

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TARGET CORPORATION
Petitioner

v.

DESTINATION MATERNITY CORPORATION
Patent Owner

Patent No. RE43,531
Filing Date: June 15, 2011
Issue Date: July 24, 2012
Title: BELLY COVERING GARMENT

AND

Patent No. RE43,563
Filing Date: June 15, 2011
Issue Date: August 7, 2012
Title: BELLY COVERING GARMENT

Inter Partes Review No. Unassigned

DECLARATION OF FRANCES HARDER

I, Frances Harder, declare as follows:

1. I have been retained by counsel for Target Corporation to provide opinions on certain issues relating to this petition for *inter partes* review. My declaration provides analysis and expert opinions on the general subject matter disclosed in the RE43,531 patent (“the ’531 Patent”) and the RE43,563 patent (“the ’563 Patent”), the level of ordinary skill in the art, and the patentability of claims 1, 2, 5, 6, 10, 11, 15-19, and 24-29 of the ’531 Patent and claims 1-4, 6-8, 10-14, 16, 20, and 21 of the ’563 Patent.

2. I am being compensated at the following rates: \$ 375 per hour for Consulting, Research and Reports; \$ 525 per hour for Deposition – Local (local, less than 75 miles); \$ 4,400 per day for Deposition – Out of Town (out of town, more than 75 miles); \$ 5,400 per day for Trial Testimony; \$1,500 per day for Travel (not including other services); \$ 225 per hour for Local Travel (e.g., from my office to client’s office, and return; local, less than 75 miles).

3. I am currently President and Founder of Fashion Business Incorporated, Adjunct Professor and Advisory Board Member at Cal Poly Pomona, Adjunct Professor and Curriculum Advisor – Teaching Professional Practices at Woodbury University in Los Angeles, California, a consultant for the United Nations regarding the development of Alpaca textiles by women owned businesses in Peru, and self-published author of “Fa\$hion for Profit,” which is often used as a

textbook. A copy of my curriculum vitae, which describes my qualifications, experience, and lists my publications within the past ten years, is attached as Exhibit 1012.

4. My first job in the fashion industry, in around 1970 for Mothercare UK, involved the design and fabrication of maternity clothes, and I have also been involved in assisting others with maternity clothing business as part of my work as an industry consultant and my educational non-profit Fashion Business Incorporated.

5. I wore commercially available maternity clothing during my pregnancies in 1976 and 1978, and also fabricated my own maternity clothing around those dates, which included pants, dresses, and tops. My daughter was more recently pregnant, from fall 2010 to summer 2011 and fall 2012 to summer 2013, and I observed the maternity garments and fashions available to my daughter at that time.

6. I reviewed and considered a substantial amount of information related to this petition. Exhibit 1013 lists the documents that I considered.

7. I have reviewed the '531 Patent; US Patent No. 7,814,575; '563 Patent; and U.S. Patent No. 7,900,276, and their file histories, and I agree with the description of its claimed subject matter provided in Section III of the respective petitions for *inter partes* review of the '531 Patent and the '563 Patent.

8. I understand that 35 U.S.C. § 102 (“§102”) provides the standards for determining whether a claim in a patent is invalid as anticipated by prior art. I understand that a claim in a patent is invalid as anticipated under §102 if each and every element of the claim is found expressly or inherently in a single prior art reference. I understand that anticipation can be found based on several different grounds, but the only grounds for anticipation that may be presented in a petition for *inter partes* review are those based on patents, and/or printed publications.

9. I understand that, when determining whether the single item of prior art anticipates the claims, one must consider not only what is expressly disclosed in that prior art, but also what is inherently present in that prior art. I understand that claim limitations that are not expressly found in a prior art reference are inherent if the prior art necessarily functions in accordance with, or includes, the claim limitations, or if the missing element or feature would be the natural result of following what the prior art teaches to persons of ordinary skill in the art. I also understand that it is acceptable to examine evidence outside the prior art reference, often referred to as extrinsic evidence, in determining whether a feature, while not expressly discussed in the reference, is necessarily present in the reference. I understand, however, that mere probabilities that an element is present are not enough, but it is not required that persons of ordinary skill actually recognized the inherent disclosure at the time the prior art was first known or used.

10. *Intentionally Blank.*

11. I understand that 35 U.S.C. § 103 (“§103”) provides the standard for determining whether a claim in a patent is invalid as obvious. I understand that a claim in a patent is invalid as obvious under §103 when the differences between the claimed subject matter and the prior art are such that the claimed subject matter as a whole would have been obvious at the time the invention was made to a person of ordinary skill in the art (“POSA”). I understand that, similar to anticipation, the only grounds for obviousness that may be presented in a petition for *inter partes* review are those based on patents and/or printed publications. I understand that the relevant inquiry for assessing obviousness consists of the following four factors: (a) the scope and content of the prior art; (b) the differences between the prior art and the claims at issue; (c) the level of ordinary skill in the pertinent art at the time of the invention; and (d) objective factors indicating obviousness or non-obviousness—sometimes referred to as secondary considerations or indicia.

12. I understand that a prior art reference may be considered in assessing a patent claim’s obviousness if the reference discloses solving any problem or addressing any need addressed by the patent, or if the reference discloses information having obvious uses beyond its primary purpose that a POSA would reasonably examine to solve a problem or address a need addressed by the patent.

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