Paper No. __

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

Filed: September 16, 2014

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

PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION FOR OBSERVATION REGARDING CROSS-EXAMINATION OF REPLY WITNESS

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I. STATEMENT OF RELIEF REQUESTED

Petitioner Target Corporation ("Target" or "Petitioner") hereby opposes Patent Owner Destination Maternity Corporation's ("DMC" or "Patent Owner") Motion for Observation Regarding Cross-Examination of Reply Witness (Paper 47) ("Motion for Observation") and requests that the Board deny the Motion for Observation in all respects.

II. RESPONSE IN OPPOSITION TO DMC'S OBSERVATIONS

As a preliminary matter, DMC's Motion for Observation should be rejected as procedurally improper. A motion for observation on cross examination should be filed only where the filing "party does not believe a motion to exclude the testimony is warranted." *See* OFFICE PATENT TRIAL PRACTICE GUIDE, 77 Fed. Reg. 48,756, at 48,767-68 (Aug. 14, 2012). DMC filed a Motion to Exclude that seeks, in part, to exclude Thomas's testimony. (Paper 49, at 3-7.) As such, the Board should deny DMC's redundant Motion for Observation.

Below, Target responds to DMC's observations in the same order as they are raised in DMC's Motion for Observation.

A. Thomas Does Not Offer Legal Opinions

The testimony DMC cites in Part II.A of its Motion for Observation is relevant in these proceedings, if at all, only to confirm that Thomas does not purport to opine on the law or provide legal opinions, as further discussed in

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Target's Opposition to Patent Owner's Motion to Exclude Evidence, filed contemporaneously herewith. Target disagrees that any aspect of the Thomas Declaration "should be given no weight if admissible."

B. Thomas Properly Considered the Subject Matter of the Claims Rejected for Obviousness in These Proceedings

The testimony DMC cites in Part II.B of its Motion for Observation is not relevant for any of the reasons DMC provides. Thomas's declaration correctly sets forth the legal framework for analyzing commercial success. (*See* Ex. 1110, ¶¶ 19-22.) And in his deposition, for example, Thomas made clear that [redacted]

(Ex. 2099, at 38:16-41:5.) Thomas's understanding is reflected more generally in his report, in which he states, for example:

[redacted]

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[redacted]

(Ex. 1110, ¶¶ 23.) Indeed, Thomas understands [redacted] (Ex. 2099, at 22:15-23:18.) Thus, to the extent the Board admits any of the testimony cited by DMC, it should also admit the testimony at Ex. 2099, pages 22:15-23:18.

It is not Thomas but DMC who does "not understand the legal framework for analyzing dependent claims" whose obviousness is at issue. (*See* Paper 47, at 3.) In an attempt to support admitting the cited testimony in this proceeding, DMC's Motion for Observation misstates the law of nexus in the commercial success context. DMC appears to believe that it can obtain the benefit of a "presumption" of a nexus [redacted].[1] (*See* Paper 47, at 1-4.) DMC is incorrect for several reasons, each of which shows that the cited testimony is not relevant for the purposes that DMC specifies:

[1] U.S. Patent Nos. RE43,531 ("'531 Patent") and RE43,563 ("'563 Patent").

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