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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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DESTINATION MATERNITY CORPORATION,

PLAINTIFF,

-against-

TARGET CORPORATION, CHEROKEE, INC. And
ELIZABETH LANGE, LLC,

DEFENDANTS.

Case No. 2-12-CV-05680-AB

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VIDEOTAPED DEPOSITION OF PHILIP GREEN
Philadelphia, Pennsylvania
Tuesday, July 8, 2014

Reported by:
Rebecca Schaumloffel, RPR, CLR
Job No: 81711

July 8, 2014
9:05 a.m.

Videotaped deposition of PHILIP GREEN, held at the offices of DLA PIPER, LLP, 1650 Market Street, Philadelphia, Pennsylvania, before Rebecca Schaumloffel, a Registered Professional Reporter, Certified Livenote Reporter and Notary Public of the State of New York and the State of New Jersey.

APPEARANCES:

DLA PIPER
Attorneys for the Plaintiff
1650 Market Street
Philadelphia, Pennsylvania 19103
BY: MICHAEL BURNS IV, ESQ.

FAEGRE BAKER DANIELS
Attorneys for the Defendant
300 North Meridian Street
Indianapolis, Indiana 46204
BY: DANIEL LECHLEITER, ESQ.
MATTHEW ENNIS, ESQ.

ALSO PRESENT:

Matthew Smith, videographer

* * *

P. GREEN
THE VIDEOGRAPHER: This begins tape label number 1 of the videotaped deposition of Philip Green in the matter of Target Corporation V Destination Maternity Corporation for the United States Patent and Trademark Office. This deposition is being held at 1650 Market Street, in Philadelphia, Pennsylvania, on July 8th, 2014, at approximately 9:05 a.m.

My name is Matthew Smith for TSG Reporting, Incorporated. I am the legal video specialist. The Court Reporter is Rebecca Schaumloffel in association with TSG Reporting.

Will counsel please introduce yourself for the record.

MR. LECHLEITER: Dan Lechleiter here on behalf of Petitioner, Target Corporation.

MR. ENNIS: Matthew Ennis here on behalf of Petitioner Target corporation.

P. GREEN
MR. BURNS: Michael Burns here on behalf of patent owner Destination Maternity Corporation.

THE VIDEOGRAPHER: Thank you. Will the Court Reporter please swear in the witness.

PHILIP GREEN, called as a witness, having been first duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY MR. LECHLEITER:

Q. Good morning, Mr. Green.

A. Good morning.

Q. Thank you for providing your deposition today. I am Dan Lechleiter. As you may have just heard me say, I represent Target Corporation. Do you understand that Target is the Petitioner in these proceedings before the Patent Office?

A. I do understand that, yes.

Q. Okay. I understand you have been deposited in prior cases, so I think you kind of know how depositions work, but I thought I

1 P. GREEN
 2 would go over some of the procedural aspects
 3 just to make sure we are both comfortable
 4 with how everything will work.

5 You understand you took an oath
 6 today, prior to beginning your testimony,
 7 that is the same as if you were to testify in
 8 court?

9 A. Yes, I do understand that.

10 Q. I am going to ask you a series of
 11 questions. You need to answer audibly so
 12 that we and the Court Reporter can hear you.

13 Do you understand that?

14 A. Yes.

15 Q. Do you understand that nods of
 16 the head and un-un and shakes and nods are
 17 inaudible responses, aren't going to work
 18 today during the deposition, we need all
 19 responses to be audible?

20 A. Yes, I understand.

21 Q. Okay. I think in the course of
 22 the deposition, there is a chance that we or
 23 your counsel and I may try to speak over each
 24 other. I think if we can all try to avoid
 25 that to aid the Court Reporter, that would be

1 P. GREEN
 2 the best way to proceed today.

3 So can we agree to try to avoid
 4 speaking over each other?

5 A. We can agree to try and do
 6 that, yes.

7 Q. Okay. And if at any time you
 8 don't understand my question, please let me
 9 know, I will repeat it or ask the Court
 10 Reporter to repeat it.

11 A. Okay.

12 Q. If you need a break at any time,
 13 just let me know. I would prefer that we not
 14 break during a pending question, and if you
 15 need lunch later today, I am sure we can
 16 accommodate that and we will need lunch as
 17 well. So just, you know, keep us apprised of
 18 your needs.

19 Is there any reason why you would
 20 be inhibited from providing full, truthful
 21 and accurate testimony today?

22 A. Not that I am aware of, no.

23 Q. You're not on any medications
 24 that would inhibit your testimony today?

25 A. Not that I am aware of, no.

1 P. GREEN
 2 Q. Any other reason that might
 3 inhibit your testimony today?

4 A. Not that I can think of, no.

5 Q. Okay. I want to talk just a
 6 little bit about your background, and I
 7 understand that you have been with your
 8 current employer since 1996?

9 A. That's correct. I am one of the
 10 founders of the firm.

11 Q. Can you talk me through your kind
 12 of undergraduate degree and progression
 13 forward in your career to your current
 14 career?

15 A. Sure. I received an -- my
 16 undergraduate degree from Rutgers College at
 17 Rutgers University in 1984. My degree was in
 18 history. Thereafter, I spent about a year
 19 and a half working for a law firm in
 20 Washington D.C. That firm was called
 21 Anderson Kill & Olick. After a couple of
 22 years with that firm, I decided to go and get
 23 an MBA, and I got that MBA at the Rutgers
 24 Graduate School of Management. And my MBA
 25 has a concentration in accounting and I

1 P. GREEN
 2 received a degree in 1987.

3 I then spent a couple of years
 4 working for an audit firm, which is called
 5 Ernst & Whinney, W-H-I-N-N-E-Y, which is now
 6 Ernst & Young. During that period of time, I
 7 was basically doing audits of big companies
 8 in New York City going from essentially tall
 9 building to tall building, had a variety of
 10 different audit clients. After a couple of
 11 years with Ernst & Whinney, I was fortunate
 12 enough to get a job working for a firm called
 13 Peterson Consulting. Peterson Consulting, at
 14 the time, was the largest independent
 15 litigation support firm in the country. It
 16 had 26 offices and maybe 5 or 600 employees
 17 at its biggest. At Peterson I did a variety
 18 of different things. Some investigations of
 19 failed banks and savings and loans. I did a
 20 number of patent infringement and other types
 21 of intellectual property infringement cases.
 22 I started doing valuation work at Peterson.
 23 I did a number of bankruptcies. I spent
 24 six years there and then wound up getting an
 25 opportunity to work at PriceWaterhouse, which

1 P. GREEN
 2 is now PricewaterhouseCoopers, one of the big
 3 accounting firms, working in their dispute
 4 analysis and corporate recovery services
 5 practice. And at Peter -- excuse me, at
 6 PriceWaterhouse, I pretty much did
 7 two things. I worked on intellectual
 8 property disputes, really of all sorts. And
 9 then I was also working on a big bankruptcy
 10 involving Maxwell Communications. We may all
 11 remember Robert Maxwell owned the New York
 12 Post, Macmillan Publishing and stuff. He
 13 sort of fell off his boat in the mid '90s.
 14 That whole business kind of got sold off
 15 ultimately thereafter, and I was part of the
 16 team that was investigating the intercompany
 17 issues, the accounting issues as well as
 18 managing the wind down of those businesses
 19 and their sale.
 20 In 1996, I was asked by one of
 21 the senior partners in PriceWaterhouse, in
 22 the dispute analysis practice, a man named
 23 Corky Hoffman, C-O-R-K-Y, H-O-F-F-M-A-N, to
 24 form the firm that is my current employer,
 25 and I have been at that firm ever since.

1 P. GREEN
 2 kind of thing.
 3 I also assist clients, various
 4 types of clients, with licensing issues, how
 5 to basically monetize their intellectual
 6 properties and convert their ideas into
 7 money, I guess is the best way of thinking
 8 about it.
 9 And then lastly, as a CPA, I do
 10 royalty audits, you know, people wind up
 11 saying I got this deal, I don't think I am
 12 getting paid what I think I should be paid or
 13 we are paying what we should be paying, what
 14 do we do. That kind of stuff.
 15 And the rest of it, the remaining
 16 20% of my practice revolves around things
 17 that accountants might think are fun or might
 18 be valuation related or transaction.
 19 Q. In your work at Hoffman, can you
 20 tell me how many times you have served as an
 21 expert witness in an intellectual property
 22 case?
 23 A. Over the course of the last
 24 18 years of the firm, I probably have
 25 testified approximately 100 times at a

1 P. GREEN
 2 Q. At Hoffman, can I call it
 3 Hoffman?
 4 A. Um-hum. Sure.
 5 Q. What has been the focus of your
 6 work at Hoffman?
 7 A. For the last 18 years at Hoffman
 8 Alvary and then the previous years from the
 9 time I was working at Peterson, about 80% of
 10 my practice at Hoffman Alvary has been
 11 related to -- things related to intellectual
 12 properties. And that kind of covers
 13 four different areas, if you will. One part
 14 of it is disputes where you wind up having
 15 infringements and measuring the damages from
 16 infringement.
 17 Another aspect of my work has
 18 been things that I will call valuation
 19 related things. So I'll value intellectual
 20 properties, but I have also been asked to do
 21 other kinds of analyses that relate to
 22 intellectual property. So I would consider
 23 analyzing commercial success, default into
 24 sort of like the category of, you know,
 25 somewhat valuation and somewhat litigation
 1 P. GREEN
 2 deposition or at a trial on something that's
 3 intellectual property related.
 4 Q. And of those cases, how many were
 5 patent cases?
 6 A. Not knowing completely off the
 7 top of my head, I bet about 80% of those had
 8 something to do with a patent one way or
 9 another.
 10 Q. So roughly 80 cases within
 11 those 100?
 12 A. Would make sense, yeah.
 13 Q. Okay. In the course of your
 14 testimony in intellectual property cases,
 15 have you ever been disqualified as an expert?
 16 A. I have never been disqualified as
 17 an expert on a Daubert challenge. I have, to
 18 my knowledge, on three occasions had my
 19 testimony limited in District Court cases,
 20 primarily because the judge determined that
 21 some of the evidence that I was relying on
 22 wasn't going to be part of the evidence that
 23 we presented at trial, so the opinions that I
 24 was able to give would therefore no longer be
 25 available to present to a jury or a finder of

P. GREEN

fact.

Q. Of those three cases, were any of them patent cases?

A. One was a patent case. One was a commercial dispute and the other was a false advertising claim.

Q. Does the patent case, does that appear on your list of testimony provided with your expert report?

A. The patent case that I am thinking about is -- the answer is yes, and it is ePlus versus Lawson.

Q. ePlus versus Lawson?

A. Correct.

Q. What district was that in?

A. It would have been in Eastern District of Virginia.

Q. Have you ever been subject to any other form of disqualification, motion, other than a Daubert challenge?

A. In the world of patent cases and intellectual property infringement, I think that for the most part it is practically malpractice for you guys to not actually file

P. GREEN

these motions. So there will be motions in limine, there will be Daubert motions. Those are the two that I'm most commonly familiar with. Probably happens in about half of the cases that I do regardless of the merits of the motions one way or another.

Q. Thinking about the 80% of your cases that have been patent cases, do you know in roughly what percentage of those cases the side for which you provided testimony was victorious in the case?

A. In other words, did they actually go all the way to jury or to a verdict?

Q. Did they prevail on the issue for which you provided testimony?

A. A good number of the patent cases that I have been in have settled, but in general, the intellectual property cases that I have worked on, either a plaintiff or a defendant, have resulted in the jury sort of uniquely siding with what I was saying. In other words, I can walk you through the list of cases that was attached to my report and I could show you in the trial testimonies how

P. GREEN

they all worked how, if that would be helpful, but for the most part, the juries have adopted what I have said.

Q. In terms of --

A. To the extent there is liability found or not liability found. I can't control the liability decisions.

Q. So you've never opined on liability one way or the other?

A. Not in a patent infringement case, no.

Q. So the testimony you are referring to I am understanding to mean related to damages or lack thereof in a patent case?

A. Correct.

Q. Okay. Before you mentioned that you had provided testimony in either a trial or deposition in around 100 intellectual property cases. Of those instances in which you provided testimony, how many were in a deposition setting?

A. I don't know exactly off the top of my head. I have probably done around

P. GREEN

40 trials throughout my career. A little more than 40 trials throughout my career. And I would be willing to bet that of the 100 so or depositions on intellectual property cases, there's probably been between 10 and 20 trials that are intellectual property cases. So about half of my trial work.

Q. And so you would have testified in each of those trials; is that right?

A. Yes.

Q. Okay. So if it was 10 to 20, I just want to make sure the record is clear, if it was 10 to 20 trials, intellectual property cases, that would have meant that you have testified in somewhere between 80 and 90 depositions based on the 100 number we were using earlier?

A. Usually there is a deposition before a trial, so probably there is a bit of overlap. In other words, it is probably, of the 100 depositions, there is probably 20 -- no more than 20 trials. Rarely do you have a situation where you don't give a deposition before a trial. I can think of one instance

1 P. GREEN
 2 off the top of my head but that's about it.
 3 Q. Got it. Have you testified in
 4 any prior cases involving soft goods?
 5 A. Soft goods? In other words,
 6 things like clothing and that kind of stuff?
 7 Q. Yes.
 8 A. Yes.
 9 Q. And are those cases listed on
 10 your list of cases with your expert report?
 11 A. To the extent they have occurred
 12 since 2010, yes.
 13 Q. If they haven't occurred since
 14 2010, do you recall what the cases were
 15 called?
 16 A. I could take a stab at it, yeah.
 17 Q. What were they?
 18 A. The ones that come to mind are a
 19 case involving True Religion, the jeans
 20 manufacturer. Another one involving Forever
 21 21. I have done some work on behalf of an
 22 entity called 24/7, which places cutters and
 23 designers in the garment industry on a
 24 temporary basis down in their offices are
 25 based in Soho, in New York. I have done

1 P. GREEN
 2 cases involving copyrighted fabric patterns.
 3 Those are the ones that come to mind.
 4 Q. Were any of those patent cases?
 5 A. I've been trying to think about
 6 whether or not they were patent cases. To
 7 date, most of the things that I have done
 8 that involve clothing, I think are pretty
 9 much copyrights or trademarks. I mean,
 10 that's typically the intellectual property
 11 that winds up being applied to these things.
 12 At least in my -- in the cases I have done
 13 so far.
 14 Q. So just talking through those, in
 15 the Forever 21 case, who was your client in
 16 that case?
 17 A. Forever 21.
 18 Q. And what type of opinion were you
 19 asked to provide?
 20 A. It was either -- I think it was a
 21 trademark infringement. Somebody using
 22 something that was -- wait, Forever 21, that
 23 would have been, yeah, copyright, excuse me,
 24 that there would have been a patent in that.
 25 I'm sorry.

1 P. GREEN
 2 Q. Okay. And what opinion were you
 3 asked to provide in that case?
 4 A. I was asked to evaluate the
 5 damages suffered by the copyright holder, who
 6 I think was Anthropology in that case, and so
 7 it was an analysis of lost profits and in the
 8 alternative, unjust enrichment.
 9 Q. And you said you represented or
 10 you worked with Forever 21 in that case?
 11 A. No, I worked, I think, on behalf
 12 of Anthropology.
 13 Q. Forever 21 was the defendant?
 14 A. Correct.
 15 Q. Okay. You mentioned you worked
 16 for, you did work on a case involving True
 17 Religion?
 18 A. Correct.
 19 Q. Who was your client in that case?
 20 A. True Religion was the ultimate
 21 client.
 22 Q. Okay. And what was the nature of
 23 the case?
 24 A. It was a trademark case.
 25 Q. And what opinion were you asked

1 P. GREEN
 2 to provide in that case?
 3 A. It was a case involving
 4 essentially lost profits or lost royalties
 5 for the alternative and analysis of unjust
 6 enrichment by the infringer.
 7 Q. And then in the 24/7 case you
 8 mentioned, who did you work with there, who
 9 was your client?
 10 A. My client in that case was 24/7.
 11 Q. And what was the nature of that
 12 case?
 13 A. That case was a trade secret
 14 theft case involving essentially some people
 15 who left 24/7 to start their own competing
 16 operation, and they took essentially all the
 17 client list, both of customers that were
 18 being served by 24/7, so 24/7 was serving,
 19 you know, Ralph Lauren and all the major
 20 clothing designers in New York, essentially
 21 by providing them with temporary help, to
 22 do -- in the important seasons in the fashion
 23 business, and the defendants took off with
 24 the names of those clients and those related
 25 contacts as well as the people that they

1 P. GREEN
2 could place in the temporary business. So it
3 started competing right away.

4 Q. What was the nature of the
5 opinion you were asked to provide?

6 A. Again, lost profits and as
7 measured by actually, 24/7's lost profits and
8 the unjust enrichment that was earned by the
9 trade secret theft. The people that stole
10 the trade secrets. I will get that out.

11 Q. So in each of those three cases,
12 correct me if I am misstating this, you were
13 asked to provide analysis of A, lost profits
14 and B, unjust enrichment?

15 A. So in the True Religion case, the
16 correct measure of lost profits or lots
17 royalties that they would be related to the
18 use of a trademark. And in the other two, it
19 was essentially the profits that would have
20 been earned from actually physically making
21 the sales that were made by the defendant.

22 Q. And what quantitative factors did
23 you consider in those analyses?

24 A. Well, typically, although it is
25 not the case law, and a trademark or a

1 P. GREEN
2 copyright infringement case or even a trade
3 secret case, what you want do is sort of
4 follow the factors that come up in panduit,
5 P-A-N-D-U-I-T, which is, you know, relates to
6 patent infringement damages. It's kind of
7 common sense and what you're trying do is
8 figure out whether or not the plaintiff could
9 have made the infringer sales. Whether you
10 can measure them. You know, whether or not
11 there were alternatives that you needed to
12 consider. That kind of stuff. So pretty
13 straightforward.

14 Q. In those analyses, do you
15 consider any qualitative factors?

16 A. I think that invariably you have
17 you to consider qualitative factors. In all
18 of these kinds of case.

19 Q. So in a lost profits situation,
20 what kinds of qualitative factors would you
21 consider?

22 A. Well, some qualitative factors
23 would wind up being things like the way that
24 the market is divided, so whether or not, you
25 know, one company only serves people that

1 P. GREEN
2 are, you know, buying very high end goods
3 versus whether or not the infringer stuff
4 only goes to, you know, a lower end of the
5 market. That's a qualitative analysis.
6 Qualitatively we're trying to evaluate
7 whether or not -- evaluate the nature of the
8 competition. So you would try and see well,
9 are there ten people competing or 20 people
10 competing for the same sale and why is that.
11 You try and evaluate seasonality, for
12 example, that's a qualitative thing at times.
13 Discount is a qualitative thing.

14 I mean, you can evaluate whether
15 or not the product is exactly the same in the
16 sense of, you know, is one blouse the same as
17 the next blouse. But I can only do that at a
18 certain level that I think comes down to an
19 infringement question or, you know, something
20 that is sort of not in my area of expertise.

21 Q. So -- but to look at -- let's go
22 back to the quantitative factors, let's look
23 at quantitative factors in those types of
24 cases. What types of information do you
25 examine or consider in arriving at your

1 P. GREEN
2 opinion?
3 A. Varies from case to case. Market
4 to market. What the things might be. I
5 mean, I think the qualitative things are just
6 understanding what the product is and the
7 market is for it. You can quantitatively
8 figure out, you know, the dollar values, but
9 you may need to understand what it is that's
10 motivating people to buy a particular
11 product. That's a soft question. That's a
12 qualitative question.

13 Q. In those cases, how do you gain
14 that understanding, through what means?

15 A. It depends on the case. In
16 certain instances when you are doing lost
17 profits, you know, the mirror of the -- the
18 evidence of sales or the actual sales is
19 evidence of demand and you don't really have
20 to do that much more.

21 In other cases, you know, the
22 average patent infringement case, lately
23 there's been a whole sequence of need for
24 surveys in copyright and trademark,
25 particularly in trademark you have this whole

1 P. GREEN
 2 issue of confusion. That's typically a
 3 survey based question. You know, it really
 4 kind of varies from case to case and
 5 circumstance to circumstance.

6 Q. How do you decide what
 7 information you would like to see in a lost
 8 profits situation?

9 MR. BURNS: Objection to form.
 10 I know you are going through the
 11 background, but a lot of this stuff is
 12 outside the scope of his Declaration.
 13 I just want to put that on the record.

14 A. Again, it really does vary case
 15 to case and circumstance to circumstance.
 16 Again, some things are really brutally
 17 obvious why it is selling. You know, it is
 18 the only drug that cures a particular form of
 19 cancer. You don't really have to think about
 20 it that hard.

21 Other things, you know, whether
 22 or not the calendar feature in your phone is
 23 driving the decision for you to buy that
 24 phone and you'll wind up having to figure out
 25 essentially why that feature was put in there

1 P. GREEN
 2 and whether or not anybody cares or not.
 3 Q. So in that case you'd have to
 4 drill down to the factors surrounding that
 5 particular feature?

6 A. You can at times. Sometimes --
 7 in thinking about your phone, typically,
 8 that's part of the challenge of the analyses
 9 is to figure out the connection between the
 10 sale of the end product and the particular
 11 feature.

12 Q. So besides the Forever 21, True
 13 Religion and 24/7 cases, were you involved in
 14 any other cases involving soft goods or
 15 clothing?

16 A. Well, soft goods, you know, I
 17 think of fabric. I have done a bunch of
 18 fabric copyright cases over the years.

19 Q. Do you recall the names of any of
 20 those cases?

21 A. There's been at least two or
 22 three for a company called American Century,
 23 American Century Fabrics, and they sell
 24 fabrics that are mostly winding -- wind up
 25 being used in furniture. Sofas, couches,

1 P. GREEN
 2 love seats and that kind of furniture. And
 3 early in my career, I did a bunch of cases
 4 involving, you know, sort of the street
 5 corner kind of copyright infringement cases
 6 that you wind up seeing in New York where
 7 people are, John Doe 1 through 50 who is
 8 knocking off Vuitton bags and that kind of
 9 stuff. So there were a number of those
 10 things early on.

11 Q. And in the copyright cases, kind
 12 of a general grouping of copyright cases you
 13 just mentioned, what kind of opinions were
 14 you asked to provide?

15 A. They were typically on the
 16 damages that would be arising from the
 17 infringements, so you would be looking at
 18 lost profits, reasonable royalties.
 19 Royalties or unjust enrichment, depending on
 20 the circumstances in the case.

21 Q. In any of the cases you have been
 22 involved in involving soft goods, considering
 23 kind of the list we just discussed, did you
 24 conduct any consumer surveys as part of your
 25 analysis?

1 P. GREEN

2 A. Me personally?

3 Q. Well, let me rephrase that. Did
 4 you rely on any consumer surveys as part of
 5 your analysis?

6 A. So in -- I think that in the
 7 Anthropology Forever 21 case, there was some
 8 kind of survey work done. I testified also,
 9 it's not quite a soft good but it is
 10 conceptually the same thing, in a case
 11 involving a trademark on -- a trademark
 12 design that was on paper. It was for a
 13 company called FiberMark, and I mean it is
 14 not quite soft goods in the sense of a
 15 clothing, but there, there was also a
 16 consumer survey to see whether or not that
 17 trademark, that model patenter, actually had
 18 established some kind of secondary meaning.

19 But a lot of these other cases it
 20 is relatively clear that they are using the
 21 name or they're -- you don't really have to
 22 go that far to sort of recognize that there
 23 is infringement.

24 Q. So I guess just to clarify, you
 25 only recall using or relying on evidence of a

1 P. GREEN
 2 survey in one case?
 3 A. One or two cases. In general,
 4 like I said, these things really depend on
 5 the facts and circumstances of the cases and
 6 what the issue is with respect to what is
 7 being accused of infringement.
 8 Q. Have you ever testified in any
 9 prior cases involving maternity products in
 10 particular?
 11 A. The only -- the only thing that I
 12 can think of, and it is not really a
 13 maternity product, is that I worked on a case
 14 in our firm related to baby bassinets and a
 15 design of baby bassinets, but that's not
 16 quite the same thing. So I can't think of a
 17 particular maternity, directly maternity
 18 related case as I would define it.
 19 Q. So no cases related to maternity
 20 bottoms or pants?
 21 A. Not that I can think of. Not
 22 that I can think of sitting here. There may
 23 be. I would have to take a deep dive into
 24 the list.
 25 Q. In any of your prior patent cases

1 P. GREEN
 2 in which you have worked as an expert, did
 3 you provide any opinions on commercial
 4 success of a patented product?
 5 A. Well, yeah. I mean, I wind up
 6 having to provide opinions regarding
 7 commercial success really kind of in
 8 three contexts, yes.
 9 Q. What are those?
 10 A. So one context is if you look at
 11 Georgia Pacific, and virtually every case I
 12 do has a royalty analysis that needs to be
 13 done, a reasonable royalty analysis. There
 14 is always a discussion of commercial success
 15 and tying the patented feature to, or the
 16 patented product or the patents that are in
 17 suit, to the revenues and profits and other
 18 issues that are in the case or financial
 19 issues that are in the case that would result
 20 in a royalty. So hundreds of those. I am
 21 also regularly asked to value patents, and to
 22 be able to do that, you have to take a deep
 23 dive into the question of what's the
 24 connection between the patent and what the
 25 claims are and what the patent -- what the

1 P. GREEN
 2 patents do and how they would affect the
 3 marketplace.
 4 So you need to know the
 5 difference between whether or not, you know,
 6 on a pharmaceutical case whether the patent
 7 is on the actual drug itself or on, you know,
 8 the purple coating. There are different
 9 things.
 10 Lastly, I have been asked to
 11 provide opinions on commercial success in
 12 connection with cases where we are -- I'm
 13 evaluating secondary considerations, if not
 14 obviousness, and the circumstance similar to
 15 what we find ourselves in here today,
 16 evaluate for liberty of a patent.
 17 Q. So in that last case, the third
 18 of the three you mentioned, do you recall
 19 which cases in which you have provided
 20 opinions on commercial success in the
 21 secondary consideration context?
 22 A. I don't have the list in front of
 23 me. I can kind of give you a general
 24 recollection, sure.
 25 Q. What's your general recollection?

1 P. GREEN
 2 A. I have given opinions regarding
 3 commercial success on a drug that's used to
 4 treat Pompe Disease. A drug that's used to
 5 treat Rosacea, microphones, little NEMS
 6 microphones, a drug that is used for
 7 migraine, a testosterone drug, and I believe
 8 there was one other that's a computer -- some
 9 kind of hardware related question. That's my
 10 recollection.
 11 Q. In those cases, can you give me
 12 an idea of what factors you considered to
 13 arrive at your opinions?
 14 A. Well, generally, when evaluating
 15 commercial success for secondary
 16 considerations of non-obviousness, what you
 17 are trying to do is, first off, figure out
 18 whether or not the product actually is
 19 successful, product practicing, the patented
 20 technology is successful, both in terms of
 21 dollar value of sales, profits or other
 22 regular financial measures, that an
 23 accountant or a finance guy would think of or
 24 that somebody who is inside of a company
 25 might think of. And then what you are trying

P. GREEN

1 to do is, essentially, prove the negative of
2 whether or not other things were actually
3 driving those sales and profits, to the
4 extent that there are any that are related to
5 the patented products, that are unrelated to
6 the patents.

7 In other words, you are looking
8 at nexus. So in a pharmaceutical case, there
9 is often a discussion about whether or not
10 advertising is driving the sales, and it is
11 not the invention of the pill, it is the fact
12 that it is, you know, on television 23 times
13 a day and there is, you know, a butterfly
14 with purple wings. We can all see those
15 drugs, and they apparently have big sales,
16 but a lot of it is because of the consumer
17 demand driven by the advertising.

18 So, you know, are there other
19 factors, maybe a rapid change in demographics
20 or was there hurricane. Or, you know, who
21 knows. You can just imagine.

22 So the idea is to figure out
23 whether or not the sales and the returns that
24 one has been able isolate in the financial,
25

P. GREEN

1 basic financial question can be correlated or
2 tied to the patented technology versus
3 everything else.

4 Q. In the drug cases -- well, let's
5 back up.

6 In the cases in which you have
7 offered an opinion on commercial success in
8 the secondary consideration context, of those
9 cases, in how many was your opinion that
10 there was in fact commercial success?

11 A. Kind of worked both -- I worked
12 both sides of the street on this question, if
13 you will. So probably three and three. If I
14 gave you a list of six, it is probably three
15 and three. Or it might be four and two. But
16 it is something like that. It is not
17 disproportionate either way.

18 Q. And when you -- and so,
19 hypothetically saying there were six prior
20 case in which you provided an opinion on
21 commercial success in the secondary
22 consideration context, in the cases in which
23 you didn't find that there was commercial
24 success, what were the factors that led you
25

P. GREEN

1 to that conclusion?

2 A. That there were outliers in terms
3 of advertising. That the -- in other words,
4 the drug -- if it was a pharmaceutical, you
5 know, they had spent for every dollar of
6 revenue, they'd spent \$4 on advertising,
7 which is not how this game usually gets
8 played as far as the pharmaceutical companies
9 go. Or that the patented technology was
10 clearly not something that was front and
11 center in the way that a product was being
12 marked or sold. So to the extent it was an
13 electronic device and you're talking about,
14 you know, some little switch on the side that
15 nobody cares about, even knows is there, just
16 an example, that was then something I would
17 have considered.

18 Q. Anything else?

19 A. Whether or not the financial
20 metrics actually indicates success would have
21 been something that would matter. So
22 sometimes you do differential comparisons
23 between what was actually being sold and the
24 profits that are being earned from the sales
25

P. GREEN

1 of the product that is allegedly used in the
2 patented technology that's at issue in the
3 pharmaceutical industry, for example.
4 Depends on the circumstances.

5 Q. And are sales -- you mentioned
6 sales. Are looking at sales alone enough to
7 make a conclusion on commercial success?

8 A. So I mean I am not the lawyer in
9 the room on any of this. But my
10 understanding is that usually the patent
11 holder winds up, in most instances, you know,
12 only really having to discuss the sales and
13 the profits that they might have earned from
14 using the patented technology, and to the
15 extent that someone is challenging the
16 validity of those patents on -- as being not
17 commercially successful falls to the entity
18 that's challenging them to identify other
19 factors. But usually I'm one to trying to
20 consider the whole issue in what I do.

21 Q. You mentioned before that part of
22 the exercise involved, I believe that your
23 statement was proving a negative that other
24 factors were less significant than sales in a
25

1 P. GREEN
 2 commercial success analysis. How do you go
 3 about proving that negative?
 4 MR. BURNS: Objection to form.
 5 A. So to use the pharmaceutical as
 6 an example, you would consider whether or not
 7 the ratio of, you know, sales to advertising
 8 is, you know, consistent with industry
 9 standard, for example. You would then also
 10 consider trends and other things that might
 11 actually be influencing whether or not
 12 something is commercially successful for some
 13 outlier reason, like I said, you know, is
 14 there some huge change in demographics that
 15 all of a sudden some other thing happened
 16 that, you know, is going to cause a vast
 17 increase in sales. Is the pricing all of a
 18 sudden, you know, 80% less than what it
 19 started, you know, relative to the other.
 20 You can just imagine the whole
 21 host of things that one would need to
 22 evaluate. And all kind of case specific.
 23 And so you try and take a look at what's
 24 really a potential or what could potentially
 25 influence sales one way or other and see

1 P. GREEN
 2 whether or not they are more a driver of
 3 sales than the actual patented technology.
 4 Q. What other factors would you
 5 consider?
 6 A. It really does vary case to case.
 7 I mean, excessive advertising is obviously
 8 one of them. Pricing. Changes in the world
 9 one way or another. All of a sudden you have
 10 an outbreak of plague and all of a sudden,
 11 you know, everybody needs a particular type
 12 of antibiotic to stop that. You can just
 13 think through what the possibilities might be
 14 and it varies from case to case.
 15 Q. But in looking through those
 16 different possibilities, how do you rule
 17 them out?
 18 A. Well, you try and see what the
 19 overall impact is of them one way or other or
 20 if they can -- whether -- how they might be
 21 correlated, if you can evaluate a
 22 correlation, whether or not there is some
 23 specific things that relates very much to the
 24 activities of an entity versus the actual
 25 benefits or functions of a technology that

1 P. GREEN
 2 might be claimed in a patent.
 3 Q. In the drug context, I am
 4 inferring from your testimony that you have
 5 opined that certain patent drug was not
 6 commercially successful; is that correct?
 7 A. Due to the patents that would be
 8 in suit, yes.
 9 Q. And have you provided opinions on
 10 lack of commercial success relative to
 11 anything besides a drug?
 12 A. Like I said, I think that I have
 13 also done that with respect to an electronic
 14 device of some sort or another. I am just
 15 trying to recall what that was for you
 16 so, yes.
 17 Q. But you mentioned you thought it
 18 was the patented aspect of it was a component
 19 within the overall device?
 20 A. Correct.
 21 (Whereupon, Green Exhibit 1054,
 22 Petitioner's Notice of Deposition of
 23 Philip Green was marked for
 24 identification as of this date by the
 25 Reporter.)

