 11 my understanding of what's to be assessed. And it 12 appears to be what he is referring to is that -- 13 that the commercial success needs to be traced back 14 to the claims at issue in a case, and I would -- I 15 would tend to agree with that. 16 Q. Well, isn't this saying, in fact, that 17 nexus has shown that if the patent product is 18 commercially successful due to the patent technology 19 when the patent shows that there's commercial 20 success and that the product that is successful, 21 here Secret Fit Belly, is the invention -- matches 22 the invention which is claimed? 23 MR. LECHLEITER: Objection. Form. 24 A. Well, again, I'd have to -- and I'm not 25 -- this appears to have come from a legal document,</p> <p style="text-align: right;">253</p>	<p>1 disagree. And what he has done has failed to assess 2 the nexus between the claimed -- the claims that are 3 at issue in this case and the success, if any, of 4 the product. 5 Q. So, you would agree with what he said in 6 Paragraph 27 about the nexus or you disagree about 7 other -- other issues? 8 MR. LECHLEITER: Objection. Form. 9 A. The only thing I can agree with in 10 Paragraph 27 is that he cited something from a case. 11 And I guess that I could look at that case to see if 12 that cite is specifically in there. But I don't -- 13 and I think he's specifically has stated he's not 14 providing legal opinions. So, while that statement 15 is in the case, I don't have any reason as I sit -- 16 excuse me, as I sit here to dispute those words are 17 not included in that case. But I also I understand 18 that he's not been engaged to and is not going to be 19 providing legal opinions either. 20 Q. Okay. But you do understand that that's 21 typically experts who provide economic analysis or 22 you should be familiar with what the legal framework 23 is for providing that analysis? 24 A. Well, yeah. A lot of times counsel will 25 provide with an understanding and a framework under</p> <p style="text-align: right;">255</p>
<p>1 and I don't want to make legal conclusions. My 2 understanding is that, not only do you have to show 3 that there's a commercial success, but you have to 4 somehow that that success resulted or can be 5 detected -- or can be linked to the claimed 6 inventions that are at issue in a particular matter. 7 How that relates to this specific case, I -- I can't 8 say for certain as I sit here. I'd have to review 9 that to see how that equates -- and again, I'm not 10 providing legal opinions here. 11 Q. Would it help you to see this case or-- 12 A. Well, I don't know if it would or 13 wouldn't. I'm not an attorney. I'm not drawing 14 legal conclusions. 15 Q. That's why I'm asking, yeah? 16 A. Nor is, as I understand, Mr. Green. 17 Q. Uh-huh. 18 A. So, he's taking aside a sentence out of 19 a case. So, I don't believe that he is intending to 20 provide legal opinion either or interpret a 21 particular case. I've been provided with my 22 understanding of what needs to be assessed and I 23 believe that his understanding of what, at least in 24 terms of the nexus as a general matter, would agree. 25 But I think in terms of his approach we would</p> <p style="text-align: right;">254</p>	<p>1 which to operate. And I think that we both agree 2 that there -- there needs to be a connection between 3 the claimed inventions or the claims of the patent 4 that are at issue -- or that should be at issue and 5 the success, if any, of a particular product. 6 Q. Do you recognize that the law says that 7 nexus can be established simply by showing that the 8 product, in this case Secret Fit Belly, embodies the 9 claims of the invention? 10 MR. LECHLEITER: Objection. Form. 11 A. I -- I don't know that that's what the 12 law says. And I would say that, if from an economic 13 perspective and understanding what features are 14 embodied by the claims, I'm not sure that that would 15 be an appropriate way to assess commercial success 16 of claims of a particular patent. 17 Q. Why not? 18 A. Because you -- you have claims that 19 cover certain features. And you want to 20 understand whether those features are driving value 21 of a -- of a product. I think you're looking at it 22 from more of a general perspective that, if you make 23 one assumption or assessment that something is 24 covered, that automatically that means that there's 25 a nexus. And I don't understand it or know that to</p> <p style="text-align: right;">256</p>

1 be the case. But again, I'm not an attorney either,
 2 and I'm not here to make legal opinions. I will say
 3 economically speaking, if you want to understand
 4 what's driving the value of a product, there are
 5 certain elements that you can assess and analyze to
 6 see if they are or they aren't.
 7 Q. What if the claim -- I mean, the claim
 8 to which you're referring, a garment, right --
 9 they're not -- a garment -- the Secret Fit Belly
 10 product is a garment, right?
 11 A. Yes.
 12 Q. Okay. So, the garment claim is not a
 13 component of a garment, right?
 14 MR. LECHLEITER: Objection. Form.
 15 Q. (BY MR. POLLACK) Garment is a garment.
 16 It's not a component of a garment.
 17 MR. LECHLEITER: Objection. Form.
 18 A. Again I -- whether from a legal
 19 perspective that's true or not, I can't say as I sit
 20 here.
 21 Q. Okay. That's not something that you've
 22 discussed before?
 23 A. I think, you may be delving into legal
 24 areas. And I'm not here to provide legal opinions.
 25 Q. Okay. And looking at Paragraph 31 of

