

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TARGET CORPORATION
Petitioner

v.

DESTINATION MATERNITY CORPORATION
Patent Owner

Patent RE43,531
Case No. IPR 2013-00530
Case No. IPR 2013-00531

Patent RE43,653
Case No. IPR 2013-00532
Case No. IPR 2013-00533

Date: May 5, 2014

DECLARATION OF PHILIP GREEN
REGARDING COMMERCIAL SUCCESS

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT	3
II. PROFESSIONAL QUALIFICATIONS AND COMPENSATION	5
III. SUMMARY OF OPINIONS.....	6
IV. BACKGROUND.....	7
A. DESTINATION MATERNITY CORPORATION.....	7
B. THE PATENTS-IN-SUIT.....	8
C. SECRET FIT BELLY BOTTOMS.....	11
D. FRAMEWORK OF RELEVANT CASE LAW	13
V. OPINIONS AND RELATED SUPPORT.....	15
OPINION I: DMC’S SECRET FIT BELLY BOTTOMS PRACTICING THE PATENTS-IN-SUIT ARE COMMERCIALLY SUCCESSFUL.....	15
OPINION II: DMC’S SECRET FIT BELLY BOTTOMS’ COMMERCIAL SUCCESS IS DUE TO THE PATENTED TECHNOLOGY AND NOT TO OTHER FACTORS.	19

I, Philip Green, declare as follows:

I. Preliminary Statement

1. I have been retained by DLA Piper LLP on behalf of Destination Maternity Corporation (“DMC”) to provide an independent and objective opinion regarding the commercial success of DMC’s full belly covering bottoms that are claimed to practice certain U.S. patents held by DMC.

2. I understand that DMC’s Secret Fit Belly bottoms practice one or more of the claims of U.S. Patent Nos. RE43,531 (“the ‘531 patent”) and RE43,563 (“the ‘563 patent”), (collectively, “the patents-in-suit”), including all of the claims instituted on obviousness grounds. The ‘531 patent is a reissue of U.S. Patent No. 7,814,575, issued on October 19, 2010.¹ The ‘531 patent, entitled “Belly Covering Garment,” was reissued on July 24, 2012. I understand the ‘531 patent describes a “garment worn during different stages of pregnancy and different stages of postpartum body changes.”² The garment consists of a first torso-encircling circumference that recedes downward allowing expansion of the belly panel and a second torso-encircling circumference that holds the garment up over the torso.³ The ‘563 patent is a reissue of U.S. Patent No. 7,900,276, issued on

¹ U.S. Patent No. 7,814,575.

² U.S. Patent No. RE43,531.

³ U.S. Patent No. RE43,531.

March 8, 2011.⁴ The ‘563 patent was issued on August 7, 2012 and is also entitled “Belly Covering Garment.” It describes a garment worn throughout pregnancy and postpartum with an expansible belly panel and two torso encircling circumferences.⁵

3. This report presents my analysis of financial, accounting, and economic factors that are related to the analysis of commercial success. Because of the nature of this action and my role in it, I have had to consider technical aspects related to the patents-in-suit and the products into which they may be incorporated. I have obtained my understanding of the technology from a variety of sources which are noted throughout this report. In addition, this analysis necessarily discusses various statutes and precedents. Other than to apply my analysis of the facts of this matter to these statutes and precedents, I have not been asked to provide legal opinions regarding the case law cited, nor is this report intended to do so.

4. Exhibit A is a list of the documents and other information that I have considered in forming my opinions. Should additional information become

⁴ Complaint of Destination Maternity Corporation v. Target Corporation, Cherokee Inc. and Elizabeth Lange LLC, Eastern District of Pennsylvania, dated October 4, 2012.

⁵ U.S. Patent No. RE43,563.

available to me that affect the conclusions or opinions herein, I may supplement or amend this report as appropriate.

II. Professional Qualifications and Compensation

5. I am one of four founding principals in the consulting firm of Hoffman Alvary & Company LLC, located in Newton, Massachusetts. Prior to founding the firm in October 1996, I was a senior manager in the Dispute Analysis and Corporate Recovery Services practice of Price Waterhouse LLP, an international accounting and consulting firm. As part of my work, I am regularly involved in the valuation and licensing of intellectual properties including patents related to consumer products, electronics, software, and pharmaceuticals.

6. For much of the past twenty years, my practice has focused on matters involving intellectual property. In connection with some of these matters, I have participated in license negotiations and have performed valuations of intellectual property assets. My work in these areas includes analyses related to consumer products, software and business methods, medical devices and coating technologies, among others. In addition, I have been retained on numerous occasions as an expert to address the appropriate measure of damages resulting from patent and other types of infringements. My resume and a list of cases in which I have given testimony either in deposition or at trial over the past four years are attached as Exhibit B.

Explore Litigation Insights

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

Real-Time Litigation Alerts



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

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

Advanced Docket Research



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

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

Analytics At Your Fingertips



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

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

API

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

LAW FIRMS

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

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

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.