1 P. GREEN
 2 (Whereupon, Green Exhibit 1055,
 3 Petitioner's Notice of Deposition was
 4 marked for identification as of this
 5 date by the Reporter.)
 6 (Whereupon, Green Exhibit 1056,
 7 Petitioner's Notice of Deposition was
 8 marked for identification as of this
 9 date by the Reporter.)
 10 (Whereupon, Green Exhibit 1057,
 11 Petitioner's Notice of Deposition was
 12 marked for identification as of this
 13 date by the Reporter.)
 14 BY MR. LECHLEITER:
 15 Q. Mr. Green, you should now have in
 16 front of you what the Court Reporter has
 17 marked as Exhibits 1054, 1055, 1056 and 1057;
 18 is that correct?
 19 A. Yes.
 20 Q. Have you had a chance to review
 21 those documents?
 22 A. Yes. Just very generally, yeah.
 23 Q. Have you seen them before?
 24 A. I have not.
 25 Q. Do you understand that these

1 P. GREEN
 2 documents are Target's Notice of Deposition
 3 with respect to your testimony in this case?
 4 A. I do understand that, yes.
 5 Q. And by "this case," I mean these
 6 four proceedings that are before the Patent
 7 Office, you understand that?
 8 A. Yes.
 9 Q. And you are appearing here today
 10 as a result of these Deposition Notices?
 11 A. I think so.
 12 Q. You can put those aside.
 13 Mr. Green, can you describe
 14 generally the nature of your opinions that
 15 you have provided in this case?
 16 A. Yes. I have two opinions. One
 17 is that Destination Maternity's products that
 18 are practicing the patents in suit are
 19 commercially successful, and secondly, the
 20 patents at issue are commercially successful,
 21 and secondly, that I am not aware of any
 22 circumstances that suggest that the
 23 commercial success is not due to the patented
 24 technologies. Or the success of those
 25 products is not due to the patented

1 P. GREEN
 2 technology.
 3 Q. I just want to understand, when
 4 you say you're not aware of any, what does
 5 that mean?
 6 A. It means that after considering
 7 the record that was available to me, as well
 8 as some of the due diligence which would have
 9 been noted in my report, I was unable to or
 10 it appeared to me, based on the facts of this
 11 case, that I am aware of, that the commercial
 12 success of the products practiced in the
 13 patents in suit is due to the claimed
 14 technologies in the patents as opposed to any
 15 other factors.
 16 Q. When you say "the record that was
 17 available to you," what does that mean?
 18 A. That means the evidence that I
 19 have seen as identified in the various
 20 exhibits and things that are part of what is
 21 typically Exhibit A to my report, but is
 22 outlined in the report.
 23 Q. Is everything that was made
 24 available to you listed in your report?
 25 A. Generally, yes. I mean, since

1 P. GREEN
 2 issuing my report, I have seen Mindy Singer's
 3 deposition. I have seen, I think some other
 4 documents that were filed in the case. In
 5 other words, some written pleadings, I guess
 6 is what they would be called. But other than
 7 that, what I have relied on is in my
 8 report, yes.
 9 Q. Is there anything that's, I just
 10 want to be clear, is there anything you
 11 relied upon that is not identified or listed
 12 in your report?
 13 A. No.
 14 Q. How did you arrive at the
 15 particular materials that you relied upon,
 16 how did you decide which materials to rely
 17 upon?
 18 A. What I did is, I asked counsel
 19 for Destination Maternity, for things that I
 20 thought would be relevant to evaluating
 21 commercial success as it relates to these
 22 patents based on my background and
 23 experience. And so I asked for certain
 24 documents. I also needed to get an
 25 understanding of the technologies, which I

1 P. GREEN
 2 got from speaking with Dr. Brookstein and
 3 reading his report.
 4 Q. And did you do any -- well, let
 5 me back up.
 6 A. And did my own independent
 7 analysis.
 8 Q. And what was that?
 9 A. Well, for example, I would have
 10 dredged up the Destination Maternity 10-K
 11 that appears as one of the exhibits in that
 12 report.
 13 Q. So was there anything that you
 14 did relative to your own independent analysis
 15 that doesn't appear in the report?
 16 A. No. So these would have been --
 17 there would have been things that I would
 18 have done. But they are in the report.
 19 Q. And so if you conducted
 20 independent analysis related to finding
 21 materials that you, to be relied upon, those
 22 would be listed in your report?
 23 A. That's correct.
 24 Q. Any not listed in your report?
 25 A. Not that I am aware of, no.

1 P. GREEN
 2 Q. When you requested -- strike
 3 that.
 4 When you requested the materials
 5 that you chose to rely on in your report,
 6 were you satisfied that you were provided
 7 with everything you needed?
 8 A. I was satisfied that I was
 9 provided with everything that was
 10 available, yes.
 11 Q. When you say "everything that was
 12 available," what do you mean by that?
 13 A. Well, what I mean is that I asked
 14 for, or I would have asked for as much
 15 detailed advertising information as I
 16 possibly could get from Destination
 17 Maternity, for example. And my understanding
 18 from Destination Maternity and from the
 19 record is that there is no detailed financial
 20 information in the sense that ties
 21 advertising to a particular product. So that
 22 information, I didn't get it because it
 23 didn't exist.
 24 Q. So that information didn't exist
 25 but the lack of that information, does that

1 P. GREEN
 2 support the conclusion that, in fact, there
 3 was no tie between advertising and sale
 4 success?
 5 A. Well when you start to look at
 6 the -- in the absence of being able to get
 7 those data, I started to look at other
 8 things. So, for example, what was in the
 9 stores and what was the overall advertising
 10 and SG&A dollars and the financial statements
 11 that were reported and what were the
 12 disclosures about those things, and then, you
 13 know, what was on the website and, you know,
 14 how were these things being marketed. To
 15 sort of satisfy myself that when you started
 16 to try and identify what was -- how the
 17 products that practiced the patents that are
 18 at issue here are marketed to see whether or
 19 not they are marketed in a way that's
 20 different or emphasized or something in
 21 comparison to other Destination Maternity
 22 products, and I couldn't identify anything
 23 from my analysis that would suggest that they
 24 were being treated differently. And
 25 therefore, one couldn't attribute commercial

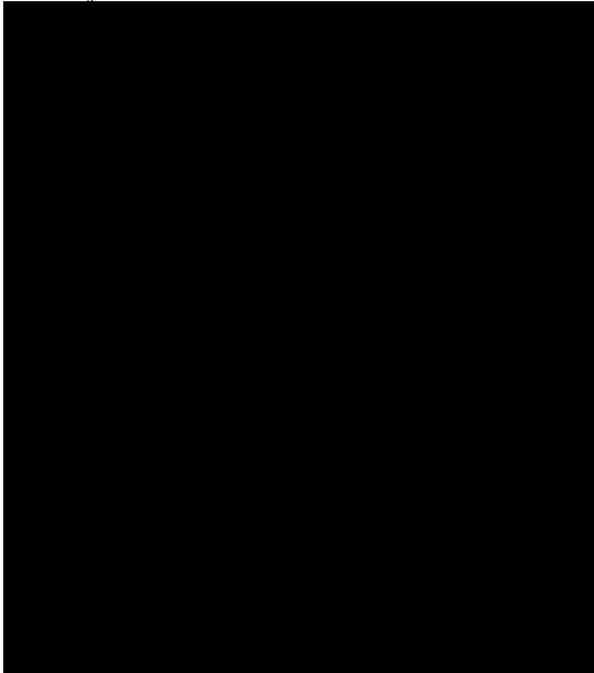
1 P. GREEN
 2 success due to excessive advertising or
 3 something like that.
 4 Q. So based on -- when you say your
 5 analysis, that's in view of the materials you
 6 considered?
 7 A. That's correct. And my
 8 experience in looking at accounting records
 9 and so forth.
 10 Q. The accounting records being
 11 Destination Maternity sales data?
 12 A. Their sales data, their profit
 13 data, the other information that I was
 14 provided, yes.
 15 Q. Are you familiar with the patents
 16 at issue in this case?
 17 A. Generally. I am not the
 18 technical expert regarding validity issues in
 19 this case. But from a technical point of
 20 view. But I know generally what the patents
 21 are about, sure.
 22 Q. Do you know how many patents are
 23 at issue in this case?
 24 A. I think my report covers two.
 25 Q. Do you recall which claims your

1 P. GREEN
 2 report covers?
 3 A. Well, my report discusses, I
 4 think, and I don't have my report in front of
 5 me, but my report discusses the first claim
 6 of both of the patents that are at issue in
 7 this matter. And recognizes that, I think
 8 that challenged claims are dependent claims
 9 throughout both -- for both patents.
 10 Q. In speaking with -- well, am I
 11 correct in saying that to the extent you have
 12 understanding of the law, it is through
 13 counsel?
 14 A. In general, I would say that's
 15 true. I mean, it is through counsel, either
 16 for this case or, you know, other cases that
 17 I have worked on over the years, sure. And
 18 certainly, you know, like a tax accountant, I
 19 would need to know the law that I am having
 20 to apply in order to do my work.
 21 Q. You mention that your reports
 22 focus on Claim 1 of each patent?
 23 A. No. I say -- I think I identify
 24 or I might recite Claim 1 of each -- of each
 25 patent but that's more because that provides,

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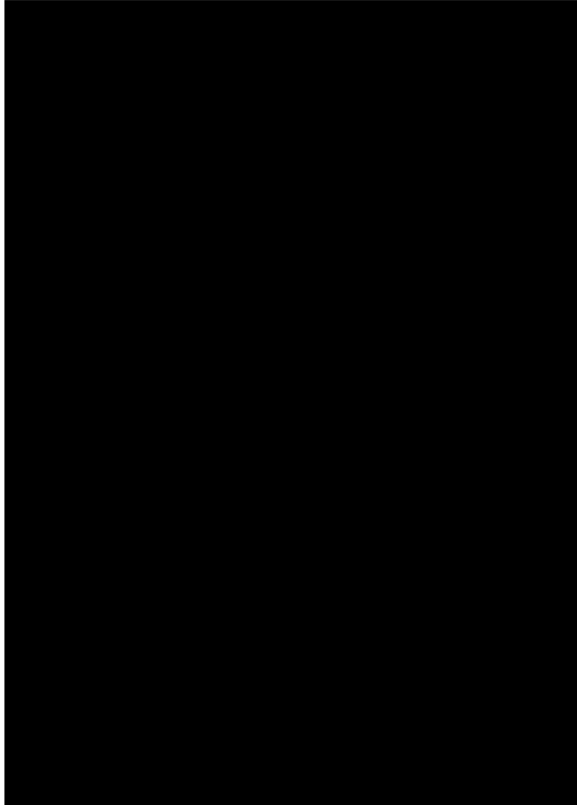
P. GREEN

I think, the most general understanding for the purpose of doing an analysis of commercial success of what the patents are really all about.



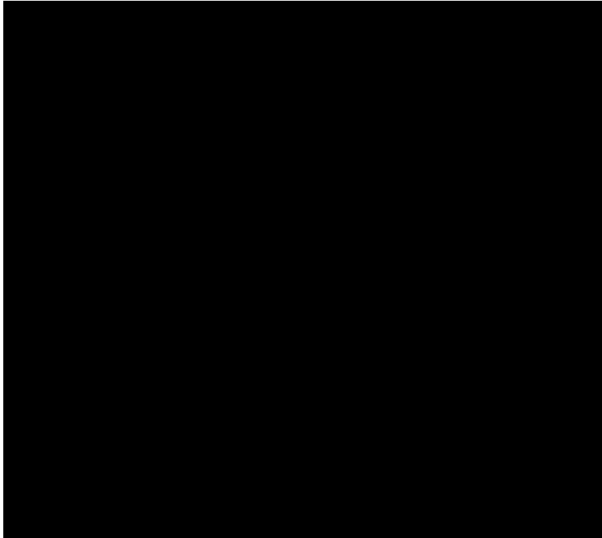
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P. GREEN



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P. GREEN



Q. Did you do any analysis to compare Secret Fit Belly pants that are denim versus Secret Fit Belly fit pants that the are not denim?

A. Yes.

Q. And what was your conclusion there?

A. The conclusion is that consistent

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P. GREEN

with the overall analysis that I have done of the Secret Fit Belly pants or bottoms and their profitability and their commercial success are the denim ones follow the same pattern, that they are commercial -- they are substantially more profitable than non -- than non-Secret Fit Belly denim pants.

Q. Let me restate --

A. And are resulting in greater profits that are only due to the difference in the patentees or the patented technology.

Q. Let me just restate the question.

Just so you understand, the question that I am going to ask you relates to only Secret Fit Belly pants. So I am wondering if, did you conduct any analysis to compare sales of Secret Fit Belly pants that were denim pants versus Secret Fit Belly pants that were not denim to determine if there was a differential in sales or profitability?

A. If you take a look -- I don't have the documents in front of me. But if you take a look at the sales records, you come to find that denim pants are about as

1 P. GREEN
2 profitable or on average as profitable as
3 every other Secret Fit Belly bottom. Whether
4 it is -- that is not made out of denim.

5 Q. So it is about the same?

6 A. Yes. Sometimes higher.
7 Sometimes lower. There is many, many SKUs,
8 so you have to kind of go through them on
9 SKU-by-SKU basis, but in general it's about
10 the same. Those are all, obviously, greater
11 than those that are not practicing the Secret
12 Fit Belly panel technology.

13 Q. But, again, just looking at the
14 Secret Fit Belly pants, I just want to
15 understand your testimony, you are
16 testifying, correct me if I am wrong, is it
17 that on average the profitability of Secret
18 Fit Belly pants that are denim jeans is about
19 the same as Secret Fit Belly pants that
20 are not?

21 MR. BURNS: Objection to form.

22 A. I think that's generally true if
23 you look throughout all the SKUs, I think
24 there may be some SKUs that are -- where the
25 denims are higher than the average. Maybe

1 P. GREEN
2 some that are lower. There's a variety of
3 different ones. I think we'd have to kind of
4 go line by line to pick them off.

5 Q. I am just asking you on average.

6 A. On average, they might be
7 slightly higher but we're not talking about
8 infinitely different margins because they
9 have higher volumes.

10 Q. So on average Secret Fit Belly
11 pants with denim jeans as the bottom fabric
12 are about the same level of profitability as
13 Secret Fit Belly pants that do not have denim
14 jeans as the bottom fabric?

15 A. On average or a little more, I
16 mean, you can see that the denim is
17 commercially successful both in terms of its
18 volumes and its profits in comparison to
19 bottoms that don't practice the patents in
20 suit and are also made out of denim.

21 Q. What about bottoms that do
22 practice the patents in suit, according to
23 Dr. Brookstein, and that are not made out of
24 denim?

25 A. I think they have, in general,

1 P. GREEN
2 profitability that is equal to or slightly
3 greater than the overall profits of Secret
4 Fit Belly pants. In other words, "they"
5 being the denim ones. But there are some
6 that are less. There are some that are more.
7 We would kind of need to look at them on
8 SKU-by-SKU basis.

9 Q. But your prior testimony was that
10 about on average they are about the same?

11 A. On average. On average they are
12 about the same to a little more. And I don't
13 have the documents in front of me. But
14 obviously --

15 Q. Did you determine whether Secret
16 Fit Belly pants, did you determine whether
17 the pockets on Secret Fit Belly are an
18 independent driver of sales?

19 MR. BURNS: Objection to form.

20 A. The pockets? I didn't look at
21 the -- I didn't analyze whether the pockets
22 themselves were driving sales. I looked at
23 the overall patented product, which is the
24 Secret Fit Belly pants, as I understand it.

25 Q. When you say "the overall

1 P. GREEN
2 patented product," what is it that you are
3 referring to as the patented product?

4 A. I am referring to products that I
5 understand from Dr. Brookstein that practice
6 the claims of the patents that are at issue
7 in this case.

8 Q. If the product practices the
9 claims, what features does it have or
10 features does it have?

11 A. Well, it has --

12 MR. BURNS: Objection to form.

13 A. And I am not the technical
14 witness in all of this, so I am doing this
15 from the point of the view of evaluating
16 commercial success. I understand that it has
17 a particular design of how it -- of the part
18 that actually wraps around a woman's belly
19 and then it has -- there is other dependent
20 claims that are discussed.

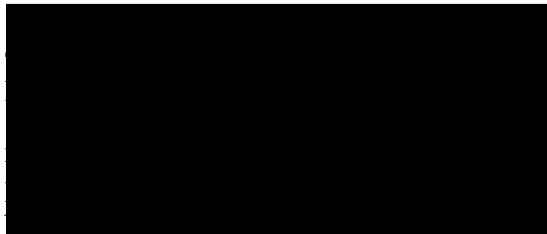
21 Q. And so your understanding of the
22 patented product is a belly panel that wraps
23 around a woman's belly attached to the pants?

24 A. In general. I mean, it is
25 obviously got a particular design that

1 P. GREEN
 2 Dr. Brookstein knows substantially more about
 3 than I do. And which has been sort of
 4 described to me. But it's those particular
 5 features that Dr. Brookstein has identified
 6 that, in his analysis, that tells me that
 7 products that practice the patents in suit
 8 are those -- or patents at issue here are
 9 those that are being sold by Destination
 10 Maternity and its Secret Fit Belly panel
 11 product lines.

12 Q. In the course of your analysis,
 13 did you analyze whether the -- if I use the
 14 term fly on the pants, do you know what I
 15 mean?

16 A. Yes, I do.



24 Q. Did you do any analysis to
 25 determine whether the presence or lack of a

1 P. GREEN
 2 record that we have an agreement that
 3 I can speak to the witness and that
 4 there will be no questions about the
 5 conversation unless his testimony
 6 changes; is that correct?

7 MR. LECHLEITER: Yes. Unless
 8 there is a change of testimony after
 9 the break, we will honor the agreement
 10 and not question the witness about
 11 your conversation.

12 MR. BURNS: Thank you.

13 THE VIDEOGRAPHER: The time is
 14 10:12 a.m.; we are off the record.

15 (Whereupon, a recess was held.)

16 THE VIDEOGRAPHER: The time is
 17 10:24 a.m.; we are on the record.

18 BY MR. LECHLEITER:

19 Q. Mr. Green, a minute ago we were
 20 talking about different features of the
 21 products and do you recall the line of
 22 questioning with respect to a fly on the
 23 Secret Fit Belly pants?

24 A. Yes, I do.

25 Q. Do you understand what a

1 P. GREEN
 2 fly would have impacted sales in any way?

3 MR. BURNS: Object to the form.

4 A. I haven't seen any documents that
 5 suggest that the presence or absence of a fly
 6 is effecting the sales of the products that
 7 are practicing the patents at issue in this
 8 case.

9 Q. So does your analysis include any
 10 opinion on that?

11 A. Not separately, no. Just my
 12 analysis is basically relying on
 13 Dr. Brookstein for giving me technical advice
 14 but evaluating the sales and profits that are
 15 being derived from the products that actually
 16 practice the patents that are at issue in
 17 this case versus those that don't. And other
 18 issues that may be relating to the commercial
 19 success of the product.

20 We have been going for a little
 21 more than an hour. Can we take a break, is
 22 that okay?

23 MR. LECHLEITER: Sure. Yes.

24 THE VIDEOGRAPHER: The time --

25 MR. BURNS: I want to put on the

1 P. GREEN
 2 zipperless fly is?

3 MR. BURNS: Objection to form.

4 A. Generally, yes.

5 Q. Would you understand if I said a
 6 zipperless fly was a fly that had been
 7 essentially sewn shut and didn't have a
 8 zipper?

9 MR. BURNS: Objection to form.

10 A. Again, that would be what my
 11 assumption would be with respect to what a
 12 zipperless fly would be in this context, yes.



P. GREEN

Q. Did all of the products you analyzed include a sewn zipperless fly?

MR. BURNS: Objection to form.

A. To my knowledge, certain of them would depending upon their configuration. But to the extent that they were a pair -- a denim pair of pants, for example, they would have a sewn zipperless fly to my knowledge.

Q. Did you do any comparison of Secret Fit Belly pants with the sewn zipperless fly versus Secret Fit Belly pants without one?

A. Again, I looked at the various margins that were being earned from products that practiced the claimed technology. So to my knowledge and according to Dr. Brookstein, I don't have my report in front of me, Dr. Brookstein has told me that all of the products practice the technology that's claimed by the patents at issue in this case. All of Destination Maternity Secret Fit Belly pants products practiced the technology, and so I have evaluated the profitability of all of them and am aware that there are certain

P. GREEN

specific individual claims, some of which are part of pants or part of products that one can identify and others that you can't.

Q. So did you conduct any particular analysis relating specifically to that sewn zipperless fly feature, apart from the general analysis you described?

A. Again, I haven't separately analyzed the profitability of a particular SKU that may or may not have this sewn zipperless fly feature. However, what I have done is I understand that that is a feature that is part of the overall product that is commercially successful when you take a look at the financial and accounting records of Destination Maternity and compare them as against products that don't actually practice the patents in suit or those particular claims.

Q. Did you conduct any analysis, though, of whether the sewn zipperless fly front was an independent driver of the commercial success you found?

MR. BURNS: Objection to form.

P. GREEN

A. I am not aware of any documents that demonstrate that the sewn zipperless fly is a particular driver of sales. What I am aware of is that products that practiced the claim that relates to the sewn zipperless fly and are commercially successful in comparison to products that are not practicing the patents that are at issue in this case.

Q. So you mentioned you're not aware of any documents relating to that feature in particular. So in light of not having those documents or not -- them not existing, either way, you didn't have them, to the extent they exist --

MR. BURNS: Objection to form.

Q. -- in your analysis?

MR. BURNS: Objection to form.

A. I didn't have a document that specifically talked about that feature. What I am aware of are that products that practice the zipperless fly functionality or feature that is part of the claims of the patents that are at issue in this case are commercially successful.

P. GREEN

Q. And so based on that, you did not conduct an independent analysis, separate analysis, related to whether the sewn zipperless fly feature was an independent driver of commercial success?

MR. BURNS: Objection to form.

A. Again, as I understand it, from talking with Dr. Brookstein, all of the Secret Fit Belly panel products practice technology that's claimed by the patents that are at issue in this case, and I have looked at the profitability of these products and compared them to the products that do not practice the patented technology, and you can see that those that actually have the zipperless fly feature, which are among those that I looked at, and are commercially successful.

Q. Are the ones with the sewn zipperless fly feature any more or less commercially successful than the Secret Fit Belly pants without it?

MR. BURNS: Objection to form.

A. I think we would need to take a

1 P. GREEN
 2 look at the SKUs because I haven't committed
 3 all the SKUs to memory to evaluate whether
 4 that would necessarily -- what the connection
 5 is. The way that I have analyzed it is that
 6 all of the Secret Fit Belly pants are
 7 commercially successful when compared to ones
 8 that do not practice the patents that are at
 9 issue in this case.

10 Q. So your analysis does not
 11 breakdown the level of evaluating
 12 specifically the feature sewn zipperless fly
 13 front?

14 A. I wouldn't say that. I would say
 15 that the sewn zipperless fly front is one of
 16 the features that I understand Dr. Brookstein
 17 has advised me that is included in products
 18 that practice the patents in suit and is one
 19 of the dependent claims that are being
 20 challenged here and that products that have
 21 some zipperless flies are commercially
 22 successful.

23 Q. But you saw no evidence, no
 24 documents that the sewn zipperless fly front
 25 drove that success?

1 P. GREEN
 2 MR. BURNS: Objection to form.
 3 A. Again, I think it is the entire
 4 product that includes a sewn zipperless fly
 5 that is commercially successful. That's how
 6 one has to look at this.

7 Q. But you also opine that products
 8 without the sewn zipperless fly were
 9 commercially successful as well?

10 A. There are some products that may
 11 not have a sewn zipperless fly that we
 12 would -- that when I look at them, they are
 13 also commercially successful, that's correct.

14 Q. So does that lead you to the
 15 conclusion --

16 A. They are not mutually exclusive
 17 when you look at it. I mean, you can have
 18 something that doesn't have a zipperless fly
 19 and it is commercially successful, and you
 20 can have one that does have a zipperless fly
 21 and it is commercially successful.

22 Q. So based on what you just said,
 23 how does the zipperless fly factor into
 24 commercial success?

25 A. Because the entire product that

1 P. GREEN
 2 is practicing the patents that are at issue
 3 in this case, and even those that
 4 specifically practicing the claims that
 5 relate to the sewn zipperless fly, are
 6 commercially successful when measured against
 7 products that do not practice any of this
 8 technology.

9 Q. So your testimony is that
 10 products that have a sewn zipperless fly that
 11 are Secret Fit Belly products are just as
 12 likely to be successful as products without
 13 it, that are Secret Fit Belly products?

14 MR. BURNS: Objection to form.

15 A. No, I am saying that Secret Fit
 16 Belly products that practice the zipperless
 17 fly claims are commercially successful, and
 18 they are commercially successful relative to
 19 any product that doesn't practice the Secret
 20 Fit Belly panel that may also have its own
 21 zipperless fly.

22 Q. Is that anywhere in your report?

23 A. Well, yeah. I mean, the whole
 24 analysis that I identified in the report, as
 25 well as the documents that I have relied on,

1 P. GREEN
 2 showed that.

3 Q. Do you mention anything about
 4 pockets in your report?

5 A. I don't think there is a specific
 6 discussion of pockets. I think it was
 7 relatively clear based on my discussions with
 8 Dr. Brookstein that the analysis that I was
 9 doing was of looking at products that
 10 practice the claims of the patents that are
 11 at issue in this case and evaluating those
 12 products relative to products that don't
 13 practice the claims of the patents that are
 14 at issue in this case.

15 Q. So does your report contain any
 16 mention of sewn zipperless fly front?

17 A. I don't think that -- I don't
 18 have the report in front of me.

19 Q. Based on your recollection.

20 A. But based on my recollection, the
 21 report in and of itself does not. But when
 22 one looks at the documents that it is based
 23 on, they do.

24 Q. But you didn't offer an opinion
 25 in your report related to the words sewn

1 P. GREEN
 2 zipperless fly front?
 3 MR. BURNS: Objection to form.
 4 A. No. What I offered an opinion on
 5 was that the products that practice the
 6 dependent claims, which are being challenged
 7 here, are commercially successful and that
 8 the patents at issue in this -- the
 9 technology that's claimed by the patents at
 10 issue are commercially successful in
 11 comparison to products that don't practice
 12 the patent -- the technology that's claimed
 13 by the patents at issue.
 14 Q. So moving on, did you discuss in
 15 your report the commercial success or lack
 16 thereof with respect to Secret Fit Belly
 17 pants, and just bear with me here, where the
 18 top edge margin of the belly panel is folded
 19 over and sewn or knitted to the inside of the
 20 belly panel fabric?
 21 MR. BURNS: Objection to form.
 22 A. I didn't separately analyze that
 23 particular dependent claim. What I
 24 understood from Dr. Brookstein is that
 25 products that practice that dependent claim

1 P. GREEN
 2 are those that are the Secret Fit Belly panel
 3 products that are sold by Destination
 4 Maternity, and that when I analyzed the sales
 5 records for and profitability records, those
 6 products were commercially successful,
 7 substantially more profitable, had greater
 8 sales, had greater prices in comparison to
 9 those products that didn't practice the
 10 patented technology.
 11 Q. Putting aside the product as a
 12 whole, did you conduct any analysis related
 13 to that feature in particular, apart from the
 14 product as a whole?
 15 A. Again, I am aware from my
 16 discussions with Dr. Brookstein that the
 17 products that are Destination Maternity's
 18 Secret Fit Belly panel products practice that
 19 dependent claim.
 20 Q. Did you particularly analyze that
 21 feature apart from the product as a whole?
 22 A. I don't think that there was a
 23 way to analyze that particular feature from a
 24 sales and profits point of view separate from
 25 the product as a whole. My understanding is

1 P. GREEN
 2 that that particular feature, from my
 3 discussions with Dr. Brookstein, is being
 4 practiced by Destination Maternity's Secret
 5 Fit Belly panel products, which are
 6 commercially successful.
 7 Q. When you said there is no way to
 8 analyze that feature in particular, what do
 9 you mean?
 10 A. I mean, as I understand it, from
 11 Dr. Brookstein, that's a feature that is part
 12 of the basic concept of the Secret Fit Belly
 13 panel product.
 14 Q. And you understand that's a
 15 dependent claim of one of the patents?
 16 A. Yes.
 17 Q. Did you conduct any analysis to
 18 determine whether the belly panel in the
 19 Secret Fit Belly products, whether Secret Fit
 20 Belly products -- strike the question.
 21 Did you conduct the analysis to
 22 determine whether Secret Fit Belly panel
 23 products that have a double layer tubular
 24 structure are commercially successful?
 25 MR. BURNS: Objection to form.

1 P. GREEN
 2 A. Again, what my analysis does is
 3 it considers the products that practice the
 4 claims of the patents that are at issue here,
 5 and so according to Dr. Brookstein,
 6 Destination Maternity's Secret belly fit
 7 panel products practice the claims that are
 8 at issue in this -- in these proceedings and
 9 so, yes, I would have analyzed whether those
 10 are commercially successful. And they are.
 11 Q. But does your report contain any
 12 particular analysis, putting aside the
 13 product as a whole, once again, does your
 14 report contain any particular analysis
 15 related to the commercial success of Secret
 16 Fit Belly products where the panel is a
 17 double layer tubular structure?
 18 MR. BURNS: Objection to form.
 19 A. Again, in my discussions with
 20 Dr. Brookstein, my understanding is that the
 21 products that practice the patented
 22 technology here are those that are called
 23 Secret Fit Belly panel products by
 24 Destination Maternity, and they are included
 25 in their accounting records as such. So I

1 P. GREEN
2 have analyzed whether or not that dependent
3 claim is, or products that are practicing
4 that dependent claim are commercially
5 successful in my overall analysis.

6 Q. Is there a portion of your report
7 that's devoted particularly to Secret Fit
8 Belly products with the panel comprising of
9 double layer tubular structure?

10 A. Again, at least based on my
11 understanding from my conversations with
12 Dr. Brookstein, all of the products -- all of
13 the Destination Maternity products that are
14 Secret Fit Belly panel products practice the
15 claim. So -- the dependent claim, so I think
16 that I have covered it in the analysis that I
17 have done, yes.

18 Q. But did you analyze whether that
19 dependent feature that I have just discussed
20 was alone a driver of sales?

21 MR. BURNS: Objection to form.

22 A. I think that's a different
23 question than the one you just asked.

24 So I didn't -- I think we have
25 talked about this a few times in a few

1 P. GREEN
2 different ways. What I did is I understood
3 from Dr. Brookstein that all of the
4 products -- all of the Destination Maternity
5 products that are Secret Fit Belly panel
6 products practice the claims that are
7 included in the patents that are at issue in
8 this matter, and so my analysis, by its
9 nature, considers those claims. But I didn't
10 separately say, well -- I didn't separately
11 analyze that specific claim. The product
12 obviously incorporates that claim. And you
13 can see that the product that incorporates
14 that claim is commercially successful.

15 Q. So I understand from your
16 testimony you analyzed the products as a
17 whole and you did not independently analyze
18 these dependent features we have been
19 discussing, apart from the product as a
20 whole?

21 MR. BURNS: Objection to form.

22 A. No, I wouldn't say that. I mean,
23 I can see from the various SKUs, for example,
24 difference in denim. You can see which ones
25 are denim fabric and you can see what their

1 P. GREEN
2 profits look like. You can, in certain
3 circumstances, figure that some are stretch
4 pants versus other types of pants, and so
5 those, to my knowledge, don't necessarily
6 have a fly. They might but they may not.
7 Others of these claims are part of the
8 infrastructure, as I understand from
9 Dr. Brookstein, of the overall product, and I
10 have -- understand from him that all of
11 the -- these products practice those claims.

12 Q. But you didn't offer a specific
13 opinion in your report on these dependent
14 features, apart from your overall opinion on
15 the product as a whole?

16 MR. BURNS: Objection to form.

17 A. Well, I mean, the dependent
18 features are all, such as the denim that we
19 have been talking about, are all consistent
20 with the overall analysis that the products
21 that are practicing the patents, the
22 patented, the claims of the patented patents
23 that at issue in this case, are all
24 commercially successful relative to products
25 that don't practice the patent. The patents

1 P. GREEN
2 at issue.
3 Q. So will I find in your report a
4 statement that denim jeans, that Secret Fit
5 Belly products that are made of denim, the
6 fact of their being made of denim is an
7 independent driver of sales of those
8 products?

9 MR. BURNS: Objection to form.

10 Q. Is that in your report?

11 A. I don't think -- you may not
12 necessarily see it in the text of the report.
13 But certainly in the exhibits that I rely
14 upon, you can see the -- that denim is a
15 fabric that is specifically outlined and --
16 or identified and you can evaluate the
17 profitability of those products, as I have
18 done, in comparison to -- and those products
19 I mean the denim products that are practicing
20 the patents, the technology that's claimed in
21 the patents that are at issue here with
22 products that do not practice the patented
23 technology but are also made of denim.

24 Q. But all of your opinions in this
25 case are in your report?

1 P. GREEN
 2 A. That's right. In the report or
 3 in the exhibits, sure.
 4 Q. So is there anywhere in your
 5 report where you conclude that pockets on
 6 pants, on Secret Fit Belly pants, are an
 7 independent driver of sales of those pants?
 8 MR. BURNS: Objection to form.
 9 A. Again, my understanding from
 10 Dr. Brookstein is that the products at issue
 11 practice the -- those claims. And those
 12 claims are part of the overall product that
 13 includes both the dependent and the
 14 independent claim and all of that together is
 15 commercially successful.
 16 Q. So I am just asking you about
 17 pockets now. Is there anywhere in your
 18 report where you opine that pockets are an
 19 independent driver of sales of Secret Fit
 20 Belly products?
 21 MR. BURNS: Objection to form.
 22 A. I don't think that there is a
 23 specific sentence just like the way that I
 24 described in the denim issue. I don't think
 25 there is a specific sentence. But you can

1 P. GREEN
 2 take a look at any of the exhibits that I
 3 relied upon and discuss in my report and see
 4 just going through and identifying, picking
 5 them off. And there is obvious profitability
 6 differences between the SKUs that have the
 7 denim, for example, and those that don't. We
 8 can identify, if we needed to, the SKUs that
 9 have, may or may not have pockets and do the
 10 same comparison.
 11 Q. There is no opinion on pockets
 12 written in your report?
 13 MR. BURNS: Objection to form.
 14 A. Again, there's no separate -- I
 15 think you will find there's no separate
 16 discussion in my report of the pockets, but,
 17 again, I am relying on Dr. Brookstein in my
 18 understanding of the fact that the -- the
 19 dependent claims that are included in the
 20 patents that are at issue here are included
 21 dependent terms and independent terms and
 22 that those products are commercially
 23 successful when you compare them to products
 24 that don't practice either of the patents
 25 that are at issue in this case.

1 P. GREEN
 2 Q. So I think the record is pretty
 3 clear that you are relying on Dr. Brookstein
 4 for what claims the products practice, but,
 5 you know, I understand that. I just want to
 6 make sure that I understand the difference
 7 between what's in your report versus what's
 8 not in your report since this is, after all,
 9 about the content of your report.
 10 Is there anything particular in
 11 your report where you've opined that a sewn
 12 zipperless fly front is a driver of sales,
 13 putting aside the overall product, is there
 14 anything in particular in your report where
 15 you discuss that a sewn zipperless fly front
 16 is a driver of sales?
 17 MR. BURNS: Objection to form.
 18 A. Again, I haven't analyzed the --
 19 again, my understanding is that this is sewn
 20 zipperless fly is a dependent claim, relates
 21 to a dependent claim that includes that
 22 claim, that is also dependent on Claim 1 of
 23 the patents that are at issue here and that
 24 the products, based on my conversations with
 25 Dr. Brookstein, all practice the products

1 P. GREEN
 2 being the Destination Maternity secret belly
 3 panel products, all practice the technology
 4 that's in these -- that's claimed by the
 5 patents and those are commercially
 6 successful. But I didn't separately analyze,
 7 to your point, the profitability of the --
 8 those that are -- that have, you know, a sewn
 9 fly or the pockets, for example.
 10 Q. Did you separately analyze in
 11 your report the profitability of Secret Fit
 12 Belly pants where a top edge margin of the
 13 belly panel is folded over and sewn or
 14 knitted to an inside of the belly panel
 15 fabric?
 16 MR. BURNS: Objection to form.
 17 A. Again, my understanding is that
 18 that's a dependent claim. It is dependent on
 19 Claim 1 of the patents that are at issue
 20 here. My understanding from speaking with
 21 Dr. Brookstein is that the patents that are
 22 at issue, that the products, the Secret Fit
 23 Belly panel products, practice that claim,
 24 and therefore, I have analyzed the overall
 25 profitability of those products of --

1 P. GREEN
 2 Q. Did you analyze the profitability
 3 of that particular feature though in your
 4 report?

5 MR. BURNS: Objection to form.

6 A. I don't think that there is a way
 7 to separate that particular feature from the
 8 product in the sense that it is discussing a
 9 particular feature of the product, but the
 10 product as a whole includes that particular
 11 feature and those that are in Claim 1. So I
 12 have had to analyze those together.

