

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TARGET CORPORATION,  
Petitioner,

v.

DESTINATION MATERNITY CORPORATION,  
Patent Owner.

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Case IPR2013-00530  
Patent RE43,563 E

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

FITZPATRICK, *Administrative Patent Judge*.

FINAL WRITTEN DECISION  
*35 U.S.C. § 318 and 37 C.F.R. § 42.73*

## I. INTRODUCTION

Petitioner, Target Corporation, filed a Corrected Petition for an *inter partes* review of claims 1–4 and 6–8 of U.S. Patent No. RE43,563 E (the “563 patent”). Paper 5, “Pet.” Patent Owner, Destination Maternity Corporation, filed a Preliminary Response pursuant to 35 U.S.C. § 313. Paper 10, “Prelim. Resp.” In a February 14, 2014, Decision, we granted the Petition and instituted trial on the challenged claims as follows:

claims 1–3 and 6–8 as anticipated by JCP fold-over panel jeans<sup>1</sup>;  
claims 3 and 4 as unpatentable over JCP fold-over panel jeans and JCP maternity bootcut jeans;<sup>2</sup> and  
claim 1 as anticipated by Browder.<sup>3</sup>

Paper 13 (“Dec. on Pet.”), 22.

After institution, Patent Owner filed a Patent Owner Response (Paper 28, “PO Resp.”), and Petitioner filed a Reply (Paper 39, “Pet. Reply”).<sup>4</sup> Also, both parties filed motions to exclude, and Patent Owner filed observations on the cross-examination of Vincent Thomas, who executed a declaration in support of Petitioner’s Reply.

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

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

<sup>3</sup> U.S. Patent 6,276,175 B1, issued Aug. 21, 2001 (Ex. 1004).

<sup>4</sup> The Patent Owner Response and several other papers and exhibits filed by the parties were filed under seal. A public version (with redactions) of each sealed document is available on PRPS.

An oral hearing was held on October 7, 2014.<sup>5</sup>

As discussed below, Petitioner has shown by a preponderance of the evidence that claims 1–4 and 6–8 of the '563 patent are unpatentable.

*A. Related Proceedings and Procedural Background*

Patent Owner asserted the '563 patent against Petitioner in *Destination Maternity Corp. v. Target Corp.*, Case No. 2:12-cv-05680-AB (E.D. Pa.). Pet. 1; Paper 7, 2. Petitioner filed two additional petitions for *inter partes* reviews of the '563 patent. IPR2013-00531 (filed Aug. 27, 2013); IPR2014-00508 (filed Mar. 14, 2014). Also, Petitioner filed three petitions for *inter partes* reviews of related U.S. Patent No. RE43,531 E. *See* IPR2013-00532; IPR2013-00533; IPR2014-00509.

*B. 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, 1:18–20. 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 1:51–53. Figure 1 of the '563 patent is reproduced below.

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<sup>5</sup> A transcript of the oral hearing is included in the record. Paper 74 (“Tr.”).

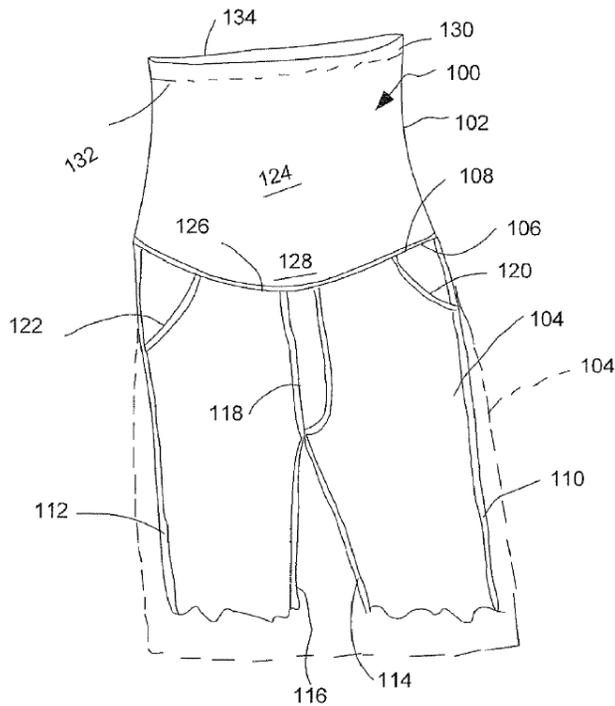


FIG. 1

Figure 1 illustrates a front view of garment 100 in accordance with the claimed invention of the '563 patent. Ex. 1001, 2:16–17, 2:35–36. The garment has upper portion 102 and lower portion 104 that are joined to one another proximate the waistline. *Id.* at 2:36–40. 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.* 2:40–43.

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 3:1–5. Bottom portion 128 of the belly panel projects downward in the front. *Id.* at 3:5–7. Upper perimeter 108 of the garment lower portion correspondingly recedes downward in the front. *Id.* at 3:8–13.

Thus, the belly panel extends, partially at least, under the abdomen of the wearer before meeting and joining the garment lower portion. *Id.* at 3:15–20.