1 Mr. Green's report. Is there any disagreement
 2 there?
 3 A. Well, I would agree that the numbers
 4 he's identified from the information he was
 5 provided, the [redacted] and a [redacted] and the averages in
 6 the gross margin, I don't believe I came up to any
 7 different result. But I would disagree that -- with
 8 the sentence that says "the commercial success of
 9 the product is shown by the revenues and profits
 10 generator."
 11 Q. Mr. Green went into some Destination
 12 Maternity stores to see how the product was
 13 marketed. Did you go into any Destination Maternity
 14 stores to see how the product was marketed?
 15 A. I didn't go into any Destination
 16 Maternity stores if that's your question.
 17 Q. Why not?
 18 A. I didn't feel it was necessary for the
 19 purpose of my analysis.
 20 Q. And why didn't you feel it was
 21 necessary?
 22 A. Well, I was again responding to
 23 Mr. Green's failure -- well, first of all,
 24 responding to his failure to address certain issues.
 25 He never disclosed in his report any visits to a

1 Destination Maternity store nor what -- what he
 2 necessarily did and associated with that. And
 3 again, I think that my opinions in response to what
 4 he's done are adequately supported.
 5 Q. But you did see though that in his
 6 deposition that he did that. And after that did you
 7 think, maybe I should go into a Destination
 8 Maternity store to see if he was right?
 9 A. No.
 10 Q. Okay. He talks about it in Paragraph
 11 32. It's right here in paragraph 32.
 12 A. Well, I guess I would disagree because
 13 he hasn't been provided with all of the sales data
 14 from the outset of when these products were
 15 introduced. So, I don't know that he can conclude
 16 that they, in fact, had been increasing since their
 17 introduction.
 18 Q. What, why do you say that that's in the
 19 beginning --
 20 A. Well, I believe that he only provided --
 21 was provided with sales for the third and fourth
 22 quarter of 2008. And it's my understanding I
 23 believe that these products were launched prior to
 24 point in time.
 25 Q. Do you have some reason to believe there

1 were significant sales before third quarter of 2008?
 2 A. Well, you're asking -- your question is
 3 whether I agree or disagree with his sentence that
 4 says that they've been increasing since their
 5 introduction. I don't think he can conclude that
 6 either or hasn't provided evidence or information
 7 that supports that contention. I don't know. I
 8 haven't been provided with information.
 9 Q. So you think it's possible from 2008 the
 10 sales were even higher than it's shown there?
 11 A. Again, I would -- could only come to a
 12 conclusion based on the information that's provided.
 13 And at this point it hasn't provided, nor have I
 14 seen any indication as to what the level of sales
 15 was at that point in time.
 16 Q. If you just -- to Paragraph 38. Here,
 17 at Paragraph 38, Mr. Green is comparing how Secret
 18 Fit Belly sales trends and non-Secret Fit,
 19 non-patented trends have increased and decreased
 20 over time. So review that -- reading that
 21 paragraph, he's not saying that there was a
 22 significant increase in sales?
 23 MR. LECHLEITER: Objection. Form.
 24 A. He's -- he just is merely saying that
 25 there is a trend of sales going -- of one product

1 going one way in sales, and one product going the
2 other way without additional context or information.
3 Q. And even when he says that that clearly
4 evidences commercial success?
5 A. Well --
6 Q. You can't make the inference that he is
7 referring to a significant increase with sales?
8 A. Well, due to the fact that I disagree
9 with his simplistic analysis as being in support of
10 a commercial success, I guess, I would -- wouldn't
11 say that that supports what you're contending or
12 trying to infer from this disclosure.
13 Q. Yeah. I'm just asking though do you
14 think he is asserting the view that there was a
15 significant increase in sales, and that's why he
16 thinks there's a commercial success?
17 MR. LECHLEITER: Objection. Form.
18 A. I can only read what he puts in his
19 declaration. And I don't see him saying that in his
20 declaration.
21 Q. Okay. So, I mean, earlier we were
22 looking at Mrs. -- Ms. Piccone's deposition and you
23 were making all kinds of inferences from things that
24 were written there. And now, when you are reading
25 Mr. Green's report you're having trouble making