13 Q. So but with that understanding,
 14 is the answer to my question no?

15 MR. BURNS: Objection to form.

16 A. I don't think, again, consistent
 17 with how I looked at the denim, although you
 18 can see the denim issue in the -- you can see
 19 the different line items for denim in the
 20 underlying sales records that I reference in
 21 my report. I think that with respect to the
 22 dependent claim that you were just reading,
 23 it's not possible to separate it from the
 24 SKU. So I don't think I separately analyzed
 25 those.

1 P. GREEN
 2 the overall product and is -- the overall
 3 products that practice the technology of the
 4 patents that are at issue in this case.

5 Q. So if I look in your report, I
 6 will not find a section that analyzes, in
 7 particular, the profitability or sales
 8 related to products having a double layer
 9 tubular structure?

10 A. I think actually that's not
 11 really true. I think you will find that
 12 there is a section that -- my understanding
 13 from Dr. Brookstein is that the products, the
 14 Secret Fit Belly panel products practice that
 15 claim and so they analyzed all of the -- the
 16 profits that I have analyzed cover that
 17 issue.

18 Q. But have you analyzed that
 19 separately apart from the other components of
 20 the product --

21 MR. BURNS: Objection to form.

22 Q. -- in your report?

23 MR. BURNS: Objection to form.

24 A. I think for purposes of doing
 25 commercial success that really wasn't

1 P. GREEN
 2 Q. And did you separately analyze
 3 whether belly panels having a double layer
 4 tubular structure were or more or less
 5 commercially successful?

6 MR. BURNS: Objection to form.

7 Q. Than other Secret Fit Belly
 8 panels?

9 A. Again, my understanding is that
 10 that's a dependent claim, which references to
 11 Claim 1 to the patents, and I spoke with
 12 Dr. Brookstein about the technology and how
 13 it was practiced. My understanding is that
 14 the Destination Maternity products, the
 15 Secret Fit Belly products, practiced that
 16 particular claim and that the analysis that I
 17 have done, basically, covers all of the --
 18 covers the additional profitability that's
 19 due to practicing the patents that are at
 20 issue in this case.

21 Based on what I can see from the
 22 SKUs, however, I can't necessarily separate
 23 out the -- that particular claim. What I can
 24 tell you is that from my conversations with
 25 Dr. Brookstein, that's an integral part of

1 P. GREEN
 2 necessary. What you can see is that the
 3 products that practice the claims of the
 4 patents that are at issue here are
 5 substantially more profitable and more
 6 successful than those that don't.

7 Q. But you didn't take a look at,
 8 particularly, the profitability or sales
 9 related to the double layer tubular structure
 10 feature alone?

11 MR. BURNS: Objection to form.

12 A. Again, as I understand it from
 13 Dr. Brookstein, the products that
 14 practiced -- all of the Destination Maternity
 15 products that have the Secret Fit Belly panel
 16 practice the -- practice the claims of these
 17 patents, the patents that are at issue here.
 18 And so I have analyzed the overall
 19 profitability differential between those that
 20 practice the patent, the technology and the
 21 pants that are also sold by Destination
 22 Maternity that don't.

23 Q. But if I read your report, I
 24 won't find the analysis -- will I find the
 25 word "double layer tubular structure" in your

1 P. GREEN
 2 report?
 3 MR. BURNS: Objection.
 4 A. I don't think you will find those
 5 words, no. You will find discussion about
 6 the claims, you will find discussion about my
 7 discussions with Dr. Brookstein. You will
 8 find my discussions about my understandings
 9 of the technology.
 10 Q. Which claims will I find
 11 discussions on?
 12 A. Well, I don't have my report in
 13 front of me. But you will certainly find
 14 discussions about Claim 1 of I think both of
 15 the patents that are at issue in this case.
 16 You may also find other -- discussion of
 17 other claims or other functionality that is a
 18 part of the dependent claims.
 19 Q. I will ask you to bear with me
 20 once again as I ask this question. Did you
 21 conduct any analysis to determine whether a
 22 belly panel having a partial waistband
 23 extending across a backside of the lower edge
 24 portion of the pants and extending onto down
 25 into the seams of an article of clothing

1 P. GREEN
 2 connected thereto, so -- strike that line of
 3 questioning.
 4 Did you conduct any analysis to
 5 determine whether the Secret Fit Belly
 6 product having a partial waistband extending
 7 across the backside of the lower edge of the
 8 panel independently drives sales of Secret
 9 Fit Belly products?
 10 MR. BURNS: Objection to form.
 11 A. Again, I understand that to be a
 12 dependent claim that's dependent on claim --
 13 other claims of the patents that are at
 14 issue, one or more of the patents that are at
 15 issue in this matter. My understanding from
 16 Dr. Brookstein is that the Secret Fit Belly
 17 panel products sold by Destination Maternity
 18 are -- practiced the claims of the patents at
 19 issue here. I have analyzed the overall
 20 profitability of those products that include
 21 practicing the patent -- the dependent claims
 22 here and identified that they are
 23 commercially successful, substantially more
 24 profitable than those and have greater sales
 25 than those that don't practice the patents at

1 P. GREEN
 2 issue. But I didn't, for purposes of my
 3 analysis, and I don't think I could based on
 4 my conversations with Dr. Brookstein,
 5 separately evaluate that claim.
 6 Q. Separately evaluate the partial
 7 waistband feature?
 8 A. Right. I think that's something
 9 that -- from a technical point of view,
 10 Dr. Brookstein can do, but I think it is so
 11 integral to the overall product, as I
 12 understand it from Dr. Brookstein, that I
 13 couldn't separate it out from the accounting.
 14 Q. So is my understanding correct
 15 that if a feature was in a dependent claim,
 16 and Dr. Brookstein said that that feature was
 17 in the product, you did not separately
 18 analyze whether that feature independently
 19 drove sales of the product?
 20 A. No, I would say that. I would
 21 say that it varied depending on the claim.
 22 And so certain of the accounting records lend
 23 themselves to being able to do some analysis.
 24 So, for example, the denim claim, denim
 25 related independent claims, provide us with a

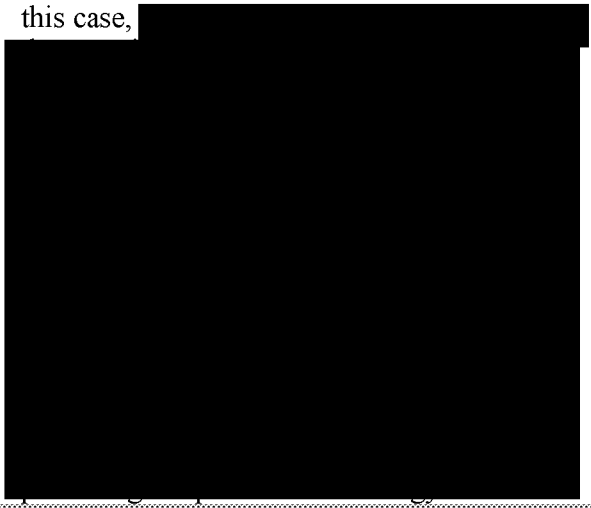
1 P. GREEN
 2 basis for being able to evaluate or do some
 3 comparative profitability between denim
 4 maternity pants that practice the claims of
 5 the patents at issue and denim maternity
 6 pants that do not practice the claims of the
 7 patents at issue.
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 Q. So do you have a discussion in
 17 your report of this denim versus non-denim
 18 issue that you are mentioning today?
 19 MR. BURNS: Objection to form.
 20 A. I don't think there is a separate
 21 discussion in the report. I think it is
 22 relatively clear from the exhibits that my
 23 report references that are -- that you could
 24 see this very easily, very clearly from.
 25 Q. But you didn't offer an opinion

P. GREEN

on that particular issue in your report?

MR. BURNS: Objection to form.

A. It really wasn't necessary to do because the opinion -- my opinion regarding the denim claims, for example, which are dependent claims, is consistent with what the overall analysis is that these products are commercially successful due to practicing the claims of the patents that are at issue in this case,



P. GREEN

MR. BURNS: Objection to form.

A. Well, what it tells you is that the difference between the -- the difference between the two products is the patented technology, and there is a willingness on the part of the consumer to pay a price premium, and then when you take a look at the difference between the profitability of those pants that practice, that have denim and those that don't necessarily have denim that are also practicing the patented technology, you find that the denim products are as profitable, if not more profitable, than the ones that aren't denim.

Q. But there is not a statement to that effect in your report?

A. No, but you can see it in the analysis -- in the underlying detail that's referenced in my report. And you can also see that the point I am making here is consistent with the overall points that are

P. GREEN

made in the report.

Q. So why isn't it contained in your report?

MR. BURNS: Objection to form.

A. Because I was essentially analyzing for purposes of doing, of evaluating commercial success, the technology that I understood was claimed by the patents that are at issue here and providing an opinion that the products that practice the claims of the patents in suit are commercially successful, which is how I have analyzed it. But you can see from the accounting records that you can get down to the denim level and to certain other levels and identify that those products are as commercially successful as product -- in comparison to other products that don't practice the patents in suit.

Q. Did you conduct any analysis, Dr. Green, to determine whether -- whether Secret Fit Belly panels having a perimeter hem stitch on the upper edge, whether that perimeter hem stitch is an independent driver

P. GREEN

of sales?

MR. BURNS: Objection to form.

A. Again, this is similar to some of the other dependent claims that we were just talking about that I understand that those are dependent claims that are dependent on other aspects of the patents that are at issue in this case. I understand from Dr. Brookstein that Destination Maternity Secret Fit Belly panel products all practice the patents that are at issue in this case and -- or practice the technology that's at issue in these patents and that that -- and that those products were commercially successful.

However, I understand that that particular claim or that technology, at least from look at account records, is something that I couldn't separately analyze because it is just part of the overall structure of the product.

Q. So there is nothing in your report particularly related to perimeter hem stitching, by that I mean, if I look through

1 P. GREEN
2 your report, there won't be a section that
3 particularly discusses perimeter hem stitch?

4 MR. BURNS: Objection to form.

5 A. I don't recall a particular hem
6 stitch section. What there is, is an overall
7 analysis that products that practice the
8 technology that's claimed by the patents at
9 issue here are commercially successful in
10 comparison to products that don't.

11 Q. So in your report, there's no
12 opinion that products having a perimeter hem
13 stitch are commercially successful?

14 MR. BURNS: Objection to form.

15 Q. Over products not having it?

16 A. Well, I understand that products
17 that don't have the -- the perimeter hem
18 stitch are not practicing the patents in suit
19 and therefore are not commercially
20 successful.

21 Q. You mentioned in your report you
22 discuss Claim 1 of both patents; is that
23 right?

24 A. That's my recollection. I don't
25 have my report in front of me, but yes.

1 P. GREEN
2 considerations relative to claims that have
3 been found obvious or likely to be obvious in
4 the case.

5 MR. BURNS: Objection to form.

6 A. I guess that's fair. That's an
7 interesting way of describing it. That's
8 fair, though.

9 Q. And do you understand or have you
10 been informed that Claim 1 in each case has
11 been found likely to be anticipated?

12 A. I understand that's one of the
13 reasons why we are all here today is to have
14 an official analysis and finding as to
15 whether or not it is anticipated in their
16 arguments of both sides.

17 Q. Do you have any understanding of
18 how commercial success relates to
19 anticipation?

20 MR. BURNS: Objection to form.

21 A. Well, I am not the patent lawyer
22 or the technical expert, but my understanding
23 is that to the extent that the patented
24 technology is not driving commercial success
25 or is not the nexus between commercial

1 P. GREEN

2 Q. What's your understanding of
3 Claim 1 in the patents?

4 MR. BURNS: Objection to form.

5 A. Well, I am not the technical
6 expert in the case. So my analysis or my
7 understanding is really for the purposes of
8 evaluating commercial success. But my
9 understanding is that Claim 1 is a
10 description of a particular design of a belly
11 panel that can be used by often pregnant
12 women that expands with them and can -- and
13 comes up to a certain area on their chest
14 that would cover a pregnant belly, for want
15 of a better term.

16 Q. And do you have any understanding
17 of, in these proceedings, the disposition of
18 Claim 1 of each patent according to the
19 Patent Office?

20 MR. BURNS: Objection to form.

21 A. I am not sure what you mean by
22 "disposition."

23 Q. Well, you understand that you
24 provided, at least my understanding is you
25 have provided in your report on secondary

1 P. GREEN

2 success and -- and then there are other
3 factors or other things that are the cause of
4 commercial success, and so it wouldn't -- the
5 invention would not necessarily have been --
6 the incentive to invent the invention would
7 not have been there.

8 Q. But do you understand how -- do
9 you understand what anticipation is?

10 MR. BURNS: Objection to form.

11 A. Again, I am not a patent lawyer.
12 I understand it generally from working on
13 patent cases over the years, sure.

14 Q. What's your general understanding
15 of anticipation?

16 MR. BURNS: Objection to form.

17 A. Again, I am not a patent lawyer.
18 I am not providing legal opinions on this
19 stuff. But as I understand it, anticipation
20 relates to whether a person of ordinary skill
21 of the art would be able to have anticipated
22 a particular invention from looking at other
23 claims and other inventions.

24 Q. So do you understand that --based
25 on your understanding, do you understand that

1 P. GREEN
2 Claim 1 in both of the patents in suit here
3 have been found likely to be anticipated by
4 prior art?

5 MR. BURNS: Objection to form.

6 A. Again, I am not the technical
7 expert in the case and nor am I a patent
8 lawyer. But that's one of my understandings
9 as to the current posture of this case, yes.

10 Q. Do you have an understanding of
11 how commercial success relates to
12 anticipation?

13 MR. BURNS: Objection to form.

14 A. Well, again, my understanding of
15 the inquiry of commercial success is that one
16 is trying to evaluate whether the commercial
17 success of a product practicing the patent in
18 suit is -- a patent at issue would be due to
19 the claims of the patented technology or
20 whether it is due to something else. And to
21 the extent that there were assertions of
22 anticipation, then what that would be
23 suggestive of is that the commercial success
24 of a particular product wouldn't necessarily
25 be due to the patent -- patents at issue or

1 P. GREEN
2 patented technology at issue, but would be
3 due to something else.

4 Q. In your analysis, did you form an
5 opinion about the commercial success of
6 garments that embodied Claim 1 of either
7 patent?

8 MR. BURNS: Objection to form.

9 A. My understanding, and I am not
10 the technical expert in this case nor am I a
11 patent lawyer, is that the challenged claims
12 in these proceedings are dependent claims
13 that relate to, I believe, Claim 1 of the
14 patents. So in evaluating what I did, by
15 evaluating commercial success, I necessarily
16 looked at the dependent claims and the
17 independent claims because they go together
18 and analyzed the overall profitability of the
19 products in accordance with my understanding
20 of those technologies as obtained from
21 Dr. Brookstein.

22 Q. And so did you reach an opinion
23 on whether products embodied just Claim 1,
24 putting aside the dependent claims, did you
25 reach any opinions in your report on whether

1 P. GREEN
2 products embodying Claim 1 of either patent
3 are commercially successful?

4 MR. BURNS: Objection to form.

5 A. Yeah, I think my analysis leads
6 us to the conclusion that the products
7 embodying the claims that are at issue in
8 these proceedings are commercially
9 successful, and so one has to look at all of
10 the pieces of the claim to understand that or
11 to evaluate that.

12 Q. But did every product for which
13 you reviewed sales data fall within every
14 claim at issue, according to Dr. Brookstein,
15 I know you have interfaced with
16 Dr. Brookstein quite a bit. I understand --
17 what is your understanding on which products
18 fell within which claims?

19 MR. BURNS: Objection to form.

20 A. Well, again, I don't have my
21 report sitting front of me. I think we were
22 talking about this a little bit before. But
23 certain products could be easily identified
24 as falling within the denim claims, but they
25 may have also fall within other claims that

1 P. GREEN
2 are -- other dependent claims. So
3 essentially, what my analysis does is it
4 assumes or it analyzes the commercial success
5 of the products that are practicing the
6 dependent claims as evidenced by the
7 accounting and other financial records that I
8 was able to consider from Destination
9 Maternity.

10 Q. Did every product you analyze
11 practice all of the dependent claims at
12 issue?

13 MR. BURNS: Objection to form.

14 A. Well, I think we can agree that a
15 product that wasn't labeled denim in the
16 accounting records may not have practiced the
17 denim dependent claim but -- and we might be
18 able to evaluate whether or not the pocket
19 claims were in every single one of the SKUs,
20 but my understanding from Dr. Brookstein is
21 that the products that are at issue in this
22 case all practice the claims of the patents
23 that are at issue here.

24 Q. So you understand other than
25 denim that all the products practice all the

1 P. GREEN
 2 dependent claims at issue?
 3 MR. BURNS: Objection to form.
 4 A. Well, that's the way that I have
 5 analyzed the accounting and financial and
 6 profitability records here. And that makes
 7 sense in this circumstance because when you
 8 look at the claim -- the products that
 9 actually have the -- you know, they actually
 10 are denim, you can see what their
 11 profitability is relative to all the rest of
 12 the -- either products that are practicing
 13 the Secret Fit Belly panel technology, which
 14 is, as I understand it, is the subject of the
 15 patents at issue here, or when you compare
 16 them to the products that don't, they are all
 17 commercially successful. They all result in
 18 higher profits. They all result in higher
 19 sales.
 20 Q. But your report aggregates the
 21 data and looks at Secret belly fit pants
 22 versus non-Secret belly fit pants; is that
 23 right?
 24 MR. BURNS: Objection to form.
 25 A. Among other things, yes.

1 P. GREEN
 2 understanding for doing my commercial -- my
 3 analysis of commercial success, what's being
 4 challenged here are a sequence of dependent
 5 claims, which are dependent in terms of what
 6 they are claiming plus they're dependent on
 7 Claim 1.
 8 Q. But you relied on Dr. Brookstein
 9 to tell you which products were covered by
 10 which dependent claims?
 11 MR. BURNS: Objection to form.
 12 A. Yes, I mean, that would be fair,
 13 sure.
 14 Q. How many products did
 15 Dr. Brookstein analyze?
 16 A. I don't know the number of
 17 products that he analyzed. What he describes
 18 in his report is what he analyzed. But what
 19 he told me from his analysis is that -- and I
 20 don't have my report in front of me to quote
 21 to you from, but my understanding is that
 22 Destination Maternity's products that include
 23 the Secret Fit Belly panels practice the
 24 technology that's claimed in these patents.
 25 Q. By practice the technologies,

1 P. GREEN
 2 Q. What are those other things that
 3 are in your report?
 4 A. The other things that are in my
 5 report are the analyzing overall data. So it
 6 is not just Secret Fit Belly pants and
 7 non-Secret Fit Belly pants. It is whether or
 8 not these products are providing superior
 9 margins in comparison to Destination
 10 Maternity as a whole.
 11 And then there is also analysis
 12 in there as to whether or not the success of
 13 these products is related to advertising or
 14 other functions that are unrelated to the
 15 patented technology.
 16 Q. When you say "the patented
 17 technology," I want to get an understanding
 18 of what you mean when you use that term.
 19 You've used it a couple of times. Does the
 20 patented technology include what's in Claim 1
 21 of each patent?
 22 A. Again, what we are talking about
 23 here that's being challenged are, and I am
 24 not the liability expert here nor am I a
 25 patent lawyer, but at least from my

1 P. GREEN
 2 that practice every claim or practice some of
 3 the claims? When you say "practice the
 4 technology," what do you mean?
 5 MR. BURNS: Objection to form.
 6 A. Well, we can see that, to my
 7 understanding, they practice, and I am not
 8 the technical expert here so my opinion on
 9 what things practice is sort of, you know,
 10 not as relevant as Dr. Brookstein's here, but
 11 for purposes of doing my commercial success
 12 analysis, my understanding is that they
 13 practice one or more claims of either of
 14 these patents and that you can see, for
 15 example, that certain of the products
 16 practice the dependent claims that relate to
 17 denim or to other things.
 18 Q. How many SKUs -- how many Secret
 19 Fit Belly -- and if I use the term SKU, S-K-U
 20 for the Court Reporter, how many SKUs Secret
 21 Fit Belly SKUs did you analyze data for,
 22 sales data for?
 23 MR. BURNS: Objection to form.
 24 [REDACTED]
 25 [REDACTED]

P. GREEN



Q. Let me ask you a different way.

P. GREEN

Of the SKUs you analyzed, how many different Secret Fit Belly products were within that group of SKUs?

A. Well, depends how you define it. I mean, they were all effectively one product, which is the Secret Fit Belly bottoms. There are different styles and different types of Secret Fit Belly products among those SKUs.

Q. And so how many did Dr. Brookstein, of those SKUs, did he look at all of them?

MR. BURNS: Objection to form.

Q. To determine whether they fall within claims of the patents?

MR. BURNS: Objection to form.

A. I don't know exactly all of the analysis that Dr. Brookstein did. What I do know is what he told me, which is outlined in my report, which is not sitting in front of me. But my general recollection is that Dr. Brookstein explained to me that Destination Maternity's Secret Fit Belly products practice one or more claims of the

P. GREEN

patents that are at issue in this case. And I would just have to go book and look at the wording. Because I have -- so and that's what he told me.

Q. And did you just take Dr. Brookstein's word for it on his analysis or did you ask further questions or ask for more data from Dr. Brookstein?

MR. BURNS: Objection to form.

A. Well, I certainly read his report very carefully. And tried to understand it as someone who is a non-technical expert would, and I certainly took a look at the accounting records and the business records and you can see what the promotional information is regarding these products from Destination Maternity. And you can see what the products do based on what a lay person would think is consistent with what's in the patents. I looked at the patents myself. So, yes.

THE WITNESS: Could we -- would now be a convenient time to take another just quick break here, just

P. GREEN

five minutes?

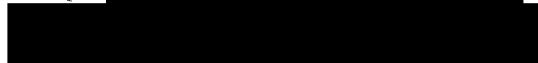
MR. LECHLEITER: If we could wait just a minute.

THE WITNESS: Sure.

Q. In the data you analyzed, there are style codes. Do you recall that?

A. Yes.

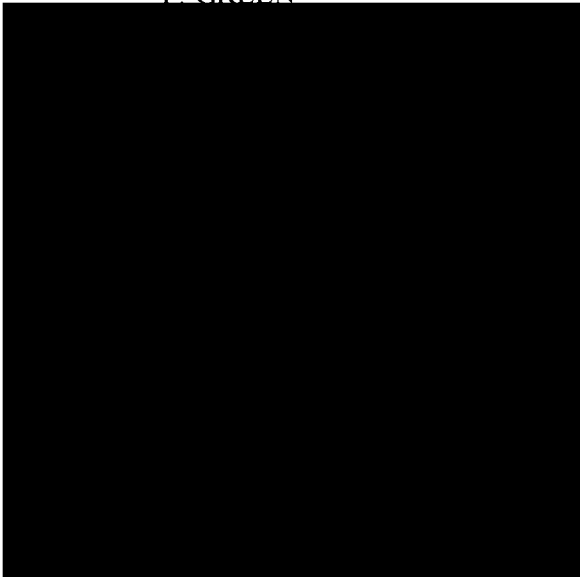
Q.



MR. BURNS: Objection to form.



P. GREEN



MR. LECHLEITER: Okay. We can take a break.

THE VIDEOGRAPHER: The time is 11:26 a.m.; we are off the record. (Whereupon, a recess was held.)

THE VIDEOGRAPHER: The time is 11:37 a.m.; we are on the record.

P. GREEN

BY MR. LECHLEITER:

Q. Mr. Green, before the break, we were talking about your reliance on Dr. Brookstein's analysis of products falling within the patent claims. Do you recall how many products Dr. Brookstein analyzed?

MR. BURNS: Objection to form.

A. Well, I don't have Dr. Brookstein's report in front of me. There are, as I understand it, there was a sampling of products that he looked at. I don't know the specific number.

Q. Did you discuss with him how he arrived at that sampling of the products?

A. I didn't ask him specifically about what all of the sampling was that he did. I noticed that his report was very much focused on certain aspects of validity in discussing prior art, which is what I looked at. So he -- I am not sure exactly how many products he looked at. There certainly is reference to it in his report, which I don't have in front of me.

Q. Did you do any comparison of the

P. GREEN

products that he looked at to the SKUs you looked at?

A. In terms of -- I mean, I looked at effectively all of the SKUs, the way that I did my analysis. I don't know -- I mean, he obviously would have looked at the subset, if we had thousands of SKUs, he would have looked at some subset.

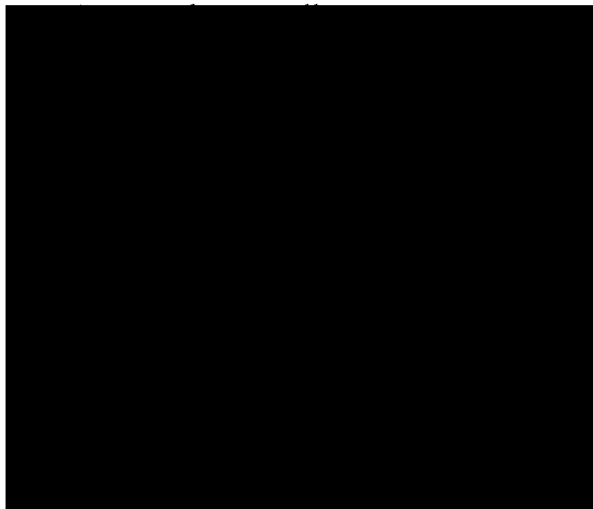
Q. Did you agree that looking at just the subset was appropriate for this analysis?

MR. BURNS: Objection to form.

A. For purposes of doing what I was doing, sure, because my understanding is that the Secret Fit Belly panel functionality, for a better phrase, that that invention is actually being practiced by Destination Maternity in its -- in the products that are called Secret Fit Belly panel products. You can see it and that's how it is coded in their SKUs.



P. GREEN



Q. Did you have any conversations with Dr. Brookstein about the appropriateness of that sampling?

MR. BURNS: Objection to form.

A. Well, I assume that Dr. Brookstein was a professional and was, you know, doing what he believed to be professionally relevant to doing the analysis that he was asked to do in this case. So I

1 P. GREEN
 2 didn't think it was necessary.
 3 Q. So you didn't provide any further
 4 input beyond Dr. Brookstein's analysis of
 5 those four samples?
 6 MR. BURNS: Objection to form.
 7 A. Of the samples that he analyzed?
 8 Q. You didn't ask Dr. Brookstein to
 9 analyze any additional samples?
 10 A. I did not. I just understood
 11 from Dr. Brookstein that the analysis that he
 12 did was sufficient for the purposes of his
 13 report, and I asked him about his view on the
 14 Secret Fit Belly panel products and whether
 15 they practiced these claims.
 16 Q. How did you determine that
 17 Dr. Brookstein's analysis was sufficient for
 18 your report?
 19 A. Through reading it and discussing
 20 it with him and taking a look at the patents
 21 and other information that was available to
 22 me or that I found.
 23 Q. Again, how many SKUs did you
 24 analyze, approximately?
 25 A. Well, I mean, when you look at

1 P. GREEN
 2 A. I don't know what you mean. I
 3 think we just discussed that I looked at a
 4 whole variety of SKUs because the accounting
 5 records cover many hundreds of SKUs. What --
 6 I don't know how many -- that Dr. Brookstein
 7 looked at all of them. I understood that he
 8 looked at the sample of Destination Maternity
 9 products.
 10 Q. When you say "a sample," do you
 11 have any idea how many that is that he
 12 looked at?
 13 A. I don't know how many he
 14 specifically tested versus how many he looked
 15 at in, you know, in sort of a summary way.
 16 My understanding from talking to him is that
 17 he believes that the Secret Fit Belly panel
 18 products infringe one or more of the claims
 19 of the patents that are at issue in this
 20 case.
 21 Q. So based on Dr. Brookstein's
 22 analysis, you assumed that his sample was
 23 sufficient?
 24 MR. BURNS: Objection to form.
 25 Q. For purposes of your report?

1 P. GREEN
 2 it, I mean, obviously the accounting analysis
 3 goes through all of the SKUs. But what's
 4 relevant here is I looked at a product, which
 5 is coded as the Secret Fit Belly panel
 6 products. And so you can see that they
 7 divide up into different types of bottoms,
 8 you know, but essentially, it is a single
 9 product.
 10 Q. I believe you testified earlier
 11 that your understanding is that some of the
 12 Secret Fit Belly products are covered by more
 13 or less claims in the patents than others?
 14 A. They could be depending on what
 15 the bottom is that's attached to them. But
 16 from my understanding, you know, they all
 17 practice at least one or more of the claims
 18 of the patents at issue in this case.
 19 Q. And that's based on the analysis
 20 that Dr. Brookstein conducted?
 21 A. Or based on my conversations with
 22 Dr. Brookstein, yes.
 23 Q. Were there any SKUs in your
 24 report that Dr. Brookstein didn't analyze?
 25 MR. BURNS: Objection to form.

1 P. GREEN
 2 A. It was sufficient for purposes of
 3 evaluating validity in this case, and it was
 4 sufficient for helping me do the analysis
 5 that I was asked to do with regard to the
 6 commercial success, yes.
 7 Q. When you say "sufficient to
 8 evaluating validity in this case," how does
 9 Dr. Brookstein's analysis of Destination
 10 Maternity's products affect validity here?
 11 MR. BURNS: Objection to form.
 12 A. Again, I mean, we need to take a
 13 look at his report. But part of what
 14 we're -- I mean, part of what his report is
 15 discussing, to my recollection, I don't have
 16 it in front of me, either, is that -- is he
 17 is discussing prior art. So in
 18 distinguishing prior art from the patented
 19 inventions, as I understand it, that's an
 20 analysis that relates to the validity of the
 21 patents.
 22 Q. You understand that the product
 23 being sold by Destination Maternity doesn't
 24 relate to the validity of the patents?
 25 A. I understand that --

1 P. GREEN
 2 MR. BURNS: Objection to the
 3 form.
 4 A. I understand that the product
 5 that's being sold by Destination Maternity is
 6 covered by one or more claims of the patents
 7 that are at issue in this case. It is what I
 8 said in my report, I think.
 9 Q. But you understand that based on
 10 only a sample conducted by Dr. Brookstein?
 11 MR. BURNS: Objection to form.
 12 A. It is whatever Dr. Brookstein in
 13 his professional opinion was appropriate to
 14 be able to have an opinion regarding
 15 Destination Maternity's products and the
 16 validity of the patents that are at issue in
 17 this case and make the connection between
 18 products that are being sold by Destination
 19 Maternity and practicing the patents that are
 20 at issue.
 21 Q. But you relied on
 22 Dr. Brookstein's selection of that sample?
 23 MR. BURNS: Objection to form.
 24 A. I relied on Dr. Brookstein's
 25 analysis and my conversations with

1 P. GREEN
 2 A. Again, I am analyzing commercial
 3 success as a secondary consideration for
 4 non-obviousness. Dr. Brookstein is a
 5 technical expert regarding various aspects of
 6 validity and the technical details of the
 7 patents that I am not familiar with.
 8 Q. How many conversations did you
 9 have with Dr. Brookstein?
 10 A. I can recall having
 11 two conversations with Dr. Brookstein.
 12 Q. And how long did the first
 13 conversation last?
 14 A. 40 minutes or an hour, probably
 15 an hour.
 16 Q. Was it in person or by phone?
 17 A. By phone.
 18 Q. What about the second
 19 conversation with Dr. Brookstein?
 20 A. Probably about half an hour.
 21 Q. Was it in person or by phone?
 22 A. By phone.
 23 Q. Did you share e-mails with
 24 Dr. Brookstein?
 25 A. No.

1 P. GREEN
 2 Dr. Brookstein in order to be able to do the
 3 analysis that I did, sure. I talked about
 4 that in my report.
 5 Q. You did not direct him to select
 6 the sample that he did select?
 7 MR. BURNS: Objection to form.
 8 A. Again, I didn't tell
 9 Dr. Brookstein what to do. I assumed that
 10 Dr. Brookstein was a professional and
 11 understood what was appropriate and required
 12 for his analysis or analyses in this matter.
 13 Q. Sure. Have you worked with
 14 Dr. Brookstein prior to this matter?
 15 A. I have not.
 16 Q. Once you saw Dr. Brookstein's
 17 analysis, did you provide any suggestions for
 18 Dr. Brookstein about how he might have done
 19 it differently?
 20 MR. BURNS: Objection to form.
 21 A. No, I did not.
 22 Q. So once you saw Dr. Brookstein's
 23 analysis, did you provide any input regarding
 24 his analysis?
 25 MR. BURNS: Objection to form.

1 P. GREEN
 2 Q. Did you share any other form of
 3 communication with Dr. Brookstein?
 4 A. No.
 5 Q. What was discussed during the
 6 first conversation? Well, let me back up.
 7 When did that first conversation
 8 occur?
 9 A. During the period prior to my
 10 issuing my initial report in this matter.
 11 Q. What did you and Dr. Brookstein
 12 discuss during that conversation?
 13 A. We discussed the claims of the
 14 patents at issue in this case and the
 15 analysis that he was doing and things that I
 16 needed to know with respect to the analysis
 17 that I was working on as far as whether or
 18 not the products, the Secret Fit Belly panel
 19 products actually practiced the claims of the
 20 patents in suit and the patents at issue here
 21 and so forth.
 22 Q. When did that conversation take
 23 place?
 24 MR. BURNS: Objection to form.
 25 A. Again, I think it would have --

1 P. GREEN
 2 it took place prior to my issuing my initial
 3 report in this matter.
 4 Q. When would that have been?
 5 MR. BURNS: Objection to form.
 6 A. I don't have the report in front
 7 of me, so I don't know the exact date. But
 8 the initial report was issued, the
 9 supplemental report was issued in -- towards
 10 the end of June, mid June-ish, so a couple of
 11 weeks before that was when the first report
 12 was issued. And then my conversations with
 13 Dr. Brookstein were before that first report
 14 was issued.
 15 Q. You don't recall when your first
 16 report was issued?
 17 A. I mostly focused on the second,
 18 on the supplemental one, since that's what I
 19 think you guys have and are focusing on.
 20 Q. And when you spoke with
 21 Dr. Brookstein, were his opinions -- well,
 22 did Dr. Brookstein relay his opinions to you
 23 when you spoke?
 24 A. I don't know if relayed all of
 25 them to me. We just discussed the things

1 P. GREEN
 2 that I analyzed.
 3 Q. Did you provide any direction to
 4 Dr. Brookstein with respect to that analysis?
 5 MR. BURNS: Objection to form.
 6 A. Me, no. I am analyzing the
 7 financial and economic and accounting issues
 8 that relate to the secondary considerations
 9 of non-obviousness. I think that
 10 Dr. Brookstein is doing a different type of
 11 analysis. I don't think I would be
 12 comfortable advising him on how to do his
 13 work.
 14 Q. But did you suggest during that
 15 call any products that Dr. Brookstein should
 16 analyze?
 17 MR. BURNS: Objection to form.
 18 A. It wasn't necessary. He was
 19 analyzing Secret Fit Belly panel bottoms that
 20 were, as I understand it, the subject of
 21 the -- or were practicing the patents in
 22 suit. Or patents at issue.
 23 Q. Did you have any input into the
 24 particular SKUs that Dr. Brookstein analyzed?
 25 MR. BURNS: Objection to form.

