

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TARGET CORPORATION,
Petitioner

v.

DESTINATION MATERNITY CORPORATION,
Patent Owner

Case IPR2013-00531
Patent RE43,563 E

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

FITZPATRICK, *Administrative Patent Judge*.

DECISION
Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

Petitioner Target Corporation filed a Corrected Petition for an *inter partes* review of claims 1, 10–14, 16, 20, and 21 of U.S. Patent No. RE43,563 E (the “’563 patent”). Paper 4 (“Pet.”). The Patent Owner, Destination Maternity Corporation, filed a Preliminary Response pursuant to 35 U.S.C. § 313. Paper 7 (“Prelim. Resp.”). We have jurisdiction under 35 U.S.C. § 314.

The standard for instituting an *inter partes* review is set forth in 35 U.S.C. § 314(a), which provides as follows:

THRESHOLD—The Director may not authorize an *inter partes* review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.

Upon consideration of the Petition and the Preliminary Response, we determine that the information presented shows there is a reasonable likelihood that Petitioner will prevail with respect to claims 1, 10–14, 16, and 20 of the ’563 patent. Accordingly, pursuant to 35 U.S.C. § 314, we authorize an *inter partes* review to be instituted as to those claims, but not as to claim 21.

A. Related Proceedings

Patent Owner asserted the ’563 patent against Petitioner in a pending lawsuit titled: *Destination Maternity Corporation v. Target Corporation et al.*, Case No. 2:12-cv-05680-AB (E.D. Pa.). Pet. 1; Patent Owner Mandatory Notices 2 (Paper 6). Petitioner contemporaneously filed another petition for a separate *inter partes* review of the ’563 patent. Claims 1–4 and 6–8 are the subject of that

petition. See IPR2013-00530. Petitioner also filed two petitions for *inter partes* reviews of related U.S. Patent No. RE43,531 E. See IPR2013-00532; IPR2013-00533.

B. The Asserted Grounds

Petitioner presents the following grounds of unpatentability:

References	Basis	Claims challenged
JCP fold-over panel jeans (Ex. 1002, 2) ¹	§ 102	1, 10, 11, 16, 20, 21
JCP fold-over panel jeans and JCP maternity bootcut jeans (Ex. 1002, 3) ²	§ 103	11 and 14
JCP fold-over panel jeans and Lauren Sara (Ex. 1005) ³	§ 103	12 and 13
JCP fold-over panel jeans and Stangle (Ex. 1003) ⁴	§ 103	12
JCP fold-over panel jeans and Browder (Ex. 1004) ⁵	§ 103	20
Stangle	§ 102	1, 10–13, 16, 20, and 21
Stangle and JCP maternity bootcut jeans	§ 103	14
Stangle and Lauren Sara	§ 103	13 and 14

¹ Ex. 1002 is an excerpt from JC Penney’s *ontrend Maternity, Fall/Winter Catalog* (2005) (the “JCP catalog”). Page 2 of the exhibit (catalog page 15) depicts “fold-over panel jeans,” hereafter, the “JCP fold-over panel jeans.”

² Page 3 of Ex. 1002 (catalog page 19) depicts “maternity bootcut jeans,” hereafter, the “JCP maternity bootcut jeans.”

³ Ex. 1005 is an excerpt from *expecting style* by Lauren Sara (2003).

⁴ U.S. Patent Application Publication US 2004/0049834 A1 (Mar. 18, 2004).

⁵ U.S. Patent 6,276,175 B1 (Aug. 21, 2001).

Stangle and Browder	§ 103	20
Browder	§ 102	1 and 20

C. The '563 Patent

The '563 patent relates to a garment worn during different stages of pregnancy and different stages of postpartum body changes. Ex. 1001, col. 1, ll. 18–20. A stated “purpose of the invention is to provide a garment that adapts to cover and fit a growing abdomen during pregnancy, wherein the garment stays up when worn.” *Id.* at ll. 51–53. Figure 1 of the '563 patent is reproduced below.

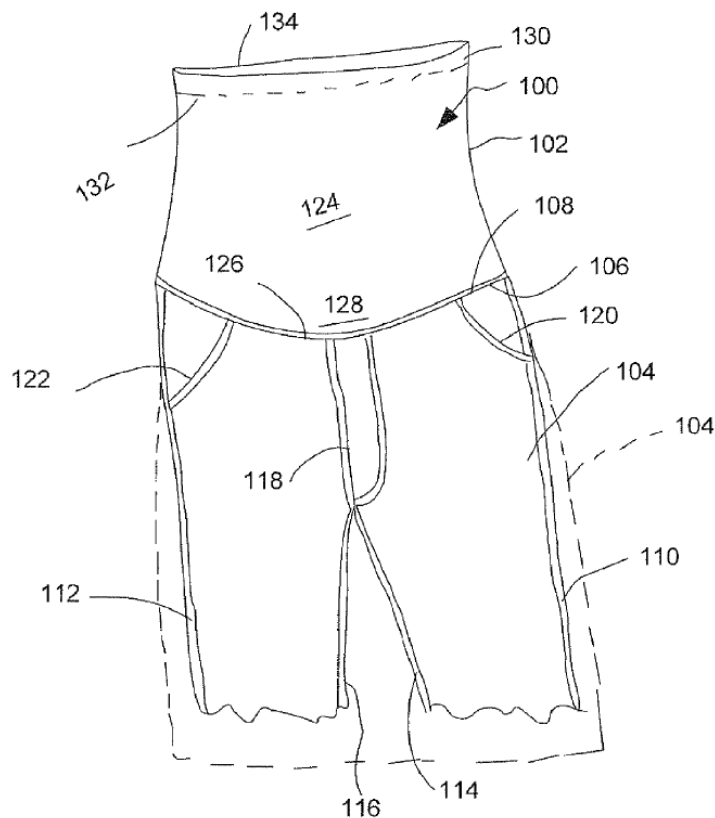


FIG. 1

Figure 1 illustrates a front view of garment 100 in accordance with the claimed invention of the '563 patent. Ex. 1001, col. 2, ll. 16–17, ll. 35–36. The garment has upper portion 102 and lower portion 104 that are joined to one another approximate the waistline. *Id.* at ll. 36–40. In the embodiment of Figure 1, the garment lower portion comprises trousers, but other lower portions are contemplated, such as a skirt, which is indicated by phantom lines. *Id.* at ll. 40–43.

The garment upper portion includes belly panel 124 that is expansible or stretchable to cover and fit over the abdomen during different stages of pregnancy. *Id.* at col. 3, ll. 1–5. Bottom portion 128 of the belly panel projects downward in the front. *Id.* at ll. 5–7. Upper perimeter 108 of the garment lower portion correspondingly recedes downward in the front. *Id.* at ll. 8–13. Thus, the belly panel extends, partially at least, under the abdomen of the wearer before meeting and joining the garment lower portion. *Id.* at ll. 15–20.

D. Illustrative Claim

Of the challenged claims 1, 10–14, 16, 20, and 21, claim 1 is the sole independent claim. It is illustrative and reproduced as follows:

1. A garment portion having an attached belly panel portion comprising:

an expansible belly panel adapted to substantially cover a wearer's entire belly region, said belly region comprising an area beginning just beneath the wearer's breast area and extending over the wearer's abdomen to a lower abdomen region beneath the wearer's belly, said belly panel comprising:

an upper edge portion defining a first encircling circumference about a wearer's torso that is at or above the wearer's upper abdomen region, and

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