1 inferences. And I was wondering what the -- what
2 the disconnect was?
3 A. The disconnect relative to what.
4 Q. Well, why you were able to make
5 inference from statements that aren't there in
6 Ms. Piccone's report -- in Ms. Piccone's deposition.
7 But when I showed you Mr. Green's declaration you're
8 unable to make inferences?
9 A. Well, I guess, I would take issue with
10 your characterization of my testimony. And I would
11 also take issue with the fact that I understand
12 Mr. Green is required to disclose his opinions and
13 the basis for his opinions. And is held to a
14 standard in that regard. And he's failed to do
15 that. And he's failed to disclose that in his
16 declaration. And you're asking me questions, and --
17 about what you -- what I think he meant to say or is
18 saying. And I don't see that in his analysis. But
19 I would candidly take issue with your
20 characterization of my testimony and my analysis.
21 MR. POLLACK: I think I have no further
22 questions.
23 MR. LECHLEITER: I just have short, few
24 redirect questions.
25 BY MR. LECHLEITER:

1 Q. Mr. Thomas, would you look, please, at
2 Paragraph 43 of your declaration. I believe that's
3 Page 34, 35. You see the first bullet-pointed
4 statement in Paragraph 43 on Page 34?
5 A. Yes.
6 Q. So, earlier you provided testimony on
7 the, I believe, the second quote in that bullet
8 point that is -- do you see it there at the bottom
9 of the tail end of the bullet point there?
10 A. Yes.
11 Q. And is that -- did you cite Footnote 111
12 for that quote?
13 A. I did.
14 Q. And in Footnote 111 you cited
15 Exhibit 10-93, Pages 140 and 141; is that correct?
16 A. That's correct.
17 Q. And I believe earlier you testified that
18 that quote does not appear on Pages 140 to 141; is
19 that correct?
20 A. That's correct.
21 Q. Does that quote, in fact, appear in
22 Ms. Piccone's deposition transcript?
23 A. Yes --
24 MR. POLLACK: Objection. Leading.
25 You can answer.

1 MR. LECHLEITER: Okay. Fine.
2 A. Yes, on Page 159 of her deposition as I
3 testified to earlier.
4 Q. And what lines on Page 159?
5 A. Line 6 through 9.
6 Q. And is -- in light of that, is -- is --
7 is this an error, citation error?
8 A. Yes. I should have cited Page 159.
9 Q. And just in general, where you've cited
10 in footnotes multiple reference, do all of those
11 reference, for instance, in the case of a quote, do
12 all those references contain a quote that you've
13 cited?
14 A. No.
15 Q. And when you've cited multiple with
16 reference, why have you done that?
17 A. I'm looking at information that I
18 reviewed in the records that would tend to support
19 the bullet point commentary that I've provided here.
20 Q. A minute ago, Mr. Pollack asked you
21 about inferences you were able to make from
22 statements in Ms. Piccone's depo. Do you recall
23 that testimony?
24 A. Yes.
25 Q. And so, if you would look at bullet

1 point -- second bullet point in Paragraph 43, which
 2 spans from Page 34 to 35?
 3 A. Okay.
 4 Q. You have a couple citations there at the
 5 end of that paragraph. What are those?
 6 A. I think you -- are you -- at the end of
 7 the bullet point, are you talking about citations
 8 112 and 113?
 9 Q. Yes.
 10 A. Yes.
 11 Q. And earlier I believe Mr. Pollack asked
 12 you to look at Page 309 of Ms. Piccone's deposition
 13 transcript.
 14 A. Okay.
 15 Q. And I believe you testified that those
 16 statements -- or statements similar to those in that
 17 second bullet point do not appear on Page 305; is
 18 that correct?
 19 A. Page 309.
 20 Q. Excuse me, 309?
 21 A. I believe those specific words don't
 22 appear on Page 309.
 23 Q. And why would you have cited Page 309
 24 there?
 25 A. Because I think that tends to -- to