1 P. GREEN
 2 that were relevant to the -- that I thought
 3 were relevant to the analysis of commercial
 4 success that I was doing.
 5 Q. Were the opinions that you
 6 discussed at that time from Dr. Brookstein in
 7 their final form?
 8 A. I don't know.
 9 Q. Do you recall if his opinions
 10 changed between that conversation and his
 11 expert report that he issued?
 12 A. I couldn't tell you what may or
 13 may not have changed. I mean, the
 14 understanding that I had from Dr. Brookstein
 15 regarding the analysis that I needed -- the
 16 analysis of commercial success that I was
 17 doing, to my knowledge, hasn't changed from
 18 what he told me to what I found in his
 19 report.
 20 Q. Did you discuss during that first
 21 conversation with Dr. Brookstein the
 22 particular products that he analyzed?
 23 A. Yeah. I mean, we talked about
 24 the fact that he analyzed Secret Fit Belly
 25 panel bottoms, which are the same products

1 P. GREEN
 2 A. Again, I didn't have any input on
 3 the specific products that he was analyzing
 4 one way or another. I assumed that he was a
 5 professional in doing what he needed to do in
 6 order to analyze the products, of course,
 7 with the analysis that he was doing and --
 8 Q. So you didn't suggest any
 9 particular SKUs to Dr. Brookstein, that he
 10 should analyze?
 11 MR. BURNS: Objection to form.
 12 A. I did not, no.
 13 Q. When was your second call with
 14 Dr. Brookstein?
 15 A. The second one was yesterday.
 16 Q. What did you discuss on that call
 17 with Dr. Brookstein yesterday?
 18 A. Mainly the same thing I talked to
 19 him about in the period prior to issuing my
 20 report. Just understanding the claims that
 21 were at issue. Understanding the claims
 22 that -- Claim 1 of the patents and some of
 23 the differences just for purpose of being
 24 able to evaluate commercial success and
 25 leaving to him the technical analysis.

1 P. GREEN
 2 Q. Did Dr. Brookstein change his
 3 opinions in any way yesterday when you spoke
 4 with him?
 5 A. Not that I am aware of, no. It
 6 was consistent with my prior conversation.
 7 Q. What was the purpose of your call
 8 with Dr. Brookstein yesterday?
 9 A. More than anything, just to kind
 10 of make sure that I was -- had in my head a
 11 way that was properly describing the
 12 technology that was at issue here in the case
 13 and to discuss with him the claims and so
 14 forth.
 15 Q. Did you suggest to Dr. Brookstein
 16 during that call that he should have done
 17 anything different in his report?
 18 A. No.
 19 Q. Did he suggest to you that you
 20 should have done anything different in your
 21 report?
 22 A. No.
 23 Q. And yesterday was July 8, 2014?
 24 A. Yes -- no, today is July 8, 2014.
 25 Q. July 7th. I apologize, yesterday

1 P. GREEN
 2 counsel for Destination Maternity?
 3 A. That would have been the date
 4 that I signed it. So somewhere in the
 5 May 5th timeframe. Might have been done a
 6 day or two earlier, sure.
 7 Q. You mentioned earlier you created
 8 a supplemental report; is that right?
 9 A. Yes.
 10 Q. What are the differences, if any,
 11 between this Declaration and your
 12 supplemental -- I mention supplemental
 13 report, I'll call it supplemental
 14 Declaration, what are the differences between
 15 this Declaration and your supplemental
 16 Declaration?
 17 MR. BURNS: Objection to form.
 18 A. The fundamental differences are
 19 that there is in various paragraphs
 20 throughout the report, notations as to the
 21 sources of the information that is about to
 22 be discussed in the paragraph.
 23 Q. Did you change your opinions at
 24 all in your supplemental Declaration versus
 25 your Declaration here that we have as

1 P. GREEN
 2 was July 7, 2014?
 3 A. Correct.
 4 MR. LECHLEITER: Exhibit 2022.
 5 (Whereupon, Green Exhibit 2022,
 6 Declaration of Philip Green regarding
 7 commercial success was marked for
 8 identification as of this date by the
 9 Reporter.)
 10 BY MR. LECHLEITER:
 11 Q. Mr. Green, I believe you have in
 12 front of you what the Court Reporter has
 13 marked as Exhibit 2022; is that right?
 14 A. Yes.
 15 Q. Have you seen Exhibit 2022
 16 before?
 17 A. I have.
 18 Q. What is Exhibit 2022?
 19 A. Exhibit 2022 appears to be the
 20 initial report that I provided in this matter
 21 as dated on -- the initial Declaration in
 22 this matter that I provided is dated May 5,
 23 2014.
 24 Q. And you said it is dated May 5,
 25 2014, is that when you in fact provided it to

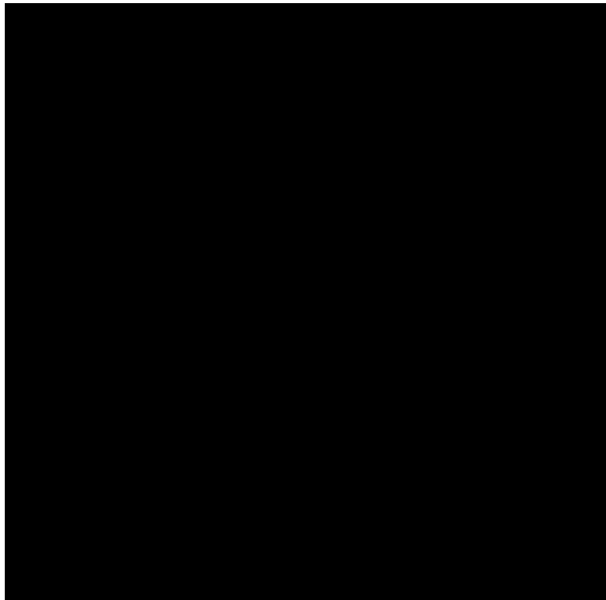
1 P. GREEN
 2 Exhibit 2022?
 3 A. No, I did not.
 4 Q. Any other substantive changes to
 5 the supplemental Declaration versus
 6 Exhibit 2022?
 7 A. Not that I can think of off the
 8 top of my head.
 9 Q. Did you rely on any additional
 10 information in your supplemental Declaration?
 11 A. I don't think so. I think that
 12 if one were to do a word compare what you
 13 would come to find is that there is mostly
 14 just information regarding, in the
 15 supplemental Declaration, there is
 16 information regarding the sources of data
 17 that's being recited in the paragraphs.
 18 There may have been some minor word tweaking,
 19 but I don't believe that there is anything
 20 that's substantively different, no.
 21 Q. Can you turn towards the back of
 22 Exhibit A of Exhibit 2022. Are you there?
 23 A. I am.
 24 Q. Did Exhibit A in your
 25 Declaration, that is Exhibit 2022, change in

1 P. GREEN
 2 your supplemental Declaration?
 3 A. I don't know. We might have to
 4 take a look at the supplemental Declaration
 5 and see. I don't -- I can't remember off the
 6 top of my head if there are -- there is more
 7 detail in the Exhibit A that's affixed to
 8 that document than there is in this one.
 9 Q. Were you provided with any new
 10 documents for your Supplemental Declaration?
 11 A. I don't believe I was provided
 12 with any new documents. I believe to the
 13 extent that there was a difference there it
 14 would be because we cited them differently.
 15 I can't make the -- to the extent there was a
 16 difference, that would be the reason for the
 17 difference.
 18 Q. When you say "cited them
 19 differently," what does that mean?
 20 A. To the extent that there was
 21 something that is -- where I could be more
 22 specific in the production documents, for
 23 example, or something of that nature, I would
 24 have endeavored to have provided you with
 25 greater detail, if the Exhibit A's are

1 P. GREEN
 2 by paragraph number, if you would.
 3 MR. BURNS: Objection to form.
 4 A. Sure. If we were to start on
 5 paragraph 12, you can see that I say, also --
 6 in the last sentence, I say, "I also
 7 understand that obviousness was instituted
 8 for dependent claims only and that DMC's
 9 Secret Fit Belly bottoms practice those
 10 instituted dependent claims."
 11 Q. Okay. Anywhere prior to
 12 paragraph 12 you discuss the dependent
 13 claims?
 14 A. Well, I guess we would need to
 15 pull out the patents and see where the
 16 quotations come from in paragraphs 2 -- in
 17 paragraph 2 that is from the -- that are
 18 noted in footnotes 2 and 3 as to whether or
 19 not they have any, and then footnote 5, as to
 20 whether or not they are in any way connected
 21 to the dependent claims.
 22 Q. But you don't know sitting here
 23 if those quotes relate to dependent claims?
 24 MR. BURNS: Objection to form.
 25 A. Correct. I mean, I have

1 P. GREEN
 2 different at all.
 3 Q. Well, let's go through your
 4 report. If you can just turn to paragraph 1
 5 of your report. Just let me know when you
 6 are there.
 7 A. I am there.
 8 Q. Here you indicate that you are
 9 providing an opinion regarding commercial
 10 success of DMC's full belly covering bottoms.
 11 In your report, do you offer any opinions
 12 aside from commercial success as stated in
 13 paragraph 1?
 14 A. No, that's the purpose of my
 15 analysis and retention in this case, is to
 16 evaluate whether or not the products that are
 17 practicing the patents at issue here are
 18 commercially successful.
 19 Q. Okay. You mentioned earlier that
 20 your understanding is that the dependent
 21 claims of the patents, several dependent
 22 claims stand rejected, and you have your
 23 report in front of you now. Can you point me
 24 to each instance in your report where you've
 25 discussed dependent claims? Just identify it

1 P. GREEN
 2 identified some aspects of the invention that
 3 I thought were relevant for purposes of
 4 evaluating commercial success in this case
 5 and have listed them in paragraphs 2 and 3.
 6 But we have -- tough to evaluate the
 7 relationships of the dependent claims.



P. GREEN



Q. What did you cite -- what is your, I guess -- let me back up.

Do I understand when you cite something here that's your basis for the statement?

A. That's the intention, is to give you a places -- a place where you can find where that information came from. But the issue is whether or not this functionality is, you know, part of the dependent claims, and so I am just telling you where -- you asked me where the dependent claims are mentioned and I am just saying -- suggesting

P. GREEN

that based on my understanding of the dependent claims, certain of the functions that are described here on paragraph 21 could be part of those dependent claims.

Q. But they are not explicitly mentioned here as being part of the dependent claims?

A. Yes.

MR. BURNS: Objection to form.

Q. Is that right?

A. That's correct.

Q. Where else do you discuss dependent claims in your report?

A. In paragraph 24.

Q. What do you say there?

A. I say, "I further understand from Dr. Brookstein that Secret Fit Belly bottoms likewise embodied many of the dependent claims of the patents in suit including all that are subject to these proceedings. I understand that only the dependent claims that are being reviewed for obviousness."

Q. Anywhere else you discuss dependent claims in your report?

P. GREEN

A. I don't think that there is anywhere else where it is -- where the word dependent claim actually is called out separately from. Again, my understanding that the dependent claims are being practiced by the products, and so I have analyzed the commercial success of the product that practices the claims and the overall analysis that I have done.

Q. The product as a whole?

A. Well, as well as when one gets down into the detail, one can see the differences in the denim, for example, but yes, I looked at the product as a whole, sure.

Q. So paragraph 3, if you look at paragraph 3 of your Declaration, you mentioned that this report -- for the record, I am using report and Declaration interchangeably. Does that make sense to you?

A. It does since I do so as well.

Q. Okay. You mentioned that "This report presents an analysis of financial

P. GREEN

accounting and economic factors that are related to the analysis of commercial success." Can you talk me through what factors you analyzed in your analysis? You mention financial accounting and economic. Can you provide more specificity in what those factors are?

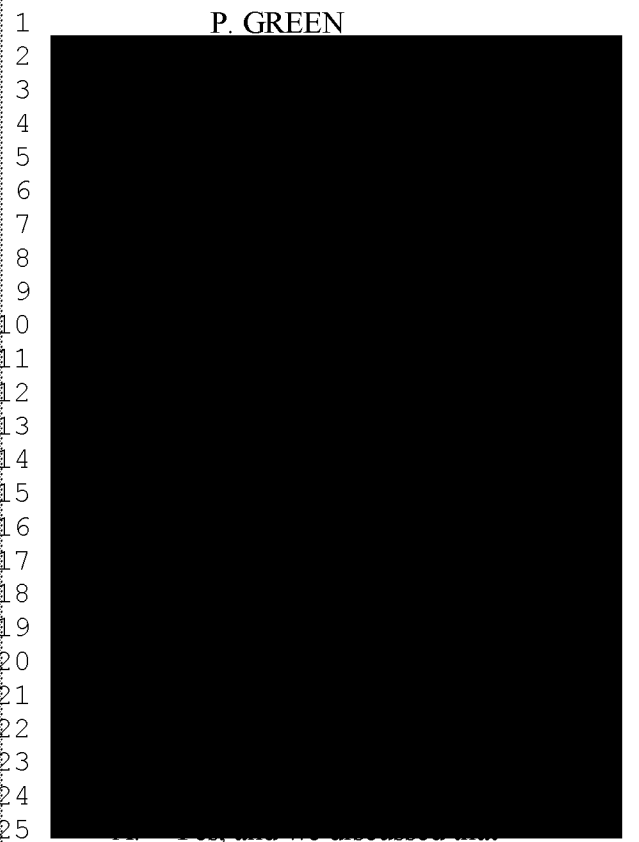
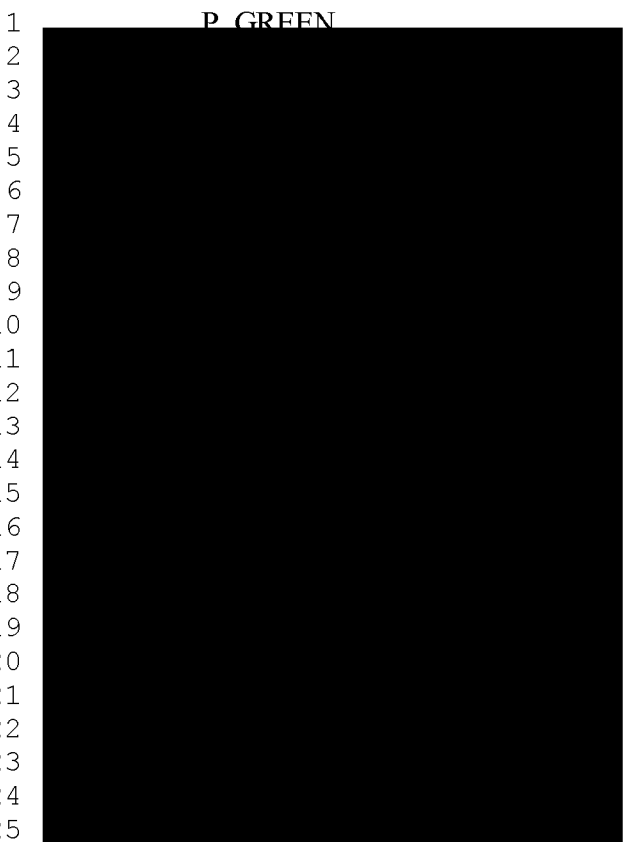
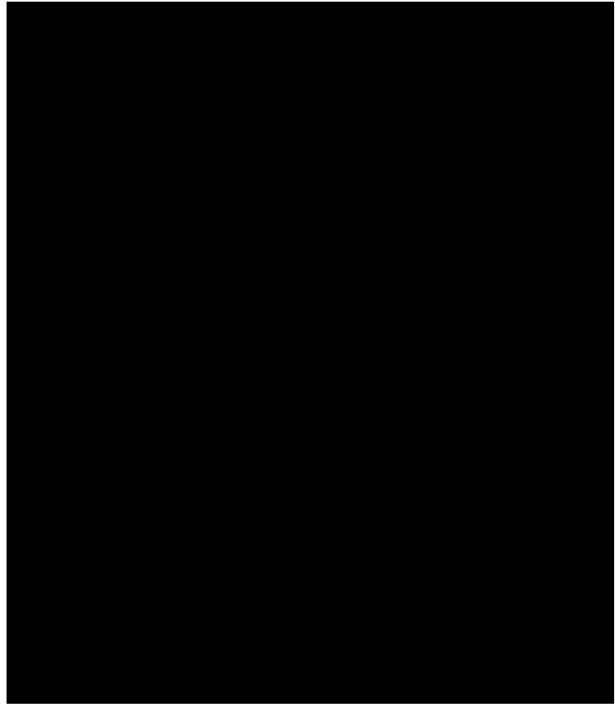
MR. BURNS: Objection to form.

A. Well, what I analyzed was whether or not from an accounting and financial point of view, the products that practiced the patents in -- at issue here are commercially successful. So I analyzed their sales and their sales trends. I analyzed the margins that are being earned, the profits that are being earned from those sales. I compared those sales and profits with other indicia that would be helpful to understanding whether or not the products are commercially successful. So I analyzed the profitability of products that don't practice the patents at issue as well as the sales of those products and the sales trends of those products. I did comparisons of those things.

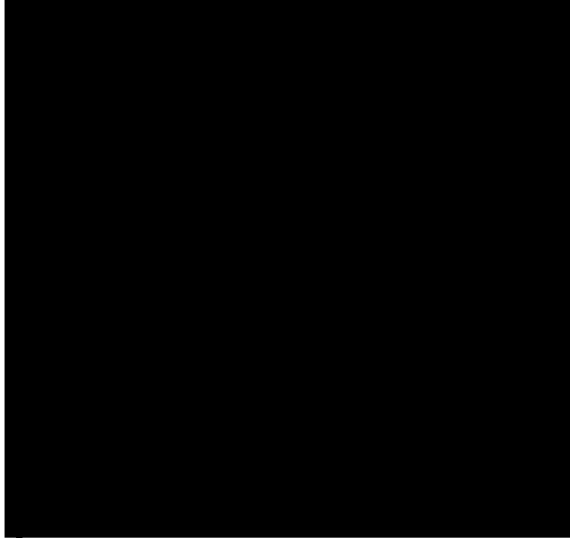
1 P. GREEN
 2 I analyzed the accounting records that were
 3 available to me from Destination Maternity of
 4 its overall business and compared those to
 5 the products that practiced the patents that
 6 are at issue here versus -- and those that
 7 don't practice the product -- the patents
 8 that are at issue.

9 I took a look at the financial
 10 reporting and evaluated whether or not there
 11 were indicia that there was greater or less
 12 advertising spend on these -- the products
 13 that were practicing the patents in suit
 14 versus those that were not. I looked for
 15 other indicators throughout the accounting
 16 and financial record as to whether or not
 17 economic factors would be influencing the
 18 sales. So whether or not there was a
 19 significant change in birth rate or decline
 20 in birth rate or something of that nature
 21 that might cause a change in the sales, in
 22 volumes between the patented products and the
 23 unpatented products or other things. So
 24 those the things that you -- one would
 25 normally look for in an analysis of

1 P. GREEN
 2 commercial success to evaluate secondary
 3 considerations of non-obviousness and help a
 4 trier of fact.



P. GREEN



Q. Did you visit a Destination Maternity store?

A. Sure.

Q. What did you see?

A. I saw that they have a variety of different pants and tops and all kinds of things that would assist women in -- during pregnancy to clothe them, and that there was

P. GREEN

no particular hype that I was aware of or section that said, you know, here they are. There is obviously, you know, pants or bottoms throughout the stores.

Q. But in your report, you mention that there is Secret Fit Belly panels across product lines?

A. Correct.

Q. So in all different product areas, not in one section or another?

A. Correct.

Q. Okay. So looking back at paragraph 3, we talked about ad spend. You mentioned you also looked at birth rate data as part of the economic factors in underlying your opinions. Where does the discussion of birth rate data appear in your report?

A. It doesn't appear in my report other than that I discussed that I have considered other factors and three of those factors are the absence of promotional activities, availability or non-patented features of the bottoms.

Q. I'm sorry, where are you looking?

P. GREEN

A. On page 20, paragraph 42.

Q. So sorry, you were identifying some factors. I don't see factors in 42.

A. Sure. It says, "Number 3, success is not due to the non-patented features of the bottoms. The Secret Fit Belly bottoms are identified -- are identical to non-patented bottoms as they are available in colors, in varieties of colors" and so forth. But I wasn't able to, for example -- and these are the three factors that I specifically called out, that I thought would be of particular interest in this case. But I did look for whether or not there is an uptick in birth rate or something like that, and then you can see in looking at the Destination Maternity 10-Ks that they actually discuss that, and they don't discuss it -- that birth rate is driving their sales.

Q. So they don't discuss that birth rate is driving their sales or lack thereof. Did you do any independent analysis to look at birth rate data, aside from Destination Maternity's 10-Ks?

P. GREEN

A. Well, I went to just make sure that I understood what the data was that they were looking at and whether or not it was consistent with -- consistent with, you know, something that you could read online. But I didn't go back and recount up the birth rate in this country for the last several years. The point is that --

Q. The fact is that factors listed on pages 19 to 20 don't mention birth rate?

A. No, but those are the ones that I was trying -- would have figured would have -- or that I thought, in my opinion in evaluating commercial success, would be things that might be relevant to the trier of facts' understanding to the extent that, you know, there was no change in the birth rate. There is really no reason to discuss that. It was something that wasn't effecting sales.

Q. So you thought birth rate was important in these factors?

A. I thought birth rate would be one of the -- was not important to these factors.

P. GREEN



Q. What's your understanding of the birth rate in the last -- over the period of time that you analyzed, what was the birth rate nationally?

A. It has varied but has generally been declining -- there's generally been about 4 million live births in this country every year and it is declining over that period by about 6, 7, 8%.

Q. So does that data appear in your report anywhere?

A. I don't think it appears in the report.

Q. So you didn't in your report rule out the effects of birth rate data?

A. I did rule it out because that's why I didn't talk about it in the tail end of the report.

P. GREEN

Q. So you are saying you ruled it out by not mentioning it?

A. Correct.

Q. Did you rely on any documents that revealed Destination Maternity's sales practices in their stores?

MR. BURNS: Objection to form.

A. So did I see anything that talked about a particular sales plan or something like that?

Q. Um-hum.

A. I think I cite to at least one document that talks about sort of the introduction in the stores. So, yes.

Q. Which document was that?

A. I think it is something that's Bates numbered DMC 2838, I'm not sure what that translates into in the exhibits that are in these proceedings.

MR. LECHLEITER: I will hand the Court Reporter what has been marked as Exhibit 2043.

(Whereupon, Green Exhibit 2043, DMC '0002838 was marked for

P. GREEN

identification as of this date by the Reporter.)

BY MR. LECHLEITER:

Q. Mr. Green, you have in front of you Exhibit 2043. Is that the DMC '0002838 document you mentioned?

A. Yes.

Q. So this is the document you relied on related to sales practices?

A. Yes, in addition to what's in the publicly reported financial information, sure.

Q. Was there anything in the publicly reported financial information related to Secret Fit Belly sales practices?

A. Specifically?

Q. Yes.

A. No. It is sort of my conclusions.

Q. This Document 2043, you see at the top it is dated?

A. Yes.

Q. What is it dated?

A. December 7, 2007.

P. GREEN

Q. And the data you considered in drawing your conclusions and conducting your analysis, when did that data begin?

A. It begins at various times. But it starts in the 2008 timeframe and runs through --

Q. If you look at footnote 29 on page 15, is that an accurate statement?

A. Well, the data actually for Destination Maternity starts at 2004 and the data for the sales of Secret Fit Belly bottoms starts in the third quarter of 2008.

Q. So if you look at footnote 29 on page 15.

A. Yes.

Q. Is it an accurate statement?

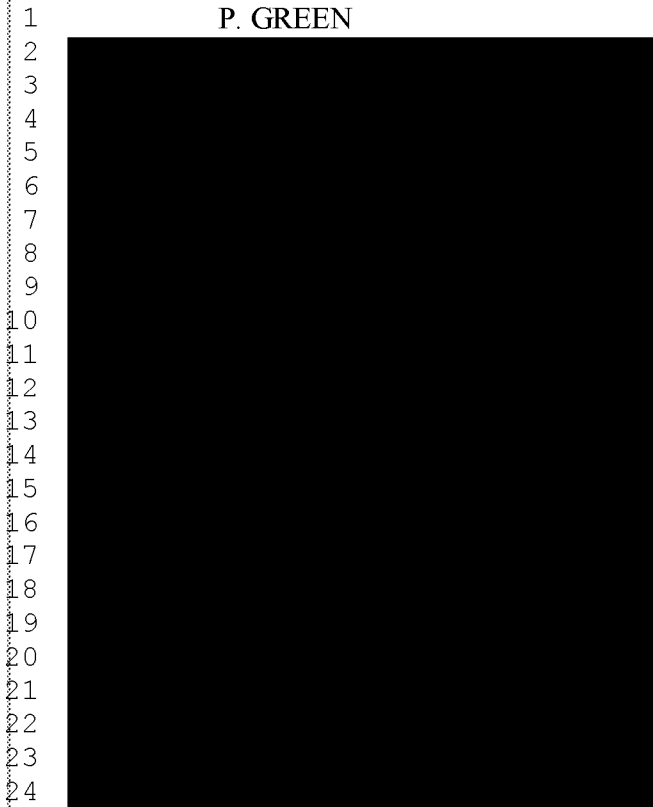
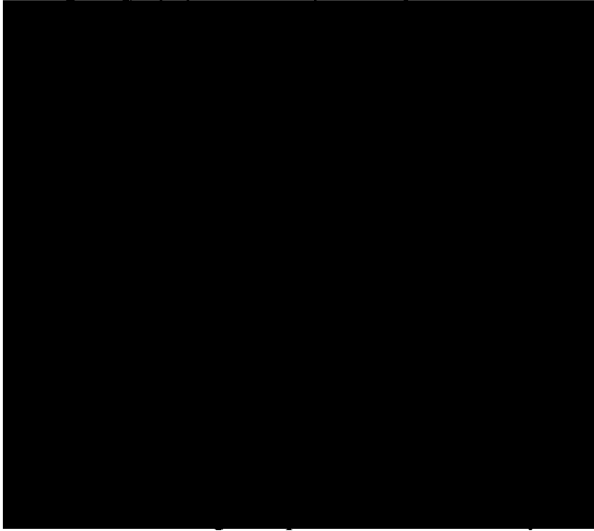
A. Yes, it is. It is consistent with the data in the schedules that are attached to the Declaration.

Q. So you began looking at Secret Fit sales data starting in Q3, 2008?

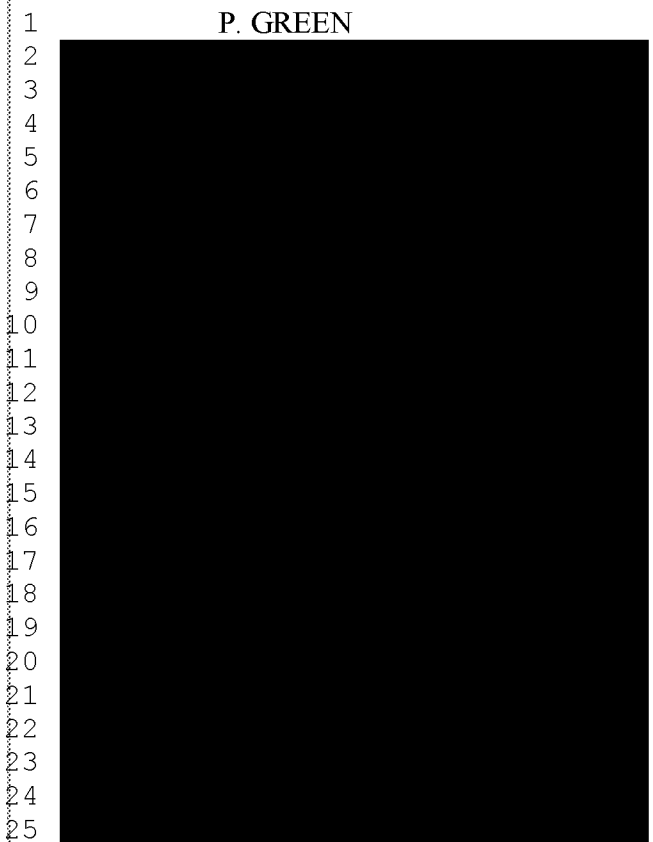
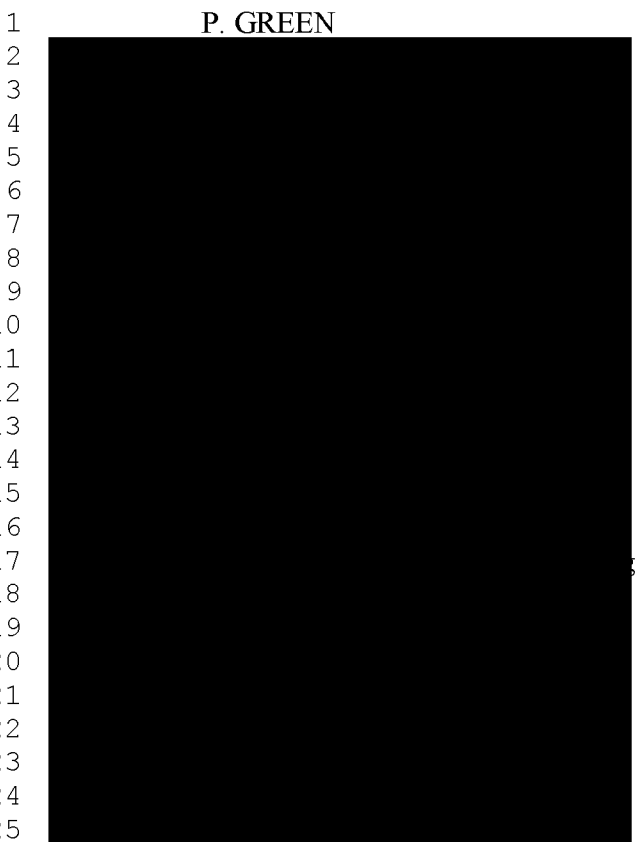
A. Yes.

Q. And in Exhibit 2020 -- excuse me, Exhibit 2043, is from December 7, 2007?

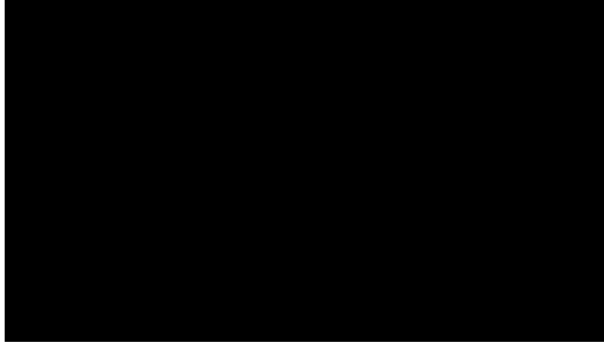
1 P. GREEN
 2 A. Yes.
 3 Q. What was the most recent sales
 4 data you looked at for Secret Fit Belly?
 5 A. Most recent, in other words?
 6 Q. The last.
 7 A. The last sales data. Was through
 8 the end of their fiscal year, which was
 9 September 30, 2013. Last fiscal year.



MR. BURNS: Objection to form.

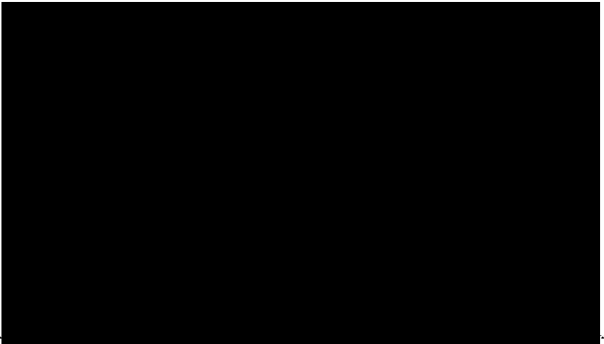


P. GREEN

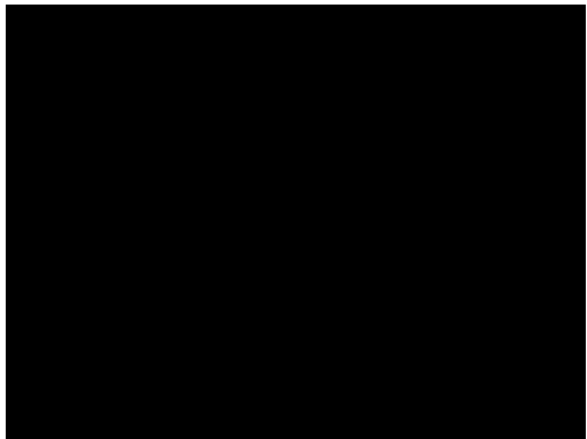


Q. Did you understand --

MR. BURNS: Objection. Let him answer, please. You have been cutting him off a little bit lately.



P. GREEN



Q. Would your opinions change if you saw documents, more recent documents?

A. Depends on what the more recent documents say.

Q. Did you consider any deposition transcripts in this matter?

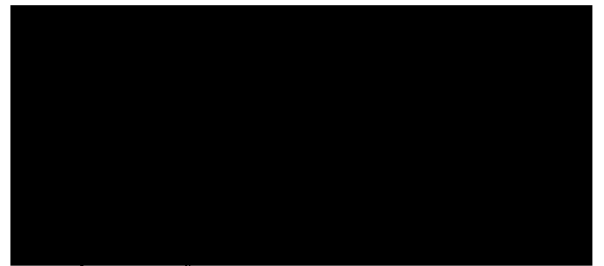
MR. BURNS: Objection to form.

A. I believe the only one that I have seen was Mindy Singer's deposition that I think we talked about earlier today.

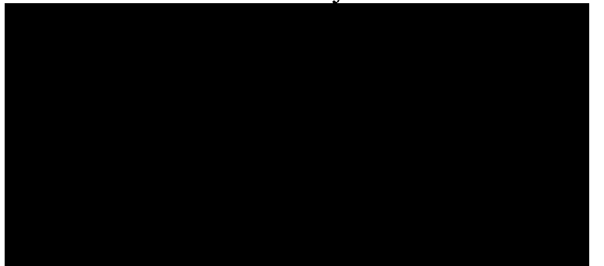
Q. Is that noted in your report?

P. GREEN

A. No, because I saw it after issuing my report. You asked me this morning if I had seen anything or considered anything since issuing my reports and I mentioned it to you.



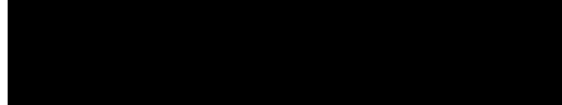
MR. BURNS: Objection to form.



MR. BURNS: Objection to form.



