

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TARGET CORPORATION
Petitioner

v.

DESTINATION MATERNITY CORPORATION
Patent Owner

Case No. IPR2013-00532
(U.S. Patent No. RE43,531)

Dated: September 16, 2014

Before JENNIFER S. BISK, MICHAEL J. FITZPATRICK, and
MITCHELL G. WEATHERLY *Administrative Patent Judges*.

**JOINT MOTION FOR ENTRY TO SEAL
UNDER 37 C.F.R. §42.54**

Pursuant to 37 C.F.R. § 42.14, Patent Owner Destination Maternity Corporation ("Patent Owner") and Petitioner Target Corporation ("Petitioner") jointly move to seal (1) Patent Owner's Opposition to Petitioner's Motion to Exclude Evidence Pursuant to 37 C.F.R. § 42.64(c) ("Patent Owner's Exclusion Opposition"); (2) Petitioner's Opposition to Patent Owner's Motion for Observation Regarding Cross-Examination of Reply Witness ("Petitioner's Observation Opposition"); (3) the deposition transcript of Lisa Hendrickson, Ex. 1119 ("Hendrickson Transcript")¹; and (4) Petitioner's Opposition to Patent Owner's Motion to Exclude Evidence ("Petitioner's Exclusion Opposition") (collectively, the "Proposed Sealed Documents"). The Proposed Sealed Documents were filed contemporaneously with this Motion.

Pursuant to the Protective Order entered in this *Inter Partes* Review, the parties are also filing partially redacted public versions of the Proposed Sealed Documents. See Protective Order, ¶ 4 (Paper No. 24). Because the Proposed Sealed Documents contain nonpublic technical, financial, and other commercially sensitive information, the Parties jointly move to seal them for good cause explained in more detail below.

I. Good Cause Exists for Sealing Confidential Information

¹ Patent Owner does not agree that Petitioner's filing of the Hendrickson Transcript is proper.

The *Office Patent Trial Practice Guide* provides that "[t]he rules aim to strike a balance between the public's interest in maintaining a complete and understandable file history and the parties' interest in protecting truly sensitive information." 77 Fed. Reg. 48756, 48760 (Aug. 14, 2012). Further, those "rules identify confidential information in a manner consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information." *Id.* (citing 37 C.F.R. § 42.54); *see also Illumina v. Columbia University*, IPR2013-00011, Paper 66, Aug. 12, 2013 Dec. (granting a motion to seal "technical and business information" and "product development information").

There is good cause to seal the Proposed Sealed Documents because they contain nonpublic technical, financial, and other commercially sensitive information. First, Patent Owner's Exclusion Opposition contains nonpublic technical, financial, and other commercially sensitive information related to sales of Patent Owner's products. Patent Owner's Exclusion Opposition contains confidential information from the Declaration of Philip Green Regarding Commercial Success (Exs. 2022 and 2029), the Supplemental Declaration of Philip Green Regarding Commercial Success (Exs. 2054 and 2055), Exhibit 2056, Exhibit 2072 (collectively, the "Green Material"), and information in Vincent Thomas's Declaration and Vincent Thomas's exhibits that relied upon information

from the Green Material. The Green Material has been previously sealed in this proceeding and contains highly sensitive, confidential financial information related to Patent Owner's sales of products. The Green Material has been designated "Highly Confidential -- Attorneys' Eyes Only" by Patent Owner under the Protective Order entered in this *Inter Partes* Review. The Green Material also relies on documents produced in the underlying litigation that were designated "Confidential" and "Highly Confidential -- Attorneys' Eyes Only" by Patent Owner under the Protective Order entered by the U.S. District Court. Accordingly, good cause exists to seal Patent Owner's Exclusion Opposition.

Second, Petitioner's Observation Opposition contains nonpublic technical, financial, and other commercially sensitive information related to sales of Patent Owner's products as reported by Petitioner's financial expert, Vincent A. Thomas. Mr. Thomas's deposition and declaration relate to the Green Material and, ultimately, Patent Owner's highly confidential sales information for products and analysis related thereto. Mr. Thomas's deposition and declaration also rely on documents produced in the underlying litigation that were designated "Confidential" and "Highly Confidential -- Attorneys' Eyes Only" by Patent Owner under the Protective Order entered by the U.S. District Court. Patent Owner's Motion for Observation Regarding Cross-Examination of Reply Witness has been previously sealed in these proceedings, and Petitioner's Observation

Opposition should likewise be sealed. *See* Sept. 12, 2014 Order at 2. Accordingly, good cause exists to seal Petitioner's Observation Opposition.

Third, the Hendrickson Transcript contains nonpublic technical, financial, and other commercially sensitive information related to, *inter alia*, the development of Patent Owner's products by Lisa Hendrickson, an inventor. Petitioner cites the Hendrickson Transcript in Petitioner's Exclusion Opposition. The Hendrickson Transcript was generated in a related district court proceeding between the parties in the U.S. District Court for the Eastern District of Pennsylvania (CA. No. 2:12-cv05680 AB). The Hendrickson Transcript was marked "Highly Confidential -- Attorneys' Eyes Only" by Patent Owner under the Protective Order entered by the U.S. District Court. Accordingly, good cause exists to seal the Hendrickson Transcript.

Finally, Petitioner's Exclusion Opposition contains nonpublic technical, financial, and other commercially sensitive information related to sales and development of Patent Owner's products as reported by Messrs. Green and Thomas, and information from the Hendrickson Transcript. The confidentiality of the information related to the analyses of Messrs. Green and Thomas and the Hendrickson Transcript are indicated above. Accordingly, good cause exists to seal Petitioner's Exclusion Opposition.

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