1 support at least the commentary within that bullet
 2 point.
 3 Q. Did you also cite another page there?
 4 A. Yeah, Page 320.
 5 Q. Would you look at Page 320 of
 6 Ms. Piccone's deposition, which is Exhibit 6 for the
 7 record.
 8 A. Okay.
 9 Q. And on Page 320 are there statements
 10 that support the statements you've made in the
 11 second bullet point there in Paragraph 43?
 12 A. There's a statement on Page 320, as I
 13 look at this, that -- Lines 8 through 12, that talks
 14 about future marketing and our intention of continue
 15 to maximize the success of the Secret Fit Belly --
 16 Secret Fit Belly and the pants. So, that is
 17 consistent with some of the language that I've used
 18 in the second bullet point, in Paragraph 43.
 19 Q. Are there any other statements on
 20 Page 320 that would support that second bullet
 21 point?
 22 MR. POLLACK: Objection. Leading.
 23 A. Lines 23 through 25, it talks about the
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 Q. And so, what we see in the second bullet
 3 point in Paragraph 43, is that a paraphrasing of
 4 that testimony?
 5 A. Yes.
 6 Q. And did you draw an inference to make
 7 that paraphrase?
 8 A. I don't know that I drew an inference.
 9 I just reviewed certainly the testimony, and that
 10 testimony I think it is consistent with what I've
 11 reflected in the bullet point that I've identified.
 12 MR. LECHLEITER: No further questions
 13 pending recess.
 14 BY MR. POLLACK:
 15 Q. Turn to Ms. Piccone's deposition,
 16 Page 159?
 17 A. Okay.
 18 Q. From Lines 5 to 9. This is what you
 19 claim to be quoting in Paragraph 43 on Page 34?
 20 A. Lines 6 through 9 on Page 159.
 21 Q. Is that right?
 22 A. Yes.
 23 Q. Okay. But in fact, it doesn't say what
 24 you wrote here on Page 34, you changed a quote. She
 25 wrote, "I focused" -- in the past tense -- "close to

1 [REDACTED] percent of my efforts on the Secret Fit
 2 Belly because it was [REDACTED] percent of my pants." So
 3 she was talking about an event that occurred in the
 4 past. And you've changed that to "she focuses close
 5 to [REDACTED] of her efforts on the Secret
 6 Fit Belly because it is [REDACTED] percent of her pants."
 7 Am I correct?
 8 A. Well, you can see that I've identified
 9 where I've changed the tense in the quote that I've
 10 included in my report. And I -- I would also say
 11 that in the answer she's provided she's talking
 12 about in the present no longer carrying half
 13 bellies. So focus close to [REDACTED] of my
 14 efforts on Secret Fit Belly because it is [REDACTED] percent
 15 of my pants. So, I assumed from that that she's
 16 talking about it in the present tense.
 17 Q. But what's spoken here is in the past
 18 tense, correct?
 19 A. She uses the word "focused," but in
 20 taking in context with the other information that
 21 she's provided I think it's not unreasonable to
 22 assume that that's in the present.
 23 Q. Actually, in the first sentence, she's
 24 referring to the time she started at Destination
 25 Maternity, correct?

1 A. I'm sorry, which sentence?
 2 Q. Line 5, 159, Line 5?
 3 A. Okay.
 4 Q. Yes?
 5 A. Yes. Yes.
 6 Q. Okay. And also she's using a pronoun I.
 7 She's not referring to what Destination Maternity
 8 was doing. She's referring to her own work at the
 9 company, right?
 10 MR. LECHLEITER: Objection. Form.
 11 A. That appears to be the case, yes.
 12 Q. Yes. And she's just telling us what she
 13 was doing when she started at Destination Maternity,
 14 that [REDACTED] of her effort was focused on
 15 Secret Fit?
 16 A. I think that's what I've reflected in
 17 the bullet point in my report as well.
 18 Q. Okay. But she's not -- do you agree
 19 with me she's not testifying, and you haven't seen
 20 her testify, that Destination Maternity was focusing
 21 [REDACTED] percent of its effort on Secret Fit pants?
 22 A. I don't know that I've seen that in
 23 terms of Destination Maternity. She is the 30(b)(6)
 24 witness wanted to talk about the marketing of the
 25 products. But no, I didn't see any information that

1 Destination Maternity as a whole was focused a
 2 [REDACTED] on that.
 3 Q. Okay. It would be fair to say you can't
 4 draw a conclusion from one employee's work when she
 5 first started at the company to draw some kind of
 6 conclusion about what the company was doing?
 7 MR. LECHLEITER: Objection. Form.
 8 A. That -- that -- in terms of the overall
 9 company that perhaps would be the case. But again
 10 she is a witness that's been produced to talk about
 11 the marketing efforts. And I understand that she
 12 hasn't -- she is undergoing through those efforts on
 13 the part of the company.
 14 Q. Okay. But here she was asked about her
 15 own personal experience, correct?
 16 A. That appears to be the case.
 17 Q. She was answering in her own personal
 18 capacity?
 19 A. That appears to be the case, yes.
 20 Q. I told you that I was relying on my five
 21 sets.
 22 A. Okay.
 23 Q. We have gone too long. I'm -- I'm
 24 letting you out.
 25 A. All right, thank you I appreciate that.