P. GREEN



Q. Apart from what is in Exhibit 2043, did you examine any evidence of DMC's promotional practices for Secret Fit Belly products?

A. Again, if you look at the report, I have looked extensively at its website, which is also a method of promoting its products, and as I mentioned to you, I have been in the stores, so I have also looked at financial statements, the 10-Ks, which also discuss product promotion and what they do, so sure.



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P. GREEN

[REDACTED]

MR. BURNS: Objection to form.

A. No.

[REDACTED]

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P. GREEN

[REDACTED] I then went and looked for things that would be publicly available which would discuss this. I looked at websites. I went into the stores. So.

Q. But, again, in terms of, you see on Exhibit 2043 that it is labeled confidential?

A. Yes.

Q. Is it your understanding typically you're not going to find confidential information in a publicly available source?

MR. BURNS: Objection.

A. Correct.

[REDACTED]

MR. BURNS: Objection.

A. Again this --

MR. BURNS: Object to the form.

A. [REDACTED]

MR. LECHLEITER: Break for

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P. GREEN

[REDACTED]

MR. BURNS: Objection to form.

[REDACTED]

P. GREEN

lunch?

MR. BURNS: Yes.

THE VIDEOGRAPHER: The time is 12:33 p.m.; we are off the record. (Whereupon, a recess was held.)

1 P. GREEN
 2 ***AFTERNOON SESSION***
 3 THE VIDEOGRAPHER: The time is
 4 1:19 p.m.; we are on the record.
 5 BY MR. LECHLEITER:

6 Q. Mr. Green, before the break we
 7 were kind of walking through the different
 8 paragraphs in your report, and I realized
 9 that I want to ask you, earlier we talked a
 10 lot about claims related to denim. Products
 11 that may have denim jeans as part of the
 12 pant. Do you anywhere in your report
 13 specifically discuss denim Secret Fit Belly
 14 pants?

15 MR. BURNS: Objection to form.
 16 A. I don't think that there is a
 17 specific discussion of the denim Secret Fit
 18 Belly pants in the text of the report.
 19 Rather, in the exhibits that are cited in the
 20 report, one can identify the margins and the
 21 associated profits and sales of the denim
 22 Secret Fit Belly pants and the economics, the
 23 profitability of the denim Secret Fit Belly
 24 pants as consistent with my overall opinion
 25 as presented in the report, that the pants

1 P. GREEN
 2 stated in the paragraph 9?
 3 A. Opinion 1 is that DMC's Secret
 4 Fit Belly bottoms practicing the patents in
 5 suit are commercially successful.

6 Q. And you say, "Secret Fit Belly
 7 bottoms practicing the patents in suit are
 8 commercially successful," your opinion
 9 doesn't engage in a claim-by-claim analysis?

10 MR. BURNS: Objection to form.
 11 A. I haven't looked at it on a
 12 claim-by-claim basis because the patents or
 13 the claims that -- the dependent claims, as I
 14 understand it, rely upon obviously an
 15 independent claim, Claim 1, and also for many
 16 of the technologies that are part of those
 17 independent -- dependent claims, according to
 18 my discussions with Dr. Brookstein, one
 19 couldn't separately identify those
 20 functionalities separate and above the
 21 overall product, which is the Secret Fit
 22 Belly pants, which is what I have analyzed.

23 Q. So when you say "practicing the
 24 patents in suit," you mean practicing all of
 25 the claims that Dr. Brookstein analyzed?

1 P. GREEN
 2 are commercially successful and --
 3 Q. Did you present an opinion
 4 specifically on denim in the report?

5 MR. BURNS: Objection to form.
 6 A. There is an opinion regarding
 7 products that practice the patents at issue
 8 here, including denim pants, yes.

9 Q. But does your report specifically
 10 mention denim anywhere?

11 MR. BURNS: Objection to form.
 12 A. Again, I think I just answered
 13 that I don't think that there is a specific
 14 discussion in here of the -- in the text
 15 where the word -- where I analyzed the denim
 16 separately. What is in here is an analysis
 17 of the commercial success of products that
 18 practice the patents in suit, including
 19 denim, and you can, in my analysis that we
 20 discussed earlier this morning where we
 21 talked about margins, I have been able to
 22 analyze the denim separately and I have
 23 discussed it with you.

24 Q. So looking at paragraph 9, where
 25 your opinion 1, what is your opinion 1 as

1 P. GREEN
 2 MR. BURNS: Objection to form.
 3 A. Like I said on page 13 of the
 4 report, in paragraph 24, "I understand from
 5 Dr. Brookstein that Secret Fit Belly bottoms
 6 likewise embody many of the dependent claims
 7 of the patents in suit including all that are
 8 subject to these proceedings."

9 Q. So -- but when you say "practice
 10 the patents in suit," are you referring to
 11 your statement in paragraph 24?

12 A. I am referring to my -- to the
 13 statement in 24, that's correct.

14 Q. So this opinion number 1 is not
 15 an indication that you believe the Secret Fit
 16 Belly bottoms practice any particular claims
 17 more or less than the others?

18 MR. BURNS: Objection to form.
 19 A. Again, my understanding is that,
 20 at least from the accounting records that I
 21 am aware of, where we can separate out the
 22 denim and perhaps where we can look at things
 23 that might have pockets and flies, based on
 24 the description of the material, the claims
 25 and the commercial success of the products

1 P. GREEN
2 that are practicing those claims is the same
3 as related to an entire product that I have
4 analyzed.

5 Q. So practicing the patents in suit
6 means practicing the claims as you state in
7 paragraph 24?

8 A. Correct. Which consist of
9 dependent and independent claims.

10 Q. And similarly in Opinion 2, what
11 is your Opinion 2 in paragraph 29?

12 A. Opinion 2 is --

13 Q. Or excuse me, paragraph 9, I
14 apologize.

15 A. That "DMC's Secret Fit Belly
16 bottoms commercial success is due to the
17 patented technology and not to other
18 factors."

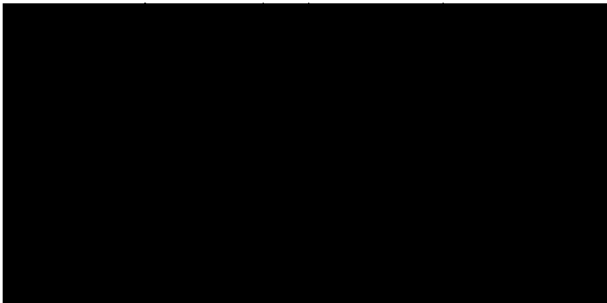
19 Q. So does your use of the term
20 "patented technology" there, is that
21 different than your use in the prior
22 Opinion 1 of the patents in suit or is it one
23 in the same?

24 A. I think that they're really one
25 in the same. They are really referring to

1 P. GREEN
2 sales.

3 Q. Which exhibits are those?

4 A. Well, if one were to look at the
5 10-K for Destination Maternity for 2012 or
6 something like that, one would be able to see
7 that we had a clear discussion in there about
8 how changes in birth rate are not what's
9 driving sales.



10 Notwithstanding what would be -- what they
11 indicate as being somewhat of a decline in
12 birth rate over the same period of time.

13 Q. But does that data you mention
14 from the 10-K, does that pertain specifically
15 to the Secret Fit Belly products?

16 A. Well, to the extent one would

1 P. GREEN

2 the discussion in paragraph 24.

3 Q. Okay. So in paragraph 9, again,
4 Opinion 2, your Opinion 2 finishes with the
5 statement "and not to other factors"; and
6 again those are the factors that we discussed
7 before the break, those are the factors
8 listed in paragraphs 39, 41 and 42?

9 A. As well as my consideration of
10 other things, which I couldn't identify as
11 actually having any impact such as what we
12 discussed this morning, like the change in a
13 birth rate or something that was demographic.

14 Q. But you don't state in here an
15 affirmative opinion that that didn't have an
16 impact. You just omitted it?

17 A. Right. What I was looking for
18 were things that would be helpful to the
19 trier of fact that they might conclude would
20 be a driver of or could potentially be a
21 driver of sales that would be outside of the
22 patented technology, and I wanted to evaluate
23 those, obviously, when one looks at some of
24 the exhibits or it is clear that the
25 demographics are not what's driving the

1 P. GREEN

2 want to -- that Secret Fit Belly products are
3 being worn by pregnant women, I would say
4 yes. To the extent that demographics are
5 actually in some way driving sales of Secret
6 Fit Belly products, then one -- you would
7 have expected that Destination Maternity
8 would say, oh, wow, this is all changing
9 Secret Fit because of demographics, that's
10 not what we're seeing. What we're seeing is
11 that Secret Fit Belly products are being
12 purchased, you know, because they provide a
13 benefit that was unavailable in the other
14 products that don't practice the patented
15 technology.

16 Q. The 10-K doesn't delineate
17 anything particular regarding the Secret Fit
18 Belly products relative to the birth rate?

19 MR. BURNS: Objection to form.

20 A. Correct. It does not.

21 Q. You mentioned, before the break
22 we discussed where in your report you
23 mentioned dependent claims of the patents.
24 Did you view the dependent claims of the
25 patents in forming your opinions?

1 P. GREEN
 2 A. Sure.
 3 Q. Did you review Dr. Brookstein's
 4 discussion of dependent claim features?
 5 A. To the extent it was in his
 6 report, sure.
 7 Q. Did you form any opinion about
 8 whether any of the features in the claims are
 9 found in the prior art?
 10 MR. BURNS: Objection to form.
 11 A. I think that's really beyond the
 12 scope of what I have been retained to do.
 13 That would be something for Dr. Brookstein
 14 and others who are involved in the technical
 15 analysis to evaluate.
 16 Q. So does your analysis take into
 17 account whether features in the claims are
 18 found in the prior art?
 19 MR. BURNS: Objection to form.
 20 A. Well, certainly to the extent
 21 that the existing Destination Maternity
 22 pants, the ones that are not practicing the
 23 patents in suit would be considered prior
 24 art, yes. And then to the extent that you
 25 have actual prior art as described in

1 P. GREEN
 2 are being asserted as prior art in this case
 3 to be able to evaluate them.
 4 Q. So aside from Destination
 5 Maternity's non-Secret Fit Belly products,
 6 did you look at any other form of prior art
 7 in forming your opinion?
 8 A. Well, again, I looked at what was
 9 identified in Dr. Brookstein's report, but I
 10 didn't -- but I wasn't aware of any
 11 particular financial information that would
 12 enable me to compare sales other than what's
 13 been asserted in his -- or described in his
 14 report as being prior art and the profits and
 15 sales, and to my knowledge, at least based on
 16 Miss Simon's deposition, there aren't
 17 documents that would help us with that
 18 inquiry.
 19 Q. Anywhere in your report do you
 20 have a discussion of claim features found in
 21 the prior art?
 22 MR. BURNS: Objection to form.
 23 A. Again, this is an area that I
 24 think is left to Dr. Brookstein to discuss.
 25 I mean, what I have done is analyzed the

1 P. GREEN
 2 Dr. Brookstein's analysis, I am just aware of
 3 the discussions, and I saw, for example, in
 4 Miss Simon's deposition that the reference to
 5 the J.C. Penney prior art, which is discussed
 6 by Dr. Brookstein, you know, is suggestive,
 7 in the deposition that they were not
 8 commercially successful and that the products
 9 didn't -- aren't still currently being
 10 marketed.
 11 Q. But did you account for in your
 12 report the availability of claim features in
 13 the prior art?
 14 A. Well, I certainly tried to
 15 evaluate whether or not there was increases
 16 in or are -- whether or not there are
 17 differences in margins between what would be
 18 Destination Maternity's non-patented goods,
 19 which would be, for example, prior art as far
 20 as evaluating commercial success, and the
 21 products that are practicing the patents in
 22 suit. So I did evaluate that. I am not
 23 aware of any particular financial information
 24 that J.C. Penney ever retained, let alone
 25 even a pair of the pants of the things that

1 P. GREEN
 2 commercial success of the products that
 3 practice the patented technology, including
 4 the dependent claims and have analyzed what
 5 those profits, sales and so forth are and
 6 their trends and all the other additional
 7 commercial success that would be relevant to
 8 analysis of the secondary consideration of
 9 non-obviousness.
 10 Q. Your report doesn't mention
 11 anything with respect to prior art?
 12 MR. BURNS: Objection to form.
 13 A. Again, to my knowledge, there was
 14 really no reason to. What I understood was
 15 that -- that there was no data related to the
 16 J.C. Penney quote prior art that is
 17 identified in Dr. Brookstein's report. The
 18 other prior art that I understand is in
 19 Dr. Brookstein's report also, I'm not aware
 20 of a commercial sale of it or anything that
 21 would actually let me do an analysis and
 22 besides which it is not actually a pair of
 23 maternity pants. So what I have done is I've
 24 compared products that don't practice the
 25 patented technology with those that do and

1 P. GREEN
2 that gives us essentially a comparison of the
3 benefit of using the patented technology.

4 Q. You mentioned J.C. Penney. Did
5 you review any other prior art that was
6 mentioned in Dr. Brookstein's report?

7 A. Again, I read Dr. Brookstein's
8 report. I don't -- I didn't do my own
9 independent analysis of prior art. That's
10 for Dr. Brookstein. I am not a technical
11 expert here.

12 Q. So you didn't determine whether
13 any of the claimed features exist within the
14 prior art?

15 MR. BURNS: Objection to form.

16 A. Again, I am relying on
17 Dr. Brookstein for those kinds of opinions,
18 and I am aware of what is in Dr. Brookstein's
19 report, but he is the better guy to testify
20 about it and what it means.

21 Q. So you didn't ask Dr. Brookstein
22 to conduct any analysis to determine whether
23 any claim features were in the prior art?

24 A. I think Dr. Brookstein's report
25 is intended to provide guidance to the trier

1 P. GREEN
2 of fact as to why the prior art doesn't
3 anticipate the claims that are in the patents
4 that are at issue in this case and in these
5 matters, and I think that Dr. Brookstein was
6 trying to identify, at least for the trier of
7 fact, why you wouldn't be looking at those
8 things.

9 Q. But you didn't ask Dr. Brookstein
10 to conduct any particular analysis related to
11 prior art?

12 MR. BURNS: Objection to form.

13 A. No. I think that -- again, I
14 relied on his professional judgment as to
15 what would be relevant to an analysis of
16 validity and prior art in this case. He is
17 the technical expert.

18 Q. If you look at paragraph 12 of
19 your report, so here you have a statement
20 that, in your view, one of the most important
21 features in the independent claims in the
22 patents in suit is the full belly panel, and
23 you also state "I also understand that
24 obviousness was instituted for dependent
25 claims only." You go in paragraphs 13

1 P. GREEN
2 through 18 to discuss the two patents in
3 suit; is that right?

4 A. Yes, that's true.

5 Q. Why don't you discuss any of the
6 dependent claims explicitly in those
7 paragraphs?

8 A. Again, for purposes of evaluating
9 commercial success and what I understood the
10 dependent claims to cover, it was important
11 to get a general understanding of the
12 technology that's in the patents and how it
13 relates to Destination Maternity's products.
14 However, Dr. Brookstein is the technical
15 expert here. So it was my view that I should
16 only generally describe what I needed for
17 purposes of doing the commercial success
18 analysis. And leave the rest to him.

19 Q. Paragraph 20 of your report, can
20 you read the second sentence of paragraph 20?

21 A. Sure. "DMC's" -- I'm assuming
22 you want me to read it out loud.

23 Q. Please.

24 A. "DMC's Secret Fit Belly bottoms
25 are similar in style to all other bottoms

1 P. GREEN
2 offerings. Generally, the only difference is
3 the expandable panel that is the subject of
4 the patents at issue in this matter."

5 Q. So is it your understanding, are
6 you saying here that the expandable panel is
7 the subject of both patents in this matter?

8 MR. BURNS: Objection to form.

9 A. I think that might be sort of a
10 shortcut to the discussion as to what's in
11 claim -- what's in the claims that are
12 described in paragraphs 13 through 18. But
13 the concept is that it is the expandable
14 panel and all the other attributes of that
15 panel that would be included in the claims.

16 Q. Do you understand what attributes
17 of the panel are included in -- you
18 mentioned, I guess, if you look back at
19 paragraph 13?

20 A. Yes, you can see that
21 paragraph 14, actually, is a cut from the
22 '531 patent.

23 Q. Which claim?

24 A. From the first claim. And it
25 says that -- what's included is a garment

1 P. GREEN
 2 that includes a belly panel and a number of
 3 other things that are part of that claim.
 4 Q. So when you say in paragraph 20
 5 that "Generally, the only difference is the
 6 expandable belly panel," is that the belly
 7 panel you are referring to, the belly panel
 8 from Claim 1?
 9 A. Well, it is the belly panel from
 10 Claim 1 or as described in Claim 1, yes. And
 11 then it is describing the fact that the other
 12 items, the jeans, trousers, capris and so
 13 forth are generally the same as what's in the
 14 Secret Fit Belly products.
 15 Q. With respect to the panel of
 16 Claim 1?
 17 MR. BURNS: Objection to form.
 18 A. No, with respect to what the
 19 products offer. So Secret Fit Belly bottoms
 20 are available in a variety of sizes and so
 21 forth, cuts, colors, and they are similar in
 22 style to the other non-Secret Fit Belly
 23 bottom -- non-Secret Fit Belly bottoms other
 24 than that the Secret Fit Belly bottoms have
 25 this expandable panel and whatever other --

1 P. GREEN
 2 Q. Is a seamless panel part of Claim
 3 1 in either patent?
 4 MR. BURNS: Objection to form.
 5 A. You know, I am not the technical
 6 expert in this and so you are asking me to
 7 compare essentially the claims of which I
 8 have identified on paragraph 17 and 14 with
 9 what is described in that first bullet point.
 10 I mean, I am an accountant here and I don't
 11 have the garments or anything like that in
 12 front of me to be able to make the comparison
 13 so --
 14 Q. Is paragraph --
 15 A. It could be.
 16 Q. Is paragraph 14 a quote of
 17 Claim 1?
 18 A. It is.
 19 Q. Does the word seamless appear in
 20 paragraph 14?
 21 A. Well -- so, the word --
 22 Q. Yes or no?
 23 A. The word seamless doesn't appear.
 24 But it -- but it is not clear to me whether
 25 there is a garment's lower portion having a

1 P. GREEN
 2 and all the related things that are described
 3 in Claim 1 as well as the dependent claims.
 4 Q. But Claim 20 doesn't mention the
 5 dependent claims?
 6 MR. BURNS: Objection to form.
 7 A. No, it's simply citing to a
 8 discussion on Destination Maternity's website
 9 about the differences between the various
 10 sizes, colors, jeans, trousers and so forth.
 11 They are all DMC's offerings and Secret Fit
 12 Belly bottoms as well.
 13 Q. I'm sorry, for the record, just I
 14 meant paragraph 20, not Claim 20.
 15 A. I understood.
 16 Q. I assume that doesn't change your
 17 answer?
 18 A. No, it doesn't I understood what
 19 you meant.
 20 Q. So then in paragraph 21, you have
 21 got listed bullet points that you state are
 22 benefits to the user of the full belly panel
 23 design. Looking at the first bullet point,
 24 you mention a seamless panel.
 25 A. Yes.

1 P. GREEN
 2 first torso and circling circumference that
 3 recedes downward to make way for expansion of
 4 the belly panel, whether that in fact has
 5 something to do with seamless panel. And
 6 certainly in paragraph 17 there is a whole
 7 discussion about in communication with the
 8 lower edge portion having a torso --
 9 Q. To just back up, is paragraph 17,
 10 is that -- do I understand that's a quote of
 11 Claim 1 of the '563 Patent?
 12 A. Yes, it is.
 13 Q. Does the word seamless appear in
 14 paragraph 17?
 15 A. It doesn't. But, again, I am not
 16 the technical expert nor am I skilled at
 17 being able to compare necessarily what the
 18 words are in this first bullet point with
 19 what's necessarily in these claims. What I
 20 can tell you is that the documents that I am
 21 aware of indicate that these are advantages
 22 of the Secret Fit Belly panel products and
 23 that --
 24 Q. And so what you --
 25 A. -- the design of the product is

1 P. GREEN
2 what I understand is covered by the claims of
3 the patents at issue here.

4 Q. So which -- you mentioned the
5 documents indicate these are benefits of the
6 Secret Fit Belly products. Which documents
7 indicate that?

8 A. Well, you can see that for the
9 first sequence of -- that first bullet point,
10 it talks about -- it is discussed in Claim 9
11 of the '563 Patent, when you look at other
12 maternity bottoms have a visible crease from
13 edge of the panel, you can see that comes
14 from the Destination Maternity website. So
15 there is two parts to that.

16 Q. What about the other bullet
17 points, what documents, the bullet points on
18 page 12, what documents indicate that those
19 bullet points demonstrate benefits of the
20 Secret Fit Belly product?

21 MR. BURNS: Object to form.

22 A. Well, those are ones that are
23 described by Destination Maternity on its
24 website. But also all appear to be, at least
25 as far as for purposes of evaluating

1 P. GREEN
2 commercial success, connected to the claims
3 of either the '531 or the '563 Patents.

4 Q. But you didn't identify which
5 claims in your report?

6 MR. BURNS: Objection to form.

7 A. I identified the claims that I
8 considered for getting a general
9 understanding of what the patents in suit
10 cover --

11 Q. Where is that?

12 A. -- and I have deferred to
13 Dr. Brookstein, who is the expert with
14 respect to the technology as far as the tail
15 goes for explaining it to the trier of fact.

16 Q. When you say you identified the
17 dependent claims you thought were important,
18 where did you do that in your report?

19 A. I didn't say dependent. I said
20 "the claims." I didn't use the word
21 dependent or independent. I don't think.

22 Q. So these benefits of the Secret
23 Fit Belly product, those are listed on
24 Destination Maternity's website based on your
25 footnotes; is that right?

1 P. GREEN

2 A. Yes.

3 Q. So isn't their website a form of
4 advertising?

5 MR. BURNS: Objection to form.

6 A. Yes. I think we discussed that.

7 Q. Their website is a vehicle for
8 marketing efforts?

9 A. Sure. We discussed that.

10 Q. So your -- you've obtained these
11 benefits of the patented product from their
12 website advertising marketing efforts?

13 MR. BURNS: Objection to form.

14 A. Sure. I have been able to
15 identify them from looking at what was on the
16 website, sure. [REDACTED]

17 [REDACTED]
18 [REDACTED] You can find out
19 other information about other products on the
20 website as well.
21 [REDACTED]

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

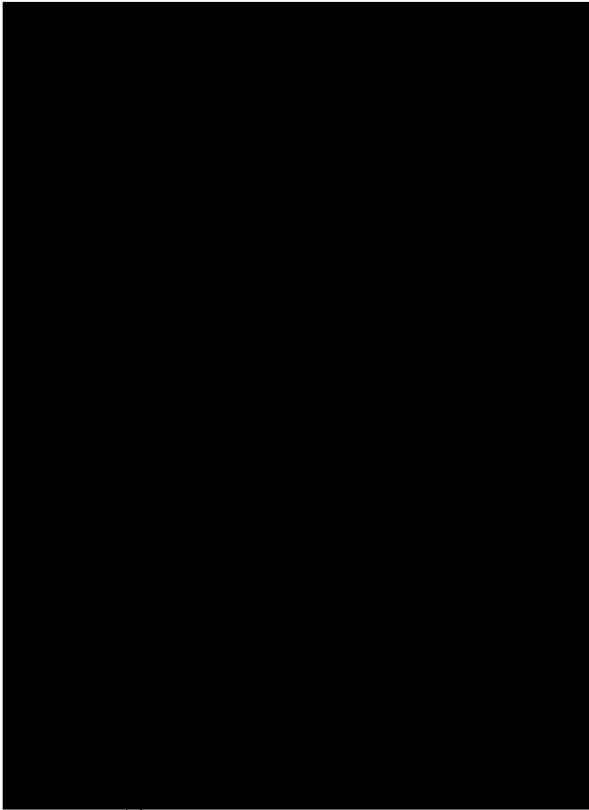
1 P. GREEN

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 MR. BURNS: Objection to form.

7 A. [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]

P. GREEN



P. GREEN

Q. When did you go to a secret -- excuse me, when did you go a Destination Maternity store, you testified earlier that you had in the past, when did that occur?

A. It occurred twice. Earlier in the spring I went to Destination Maternity store, and I was in one just yesterday just to see if anything had changed or was different down here, and then in an earlier time, I certainly was in Pea in the Pod and other Destination Maternity stores in connection with my own kids.

Q. What store were you in yesterday?

A. The Destination Maternity store over on Spruce, I think it's on Spruce. A few blocks over here.

Q. Here in Philadelphia?

A. Yes.

Q. Which store did you go to, you said several months ago?

A. Yes, up in Massachusetts, in Boston.

Q. What street is that on?

A. I think it was the one that was

P. GREEN

on Route 9 in Waltham, excuse me, in Wellesley.

Q. Where?

A. Wellesley.

Q. Did you create any notes of those visits?

A. No.

Q. Did you note the first visit to a Destination Maternity store, did you note that in your report?

A. No.

Q. Why not?

A. Because it was, you know, me going and looking at something. It was not so much -- it was to get an understanding of what they were doing.



Q. But what you were told being based on Exhibit 2043?

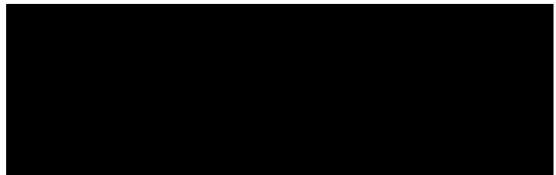
A. 2043, what was available me in

P. GREEN

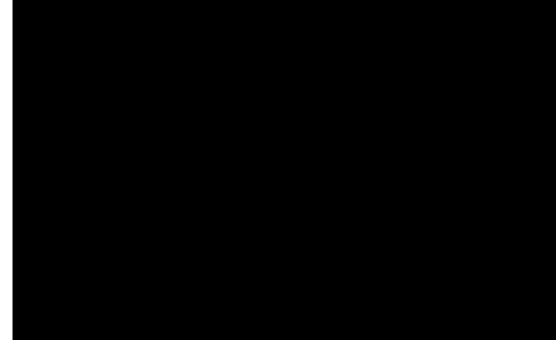
the public domain, yes.

Q. So in the public domain being the website?

A. Yes, the website. Like I said, my own observation.



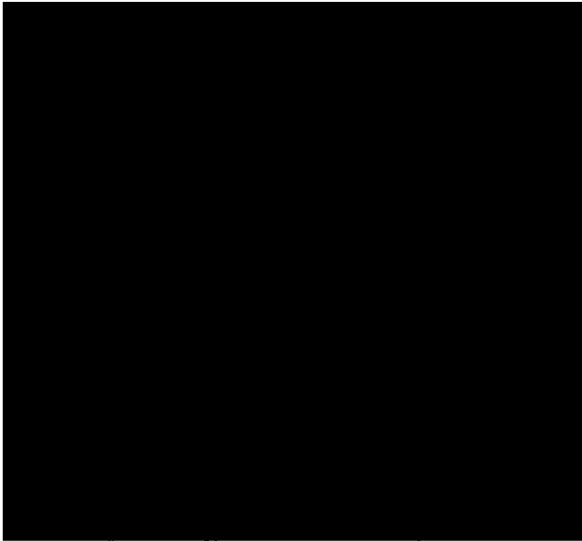
MR. BURNS: Objection to form.



MR. BURNS: Objection to form.



P. GREEN

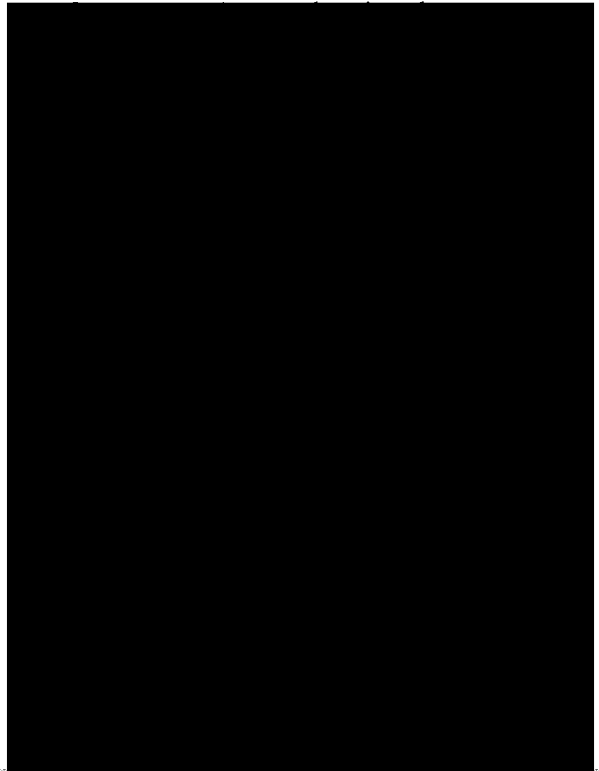


Q. So you are drawing that conclusion based on the publicly available documents and Exhibit 2043 and your visit to stores?

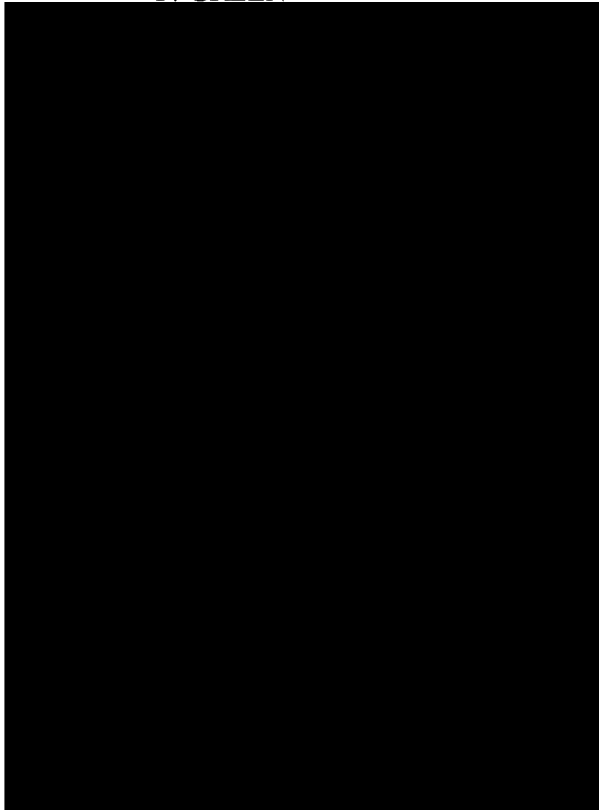
A. As well as my looking at the website and, you know, whatever else I could find that was publicly available that we've discussed, advertising spend at Destination

P. GREEN

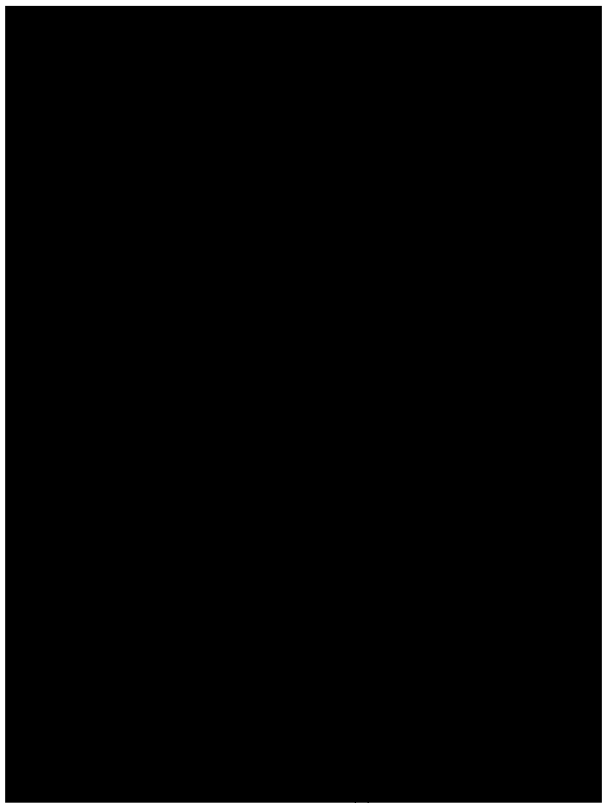
Maternity and what it was doing.



P. GREEN



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MR. BURNS: Objection to form.

MR. BURNS: Objection to form.

P. GREEN



Q. So that's the only basis for extraordinary is if they reported it in their 10-K?

MR. BURNS: Objection to form.

A. No. The question really is, was there anything in the other publicly available information that I was able to find that suggested something that was extraordinary about the marketing of Secret Fit Belly. So I went to look at the website. Did they do more or less on the website. Were there things in the store that would suggest the difference. I didn't find those things.

Q. So did you talk to anyone at

P. GREEN

Destination Maternity about their marketing or advertising?

MR. BURNS: Objection to form.

A. Not in connection with this matter, which is why we have a footnote 2, Exhibit 2043.

Q. So just so I understand what you are saying, did you talk to anyone at Destination Maternity, when you say "in connection with this matter," what do you mean?

A. What I mean is that I relied upon the documents that were available to me in this matter to form my opinions in this matter.

Q. So did you talk with anyone in DMC's marketing department regarding how they marketed Secret Fit Belly products?

MR. BURNS: Objection to form.

I think we might be getting outside the scope of his testimony for this IPR.

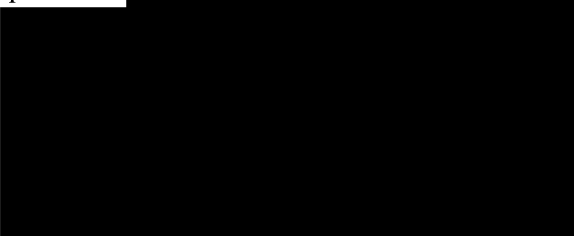
A. I don't think I spoke with anyone in connection with this matter regarding

P. GREEN

Destination Maternity's marketing of the Secret Fit Belly products.

Q. Did you speak with anyone at Destination Maternity for this matter regarding Destination Maternity's marketing, or excuse me, advertising of these products?

A. I did not speak with anyone at Destination Maternity in connection with this matter regarding its advertising of these products.



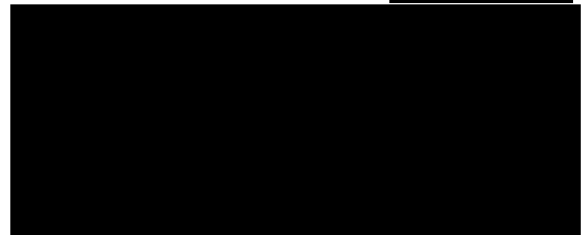
Q. Did you speak to anyone at Destination Maternity regarding sales practices related to the Secret Fit Belly products?

MR. BURNS: Objection to form.

A. Again, I didn't speak with anybody in connection with this matter, these

P. GREEN

IPRs, with respect to Destination Maternity's marketing and sales of products that are -- that Secret Fit Belly products.



