Paper No. 52
Filed: September 3, 2014

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 E

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

PETITIONER'S MOTION TO EXCLUDE EVIDENCE
PURSUANT TO 37 C.F.R. § 42.64(c)

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I. STATEMENT OF RELIEF REQUESTED

Petitioner Target Corporation ("Target" or "Petitioner") seeks the following relief with this Motion to Exclude Evidence Pursuant to 37 C.F.R. § 42.64(c):

(1) Philip Green, a testifying expert for Patent Owner Destination Maternity Corporation ("DMC" or "Patent Owner"), opines that DMC's Secret Fit Belly ("SFB") products have been "commercially successful." However, there is no support in Green's declaration for a nexus between the purported commercial success, on the one hand, and, on the other hand, the merits of the claims subject to obviousness rejections in this proceeding. As such, pursuant to Rule 702 of the Federal Rules of Evidence, Target respectfully requests that the Board exclude from evidence Green's declaration and its associated exhibits, Exs. 2022, 2029, 2054, 2055, 2064-2073 (collectively, the "Green Testimony").

(2) In support of its arguments that various claims at issue should not be found invalid as obvious pursuant to 35 U.S.C. § 103, DMC has filed in this proceeding several website printouts, Exs. 2001, 2002, 2007-2016, 2046, 2048-2051, and 2083 (collectively, the "Website Materials"), containing statements by mostly unidentified—and most likely unidentifiable—third parties, purportedly "show[ing] praise" for the "claimed features" of DMC's SFB products. (*See* Paper 7, at 34.) Because none of the Website Materials can be authenticated, Target respectfully requests that the Board exclude them as evidence under Rule 901.

II. PETITIONER'S OBJECTIONS

A. Target Timely Objected to the Green Testimony Under Rule 702

DMC served Exs. 2022 and 2029 on May 5, 2014, and it served Exs. 2054, 2055, 2064-2073 on May 23, 2014. On May 12 and June 2, 2014, respectively, pursuant to 37 C.F.R. § 42.64(b)(1), Target timely served objections to each of those exhibits on Rule 702 grounds, among others.

B. Target Timely Objected to the Website Materials Under Rule 901

DMC served Exs. 2001, 2002, and 2007-2016 on December 4, 2013, and it served Exs. 2048-2051 and 2083 on May 23, 2014. On March 3 and June 2, 2014, respectively, pursuant to 37 C.F.R. § 42.64(b)(1), Target timely served objections to each of those exhibits on Rule 901 grounds, among others.

III. ARGUMENT

A. The Green Testimony Should Be Excluded from Evidence Because It Is Unreliable Under Rule 702

The Federal Rules of Evidence, including Rule 702, apply in this proceeding. *See* 37 C.F.R. § 42.62; *Sundance, Inc. v. Demonte Fabricating Ltd.*, 550 F.3d 1356, 1360 (Fed. Cir. 2008). Rule 702 precludes expert testimony unless it "will help the trier of fact to understand the evidence or to determine a fact in issue," "is based on sufficient facts or data," "is the product of reliable principles and methods," and "the expert has reliably applied the principles and methods to the facts of the case." FED. R. EVID. 702.

Rule 702 serves "a 'gatekeeping role,' the objective of which is to ensure that expert testimony admitted into evidence is both reliable and relevant." *Sundance*, 550 F.3d at 1360 (quoting *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)). Thus, the Board, "acting as a gatekeeper, may exclude evidence if it is based upon unreliable principles or methods, or legally insufficient facts and data." *Apple Inc. v. Motorola, Inc.*, Nos. 2012-1548, 2012-1549, 2014 WL 1646435, at *19 (Fed. Cir. Apr. 25, 2014). "*Daubert* requires the [Board to] ensure that any scientific testimony 'is not only relevant, but reliable.'" *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir. 2010). Expert testimony that is not "'sufficiently tied to the facts of the case that it will aid . . . in resolving a factual dispute'" "is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 591 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). The proponent of expert testimony must demonstrate its "reliability by a preponderance of the evidence." *In re TMI Litig.*, 193 F.3d 613, 705-06 (3d Cir. 1999).

Obviousness, including any proffered secondary considerations, must be analyzed on a claim-by-claim basis. *MeadWestVaco Corp. v. Rexam Beauty & Closures, Inc.*, 731 F.3d 1258, 1264–65 (Fed. Cir. 2013). "Evidence of commercial success, or other secondary considerations, is only significant if there is a nexus between the claimed invention and the commercial success." *Ormco Corp. v. Align Tech., Inc.,* 463 F.3d 1299, 1311–12 (Fed. Cir. 2006). "A prima

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