1 MR. POLLACK: No further questions.
 2 MR. THOMAS: All right. Thank you.
 3 MR. POLLACK: All right. Who wants to
 4 go?
 5 BY MR. LECHLEITER:
 6 Q. Mr. Thomas, I think just to make sure
 7 your testimony is clear on this. You testified a
 8 minute ago that Ms. Piccone -- your understanding is
 9 Ms. Piccone was testifying on behalf of the company
 10 on certain marketing topics?
 11 A. That's my understanding that she was
 12 produced -- produced as a witness in that regard.
 13 Q. And I think earlier you testified, you
 14 mentioned the term 30(b)(6); is that right?
 15 A. Yes.
 16 Q. Do you have an understanding of 30(b)(6)
 17 witness is?
 18 A. I understand that that witness is
 19 providing testimony on behalf of the company.
 20 Q. And this testimony from Ms. Piccone was
 21 in the course of her 30(b)(6) deposition for DMC?
 22 A. That's my understanding.
 23 MR. LECHLEITER: No further questions.
 24 BY MR. POLLACK:
 25 Q. I'm going to ask you one question in

1 response to that. Sorry. Turn to Page 8 of her
 2 deposition. Just want to make sure you saw this.
 3 If you could look at Lines 5 through 10?
 4 A. Okay.
 5 Q. Do you see that she says she is also
 6 testifying in your individual capacity?
 7 A. Well, she's here to testify on behalf of
 8 Destination Maternity, yes. And also in her
 9 individual capacity. Correct. Yes.
 10 Q. Yes. Okay. And so, what she's asked a
 11 question and answers with the word "I," she's
 12 answering in her individual capacity?
 13 A. Perhaps. But she certainly is providing
 14 testimony on behalf of Destination Maternity as part
 15 -- as being a 30(b)(6) witness as well.
 16 Q. Right. But she's also providing
 17 testimony in her individual capacity, correct?
 18 A. That's my understanding, at least based
 19 on her testimony.
 20 MR. POLLACK: All right. No further
 21 questions.
 22 BY MR. LECHLEITER:
 23 Q. Mr. Thomas, going back to Page 159 of
 24 Ms. Piccone's deposition transcript?
 25 A. Okay.

1 Q. It's talking about the same little
 2 snippet that we've been talking about. Do you see
 3 where she says because it is [REDACTED] percent of my pants?
 4 A. Yes.
 5 Q. Do you understand that Ms. Piccone is
 6 personally selling these pants, the Secret Fit Belly
 7 pants in question here?
 8 A. No.
 9 Q. And who was selling those pants?
 10 A. Destination Maternity.
 11 Q. Okay.
 12 MR. LECHLEITER: No further
 13 questions.
 14
 15 * * *
 16 (Witness excused.)
 17 * * *
 18 (The deposition concluded at 4:54 p.m.)
 19
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1 ERRATA SHEET
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1 DECLARATION UNDER PENALTY OF PERJURY
 2
 3 I, Vincent A. Thomas, do hereby certify under penalty of
 4 perjury that I have read the foregoing transcript of my
 5 deposition taken on Friday, August 22, 2014; that I have
 6 made such corrections as appear noted herein; that my
 7 testimony as contained herein, as corrected, is true and
 8 correct.
 9
 10
 11 DATED this _____ day of _____, 2014,
 12 at _____, California.
 13
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 17 _____
 18 Vincent A. Thomas
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 21
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 25

1 UNITED STATES PATENT AND TRADEMARK OFFICE
 2 BEFORE THE PATENT TRIAL AND APPEAL BOARD
 3 Case No. IPR2013-00530
 4 (U.S. Patent No. RE43,563)
 5
 6 I, ALISHA McRAE, a Notary Public within and for
 7 the State at Large, do hereby certify that the
 8 foregoing deposition was taken before me at the time
 9 and place and for the purpose in the caption stated;
 10 that the witness was first duly sworn to tell the
 11 truth, the whole truth and nothing but the truth;
 12 that the deposition was reduced to electronic
 13 shorthand and recording by me in the presence of the
 14 witness; that the foregoing is a full, true and
 15 correct transcript of my electronic notes and
 16 recording; that there was no request that the
 17 witness read and signed this deposition; that the
 18 appearances were as stated in the caption
 19 WITNESS MY SIGNATURE, this 28th day of August,
 20 2014.
 21 My commission expires August 18, 2021.
 22
 23 /s/Alisha McRae _____
 24 ALISHA McRAE
 25 State of Indiana
 Court Reporter
 Notary Public, State at Large

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