Q. So is it fair to say you drew your conclusions without speaking to anyone at Destination Maternity?

A. It would be fair to say that I drew my conclusions regarding the marketing and sales information by looking at the documents and doing my own research with respect to the marketing and sales of Destination Maternity's Secret Fit Belly products.

Q. Why didn't you seek to speak with anyone at Destination Maternity regarding marketing?

MR. BURNS: Objection to form.

1 P. GREEN
 2 A. [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] I
 9 was able to confirm that by looking at the
 10 website. I was able to confirm that by my
 11 own research regarding advertising for these
 12 products, and I had Exhibit 2043 available
 13 to me.
 14 Q. [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 MR. BURNS: Objection to form.
 19 A. [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED] Again,
 25 what I relied on for doing my analysis in

1 P. GREEN
 2 these matters with regard to promotional
 3 activities are Exhibit 2043, the public
 4 record and other exhibits that have -- that
 5 are produced in this IPR.
 6 Q. So is it fair to say you didn't
 7 speak with anyone person-to-person at
 8 Destination Maternity regarding the subject
 9 matter of your report?
 10 MR. BURNS: Objection to form.
 11 A. I think if you take a look at
 12 Exhibit A, which is described in paragraph 4,
 13 it discusses that I have looked at specific
 14 documents, which are identified, and I also
 15 note in my report that I spoke with
 16 Dr. Brookstein in forming my opinions.
 17 Q. So no one at Destination
 18 Maternity?
 19 A. I don't believe I spoke with
 20 anyone at Destination Maternity in connection
 21 with this report.
 22 Q. Did you have any drafts of your
 23 report reviewed by anyone at Destination
 24 Maternity to confirm the accuracy of your
 25 report?

1 P. GREEN
 2 MR. BURNS: Objection to form.
 3 A. I personally did not. I don't
 4 know if counsel for Destination Maternity.
 5 Q. Did anyone at Destination
 6 Maternity provide any input on your
 7 conclusions?
 8 A. I don't know. I'm not directly
 9 aware of it if there were.
 10 Q. So no one at Destination
 11 Maternity provided any input directly to you?
 12 A. I don't believe I spoke with
 13 anyone at Destination Maternity or received
 14 direction from anyone at -- or received any
 15 commentary from anyone at Destination
 16 Maternity, no.
 17 Q. Regarding your report?
 18 A. Regarding my report, no.
 19 Q. Mr. Green, who wrote your report?
 20 A. I did.
 21 Q. Did counsel for Destination
 22 Maternity write any aspects of your report?
 23 A. No. They reviewed a draft of it.
 24 Q. Did they provide a redline to you
 25 of that draft?

1 P. GREEN
 2 A. They might have. I don't recall.
 3 Q. Did you review it with them over
 4 the phone?
 5 A. Yeah, I would have spoken with
 6 them over the phone about it.
 7 Q. Did you exchange e-mails with
 8 them about it?
 9 A. I don't know. I mean, I would
 10 have sent them the report via E-mail I
 11 suspect.
 12 Q. How did you receive the documents
 13 that you have listed in Exhibit A?
 14 A. Either through an FTP site or via
 15 E-mail, would be my bet, or I looked them up
 16 myself.
 17 Q. And the ones you didn't find on
 18 your own, did those come from counsel for
 19 Destination Maternity?
 20 A. What do you mean?
 21 Q. The items listed in Exhibit A to
 22 your report, you mentioned you found some on
 23 your own?
 24 A. Right.
 25 Q. And the others, those come from

1 P. GREEN
 2 counsel for Destination Maternity?
 3 A. To the extent they had a Bates
 4 number on them or are part of this
 5 record, yes.
 6 Q. How many times did you discuss
 7 drafts of your report with counsel for
 8 Destination Maternity?
 9 MR. BURNS: Objection to form.
 10 A. I don't know. A couple, maybe.
 11 Q. Do you think two?
 12 A. Two, three. Wasn't a lot of
 13 conversation about it.
 14 Q. Thinking about the first
 15 conversation, how long did that last?
 16 A. Half an hour, maybe.
 17 Q. What about the second
 18 conversation?
 19 A. Again, maybe half an hour. I
 20 mean, it wasn't -- these were just general
 21 discussions around the drafts.
 22 Q. How long did the third discussion
 23 last?
 24 A. 15 minutes. Really were not long
 25 substantive discussions.

1 P. GREEN
 2 A. A couple of hours.
 3 Q. And when was that?
 4 A. Yesterday.
 5 Q. How long did you spend together?
 6 A. A few hours.
 7 Q. Two hours?
 8 A. A few hours. Two, three,
 9 something like that.
 10 Q. You don't recall specifically?
 11 A. By the time we were done,
 12 probably three hours, most. Including lunch.
 13 Q. And that was to prepare for
 14 today's deposition?
 15 A. Correct.
 16 Q. Mr. Green, how much time did you
 17 spend on your report in this matter -- these
 18 matters?
 19 A. Reviewing the documents, writing
 20 the report, also, I don't know the exact
 21 number of hours. 30, maybe. 30 to 40.
 22 (Whereupon, Green Exhibit 2045,
 23 DMC '0031917 was marked for
 24 identification as of this date by the
 25 Reporter.)

1 P. GREEN
 2 Q. Any other discussions with
 3 counsel?
 4 MR. BURNS: I just want to
 5 object. I think that communications
 6 between counsel and drafts are
 7 privileged under, I think, the rules
 8 of evidence that would extend to
 9 Federal Rules of Civil Procedure
 10 unless he is using the information
 11 either for his compensation or for
 12 assumptions or for base his opinion
 13 on. So I just want to put that on the
 14 record. And for everybody to think
 15 about that as we go forward.
 16 Q. Any other times that you just had
 17 discussions with counsel besides the three
 18 that we just discussed?
 19 A. Would have been to, for example,
 20 schedule a call with Dr. Brookstein or ask
 21 for documents or something of that nature.
 22 Q. And did you meet with counsel
 23 prior to this deposition?
 24 A. Yes.
 25 Q. How long was that?

1 P. GREEN
 2 BY MR. LECHLEITER:
 3 Q. Mr. Green, I believe the Court
 4 Reporter has handed you what is marked as
 5 Exhibit 2045; is that right?
 6 A. Yes.
 7 Q. If you look at page 12 of your
 8 report.
 9 A. Yep.
 10 Q. Is the image on page 12 of your
 11 report, was that taken from Exhibit 2045?
 12 A. Yes.
 13 Q. And on page 12 of your report,
 14 you identify it as an image of the Secret Fit
 15 Belly jeans?
 16 A. Yes.
 17 Q. How do you know that?
 18 MR. BURNS: Objection to form.
 19 A. Well, it's my understanding that
 20 this is a picture of a Secret Fit Belly jean,
 21 but it says, "Don't forget our little secret.
 22 The Secret Fit Belly jean is a great jean for
 23 the pregnant lady," right in the middle of
 24 the page.
 25 Q. But it doesn't say that's

1 P. GREEN
 2 specifically with the image you identified?
 3 MR. BURNS: Objection to form.
 4 A. No, I think that these are the
 5 descriptors that wind up being the product
 6 codes.
 7 Q. And this document, Exhibit 2045,
 8 do you see a date at the top?
 9 A. Yes.
 10 Q. What is that date?
 11 A. July 2007.
 12 Q. Do you have any understanding of
 13 why -- let me back up.
 14 Did Destination Maternity or,
 15 well, did counsel for Destination Maternity
 16 provide this document to you?
 17 A. Yes, they would have.
 18 Q. Do you have an understanding of
 19 why they didn't provide you with anything
 20 more current than this document?
 21 MR. BURNS: Objection.
 22 Objection to form.
 23 A. No, I thought this was -- my
 24 understanding was that this was a picture
 25 of -- in the middle of the Secret Fit Belly

1 P. GREEN
 2 Belly product?
 3 MR. BURNS: Objection to form.
 4 A. Again, my understanding is that
 5 it is.
 6 Q. Okay.
 7 MR. BURNS: Are you doing okay?
 8 Do you need a break?
 9 THE WITNESS: We have been going
 10 a little more than an hour. I would
 11 like some water.
 12 MR. LECHLEITER: Sure, let's
 13 take a break.
 14 THE VIDEOGRAPHER: The time is
 15 2:19; we are off the record.
 16 (Whereupon, a recess was held.)
 17 THE VIDEOGRAPHER: The time is
 18 2:29 p.m.; we are on the record.
 19 BY MR. LECHLEITER:
 20 Q. Mr. Green, I will have you look
 21 at paragraph 24 of your report, please.
 22 A. Sure.
 23 Q. So the second-to-last sentence,
 24 you see it there right after footnote 25 and
 25 paragraph 24?

1 P. GREEN
 2 jeans. Secret Fit Belly panel jeans, yes.
 3 Q. How do you know that?
 4 A. Again, that's my understanding
 5 and this was a nice, clear, clean image that
 6 we could work with.
 7 Q. But you're not certain?
 8 MR. BURNS: Objection to form.
 9 A. Again, this is what I understood
 10 these products were.
 11 Q. Did Dr. Brookstein confirm that
 12 that was in fact an image of the Secret Fit
 13 Belly product?
 14 A. I don't recall if Dr. Brookstein
 15 weighed in on this point.
 16 Q. Did counsel for Destination
 17 Maternity provide you with that
 18 understanding?
 19 A. Counsel for Destination Maternity
 20 reviewed this document, so to the extent that
 21 it wasn't the product, I assume they would
 22 have told us so. "This document" being my
 23 report.
 24 Q. Sure. But no one told you with
 25 certainty that that was in fact a Secret Fit

1 P. GREEN
 2 A. Yes.
 3 Q. When you say that "The Secret Fit
 4 Belly bottoms likewise embody many of the
 5 dependent claims," is that based on
 6 Dr. Brookstein's analysis?
 7 A. You can see from the beginning
 8 part of the sentence, "I further understand
 9 from Dr. Brookstein that Secret Fit Belly
 10 bottoms likewise embody many of the dependent
 11 claims of the patents in suit," so yes, it
 12 comes from Dr. Brookstein.
 13 Q. Is it your understanding from
 14 Dr. Brookstein that different Secret Fit
 15 Belly products may embody different dependent
 16 claims?
 17 MR. BURNS: Objection to form.
 18 A. Yes, from Dr. Brookstein as well
 19 as also from common sense looking at the
 20 accounting records that you can see, for
 21 example, that the denim is a particular
 22 feature that is identifiable in the SKU
 23 descriptions and is also a dependent claim in
 24 the patents and so one can easily figure out
 25 that there were Secret Fit Belly bottoms that

1 P. GREEN
 2 did not necessarily include the denim.
 3 Q. So wouldn't relate to the denim
 4 claims?
 5 MR. BURNS: Objection to form.
 6 A. That may be -- to me, logically
 7 as a lay person, that might in fact be true.
 8 But I mean I don't know if there is a
 9 technical reason to not think about it that
 10 way from a point of view of analyzing the
 11 patent and their claims.
 12 Q. So looking at paragraphs 25 to 27
 13 of your report, what's in those paragraphs?
 14 A. It's just a general recitation,
 15 as I understand it, of what the role of my
 16 analysis is relative to the relevant case
 17 law. So the reason why one might consider
 18 secondary considerations or the reason a
 19 trier of fact might consider secondary
 20 considerations of non-obviousness is in
 21 connection with evaluating patent validity.
 22 And commercial success is one of those
 23 secondary considerations.
 24 Q. The list of bulleted items in
 25 paragraph 26, do you see those four bulleted

1 P. GREEN
 2 needs fulfilled by the patented invention."
 3 Q. Have you -- are you providing an
 4 opinion on long felt but unsolved needs
 5 fulfilled by the patented invention?
 6 A. I don't believe that I am
 7 actually presenting an opinion regarding the
 8 long felt need as would be described in the
 9 bullet point in the middle of paragraph 26.
 10 But I am -- I do discuss the benefits to the
 11 users of these patented features.
 12 Q. But you don't offer an opinion on
 13 whether those benefits you identify are in
 14 fact long felt but unsolved needs fulfilled
 15 by the patented invention?
 16 MR. BURNS: Objection to form.
 17 A. Correct. As I understand it,
 18 that inquiry would be done by someone with a
 19 technical background who would be able to
 20 make to those comparisons, sort of lab
 21 notebook to lab notebook.
 22 Q. And the third bullet point, I
 23 understand that in your report, you are, in
 24 fact, offering an opinion on commercial
 25 success; is that right?

1 P. GREEN
 2 items there?
 3 A. Yes.
 4 Q. Can you read the first one?
 5 A. "Evidence of the failure of
 6 others to make the patented invention."
 7 Q. Are you offering an opinion on
 8 that in your report?
 9 A. I am not offering an opinion with
 10 respect to the evidence of the failure of
 11 others to make the patented invention. I do,
 12 however, point out that others are -- such as
 13 Target, are accused of infringing the patents
 14 and make products that are accused of using
 15 the same technology.
 16 Q. But you're not offering an
 17 opinion, so I understand it, you're not
 18 offering an opinion on failure of others to
 19 make the patented invention?
 20 A. No, I haven't done, you know, a
 21 laboratory notebook analysis or something
 22 like that.
 23 Q. The second bullet point, there
 24 can you read it out loud?
 25 A. It says, "Long felt but unsolved

1 P. GREEN
 2 A. That's correct.
 3 Q. The fourth bullet point, can you
 4 read that into the record, please?
 5 A. "Unexpected results produced by
 6 the patented invention."
 7 Q. And have you offered an opinion
 8 in your report on unexpected results produced
 9 by the patented invention?
 10 A. No, I have not provided an
 11 opinion regarding unexpected results. As
 12 would be defined by that bullet point.
 13 Q. So just looking back to
 14 paragraph 25, did you draft paragraph 25?
 15 A. Yes.
 16 Q. And it looks like in paragraph
 17 25, you cite to a footnote 26?
 18 A. Yes.
 19 Q. To a federal circuit case?
 20 A. Yes.
 21 Q. Did you select the language to
 22 insert into paragraph 25 from that case?
 23 A. Yes. As I would normally do in a
 24 patent infringement or other analysis that --
 25 in which there is judicial precedent, I would

1 P. GREEN
 2 consider what that was and apply it and
 3 describe it in a general way.
 4 Q. Is that the same with
 5 paragraph 26, did you determine the
 6 statements to make there regarding the state
 7 of the law?
 8 A. Again, it comes from the same
 9 cases in footnote 26. But generally, yeah.
 10 I certainly picked these factors, and it is
 11 my understanding of what the relevant case
 12 law is. And relevant considerations are in
 13 doing an evaluation of commercial success.
 14 Q. Paragraph 27, is that another
 15 statement of the law as you understand it?
 16 A. Yes.
 17 Q. And did you select that statement
 18 of the law?
 19 A. I did.
 20 Q. It looks like in paragraph 27,
 21 could you read the first sentence in
 22 paragraph 27?
 23 A. It says, "I understand that a
 24 prima facie case of nexus that the patented
 25 product is commercially successful due to the

1 P. GREEN
 2 patented technology as opposed to other
 3 features is made when the patentee shows that
 4 there is commercial success and the product
 5 that is commercially successful is the
 6 invention disclosed and claimed in the
 7 patent."
 8 Q. So in the parenthetical there, in
 9 the quote, where it says "that the product is
 10 commercially successful due to the patented
 11 technology as opposed to other features,"
 12 what is meant by "as opposed to other
 13 features"?
 14 MR. BURNS: Objection to form.
 15 A. So maybe your patent is on the
 16 lug nuts of a car and, you know, you have an
 17 entire car and you are trying to say that the
 18 car is commercially successful because of the
 19 lug nuts. One would need to evaluate whether
 20 or not that's the tail wagging the dog in
 21 that circumstance.
 22 Q. So what there, in your
 23 hypothetical, would you need to show that the
 24 sales of the car are successful because of
 25 the car as a whole or because of the lug

1 P. GREEN
 2 nuts?
 3 A. Well, one would need to evaluate,
 4 in that analogy, how much the lug nuts are
 5 contributing to the overall commercial
 6 success of the car, if you could separate it.
 7 Q. So you are saying if the patent
 8 claim was to the lug nuts on the car?
 9 A. Correct.
 10 Q. So how does determining -- how
 11 does making a determination that a patent
 12 claim covers a given product rule out other
 13 features of the product as contributing to
 14 sales of that product?
 15 MR. BURNS: Objection to form.
 16 A. One needs -- how does it?
 17 Q. Yes. In other words, when you
 18 say as opposed -- let me rephrase the
 19 question.
 20 Here is a quote of the law, it
 21 says "Successful due to the patented
 22 technology as opposed to other features."
 23 How does showing that something that is
 24 patented is commercially successful, how does
 25 that showing rule out that the success is due

1 P. GREEN
 2 to other features potentially?
 3 MR. BURNS: Objection to form.
 4 A. Well, as I understand it, I am
 5 not the lawyer in the room, obviously, is
 6 that the purpose of this inquiry that's on
 7 paragraph 27, really relates to situations
 8 where the patent is the product. So if you
 9 are trying to demonstrate commercial success
 10 on lug nuts, you would say, well, in
 11 comparison to all the other lug nuts out
 12 there, this thing may be commercially
 13 successful, if that's what the patent is on.
 14 But if you are trying to say well, look, my
 15 car is commercially successful because of my
 16 patented lug nuts that may not be the exact
 17 like kind analysis. So one needs to evaluate
 18 what the patents are covering, what they are
 19 used in, and in certain circumstances, you
 20 find that the patent is the product and that
 21 in general, when you see that, my
 22 understanding of the law is that's a basis
 23 for saying that the patented technology is
 24 commercially successful, assuming the product
 25 is actually commercially successful.

P. GREEN

Q. So, again, just thinking about the lug nuts hypothetical, how would you determine whether cars sold with the lug nuts indicated that the lug nuts were commercially successful?

A. You probably have to go and look at what was actually driving the demand for the lug nuts and whether or not car sales increased because of it or whether or not they stayed the same. Whether there was, you know, a huge marketing splash that created, you know, increased demand because you had, you know, highfalutin lug nuts that made your cell phone work better or whatever. You can just imagine how you might have to go about doing that. So a lot of different pitches. But if you are just saying well, look, I have got a new invention of a lug nut and it is commercially successful and that's the entire idea of my patented product, that's all it does is it sits on a shelf. That's a different thing.

Q. If you said that cars sold with the patented lug nuts were commercially

P. GREEN

successful, sales of cars with the patented lug nuts were commercially successful, is that the same as saying that the commercial success is due to the lug nuts?

MR. BURNS: Objection to form.

A. No, you'd have to do some kind of comparison. Like what I have done in this case, where I have taken a pair of -- we have taken pants that are not practicing the patents, the patented technologies here and compare them to the pants that are practicing the patented technologies that accounts for the differences in those things. So, for example, color, style, which we have done, which I have done, and account for other factors. Then you can evaluate it. If you can say, well, look, I can get two identical Ford Pintos together and the one that sells much better is the one that has the blue lug nuts on it, maybe that is what is driving sales.

But, you know, you would have to be able to do that kind of analysis in control for other things. Just what I have

P. GREEN

done here.

Q. So how do the lug nuts in your hypothetical differ from a dependent claim a here where what is claimed are pockets and the full fly front, for instance?

MR. BURNS: Objection to form.

A. You are probably reaching a little bit beyond my technical expertise. But, again, what I have evaluated here is the products, many of which practice the dependent claims, and you can identify that the entirety of the product is commercially successful. The dependent claims include not just the dependent claim but also the first claims. So it is the entirety of that invention. So what you are seeing here is that the products are commercially successful, and you can measure it as in comparison to other products that aren't practicing the patented technology.

Q. But that's just relative, one product with the patented features versus a product that doesn't have them?

MR. BURNS: Objection to form.

P. GREEN

A. The fact is that we are doing, it is not -- the dependent claims are, you know, the dependent claim plus the independent claim in order to be able to get that invention. So the entirety of that claim is what you are evaluating here. There are a whole variety of dependent claims that are being asserted here. So when you take a look at those products that are practicing the dependent claims, they are all commercially successful.

Q. Do you understand that in paragraph 27, is that a quotation from the cited case?

A. It should be, although I wonder if the parenthetical is actually in the cited case or whether that's something that I added.

(Whereupon, Green Exhibit 1058, Copy of the opinion in Crocs International was marked for identification as of this date by the Reporter.)

BY MR. LECHLEITER:

P. GREEN

Q. Mr. Green, the Court Reporter has handed what we have marked as Exhibit 1058. This is -- do you know what Exhibit 1058 is?

A. It appears to be a copy of the opinion in Crocs International.

Q. Is that same opinion that you cited in footnote 28 of your report?

A. It is.

Q. And if you would turn to page 1310 in the opinion, you will note the page numbers are at the top left-hand corner.

A. Yes.

Q. Just let me know when you've found page 1310.

A. I did.

Q. If you look at the very bottom of the right-hand side column, you see the last line, you see where it says a prima facie case?

A. Yes.

Q. And that continues onto page 1311. Can you read that sentence into the record, please?

P. GREEN

MR. BURNS: Objection to form.

A. As well as my background training and experience in evaluating issues that relate to the commercial success of patents, sure.

Q. So if your parenthetical changes the meaning of the law, does that affect your conclusions?

A. No. I mean, I am not the trier of fact here. I am applying the law as I understand it. But, again, I think that the trier of fact is the ultimate arbiter as to what the law is and what law they would like to apply to all of this. This is just to help me and the readers understand what I was thinking about.

Q. So if in paragraph 27 there is a misstatement of the law, that wouldn't affect your opinion?

MR. BURNS: Objection to form.

A. Again, I am an accountant. I am here to analyze commercial success. I am not the legal expert in the room nor am I the judge. So I have an understanding as to what

P. GREEN

A. It says, "The prima facie case of nexus is made when the patentee shows there is commercial success and that the product that is commercially successful is the invention disclosed and claimed in the patent."

Q. So is that the same or different than your quote in paragraph 27 of your report?

A. Again, I think that what's different between this quote and what is in paragraph 27 is the insertion of the parenthetical, which is mine.

Q. So why did you insert that parenthetical?

A. Because it helps me understand and I think it helps the reader understand what is important about this nexus discussion. That appears in the Crocs decision.

Q. And you -- the opinions in your report, are they based on your understanding of the law as set forth in paragraphs 25 to 27?

P. GREEN

the law is, just like a tax accountant understands the tax law, and I have applied that as I understand it. To the extent that a judge disagrees or a trier of fact disagrees with my application of the law, I assume that they will adjust their view of my opinion.

Q. Mr. Green, if look at paragraph 28 of your report, on page 15.

A. Yes.

Q. Would you read the second sentence out loud of paragraph 28?

A. It says, "If the invention was obvious, it would have been brought to market sooner by some other party in response to that incentive."

Q. So did you look at, in forming your opinions, did you look at any other products that were brought to market in the maternity pants area?

A. Again, what I looked at was whatever was cited in Dr. Brookstein's report, as well as I was aware of the maternity pants that were and still are made

1 P. GREEN
 2 by Destination Maternity that I understand to
 3 have practiced the patents in suit.
 4 (Whereupon, Green Exhibit 1002,
 5 Excerpt from the J.C. Penney On Trend
 6 maternity catalog from fall and winter
 7 2005 was marked for identification as
 8 of this date by the Reporter.)
 9 BY MR. LECHLEITER:
 10 Q. Mr. Green, you have in front of
 11 you what the Court Reporter has marked
 12 Exhibit 1002. Have you seen Exhibit 1002
 13 before?
 14 A. Yes.
 15 Q. What is Exhibit 1002?
 16 A. It is, to my knowledge, an
 17 excerpt from the J.C. Penney On Trend
 18 maternity catalog from fall and winter 2005.
 19 Q. So if you could look at the
 20 second page of that exhibit, you will see
 21 three pictures in the bottom left-hand
 22 corner. And do you understand from page 2 of
 23 the catalog here, this product was actually
 24 for sale by J.C. Penney?
 25 A. Yes, I assume it was.

1 P. GREEN
 2 invention?
 3 MR. BURNS: Objection to form.
 4 A. Again, this is part of the reason
 5 that we are all here. That there is a
 6 dispute as to whether or not this is actually
 7 relevant prior art to the Destination
 8 Maternity patents that are at issue in this
 9 matter.
 10 Q. Did you consider -- in assessing
 11 commercial success of the Destination
 12 Maternity products, did you consider the
 13 prior sales of this product by J.C. Penney?
 14 MR. BURNS: Objection to form.
 15 A. You know, I wish I could. I
 16 mean, there was no evidence in the record as
 17 to what J.C. Penney's sales were of any of
 18 these products, if any. And we are still,
 19 you know, waiting to see an actual pair of
 20 these pants, as I understand it, from reading
 21 Miss Simon's deposition. So, I mean, I am
 22 aware of this stuff but there is no financial
 23 analysis that could reasonably be done, and
 24 the fact that they actually don't make and
 25 sell these anymore suggested to me that they

1 P. GREEN
 2 Q. And so with respect to your
 3 statement in paragraph 28 regarding if the
 4 invention was obvious it would have been
 5 brought to market sooner by some other party,
 6 isn't this evidence of J.C. Penney having
 7 brought the invention to market sooner?
 8 MR. BURNS: Objection to form.
 9 Plus I think this is outside the scope
 10 of his Declaration.
 11 A. I am not the technical expert in
 12 this case. I understand that Dr. Brookstein
 13 disputes that this is evidence of anything
 14 even modestly close to the Secret Fit Belly
 15 technology.
 16 Q. You understand that the Patent
 17 Office, as we sit here, disagrees with
 18 Dr. Brookstein?
 19 MR. BURNS: Objection to form.
 20 A. I think this is where we started
 21 this morning. That there is a -- this IPR
 22 was instituted over that very point, yes.
 23 Q. So you understand that the Patent
 24 Office believes that this product is, in
 25 fact, evidence of a prior sale of the claimed

1 P. GREEN
 2 aren't commercially successful.
 3 Q. But based on the date of this
 4 catalog, do you agree that this product was,
 5 in fact, brought to market sooner than the
 6 Secret Fit Belly products?
 7 MR. LECHLEITER: Objection to
 8 form.
 9 A. Again, I mean, it would appear
 10 that these products were advertised in 2005
 11 and you really can't tell, other than the
 12 three-year old pictures on the bottom of the
 13 second page, whether or not they apply,
 14 actually to the rest of the exhibit or not.
 15 Q. So you understand that 2005 is
 16 prior to when Destination Maternity began
 17 selling Secret Fit Belly products; is that
 18 right?
 19 MR. BURNS: Objection to form.
 20 A. Again, you know, to my knowledge,
 21 that's true. But the inquiry that you are
 22 asking about here and that whole point I
 23 think really is something that's related to
 24 technical considerations of validity, you
 25 know, from an analysis that Dr. Brookstein

1 P. GREEN
2 and others are doing. They don't necessarily
3 have to do with my evaluation of commercial
4 success, especially since we know nothing
5 about what J.C. Penney sold, their profits,
6 you know, can't even find a pair of these
7 pants.

8 Q. But based on the dates -- well,
9 let me back up.

10 When do you understand -- I guess
11 let's look at footnote 29 on page 15 of your
12 report where you state that Secret Fit Belly
13 bottoms were first introduced in 2007; is
14 that accurate?

15 A. To my knowledge that's
16 accurate, yes.

17 Q. And do you agree that a product
18 advertised for sale in the fall, winter of
19 2005 is brought to market sooner than 2007?

20 MR. BURNS: Objection to form.

21 A. Again, I can agree with you that
22 2005 is earlier than 2007 as far as the dates
23 go. There is a significance that I think
24 relates to the liability issues in this
25 matter that -- or validity issues in this

1 P. GREEN
2 analysis of the prior art to evaluate whether
3 or not the patents that are at issue in this
4 case are valid, yes.

5 Q. So whether or not, you know --
6 scratch that.

7 Did you review the patent trial
8 and appeal board's decisions instituting
9 these proceedings?

10 A. I looked at the petitions for the
11 parties' review. I don't recall seeing the
12 opinions, to the extent they are separate.

13 Q. Okay. So you did review
14 the decisions of the Patent Office and their
15 findings with respect to Exhibit 1002?

16 MR. BURNS: Objection to form.

17 A. Again, I understood that one of
18 the reasons that we were all involved in this
19 analysis is the because the Patent Office had
20 actually instituted these IPRs in part
21 because of the prior art, yes.

22 Q. But you didn't take into account
23 in your opinion any of the Patent Office's
24 findings with respect to Exhibit 1002?

25 MR. BURNS: Object to form.

1 P. GREEN
2 matter that really are not part of the
3 analysis that I have done that -- that sort
4 of suggest to me that my commentary on the
5 dates is just an analysis of looking at
6 one date versus another. It doesn't have the
7 importance of the way that Dr. Brookstein or
8 others may testify here.

9 Q. So you are saying only
10 Dr. Brookstein would be able to testify
11 one way or the other regarding whether this
12 product is an embodiment of the claims?

13 MR. BURNS: Objection to form.

14 A. I think he is, at least as far as
15 I know, he is the expert that would be
16 evaluating whether or not these claims or
17 whether or not these particular photographs
18 are telling us anything that would relate to
19 the claims in the patents that are at issue
20 in this matter.

21 Q. So you would rely on
22 Dr. Brookstein's opinion on whether or not
23 those products fall within the claims?

24 MR. BURNS: Objection to form.

25 A. I would rely on Dr. Brookstein's

1 P. GREEN
2 A. Again, I am aware of it and
3 certainly had reviewed Dr. Brookstein's
4 opinion on the fact is that there is nothing
5 really to take into account of because there
6 is no financial data or other evidence that
7 would really help us with the evaluation of
8 commercial success, that I am aware of, that
9 relates to these -- to Exhibit 1002 that
10 would be helpful and that's consistent with
11 the testimony of Miss Simon from J.C. Penney.

12 Q. So let me ask a different
13 question. Are you offering an opinion on
14 whether or not the invention was obvious?

15 MR. BURNS: Objection to form.

16 A. I think obviousness is a question
17 for Dr. Brookstein and other experts who are
18 dealing with that area as well as the trier
19 of fact. My analysis is really focusing on
20 the fact that the Secret Fit Belly panel
21 pants have -- are commercially successful as
22 evidenced by their sales and profits and that
23 success is due to the claims of the patents
24 in suit.

25 Q. But you didn't take into account

1 P. GREEN
 2 whether or not someone else might have
 3 brought a similar product to market earlier?
 4 MR. BURNS: Objection to form.
 5 A. Well, I was aware of this, and I
 6 was also aware that these pants aren't being
 7 sold anymore. So the fact is that to the
 8 extent that Destination Maternity's pants
 9 were brought to the market in 2007 and here
 10 we are in 2014, there is seven years of
 11 history. There is no evidence that I am
 12 aware of that suggests that these things are
 13 being sold, and you would have expected
 14 something from these, 2010, 2011, if you're
 15 just going to use the parallels on the years
 16 together.
 17 Q. So did you consider this
 18 document, Exhibit 1002, in forming your
 19 opinions?
 20 MR. BURNS: Objection to form.
 21 A. Again, I was aware of what's in
 22 Dr. Brookstein's report regarding the
 23 discussion of prior art and whether or not
 24 the image that appears in the lower left-hand
 25 column of page -- lower left-hand portion of

1 P. GREEN
 2 that information is not available and the
 3 fact that the products aren't actually being
 4 sold is also evidence that they weren't
 5 commercially successful.
 6 Q. If you look at paragraph 29 of
 7 your report, Mr. Green. You discuss economic
 8 factors such as sales and profits of products
 9 embodied in the patents in suit as well by
 10 other qualitative factors. What are those
 11 qualitative factors?
 12 A. So qualitative factors would be
 13 those things that would be comparative, or in
 14 this case, you would be looking at, say, you
 15 see sales and profits we can measure them
 16 with accounting tools, but then one can take
 17 a look at sales and profits of products that
 18 don't practice the patents at issue in this
 19 matter and do a comparison between those
 20 sales and the sales of the Secret Fit Belly
 21 bottoms and one can see that there are all
 22 kinds of differences, and then, you know, I
 23 guess under number -- under 4, on
 24 paragraph 37, I note that the patented
 25 technology has, at least, been asserted by

1 P. GREEN
 2 page 2 of Exhibit 1002 was relevant prior art
 3 or something that needed to be considered.
 4 But that's as far as my analysis went.
 5 Dr. Brookstein has far better -- is the
 6 person to be asking about it in terms of
 7 prior art. I have just tried to evaluate
 8 whether or not there were financial
 9 information of some sort to evaluate whether
 10 or not these were commercially successful and
 11 I used them comparative characteristics.
 12 Q. So apart from Dr. Brookstein's
 13 report, this document is not listed on
 14 Exhibit A to your report; is that correct?
 15 A. Correct. I mean, again, my
 16 analysis here relates to commercial success
 17 and this is being cited by Target as prior
 18 art over the patents that are at issue here.
 19 I mean, this is an area for someone with a
 20 different type of expertise than mine. To
 21 the extent I was aware of financial
 22 information that let me compare these, the
 23 profits that were earned by J.C. Penney or
 24 some kind of volumes or something like that,
 25 I would have considered it. But I understand

1 P. GREEN
 2 DMC to be used by Target. And that's also a
 3 qualitative analysis.
 4 Q. So other than these factors, did
 5 you consider any other qualitative factors or
 6 are the ones you considered listed here in
 7 your report?
 8 MR. BURNS: Objection to form.
 9 A. The ones identified here I
 10 thought would be the ones that would be
 11 helpful to the trier in fact, and these are
 12 ones for which I had some accounting and
 13 financial evidence to demonstrate their
 14 support. So we already talked about, for
 15 example, though that I considered whether or
 16 not the sales that were of the patented
 17 technology or the products in the patented
 18 technology were due to changes in
 19 demographics. I didn't find that. I didn't
 20 find all of a sudden that there were, you
 21 know, some huge shift in the maternity
 22 business that would suggest that gestation
 23 maternity was without competition or
 24 something like that. So those would also be
 25 qualitative factors. There was no evidence

1 P. GREEN
 2 of that.
 3 Q. And so if you found no evidence
 4 of it, you just left it out of your report?
 5 A. Well, what I had left out -- I
 6 didn't necessarily include it, correct. I
 7 focused in on the things that I thought would
 8 be of question to a trier of fact and
 9 highlighted those.
 10 Q. For footnote 29 on page 15, you
 11 have a brief discussion about the data you
 12 received and the completeness of it. Do you
 13 know why data was not provided for the Secret
 14 Fit Belly bottoms between their introduction
 15 in 2007 and Q2, 2008?
 16 A. I don't know for certain. But my
 17 recollection is simply that the information
 18 was not available in a way that could be
 19 downloaded to a form that we could work.
 20 Q. Did you ask anyone at Destination
 21 Maternity for that additional data?
 22 MR. BURNS: Objection to form.
 23 A. I think I would have, sure. I
 24 would have asked counsel for Destination
 25 Maternity to obtain it for us, if it were

1 P. GREEN
 2 A. I am not sure I understand your
 3 question.
 4 Q. What portion of those sales are
 5 related to products that embody Claim 1 of
 6 each of the patents at issue here?
 7 MR. BURNS: Objection to form.
 8 A. I understand that, from
 9 Dr. Brookstein, that the Secret Fit Belly
 10 bottoms that have been sold include the
 11 dependent claims that are the subject of
 12 these proceedings and those dependent claims
 13 include Claim 1.
 14 Q. So you don't know specifically
 15 what proportion relate only to what is
 16 claimed in Claim 1?
 17 MR. BURNS: Objection to form.
 18 A. Like I said, I understand from
 19 Dr. Brookstein that the Secret Fit Belly
 20 bottoms embody many of the dependent claims
 21 of the patents in suit including all that are
 22 subject to these proceedings.
 23 Q. But you haven't broken that down
 24 on a claim-by-claim basis?
 25 MR. BURNS: Objection to form.

