

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TARGET CORPORATION

Petitioner

v.

DESTINATION MATERNITY CORPORATION

Patent Owner

Case IPR2013-00533

Patent No. RE43,531

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

**PETITIONER'S REPLY TO
PATENT OWNER'S RESPONSE**

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I. INTRODUCTION

The parties' key dispute centers on how high a belly panel must extend on a wearer to be within the scope of claim 1. The Board correctly determined and applied the broadest reasonable interpretation of the relevant '531 Patent claims. In attempting to show that the Board erred, DMC: (1) ignores the express language of the claims and specification; (2) reads alleged features of its commercial Secret Fit Belly ("SFB") products into the claims and specification; (3) ignores key teachings of the prior art; and (4) ignores its prior infringement allegations. As discussed below, the intrinsic and extrinsic evidence demonstrate that the '531 Patent claims-at-issue in this proceeding are unpatentable.

II. CLAIMS 1, 24-26, 28, AND 29 ARE ANTICIPATED BY JCP FOLD-OVER PANEL JEANS (EX. 1002)

The Board correctly observed that the JCP Fold-Over Panel Jeans ("JCP") disclose all elements of claim 1. DMC does not dispute that JCP discloses all elements of claim 1, except for "an upper edge of the belly panel that encircles a wearer's torso just beneath the wearer's breast area" and a belly panel that "substantially cover[s] the wearer's entire pregnant abdomen during all stages of pregnancy." Paper 25, at 15, 16. If claim 1 is anticipated, DMC does not separately dispute that claims 25-26, and 28-29 are anticipated. *Id.* at 34-37. DMC disputes whether JCP discloses the additional limitations of claim 24, but JCP anticipates this claim. *Id.*

A. The Claims Demonstrate that the Board’s Findings Are Correct

Claim 1 does not require the belly panel to cover the entire pregnant abdomen. Ex. 1018, cl. 1. This is illustrated by the claim limitations “*substantially* covering the wearer’s entire pregnant abdomen” and “*just beneath* the [] breast *area*.” *Id.* (emphasis added). The Board’s interpretation of claim 1 is consistent with this claim language, while DMC’s interpretation of claim 1 ignores these phrases and incorrectly requires the entire pregnant abdomen, and more, to be covered by the belly panel. *E.g.*, Paper 25, at 26-32.

The flaws in DMC’s interpretation are brought to light simply by reading its motion to amend in IPR2013-00531 and its opposition in this proceeding. In each, DMC explains how “substantially” means “largely, *but not wholly*, that which is specified,” but DMC goes on to *require* the whole when applying the claim to the prior art; this is contrary to the meaning of “substantially” advanced by DMC and its expert. Ex. 1117, at 2-4, 6-9, Ex. 2026, ¶¶ 24, 52, 55-56, 62, 65-66; Ex. 2017, ¶¶ 21-22, 41, 44-45; Paper 25, at 7, 14 n. 2 (emphasis added), 20. Thus, a location just beneath the wearer’s breast area must necessarily include at least the portion of the abdomen as indicated by the Board; otherwise, “substantially covering the wearer’s entire pregnant abdomen” would improperly be deprived of meaning. *See Merck & Co. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005) (“A claim construction that gives meaning to all the terms of the claim is preferred over

one that does not do so.”); Paper 11, at 12. [REDACTED]

[REDACTED]

[REDACTED]

Turning to “just beneath the [] breast area,” the Board’s observation that “[t]he term ‘breast area’ connotes a broader [] meaning than the word ‘breast’ alone” is correct. Paper 11, at 7. Petitioner’s expert, Ms. Harder, explained that adding “area” to a specific place could connote more than the place alone; i.e. the “L.A. area” encompasses more the than “L.A.,” alone. Ex. 2018, at 17:8-17. DMC’s interpretation is, therefore, inconsistent with the plain language of claim 1.

B. The Specification Demonstrates that the Board’s Findings Are Correct

The Board’s interpretation of claim 1 is also consistent with the specification. When the specification explicitly contemplates belly panel height, the panel is described as being “at least somewhat above the maximum girth of the abdomen.” Ex. 1018, at 3:36-41. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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