

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

TARGET CORPORATION,

Petitioner

v.

DESTINATION MATERNITY CORPORATION,

Patent Owner

Case IPR2013-00530, Patent RE43,563 E

Case IPR2013-00531, Patent RE43,563 E

Case IPR2013-00532, Patent RE43,531 E

Case IPR2013-00533, Patent RE43,531 E

DECLARATION OF

VINCENT A. THOMAS, CPA, CVA, CFF, ABV

REGARDING COMMERCIAL SUCCESS

Submitted July 25, 2014

CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER

Target Corporation Exhibit 111C

TABLE OF CONTENTS

I. EXPERIENCE AND CREDENTIALS	1
II. SCOPE OF ASSIGNMENT.....	2
III. INFORMATION RELIED UPON.....	5
IV. SUMMARY OF OPINIONS	5
V. BACKGROUND	7
A. The '531 And '563 Patents	7
B. DMC and Secret Fit Belly Bottoms.....	11
C. Legal Framework	14
VI. MR. GREEN FAILS TO ASSESS THE COMMERCIAL SUCCESS OF THE CLAIMS SUBJECT TO OBVIOUSNESS	16
VII. ANALYSIS OF MR. GREEN'S OPINIONS REGARDING COMMERCIAL SUCCESS	20
A. Overview	20
B. Mr. Green's Basis For Commercial Success Opinion is Deficient	22
C. Factors Unrelated to Asserted Claims of the Patents-In-Suit	28

I. EXPERIENCE AND CREDENTIALS

1. I am a Senior Managing Director in the Forensic & Litigation Consulting ("FLC") practice of FTI Consulting, Inc. ("FTI"), a multidisciplinary international financial advisory and consulting firm. I am a member of the FLC National Leadership Team, serve as market and administrative leader for the Chicago and Indianapolis offices and also co-lead FTI's National Intellectual Property Practice. Before joining FTI, I was a partner with the international professional services firm, KPMG, LLP.

2. I have significant experience assisting companies and clients with complex accounting, corporate finance and litigation issues. I focus on the preparation of sophisticated economic analyses and the assessment of damages in various types of commercial disputes; and over the course of my career, I have analyzed economic and financial issues in more than one hundred commercial disputes, many of which involved patent, copyright, trade secret, and trademark infringement. Many of those assignments have also involved complex studies of damages and sophisticated valuation analysis in matters involving various biotechnology and pharmaceutical products, and drug technologies.

3. In addition to preparing damages studies in commercial litigation, I also have significant experience in corporate, financial, and accounting management positions, including Analyst and Director as well as Chief Financial Officer for a high-tech company, where I was responsible for managing its intellectual property portfolio. In that capacity, as well as during my consulting

U. S. Patent and Trademark Office, Before the Patent Trial and Appeal Board
Target Corporation v. Destination Maternity Corporation
Cases IPR2013-00530, -00531, -00532, -00533

career, I have been involved in license negotiations, performing royalty analysis, valuing intellectual property and reviewing and analyzing license agreements.

4. I graduated *cum laude* from DePauw University with a Bachelor of Arts degree in Economics and subsequently received a Masters of Business Administration degree from Indiana University. I am a Certified Public Accountant, Certified Valuation Analyst, and am Certified in Financial Forensics and Accredited in Business Valuation. I am also a member of the American Institute of Certified Public Accountants and National Association of Certified Valuation Analysts. **Exhibit 1111** contains a summary of my education, experiences, prior testimony, and publications/seminars that I have authored.

II. SCOPE OF ASSIGNMENT

5. Target Corporation ("Target" or "Petitioner") filed four petitions for *inter partes* review ("IPR") of various claims of U.S. Patent RE43,531 E ("531 patent"), titled "Belly Covering Garment," and U.S. Patent RE43,563 E ("563 patent"), also titled "Belly Covering Garment."^{1,2} The patents-in-suit are owned by Destination Maternity Corporation ("DMC") and relate to bottoms that are

¹ Jointly referred to as "patents-in-suit".

² Exhibit 1027 (Institution Decision IPR2013-00530), Exhibit 1029 (Institution Decision IPR2013-00531), Exhibit 1031 (Institution Decision IPR2013-00532), Exhibit 1033 (Institution Decision IPR2013-00533).

U. S. Patent and Trademark Office, Before the Patent Trial and Appeal Board
Target Corporation v. Destination Maternity Corporation
Cases IPR2013-00530, -00531, -00532, -00533

worn during different stages of pregnancy, different stages of post-partum body changes, and different stages of torso weight gains and losses. Generally, I understand the bottoms are trousers or skirts with an attached belly panel. DMC sells bottoms under its trademark “Secret-Fit Belly” that DMC represents are covered by the patents-in-suit.

6. On February 14, 2014 and February 19, 2014, the Patent Trial and Appeal Board (“PTAB”) issued decisions related to the ‘563 patent³ and ‘531 patent,⁴ respectively. I understand that the PTAB Institution Decisions related to the ‘563 patent found that there is a reasonable likelihood that the Petitioner would prevail in showing anticipation of claims 1-3, 6-8, 10, 11, 16, and 20,⁵ and that claims 3, 4, and 12-14 will likely be shown to be obvious.⁶ I understand that

³ Exhibit 1027 (Institution Decision IPR2013-00530); Exhibit 1029 (Institution Decision IPR2013-00531).

⁴ Exhibit 1031 (Institution Decision IPR2013-00532), Exhibit 1033 (Institution Decision IPR2013-00533).

⁵ Exhibit 1027 (Institution Decision IPR2013-00530), p. 22; Exhibit 1029 (Institution Decision IPR2013-00531), p. 29.

⁶ Exhibit 1027 (Institution Decision IPR2013-00530), p. 22; Exhibit 1029 (Institution Decision IPR2013-00531), p. 29.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.