1 P. GREEN
 2 available.
 3 Q. So it just wasn't provided
 4 to you?
 5 A. I don't think it was available.
 6 Q. To you or to counsel?
 7 MR. BURNS: Objection to form.
 8 A. I believe that counsel would have
 9 provided it to me if it were available.
 10
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 25
 Q. So what portion of those sales
 are related to the independent claims in the
 two patents at issue here?
 MR. BURNS: Objection to form.

1 P. GREEN
 2 A. Well, the accounting records, I
 3 think we talked about this earlier, are such
 4 that one can do that with respect to the
 5 denim, for example, you can figure out
 6 whether or not there is some -- you can
 7 identify the pricing and the profits that
 8 relate to the denim Secret Fit Belly panels
 9 and compare that against the non-Secret Fit
 10 Belly products. But many of the other claims
 11 are, you know, there's so much imbedded in
 12 the actual product themselves, the other
 13 dependent claims are imbedded in the products
 14 themselves, they are not really separable.
 15 So when you look at it, you've got a
 16 dependent claim and an independent claim and
 17 they're all wrapped up together, you have a
 18 product and that product is commercially
 19 successful.
 20 Q. So using denim as an example, you
 21 testified several times now that you could
 22 look at the data and you could pull out data
 23 pertaining specifically to denim. Why didn't
 24 you do that in the text of your report?
 25 MR. BURNS: Objection to form.

P. GREEN

A. Because I was looking at the fact that, at least as I understand from Dr. Brookstein, you know, the claims, the dependent claims all involve, you know, independent claim, such as Claim 1. So the analysis that I have done is essentially wrapped up all of the benefits of the technology to demonstrate that, you know, the Secret Fit Belly bottoms that practice the patented technology, which is claimed by the two patents that are at issue in this case, are commercially successful over and above the products that don't practice the patents in suit.

Q. So the first sentence in paragraph 1 relates to all of the claims at issue in these proceedings, relates to products that embody all of the claims in these proceedings, is that --

A. That's correct.

Q. I said paragraph 1. I meant paragraph 31.

A. Yeah, I understood what you were talking about.

P. GREEN

Q. So I take it from that, that we can't break down similarly what proportion of these sales numbers relate only to dependent claims?

MR. BURNS: Objection to form.

A. Again, the dependent claims depend on independent claims, and so what we are looking at is, you know, the entirety of the products that are being, all of the Secret Fit Belly products and comparing them to the products that don't practice the patented technology or practice the Secret Fit Belly panel products, and I have, from looking at the specific data, you can look at and evaluate the profitability of the denim ones and compare that to non-denim, for example. But for the most part, the claims, as I understand them from Dr. Brookstein, are wrapped up in the internal workings of the product and don't get exhibited in the SKUs.

Q. So this sentence again relates to all the claims together, not one dependent claim or another?

MR. BURNS: Objection to form.

P. GREEN

A. That's correct.

Q. So paragraph 32, you indicate that sales of Secret Fit Belly bottoms have been increasing since their introduction over the same time DMC sales of other bottoms sales have decreased. [REDACTED]

[REDACTED]

P. GREEN

[REDACTED]

Q. What other factors -- what other factors besides price might cause that decrease of non-Secret Fit Belly bottoms?

MR. BURNS: Objection to form.

A. Whether or not they were offered in the same stores. In other words, did stores, some stores only carry non-Secret Fit or only Secret Fit, you know, that kind of stuff I look for that. To my understanding-

Q. Where did you look for that?

A. Well, if you look at paragraph 41 on page 20 of my report.

Q. That's from DMC's website?

A. Correct. So my understanding is that all these products are offered in all of their stores. So it is not a distribution question. So and it's not, to my understanding, as we talked earlier, a difference per se in marketing. I mean the pants are, both types of bottoms are available on the website. As far as I know, they are both available in the stores. So I

P. GREEN

1 think what's actually driving the difference
2 here is that the Secret Fit Belly has an
3 advantage over the non-Secret Fit Belly
4 bottoms, and those are the -- embodied in the
5 technology that's claimed by the patents.

6 Q. Did you talk to anyone at
7 Destination Maternity regarding distribution
8 of their pants?
9

10 MR. BURNS: Objection to form.

11 A. Again, I think we established
12 earlier that I hadn't talked to anybody at
13 Destination Maternity with respect to the
14 analyses that I have done -- in these IPR
15 matters, no.

16 Q. So nobody confirmed your
17 conclusion about their distribution of Secret
18 Fit Belly versus non-Secret Fit Belly pants?
19

20 MR. BURNS: Objection to form.

21 A. Again, my understanding from
22 looking at the website and the other
23 information that's available to me, is it
24 that these products are available in both the
25 Secret Fit and non-Secret are available
throughout both online and bricks and mortar

P. GREEN

1 stores.

2 Q. Did you gain an understanding
3 from any of the documents that you considered
4 about the relative proportion of products in
5 stores that were Secret Fit Belly bottoms
6 versus non-Secret Fit Belly bottoms?
7

8 A. I am not sure exactly how to
9 measure that other than doing it on a
10 store-by-store basis, and I was not aware of
11 a document that necessarily did that. I was
12 just aware that the non-Secret Fit bottoms
13 are available in their -- in the Destination
14 Maternity stores alongside the Secret Fit
15 maternity bottoms.

16 Q. So did you assume equal
17 availability of both?
18

19 MR. BURNS: Objection to form.

20 A. I assumed that you could get them
21 through the various distribution channels.
22 Again, if we look at paragraph 41 on page 20,
23 I understand that DMC offers both Secret Fit
24 Belly and non-patented bottoms in all of
25 their stores and collections, from the
highest priced Pea in the Pod to the lowest

P. GREEN

1 price in the department store ones. So you
2 can see it in the accounting departments.
3

4 Q. But you don't have an
5 understanding of what proportion those
6 offerings are to each other?
7

8 MR. BURNS: Objection to form.

9 A. I am not sure I am understanding
10 your question. I can take a look and tell
11 you, you know, the relative volumes of sales,
12 if that's what you are looking for, I can
13 tell you --

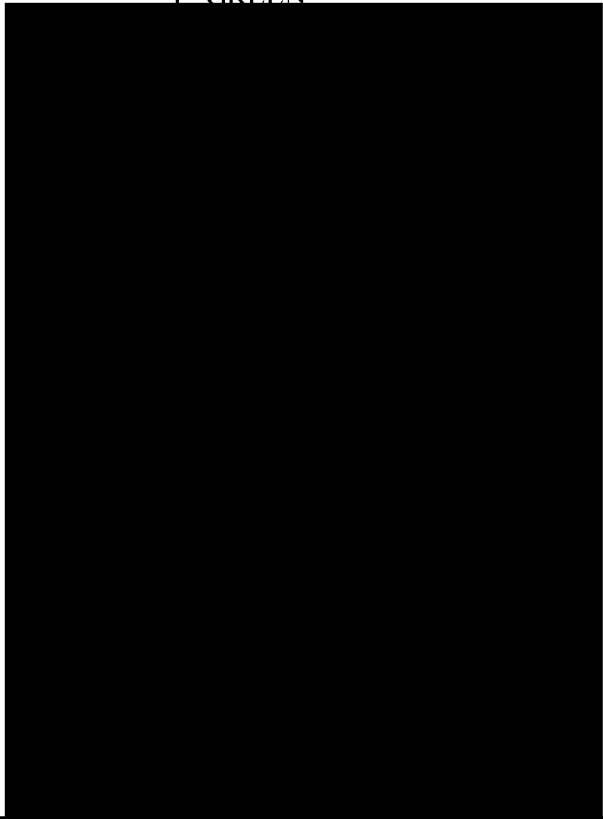
14 Q. No, no. I just mean the relative
15 offerings in a store of Secret Fit Belly
16 pants versus non-Secret Fit Belly pants, were
17 they purely offered equally in the stores,
18 did you determine that?
19

20 MR. BURNS: Objection to form.

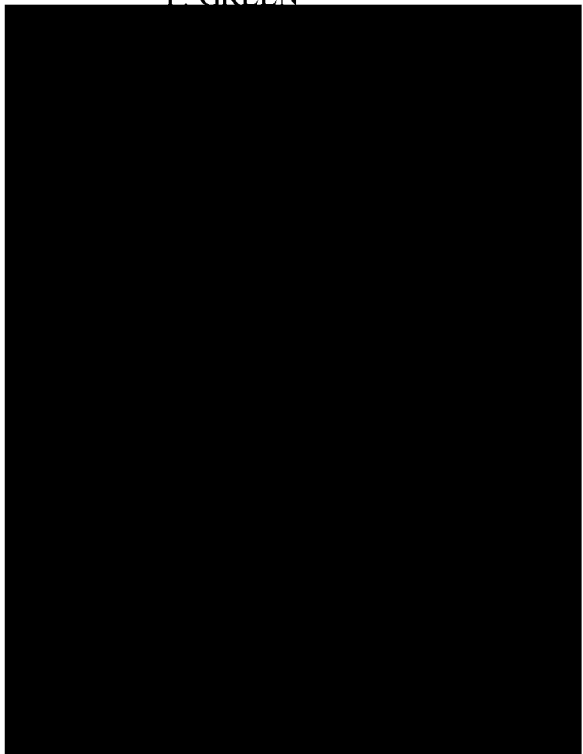
21 A. I understand they are available
22 in the stores. I don't know exactly whether
23 there is 20 pairs of one and only 10 pairs of
24 the other, if that's what your question is.
25

Q. Any other -- were there any other
reasons or factors why the non-Secret Fit
Belly pants, why sales of the non-Secret Fit

P. GREEN



P. GREEN



Q. Is another explanation for sales of the patented product increasing heavy

P. GREEN

marketing or advertising?

MR. BURNS: Objection to form.

A. Again, there is no evidence that that's actually occurring in this circumstance. We are seeing that the --

Q. Based on what you have considered?

A. Based on what I am aware of, it appears that the patented goods are, you know, advertised in the same manner as the unpatented goods that are available equally on the website that are promoted equally as far as I can tell.

Q. Does the -- if you look at page 12 of your report, footnote 22, you see that citation to the Destination Maternity website?

A. Yes.

Q. Does the Secret Fit Belly product have its own website, is that the link I see at footnote 22?

A. I don't think it has its own website. I think you go --

Q. Or web page. Let me rephrase it.

P. GREEN

Does the Secret Fit Belly product have its own website page?

A. I think you can land on Secret Fit Belly by going to bottoms and then pushing on the link that is in the bottoms link.

Q. Is this link in footnote 42 accurate, as far as you know?

A. As far as I know, I think we -- if we were to take a look at -- if there's an exhibit that has an exhibit number, we can probably confirm that.

Q. Do the non-Secret Fit Belly products have their own website or web page?

A. I think that if you were to look at other bottoms, there is a whole separate link to other bottoms.

Q. Did you look at those?

A. Yes.

Q. Was that noted in your report?

A. I dont think I noted it in my report. I certainly, again, was looking to see if there was something over and above what was being done for other products for

P. GREEN

the Secret Fit Belly bottoms and didn't identify.

Q. But you do not identify in your report a website specific to or a web page specific to non-Secret Fit Belly products?

MR. BURNS: Objection to form.

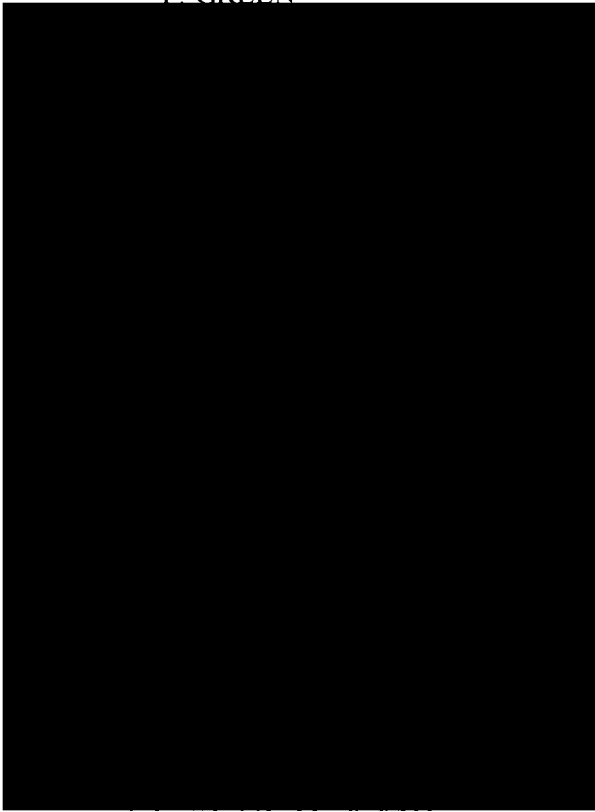
A. Again, you can identify -- you can go into the Destination Maternity website, go to bottoms and you will find that there is Secret Fit and other types of bottoms.

Q. So earlier, we talked about Exhibit 2043.

A. Yep.



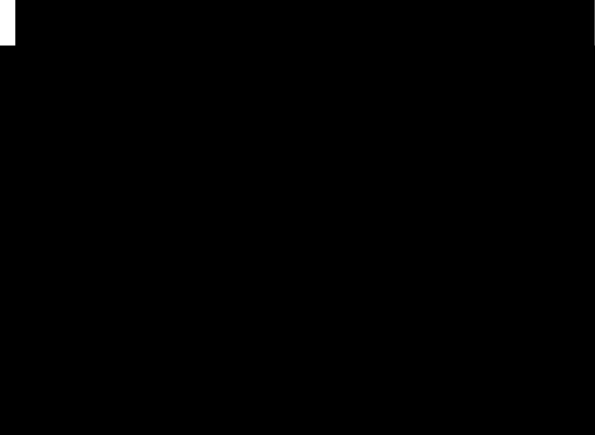
P. GREEN



P. GREEN



I then went to look what was on website to see if the website was pretty much consistent with respect to how Secret Fit Belly products were being handled in comparison to other bottoms, and there was not an especially large difference. Then I also went into the stores to try and see if there was any difference and I didn't identify.



P. GREEN



Q. Did you have a similar document to 2043 for non-Secret Fit Belly products that you could compare to?

A. I didn't see that. I mean, I was aware of the fact that the non-Secret Fit Belly products were already in the marketplace and they were being promoted on the website and other media that was available to Destination Maternity.

Q. Did you look at any marketing plans that were particular to non-Secret Fit Belly bottoms?

A. I am not aware of any that were provided to me, no.

MR. BURNS: Do you want to take break?

THE WITNESS: It's been another hour. Should we just stop and take five at this point?

MR. LECHLEITER: Let's take five. That works.

P. GREEN

THE VIDEOGRAPHER: The time is 3:28 p.m.; we are off the record.

(Whereupon, a recess was held.)

THE VIDEOGRAPHER: The time is 3:38 p.m.; we are on the record.

BY MR. LECHLEITER:

Q. Mr. Green, we were discussing the factors that you looked at with respect to possible -- well, possible factors related to the decline in sales of non-Secret Fit Belly products --

A. Yes.

Q. How did your comparison of the Secret Fit Belly sales and the non-Secret Fit Belly sales control for those factors?

MR. BURNS: Objection to form.

A. I am not sure exactly what you mean. But what I was doing was looking at -- first off, what the differences were between the Secret Fit and the non-Secret Fit Belly bottoms, and noticed, at least among the sales data, that essentially these same types of products were being sold in terms of you

P. GREEN

1 had denim, you had various fabrics. You had
2 colors and so forth. So one of the things
3 that are meant to control for very much was
4 whether or not there were just fewer or there
5 were different types of the non-Secret Fit
6 Belly products, and it turns out that both
7 products, both types of products have a full
8 complement of different fabrics and design.
9 So that was the first thing.

10
11 And then, secondly, I was looking
12 to see if there were other things that were
13 not necessarily product related but, rather,
14 advertising or promotion that would be or
15 space on shelves or availability that would
16 be causing the decline in the non-Secret Fit
17 Belly sales and didn't find much evidence
18 that any of those things were contributing
19 to it.

20 So what I concluded was that
21 despite their higher price, the Secret Fit
22 Belly bottoms were commercially successful
23 and that commercial success was -- is due to
24 presence of the patented features.

25 [REDACTED]

P. GREEN

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 MR. BURNS: Objection to form.

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]

MR. BURNS: Objection to form.

A. I don't think I understand your
question.

[REDACTED]

P. GREEN

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

5 MR. BURNS: Objection to form.

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]

MR. BURNS: Objection to form.

A.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

P. GREEN

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

I mean, the
fact is that you have pretty much matching
types of products, from what I can tell,
between the non-Secret Fit Bellies and the
Secret Fit Bellies in terms of style and
color and so forth.

Q. Is that, just so I understand, is
that your opinion or is that Dr. Brookstein's
opinion?

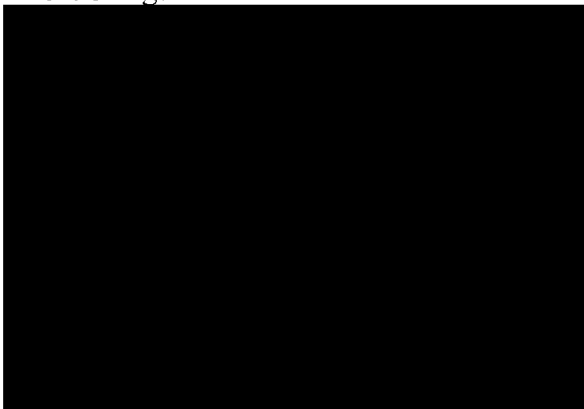
A. I mean, I am looking at it from
the point of view of the accounting records
and what you can see product wise and do on a
SKU comparison basis.

Q. How did you arrive at the
conclusion that they are more or less the
same in the Secret Fit Belly versus the non?

A. You can look at the SKUs. I

1 P. GREEN
 2 looked at it in terms of what's in the SKUs,
 3 or at least with the SKUs described as well
 4 as just overall quantities over time.
 5 Q. So you independently concluded
 6 that they were about the same based on SKU
 7 data?
 8 A. Well, the accounting data tells
 9 us the story about what's happening with the
 10 Secret Fit products and their profitability
 11 versus the non-Secret Fit products and their
 12 profit.
 13 Q. I'm talking about just the
 14 description of the products themselves. When
 15 you say they are about the same in terms of
 16 colors and fabrics and things of that nature,
 17 how did you arrive at that conclusion that
 18 they were about the same?
 19 A. By looking at the SKUs.
 20 Q. Is that language -- is that only
 21 the language that's in the SKU data that
 22 helped you make that determination?
 23 MR. BURNS: Objection to form.
 24 A. Well, the SKU data turns out to
 25 be fairly informative when one takes a look

1 P. GREEN
 2 at it. To some level it tells you about
 3 fabric. It tells you about design. It tells
 4 you about whether it is denim. It tells you
 5 a few things about the product. It tells you
 6 whether it is Secret Fit Belly versus not.
 7 So you can get an understanding as to what is
 8 going on.
 9 Q. Did you actually run in the data
 10 an analysis to determine all those factors,
 11 those indicia of similarity that you are
 12 mentioning?
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 25 Q. Were these products both sold at



1 P. GREEN
 2 the same time?
 3 A. To my knowledge, they were. We
 4 can pull out the data, but I think so.
 5 Q. Does that make a difference to
 6 your analysis?
 7 A. I don't think so. Literally,
 8 what we are doing is we are showing there are
 9 similar offerings from both the patented and
 10 the Secret Fit Belly products and the ones
 11 that aren't practicing -- that aren't the
 12 Secret Fit Belly bottoms.
 13 Q. How do you know both of these
 14 products were sold under the Motherhood
 15 brand?
 16 A. You can see that in the SKU data
 17 as to which brand they are being sold under.
 18 Q. So there's no indication here of
 19 when these products were actually sold,
 20 though, is that right?
 21 MR. BURNS: Objection to form.
 22 Q. In paragraph 36?
 23 A. I mean, like I said, we can get
 24 out the documents and test them out, but the
 25 intention would have been to compare them in

1 P. GREEN
 2 a similar timeframe and similar products.
 3 Q. So when you say similar products,
 4 it appears that the names you have quoted are
 5 different. So how do you understand that
 6 those products are similar?
 7 A. Because they are both black capri
 8 leggings and one is the Secret Fit and the
 9 other is not.
 10 Q. Isn't one also CS, do you have an
 11 understanding what CS is?
 12 A. I don't know specifically what
 13 that refers to or the CL, but what my -- we
 14 can go back and look at what the actual
 15 product is as I understand that these are
 16 equivalent products.
 17 Q. You said in paragraph 36 they are
 18 identical. So that's not correct, is it?
 19 A. I think they are actually
 20 identical to the human that would actually be
 21 staring at them if we were to lay them out on
 22 the table.
 23 Q. Do you understand that cotton CS
 24 is cotton spandex, CL is cotton Lycra?
 25 MR. BURNS: Objection to form.

1 P. GREEN
 2 A. Again, I think if you were to lay
 3 them out for a human on the table, you would
 4 come to find that --
 5 Q. Did you do that?
 6 A. I personally didn't. But I was
 7 looking for a product that is -- for products
 8 that are matching and they are matching.
 9 Q. But they are not identical, as
 10 you stated in paragraph 36?
 11 MR. BURNS: Objection to form.
 12 A. They are black capri leggings
 13 that are being sold to women that are in need
 14 of maternity clothing. So for purposes of
 15 doing this analysis, they are identical.
 16 Q. But if they are different
 17 materials, they are not identical; is that
 18 correct?
 19 A. I think that, like I said, if you
 20 were to lay them out and side by side, you
 21 probably, the fact that these are not both,
 22 one is not cotton and the other is spandex.
 23 One is not, you know, made of tweed and the
 24 other is made of Spandex. You're talking
 25 about, as I understand it, fabrics that are

1 P. GREEN
 2 fundamentally the same.
 3 Q. So your opinion is that cotton
 4 Lycra is fundamentally the same as cotton
 5 Spandex?
 6 MR. BURNS: Objection to form.
 7 A. For the purposes of doing this
 8 sort of comparison, yes.
 9 Q. And that assumes these products
 10 were sold at around the same time period?
 11 MR. BURNS: Objection to form.
 12 A. That would be the intention of
 13 the analysis is to get them around the same
 14 time period, but certainly to get to the
 15 point where we could all have a comparison
 16 between the difference in price of a
 17 particular SKU in Secret Fit Belly panels
 18 versus those that are not practicing the
 19 patents.
 20 Q. So thinking about time periods,
 21 how have prices of non-Secret Fit Belly pants
 22 changed over time, the periods you analyzed?
 23 MR. BURNS: Objection to form.
 24 A. [REDACTED]
 25 [REDACTED]

1 P. GREEN
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 Q. So the time period in which these
 10 products were sold would have an impact on
 11 their sales price?
 12 A. They could. That's why the
 13 intention is to get them in the same time
 14 period.
 15 Q. So looking at paragraph 35 of
 16 your report, on page 17, you talked about
 17 during the period you analyzed, and I
 18 understand that to be Q3, 2008 through 2014?
 19 A. '13.
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 P. GREEN
 2 [REDACTED]
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P. GREEN
MR. BURNS: Objection to form.
Q. [REDACTED]
MR. BURNS: Objection to form.
A. [REDACTED]

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P. GREEN
[REDACTED]
MR. BURNS: Objection to form.
[REDACTED]

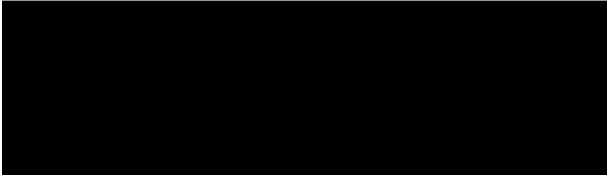
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P. GREEN
[REDACTED]
Q. Earlier today we talked about some of the other cases in which you have worked as an expert, and you indicated, at least in one or two of those cases, you may have examined evidence of consumer surveys?
A. Yes.
Q. Did you examine any evidence of a consumer survey in this case in forming your opinions in your report?
A. I am not aware of a consumer survey in this case that I looked at, no.
Q. Did you believe one was necessary in forming your opinions?
A. No, because we had this really good control group of the non-Secret Fit Belly bottoms, the ones that weren't actually practicing the patents in suit, as a control group that was already available to us, and we could see from looking at the accounting records that you had very similar types of products that were being distributed in the same way and that were, you know, not suffering from, you know, a lack of promotion

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P. GREEN
and so what you really have left is to figure out the differences and the willingness to pay more is because of the patented features.
Q. Did you ask any consumers why they would be willing to purchase the patented products in this case?
MR. BURNS: Objection to form.
A. I didn't ask a consumer about why they would be willing to purchase these products. I understand from reading the record and their website, Destination Maternity's website, that these products, the ones that Secret Fit Belly bottoms offer benefits to the wearer that are not available in other products, and you can see that also from Dr. Brookstein's analysis where he discusses the benefits of the patented technology in comparison to the prior art.
Q. So you didn't ask any actual consumers about why they may or may not have been willing to buy Secret Fit Belly pants?
MR. BURNS: Objection to form.
A. [REDACTED]

P. GREEN



So any differences that I am aware of between products are really the availability of the patented features as opposed to because they have similar designs, they have similar fabrics. They offer -- they are offered, you know, similar distribution, to my knowledge, there's not a different advertisement for these products. So you have to land on the patented technology as driving these sales.

Q. But your report doesn't rely on any data from the consumer survey in this case?

MR. BURNS: Objection to form.

A. Again, there was really no need to in this circumstance given the fact that we had our own laboratory here of accounting records and information that would let us have a normal pattern of non-patented goods.

P. GREEN

Q. So other than the conclusions you have drawn from the accounting records regarding consumer habits, you don't have any other data regarding consumers' reasoning for purchasing Secret Fit Belly versus non-Secret Fit Belly patents?

MR. BURNS: Objection to form.

A. Again, I am not aware of a particular consumer survey. There certainly is throughout the website or, you know, some discussion as to the benefits of these Secret Fit Belly pants in comparison to other things. You can see that in the patent and in the report, which is the kind of data that I considered in my analysis.

Q. Paragraph 35, the price premium we discussed, how do you know -- well, let me back up.

Is that premium all the result of the patents?

A. Well, again, I tried to look for something that it could possibly be related to, whether it was greater advertising. Whether it was due to some other technology.

P. GREEN

Whether it was due to something that was not comparable or that would make the non-patented bottoms that Destination Maternity was selling incomparable to the patented Secret Fit Belly bottoms, and to my knowledge, there wasn't any.

Q. So how do you know though that that premium that you identified was as a result of the patent, is it merely because of the absence of data to the contrary?

A. Well, that's --

MR. BURNS: Objection to form.



These are commercially successful products the ones that actually are practicing the patented technology. So the question becomes is there some reason why they are commercially successful that is greater than what is influencing their sales, and I tried to identify those things and other factors

P. GREEN

and haven't found any. So the conclusion that one would have to make, and this is what goes on in commercial success cases or commercial success analysis, is that there is nothing else that I am aware of that's actually driving the commercial success.

Q. So your conclusion is just based on the fact that you looked at the record available to you and nothing else indicated anything to the contrary?

A. Or said another way, all the data that I was aware of was supportive of the fact that the commercial success was due to the patented technology as opposed to other factors, which is what my opinion is.

Q. Is it possible that there are other factors that contribute to that price premium?

MR. BURNS: Objection to form.

A. I am not aware of any. There may be factors that are out there that I haven't considered, but I am not aware of any as I sit here today.

Q. Did you compare average sales

1 P. GREEN
 2 prices of the products you considered in any
 3 other form than just the aggregate across all
 4 Secret Fit Belly products?
 5 A. So yes, I mean, I looked at
 6 things for denim, you know, for example, I
 7 compared Secret Fit Belly denim products as
 8 against non-Secret Fit Belly denim products.
 9 Q. That's not in your report?
 10 A. No. But you can see easily from
 11 the exhibits that are referenced in the
 12 report. And it is consistent with the
 13 overall analysis that I have presented -- the
 14 conclusions that one would draw about the
 15 denim and the -- in the Secret Fit Belly in
 16 the denim and the non-Secret Fit Belly
 17 products.
 18 Q. For the non-Secret Fit Belly
 19 products, did you compare average sales
 20 prices in any other forms than the aggregate
 21 across those products?
 22 A. Yes, you can see it right on the
 23 documents. So I took a look to see what the
 24 average was price was of the non-Secret Fit
 25 Belly denim and compared it to the Secret Fit

1 P. GREEN
 2 Belly denim products. In the aggregate and
 3 the individual.
 4 Q. Did you conduct any analysis
 5 related to the price differentials across
 6 Destination Maternity's different branded
 7 stores?
 8 A. Well, I am aware of the fact that
 9 there are different price differentials
 10 across the stores and certainly analyzed that
 11 but that's one of the reasons I did things in
 12 the aggregate. Because there are fewer sales
 13 in theory of very expensive things that keep
 14 Pea in the Pod and greater sales in the
 15 aggregate at the lower end products. So they
 16 kind of cancel each out in terms of the
 17 averages.
 18 Q. So just, again, in terms of, just
 19 so I understand, you looked at the data
 20 across the different branded stores in the
 21 aggregate and also averaged that data?
 22 A. Yes. Sure.
 23 Q. In your analysis, did you control
 24 for the promotion of any particular SKUs in
 25 one Destination Maternity brand versus

1 P. GREEN
 2 another? In other words, for example, did
 3 you control for promotions of higher end
 4 higher priced Secret Belly products versus
 5 the lower end Secret Belly products that were
 6 sold at Motherhood Maternity stores or
 7 Destination Maternity stores?
 8 MR. BURNS: Objection to form.
 9 A. Again, I looked to see if there
 10 were evidence of substantial promotion one
 11 way or another in terms of -- in the stores
 12 that were different or extraordinary relative
 13 to other products. I wasn't aware of
 14 anything that was specifically greater.
 15 Whether it was in the Pea in the Pod or
 16 Motherhood Maternity.
 17 Q. Did you compare any particular
 18 products, Secret Fit Belly products,
 19 available at Motherhood to higher end Secret
 20 Fit Belly products available at, for
 21 instance, Pea in the Pod?
 22 A. In other words, did I look at the
 23 pricing in the margins?
 24 Q. Um-hum.
 25 A. Yes.

1 P. GREEN
 2 Q. Individually or just in the
 3 average, in the aggregate?
 4 A. You can see it individually and
 5 in the aggregate. So, yes. Both.
 6 Q. So did you, at a Pea in the Pod,
 7 did you account for the effect particular
 8 product, partnerships or promotions, for
 9 example, there is a Jessica Simpson line of
 10 Secret Fit Belly jeans, did you account for
 11 the contribution of that additional branding
 12 to sales of those products?
 13 MR. BURNS: Objection to form.
 14 A. Again, if we go back and look at
 15 the underlying accounting records, you can
 16 evaluate whether or not those things -- you
 17 can look at the sales individually. To the
 18 extent that those had higher prices, they
 19 tended to have lower volumes. So they are
 20 all accounted for in the aggregate, which is
 21 why I cite aggregate data.
 22 Q. Okay. Let's go back to
 23 paragraph 36. We talked a little about the
 24 items you compared in paragraph 36. Did you
 25 select those items to be compared?

1 P. GREEN
 2 A. Yes.
 3 Q. Did anyone else contribute to the
 4 selection of those items to be compared?
 5 A. Only people who work with me.
 6 Q. Did you compare any other Secret
 7 Fit Belly and non-Secret Fit Belly products
 8 in the same manner you did in paragraph 36?
 9 MR. BURNS: Objection to form.
 10 A. We ran other comparisons, yes.
 11 Q. Do they appear in your report in
 12 the same manner as in paragraph 36?
 13 A. They don't appear in the report,
 14 but I ran other comparisons. You can see
 15 that paragraph 36 starts off "for example."
 16 Q. So why did you omit those other
 17 comparisons from your report?
 18 A. Because I thought that this one
 19 was pretty compelling and a the other ones
 20 were pretty consistent.
 21 Q. Were any of the others ones not
 22 compelling?
 23 MR. BURNS: Object again that
 24 goes under work product privilege.
 25 So just be cautious about what

1 P. GREEN
 2 you discuss.
 3 A. No. In general, when one looks
 4 across the comparisons between the products
 5 that practice the technology that's claimed
 6 by the patents at issue here versus the
 7 products that actually don't practice the
 8 patents, the same price differentials occur.
 9 We can just see that, you know, from a --
 10 even a cursory comparison of what's on
 11 Exhibits D and D-1 to the report. And it is
 12 simply consistent.
 13 Q. Here you have stated that you
 14 have compared identical products. There is
 15 no other comparison of similar or identical
 16 products in your report, as you have done in
 17 paragraph 36?
 18 A. I didn't write in another one. I
 19 just used this one as an example.
 20 Q. Paragraph 37, you talk about
 21 Destination Maternity's competitors in the
 22 apparel market?
 23 A. Yes.
 24 Q. You mention Target. Who are
 25 Destination Maternity's other competitors in

1 P. GREEN
 2 the apparel market?
 3 MR. BURNS: Objection to form.
 4 A. They would be other maternity --
 5 maternity vendors.
 6 Q. Can you name them?
 7 MR. BURNS: Objection to form.
 8 A. So many of them are actually
 9 being provided clothing by Destination
 10 Maternity it is hard it to identify
 11 another --
 12 Q. Would that be a competitor
 13 though?
 14 A. That's not an competitor. That's
 15 my point. Destination Maternity has -- as I
 16 understand it, a large number of outlets in
 17 which it is -- its products are being sold.
 18 I can't think of another non-Destination
 19 Maternity competitor off the top of my head.
 20 I know that there are local ones in
 21 geographic areas.
 22 Q. So paragraph 37 says that you
 23 understand the competitors, plural, and the
 24 maternity market such as Target. As you sit
 25 here today, you're not aware of any other

1 P. GREEN
 2 Destination competitors by name?
 3 A. Well, I just know they exist. I
 4 would have to -- my knowledge of their
 5 competitors is coming from their 10-Ks and
 6 some other documents that I have seen.
 7 Q. So the 10-Ks identify some
 8 competitors, do they not?
 9 A. Yes, they do.
 10 Q. Who are they?
 11 MR. BURNS: Objection to form.
 12 A. It's been a long day already. My
 13 mind is blanking as to what's in the 10-K.
 14 We can pull them out and take a look.
 15 Q. So did you consider as one of
 16 Destination Maternity's competitors
 17 J.C. Penney?
 18 A. That would be fair, yes.
 19 Q. Did you consider, in thinking
 20 about J.C. Penney, did you consider
 21 Exhibit 1002, which is the J.C. Penney
 22 catalog from 2005?
 23 MR. BURNS: Objection to form.
 24 A. Again, I assumed that J.C. Penney
 25 was competing or endeavoring to compete with

1 P. GREEN
 2 Destination Maternity back in the 2005
 3 timeframe with these products.
 4 Q. So you understand that in this
 5 case it has not been established that Target
 6 in anyway infringes on Destination
 7 Maternity's patents?
 8 MR. BURNS: Objection to form.
 9 A. I understand that that's --
 10 hasn't been established. The point here of
 11 this paragraph is to say, well, look there
 12 are other competitors, Target being
 13 significant, and as I understand it, are
 14 accused of infringing the patents that are at
 15 issue in this case. That's evidence of
 16 commercial success.
 17 Q. So why does this paragraph also
 18 mention J.C. Penney?
 19 MR. BURNS: Objection to form.
 20 A. I think mostly because we are
 21 dealing with -- in this IPR we are dealing
 22 with Target. So I just focused on Target as
 23 opposed to any of the other competitors that
 24 could have been mentioned in the 10-K, and I
 25 also was aware of the fact that there had

1 P. GREEN
 2 demand for patented features." What do you
 3 mean by replication?
 4 A. What I mean is to the extent that
 5 someone is accused of practicing a patent or
 6 infringing a patent, there is at least some
 7 belief on the part of the person that owns
 8 the patent or who is making the assertion
 9 that the product is actually using the
 10 patented technology in some way, shape or
 11 form, and I understand that knockoff and
 12 copying have particular legal words or
 13 definitions in this kind of context, so I
 14 thought replication was a fair way of
 15 describing what was happening here.
 16 Q. So if replication, in your view
 17 is a function of whether or not the patent
 18 owner believes that there is infringement,
 19 shouldn't you have also included J.C. Penney
 20 and Gap here given Destination Maternity's
 21 prior patent allegations against them?
 22 MR. BURNS: Objection to form.
 23 A. Again, I could have. I did not
 24 for purposes of this analysis.
 25 Q. You chose to omit them?

1 P. GREEN
 2 been litigation instituted against Target
 3 with respect to infringing Destination
 4 Maternity's patents, so that seemed like a
 5 better example than other entities for which
 6 there hadn't been any claims of infringement
 7 brought, for which might be selling an
 8 infringing product.
 9 Q. So are you aware that Destination
 10 Maternity has accused in the past Gap of
 11 infringement?
 12 MR. BURNS: Objection to form.
 13 A. I am aware of that, but I didn't
 14 consider that in connection with providing my
 15 opinion in this matter.
 16 Q. Are you aware that Destination
 17 Maternity has in the past accused J.C. Penney
 18 of infringement?
 19 MR. BURNS: Objection to form.
 20 A. Again, I am aware of that, but I
 21 didn't consider that in connection with
 22 forming my opinion in this matter.
 23 Q. So in paragraph 37, I just want
 24 to understand, you say "This replication
 25 shows that competitors are aware of the

1 P. GREEN
 2 MR. BURNS: Objection to form.
 3 A. Again, for purposes of this
 4 analysis, I did.
 5 Q. Just to be clear, is it your
 6 testimony that replication, your use of the
 7 term replication here is not the same as
 8 copying in a legal sense?
 9 MR. BURNS: Objection to form.
 10 A. Again, as I understand it, there
 11 are copying and -- it has a particular
 12 meaning in the sense of the law around
 13 intellectual property and infringement. So
 14 instead what I am doing is I am asserting
 15 that, as I understand it, since there has
 16 been no finding of infringement, the best way
 17 of describing this circumstance would have
 18 been being that there is a replication of
 19 what would appear to be the patented
 20 products.
 21 Q. So just so your testimony is
 22 clear, your use of replication here is not
 23 meant to be a statement of copying in the
 24 legal sense?
 25 MR. BURNS: Objection to form.

1 P. GREEN
 2 A. It is meant to indicate that, to
 3 my knowledge, Destination Maternity has sued
 4 Target for infringement of a patent. A final
 5 determination hasn't been made as to whether
 6 that infringement has already occurred from
 7 the point of view of a commercial success
 8 analysis. What we are really trying to do is
 9 demonstrate if the patented technology was of
 10 no use or value, there would be no -- no
 11 reason for Target to have replicated it in
 12 its products.

13 Q. But you didn't analyze in
 14 paragraph 37 the effect of J.C. Penney's
 15 prior replication of the product?

16 MR. BURNS: Objection to form.

17 A. Not for purposes of doing this
 18 analysis, no.

19 Q. So in your paragraph 37, is it
 20 fair to say that J.C. Penney, as shown in
 21 Exhibit 1002, also replicated the product?

22 MR. BURNS: Objection to form.

23 A. I think we are wading into an
 24 area of infringement and validity and other
 25 things that might be well beyond the scope of

1 P. GREEN
 2 what my opinion is let alone that I'd be
 3 qualified to make. I think --

4 Q. This in paragraph 37 of your
 5 report, correct?

6 A. Right. That's why I have limited
 7 it to Target. The J.C. Penney products, as I
 8 understand it, are being asserted as prior
 9 art, and so I think there's a whole lot of
 10 legal conclusions that others in this room
 11 are more qualified to make than I am
 12 regarding prior art and infringement and
 13 those kind of things.

14 Q. Are you distinguishing between
 15 the legal conclusion with respect to
 16 infringement and a legal conclusion with
 17 respect to invalidity?

18 MR. BURNS: Objection to form.

19 A. Again, I am making a
 20 distinction -- drawing on a distinction
 21 between the fact that I am aware of
 22 allegations that Target infringes one or more
 23 of the claims of the patents in suit as is
 24 asserted in the District Court case versus
 25 any assertions that have been made by

1 P. GREEN
 2 Destination Maternity with regard to
 3 J.C. Penney's infringements or whether or not
 4 the products that are in Exhibit 1002 are
 5 relevant to that inquiry.

6 Q. I want to make sure I understand
 7 in paragraph 37, you're not offering an
 8 opinion that Target copied any Destination
 9 Maternity products?

10 MR. BURNS: Objection to form.

11 A. Again, what I am offering an
 12 opinion is that for purposes of evaluating
 13 commercial success, one of the things that is
 14 relevant, or could be considered relevant by
 15 a finder of fact, is whether or not others
 16 have endeavored to use the technology, not --
 17 and in this circumstance, or make products
 18 that actually practice aspects of the
 19 technology or in -- so what I have been --
 20 I've used here or done here, because I know
 21 that there is some sensitivity to the use of
 22 the words copying and knockoff and so forth
 23 from the legal point of view, is I am just
 24 offering the point that Destination Maternity
 25 has asserted in a separate action for patent

1 P. GREEN
 2 infringement that Target has replicated the
 3 features that are in Destination Maternity's
 4 Secret Fit Belly bottoms.

5 Q. So you used the word replication
 6 on the basis that Destination Maternity has
 7 asserted a claim of infringement?

8 A. Yes.

9 Q. You understand that claim has not
 10 been proved yet?

11 A. That's my point. That's why I
 12 use the word replication as opposed to, say,
 13 this infringement or this alleged
 14 infringement.

15 Q. So how is the mere assertion of
 16 infringement relative to commercial success?

17 A. Because --

18 MR. BURNS: Objection to form.

19 A. Because if you are going to
 20 assert a claim of infringement, at least my
 21 understanding, is that there would be some
 22 belief on the part of the patent holder that
 23 there would be some basis for or some
 24 comparison that had been done between the
 25 patents and their claims and the technology

1 P. GREEN
 2 that's being accused of infringement.
 3 Otherwise you wouldn't be alleging it.
 4 Q. But you've omitted here any
 5 mention of other parties such as J.C. Penney
 6 or Gap who DMC has accused of infringement in
 7 the past; is that right?
 8 MR. BURNS: Objection to form.
 9 A. I have for purposes of this
 10 analysis, that's correct.
 11 Q. I am just wondering why you chose
 12 to omit those parties but included Target in
 13 paragraph 37?
 14 MR. BURNS: Objection to form.
 15 A. Because Target was the Petitioner
 16 in this case. It's something that I am aware
 17 of with respect to Target and Destination
 18 Maternity's circumstances, and for purposes
 19 of making this point, I only thought it
 20 was -- it was sufficient to point out that
 21 Target was doing this as well.
 22 Q. Had you been aware of J.C. Penney
 23 and Gap, would have you included them there?
 24 MR. BURNS: Objection to form.
 25 A. Again, I was aware of both

1 P. GREEN
 2 J.C. Penney and Gap. I concluded, based on
 3 the -- that I wasn't going to, for purposes
 4 of doing this report, include them -- include
 5 J.C. Penney or Gap under this section.
 6 Q. So earlier you testified you
 7 weren't aware that Destination Maternity had
 8 accused them of infringement in the past. So
 9 now you are saying you are aware of them or
 10 you're not? I want to understand so the
 11 record is clear.
 12 A. I think I said I was aware of
 13 both of those cases, but I hadn't included
 14 them in this case. Hadn't considered them in
 15 this case.
 16 Q. You understand that those weren't
 17 cases, they were just accusations of
 18 infringement?
 19 A. Yes.
 20 Q. So you reviewed documents
 21 relating to those allegations of
 22 infringement?
 23 MR. BURNS: Objection to form.
 24 A. Not documents that are in this --
 25 in these matters. And therefore, nothing

1 P. GREEN
 2 that I have relied upon.
 3 Q. Are you aware of any, same
 4 paragraph, paragraph 37, are you aware of any
 5 other competitors who offer full panel
 6 bottoms with similar features, as we sit here
 7 today?
 8 MR. BURNS: Objection to form.
 9 A. Again, I don't know by name, the
 10 names of other competitors that are offering
 11 full panel bottoms with other similar -- with
 12 similar features to those that are claimed by
 13 the patents that are at issue in this matter.
 14 But I am aware that there are others out
 15 there.
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 P. GREEN
 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 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 Q. Did you review any studies that
 21 would have provided industry market share in
 22 the maternity industry?
 23 A. I did not. Like I said, I think
 24 we have a very good circumstance here to
 25 evaluate commercial success by making a

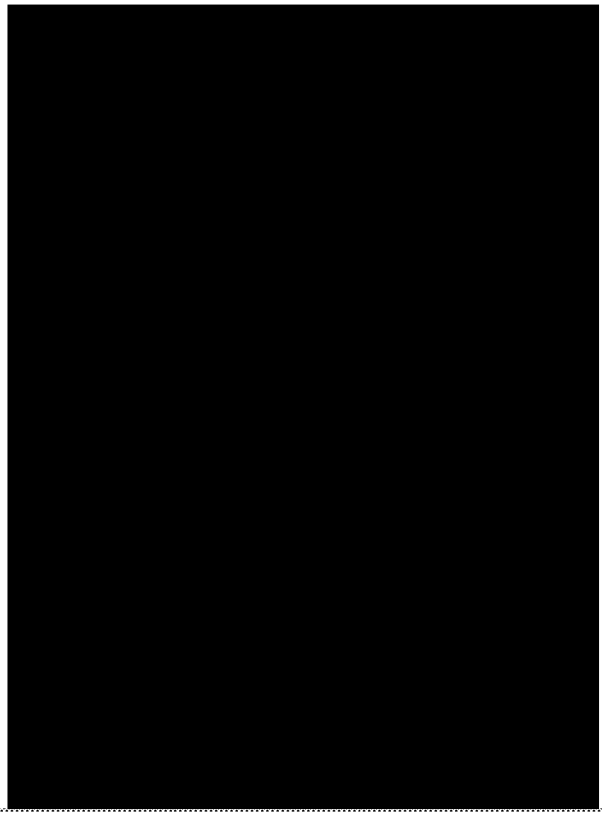
1 P. GREEN
 2 comparison between products that Destination
 3 Maternity -- markets and sales that don't
 4 practice the patents versus products that
 5 Destination Maternity markets and sells that
 6 are practiced in the patents.

7 Q. But your commercial success
 8 determination is based on the comparison of
 9 patented goods sold by Destination Maternity
 10 to unpatented goods sold by Destination
 11 Maternity?

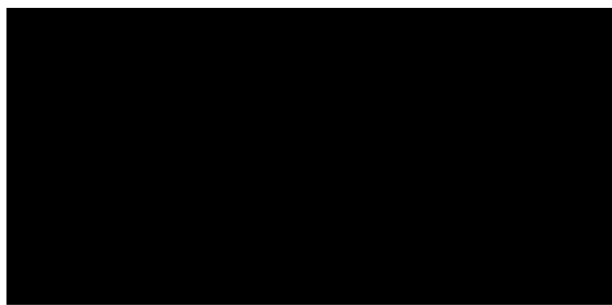
12 A. That's correct. So we get to
 13 evaluate the next closest product that is
 14 being marketed in a similar manner to the
 15 product that's covered by the patents in
 16 suit.



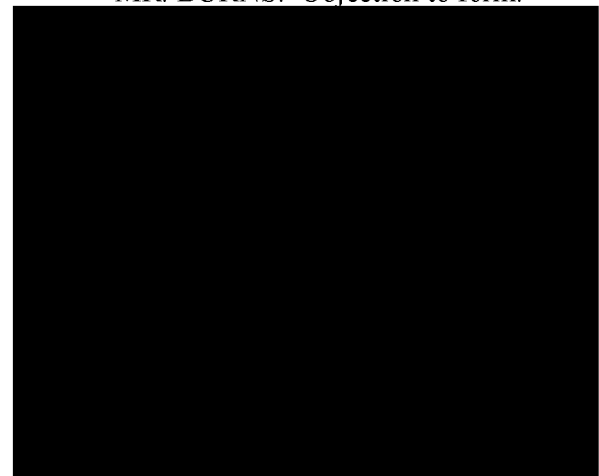
1 P. GREEN



1 P. GREEN



11 MR. BURNS: Objection to form.



1 P. GREEN



3 Q. Earlier in the deposition I think
 4 I asked you the question of whether you
 5 considered any deposition transcripts in this
 6 case?

7 A. Yes.

8 Q. And you mentioned, I think one
 9 that you took a look at. Which one was that?

10 A. That was Mindy Singer?

11 Q. Is it Mindy Simons?

12 A. Mindy Simons, sorry, exactly.

13 Q. And you understand that
 14 Mindy Simons was a witness for J.C. Penney?

15 A. That's correct.

16 Q. Do you understand that there are
 17 depositions in this case from representatives
 18 of Destination Maternity?

19 MR. BURNS: Objection to form.

20 A. There may be. I don't know. I
 21 haven't seen them.

22 Q. So those weren't provided to you?

23 MR. BURNS: Objection --

24 A. I don't know --

25 MR. BURNS: Objection to the

1 P. GREEN
 2 form.
 3 A. I don't know what the timing was
 4 of the deposition whether they occurred
 5 before or after my reports.
 6 Q. Did you ask counsel for those --
 7 for any depositions related to Destination
 8 Maternity witnesses?
 9 A. I would have asked for ones that
 10 would be relevant to evaluating commercial
 11 success in a way that was not consistent with
 12 what my opinions were here, sure.
 13 Q. Did you receive any?
 14 A. I haven't seen any of the
 15 depositions.
 16 Q. Did you ever see the deposition
 17 transcript of Rebecca Piccone, P-I-C-C-O-N-E?
 18 A. I have not seen that deposition
 19 transcript that I am aware of, no.
 20 (Whereupon, Green Exhibit 1059,
 21 Defendant Target's notice of the
 22 deposition of Destination Maternity
 23 corporation pursuant to Fed 30(b)6 was
 24 marked for identification as of this
 25 date by the Reporter.)

1 P. GREEN
 2 Q. Could you turn to page 16,
 3 please.
 4 A. Sure.
 5 Q. Do you see Topic 44 on page 16?
 6 A. Yes.
 7 Q. And do you see the term in caps,
 8 well, it's a capitalized term, "Your
 9 pertinent maternity products"? In
 10 paragraph 44.
 11 A. Yes, I do see that.
 12 Q. Would you turn to page 7 and look
 13 at Item P and do you see there that there is
 14 the definition for pertinent maternity
 15 products?
 16 A. Yes.
 17 Q. Do you see that part of the
 18 definition is "Products that are similar to
 19 or that embody the subject matter disclosed
 20 and/or claimed in the patents in suit"?
 21 A. Yes.
 22 Q. So looking at paragraph 44,
 23 again, with an understanding of what
 24 pertinent maternity products means, would you
 25 have wanted to consider testimony regarding

1 P. GREEN
 2 BY MR. LECHLEITER:
 3 Q. Mr. Green, I believe you have in
 4 front of you Exhibit 1059 from the Court
 5 Reporter; is that correct?
 6 A. Yes.
 7 Q. Do you see what the title of that
 8 document is?
 9 A. It says that it is a Notice of
 10 Deposition of plaintiff Destination Maternity
 11 pursuant to Federal Rule of Civil Procedure
 12 30(b)6 from the District Court case in the
 13 Eastern District of Pennsylvania, yes.
 14 MR. BURNS: I will object. This
 15 seems to be outside the scope of
 16 Mr. Green's Declaration.
 17 Q. Do you have any understanding of
 18 what a deposition pursuant to Rule 30(b)6 is
 19 or means?
 20 A. Yes, I do.
 21 Q. What is that?
 22 A. Generally a 30(b)6 deposition is
 23 a deposition in which an individual, since a
 24 corporation can't speak for itself, speaks on
 25 behalf of the corporation.

1 P. GREEN
 2 Topic Number 44?
 3 MR. BURNS: Objection to form.
 4 A. Possibly. This deposition, to
 5 the extent it actually occurred or there was
 6 ever a 30(b)6 testimony on these topics, was
 7 part of the record in the District Court case
 8 that I wasn't aware was transported or
 9 available in the IPRs. There is a whole
 10 separate exhibit process in IPRs, as I
 11 understand.
 12 Q. So just so I understand, your
 13 report, in Exhibit A, you do have items
 14 listed from the District Court litigation; is
 15 that correct?
 16 A. I have the Complaint and I am
 17 not -- and obviously, you know, the patents.
 18 To the extent that there are other documents
 19 that are necessarily from the District Court
 20 case they would have in the supplemental or
 21 the revised versions, they would have
 22 connection to the -- this matter would have
 23 exhibit numbers for them.
 24 Q. So if you look at paragraph 47 on
 25 page 16, again, do you see that paragraph 47

1 P. GREEN
 2 uses the term pertinent maternity products?
 3 A. I do see that.
 4 Q. You see that topic relates to
 5 marketing sales and testing of pertinent
 6 maternity products?
 7 A. Yes.
 8 Q. If there was deposition testimony
 9 on that topic, is that testimony you would
 10 have wanted to consider in drafting your
 11 report?
 12 MR. BURNS: Objection to form.
 13 A. It might have been. Again, I
 14 have data that is available to me in the form
 15 of accounting records and other things that
 16 are providing me with information regarding
 17 the marketing and sales of the Destination
 18 Maternity products that I am informed
 19 practice the patents at issue in the IPRs.
 20 Q. But isn't it important to
 21 consider all available data in authoring
 22 reports such as you authored in this case?
 23 MR. BURNS: Objection to form.
 24 A. Again, if the data tells me
 25 something in addition to what it is already

1 P. GREEN
 2 available to me, perhaps, yes, but I have
 3 data here that is, in my opinion, reliable
 4 and valuable and provides us with
 5 information, provides the trier of fact with
 6 reliable information regarding the sales of
 7 the products practicing the patents in suit
 8 and the ones that don't and provides a basis
 9 for making comparisons to conclude that the
 10 products that practice the patents in suit
 11 are commercially successful in comparison to
 12 those that don't.
 13 Q. Have you ever seen Exhibit 1059
 14 before today?
 15 A. I don't know.
 16 Q. Just so your testimony is clear,
 17 you didn't rely on any depositions that may
 18 have resulted from the topics in
 19 Exhibit 1059?
 20 MR. BURNS: Objection to form.
 21 A. That's correct. In connection
 22 with these IPRs, that's correct.
 23 THE WITNESS: We have gone about
 24 another hour. Can we take a couple of
 25 minutes?

1 P. GREEN
 2 MR. LECHLEITER: Sure, yes,
 3 happy to do it.
 4 THE VIDEOGRAPHER: The time is
 5 4:36 p.m.; we are off the record.
 6 (Whereupon, a recess was held.)
 7 THE VIDEOGRAPHER: The time is
 8 4:48 p.m.; we are on the record.
 9 BY MR. LECHLEITER:
 10 Q. Mr. Green, will you look at
 11 paragraph 11 of your report.
 12 A. Okay.
 13 Q. Paragraph 11, would you mind
 14 reading it into the record, the first
 15 sentence of paragraph 1.
 16 A. It says, "In its retail stores,
 17 DMC had two primary apparel product lines,
 18 Motherhood Maternity, which offers value
 19 prices, parenthesis, \$10 to \$45, end of
 20 parenthesis, and A Pea in the Pod, which
 21 offers apparel at luxury prices, parenthesis,
 22 \$18 to \$395, closed parenthesis, period."
 23 Q. [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 P. GREEN
 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 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 MR. BURNS: Objection to form.
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

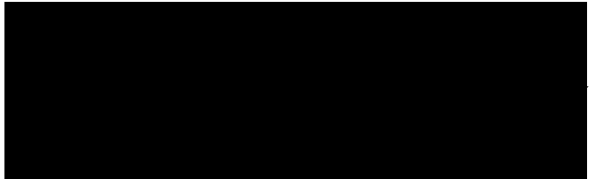
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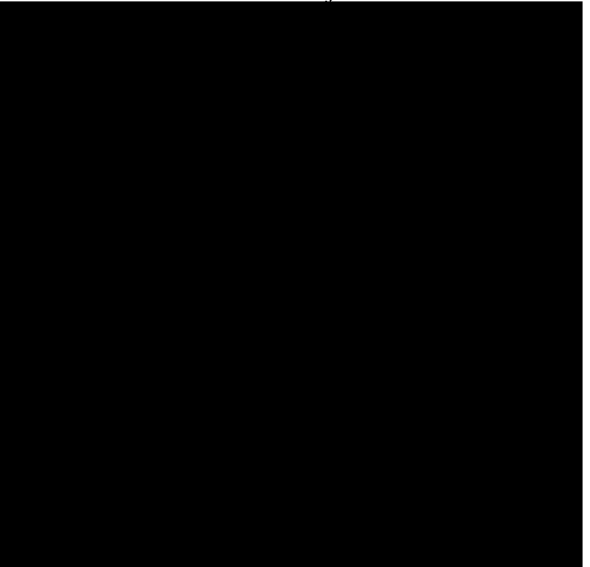


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MR. BURNS: Objection to form.



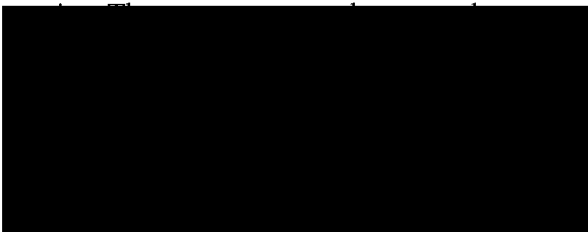
MR. BURNS: Objection to form.

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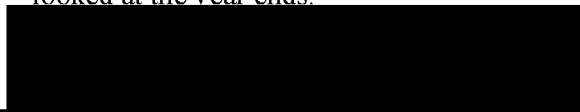


MR. BURNS: Objection to form.



Q. Did you examine any quarterly reports of Destination Maternity for material disclosures?

A. I didn't look at quarters. I looked at the year ends.

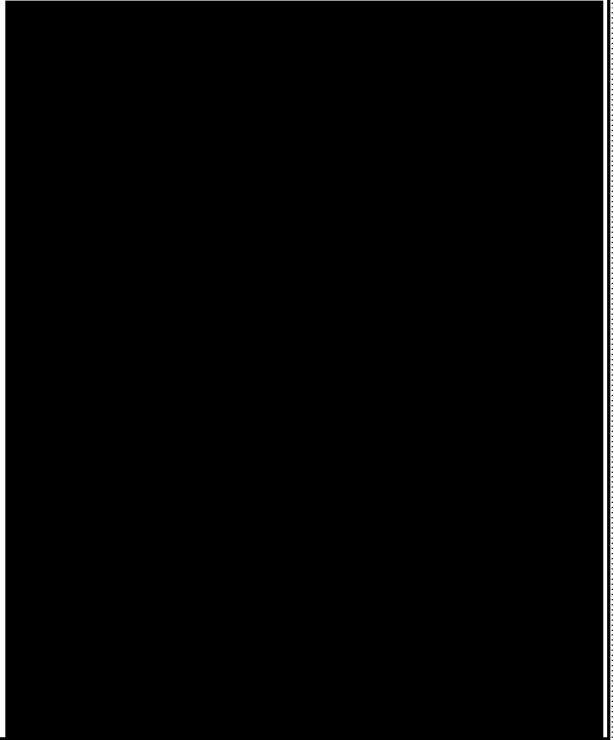


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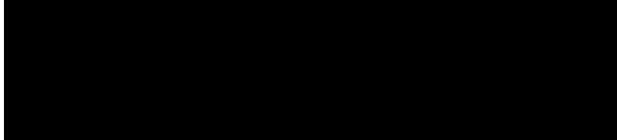
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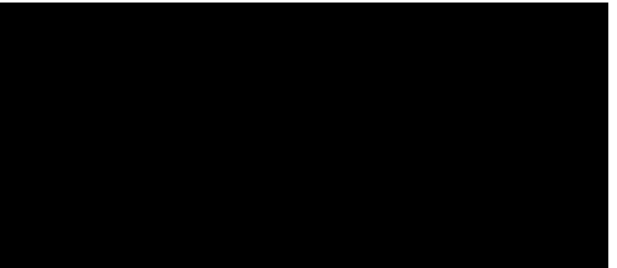
MR. BURNS: Objection to form.



P. GREEN



MR. BURNS: Objection to form.



Q. Are you aware that Destination Maternity has other patents on products.

A. I am.

Q. Did you look at any of those patents in the course of performing your analysis in your report?

A. No. I was focused on the ones that are the subject of these proceedings.

Q. Look at paragraph 40 of your report.

A. I don't think I am missing

P. GREEN

something, but the document that I have doesn't have a 40. It has a 41.

Q. That's the same as mine. I just wondered is the omission of paragraph 40 intentional or is there actually omitted material?

A. I don't think there is omitted material. I am betting that because, as you can see under 39, there is a 1 and a 2 and a 3, that there is some software glitch with respect to the numbering.

Q. Okay. So paragraph 40 was -- does not appear in the report?

A. I don't believe so. I think there's a gremlin in the number.

Q. Did you, in conducting your analysis, did you assess how different material qualities of the products you looked at impacted sales?

A. In other words, did the fabric that the product was being made of affect sales?

Q. The quality of the fabric. For instance, a higher end product may have a

P. GREEN

higher quality fabric versus a lower end product.

A. Again, I am aware that the products that are sold by this niche maternity that encompass the -- use the patented technology are sold in a variety of different fabrics. But because I have used averages for doing much of this analysis, I have sort of taken the meaningful differences, to the extent there was a higher price for a particular fabric, typically means fewer units will be sold. So using averages that normalize for that.

Q. So just so I understand, you are saying that to the extent quality impacted price, that would be accounted for in the averaging that you relied upon?

A. Correct.

Q. So paragraph 42 of your report, you state that -- well, could you read the second sentence of paragraph 42 into the record?

A. Second sentence says, "The only difference between the Secret Fit Belly and

P. GREEN

all their bottoms is a patented full belly panel."

Q. And just so I understand, a patented full belly panel that difference, is it your understanding that that difference is from Claim 1 of each patent?

MR. BURNS: Objection to form.

A. No. What I am really referring to, I think, is something that we talked about earlier. When I was doing my analysis, I considered what I identified in paragraph 24. What I was considering were the products that were practicing the -- that I understand practiced the patents that are the subject of these proceedings and both dependent and independent claims.

Q. Did you conduct any analysis related to whether the shape of the panel, the sides of the panel, impacted sales of the products with the Secret Fit Belly panel?

MR. BURNS: Objection to form.

I think this is outside the scope of his Declaration.

A. Again, I understand that there

1 P. GREEN
 2 are claims that are related to the panel
 3 design. But my understanding all comes from
 4 Dr. Brookstein, and he would have been the --
 5 he would be the guy to ask about the very
 6 specifics of it. I analyzed the overall
 7 products and considers were appropriate that
 8 the dependent claims and their
 9 interconnection with the independent claims.

10 Q. I want to understand, you
 11 testified earlier with respect to
 12 paragraph 12 and 24, both places you
 13 mentioned instituted -- well, you mentioned
 14 dependent claims either in the context of
 15 instituted dependent claims in paragraph 12
 16 or dependent claims reviewed for obviousness
 17 in paragraph 24. So you understand that
 18 there are dependent claims at issue here that
 19 relate to the shape of the sides of the
 20 panel?

21 MR. BURNS: Objection to form.
 22 I think that again is outside the
 23 scope of his Declaration.

24 A. Again, I am aware that there are
 25 dependent claims that are related to the

1 P. GREEN
 2 panel, yes.

3 Q. Did you perform any particular
 4 analysis related to the claims that discuss
 5 the shape of the sides of the panel?

6 MR. BURNS: Same objection.

7 A. Again, I didn't do -- similar to
 8 the other discussion that we had this morning
 9 and earlier this afternoon, as I understand
 10 it, the dependent claims, whatever they might
 11 be, are also dependent on the independent
 12 Claim 1, and so these are all features and
 13 functions of the product in and of itself,
 14 and to my knowledge, those kinds of things
 15 are not something that is separable and
 16 excused, so what I did was I looked at the
 17 overall value of the entire product and the
 18 differences between it and the practices.

19 Q. Is there any discussion in your
 20 report about the claims that have -- that
 21 require different shapes of the side panel in
 22 the Secret Fit Belly pants?

23 MR. BURNS: Same objection.

24 A. There is no separation discussion
 25 that I believe appears in the report.

1 P. GREEN
 2 However, the analysis of the overall profit
 3 differentials and margin differentials and
 4 sales price differentials and the commercial
 5 success apply to those particular claims.

6 Q. To the extent that Dr. Brookstein
 7 looked at those claims?

8 MR. BURNS: Same objection.

9 A. Again, even if -- the analysis,
 10 as I understand it, or the analysis that I
 11 have done, looks at the patented products and
 12 recognizes that they are independent and
 13 dependent claims, and I have analyzed the
 14 fact that certain of the dependent claims
 15 cannot be separated from a SKU, but they are
 16 actually part of the -- integral to the
 17 overall product in and of itself.

18 Q. It's your understanding that was
 19 from Dr. Brookstein?

20 A. Correct.

21 Q. So if he offered an opinion on a
 22 dependent claim that's within the scope of
 23 your report?

24 MR. BURNS: Objection. Same
 25 objection.

1 P. GREEN

2 A. Or I would have considered it in
 3 my discussion with him one way or another.

4 Q. But to the extent you relied on
 5 his report, if he offered an opinion that a
 6 dependent claim covered the Secret Fit Belly
 7 products, that claim would be part of your
 8 report?

9 A. It would be part of the report.
 10 But then again, I spoke with Dr. Brookstein,
 11 and if you look at page -- paragraph 24 on
 12 page 13, "I further understand from
 13 Dr. Brookstein that the Secret Fit Belly
 14 bottoms likewise embodied many of the
 15 dependent claims of the patents in suit
 16 including all that are subject to these
 17 proceedings."

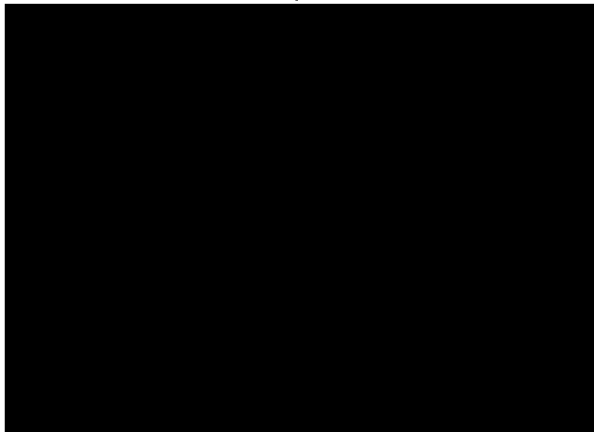
18 Q. Did you, in conducting your
 19 analysis and your report, consider the impact
 20 of the Secret Fit Belly name as a trademark
 21 name with respect to sales of the Secret Fit
 22 Belly products?

23 MR. BURNS: Objection to form.

24 A. Not separately, no, I didn't
 25 think it was necessary. I mean, I think that

P. GREEN

I was comparing things on the products being sold by Destination Maternity, which is the overall parent, and so we would have normalized, to the extent there is other trademarks or other identifiers of the non-Secret Fit products, they would have been considered in the analysis.



MR. LECHLEITER: Subject to re-cross, I don't have any further questions at this time.

MR. BURNS: I'm going to reserve

P. GREEN

questions and let everyone go home.

THE VIDEOGRAPHER: This concludes today's deposition. The time is 5:07 p.m.; we are off the record.

(Whereupon, at 5:07 p.m., the Examination of this Witness was concluded.)

PHILIP GREEN

Subscribed and sworn to before me this ____ day of _____, 2014.

NOTARY PUBLIC

EXHIBITS

EXHIBIT NUMBER	EXHIBIT DESCRIPTION	PAGE
Exhibit 1054	Petitioner's Notice of Deposition of Philip Green	40
Exhibit 1055	Petitioner's Notice of Deposition	41
Exhibit 1056	Petitioner's Notice of Deposition	41
Exhibit 1057	Petitioner's Notice of Deposition	41
Exhibit 2022	Declaration of Philip Green regarding commercial success	127
Exhibit 2043	DMC '0002838	147
Exhibit 2045	DMC '0031917	208
Exhibit 1058	Copy of the opinion in Crocs International	225

EXHIBIT NUMBER	EXHIBIT DESCRIPTION	PAGE
Exhibit 1002	Excerpt from the J.C. Penney On Trend maternity catalog from fall and winter 2005	230
Exhibit 1059	Defendant Target's notice of the deposition of Destination Maternity corporation pursuant to Fed 30(b)6	306

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INFORMATION AND/OR DOCUMENTS	(NONE)

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CERTIFICATE

STATE OF NEW YORK)
: SS.:
COUNTY OF NASSAU)

I, REBECCA SCHAUMLOFFEL, a Notary Public for and within the State of New York, do hereby certify:

That the witness whose examination is hereinbefore set forth was duly sworn and that such examination is a true record of the testimony given by that witness.

I further certify that I am not related to any of the parties to this action by blood or by marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of July, 2014.

REBECCA SCHAUMLOFFEL

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WITNESS ERRATA SHEET

Witness Name: Philip Green
Case Name: Destination Maternity v. Target Corporation
Date Taken: July 7, 2014

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