### *C. Illustrative Claim*

Of the challenged claims 1–4 and 6–8, 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

a lower edge portion spaced from the upper edge portion and defining a second encircling circumference about the wearer's lower abdomen region; and

a garment lower portion, in communication with the lower edge portion, having a torso encircling circumference that recedes downward to make way for expansion of the belly panel.

## II. ANALYSIS

### *A. Claim Construction*

“A claim in an unexpired patent shall be given its broadest reasonable construction in light of the specification of the patent in which it appears.”

37 C.F.R. § 42.100(b). Pursuant to that standard, the claim language should be read in light of the specification as it would be interpreted by one of

ordinary skill in the art. *In re Suitco Surface, Inc.*, 603 F.3d 1255, 1260 (Fed. Cir. 2010). Thus, we give claim terms their ordinary and customary meaning. *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007) (“The ordinary and customary meaning is the meaning that the term would have to a person of ordinary skill in the art in question.” (internal quotation marks omitted)).

We address below the limitations at issue in this proceeding.

1. *Claim 1: “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”*

Patent Owner argues that “[c]laim 1 requires a *panel* that reaches just beneath the wearer’s breast area.” PO Resp. 5 (emphasis added). Claim 1, however, recites “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.” Thus, it is the belly *region*, and not the belly *panel*, that the claim recites as “beginning just beneath the wearer’s breast area.” Ex. 1001, 5:35–37. The belly panel merely is required to be “adapted to substantially cover a wearer’s entire belly region.”

2. *Claim 1: “just beneath the wearer’s breast area”*

Patent Owner argues that “just beneath the wearer’s breast area” means “beneath the location of the breasts by a very small margin.” PO Resp. 7 (citing Ex. 2017<sup>6</sup> ¶¶ 14–22, 26–27). In particular, Dr. Brookstein

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<sup>6</sup> Exhibit 2017 is a declaration by David Brookstein, Sc.D., on behalf of Patent Owner.

notes that a dictionary definition for the word “just” is “by a very small margin.” Ex. 2017 ¶ 21 (citing Ex. 2023, 679).<sup>7</sup>

Because we determine that the limitation “just beneath the wearer’s breast area” refers to the belly region of a wearer, and not the belly panel of the claimed apparatus, we need not construe further this limitation for purposes of this final written Decision.

### 3. Claim 1: “an expansible belly panel”

Patent Owner argues that “an expansible belly panel” means “a belly panel that expands *to a degree commensurate with covering a pregnant abdomen.*” PO Resp. 18 (citing Ex. 2017 ¶¶ 28–33) (our emphasis). In the cited testimony, Dr. Brookstein relies on excerpts from the specification that discuss embodiments in relation to pregnancy. In particular, he states:

When discussing “*expansible*” with regard to the belly panel, the ‘563 patent routinely discusses that the belly panel must cover and fit over a pregnant abdomen. For example, the Specification identifies a “*belly panel that is expansible to cover and fit over a growing abdomen during different stages of pregnancy.*” (1:55-57), and “*The belly panel 124 is expansible, for example, when made of a stretchable fabric, to cover and fit over a growing abdomen during different stages of pregnancy*” (3:2-5)[.]

Ex. 2017 ¶ 30. But, claim 1 does not require the belly panel to cover and fit over a pregnant abdomen. It does not even mention pregnancy. Patent Owner, through Dr. Brookstein, is attempting to read limitations into claim 1 from the specification, which we will not do. *See Thorner v. Sony Computer*

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<sup>7</sup> Exhibit 2023 is *Merriam-Webster’s Collegiate Dictionary*, 11th Edition (2007).

*Entm't Am. LLC*, 669 F.3d 1362, 1366 (Fed. Cir. 2012) (“We do not read limitations from the specification into claims.”).

Although the '563 patent describes embodiments in the context of pregnancy in certain instances, broader claim scope was obtained through the use of claim language that lacked any such limitation. “It is the claims that define the metes and bounds of the patentee’s invention. The patentee is free to choose a broad term and expect to obtain the full scope of its plain and ordinary meaning unless the patentee explicitly redefines the term or disavows its full scope.” *Thorner*, 669 F.3d at 1367 (citation omitted). Claim 1 recites “an expansible belly panel.” Patent Owner has not shown (1) that the '563 patent defines “expansible” to mean that the belly panel expands to a degree commensurate with covering a pregnant abdomen or (2) that the patentees disavowed, from the scope of the claim, belly panels that expand albeit not to a degree commensurate with covering a pregnant abdomen (if such a lesser degree exists).

We reject Patent Owner’s proposed construction. The broadest reasonable construction of “expansible belly panel” is a belly panel that is expandable.

*4. Claim 1: “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”*

In its Preliminary Response, Patent Owner expressly argued that claim 1 requires “an upper edge of the belly panel that encircles a wearer’s torso *just beneath the wearer’s breast area.*” Prelim. Resp. 11 (emphasis added). To the contrary, we determined that claim 1 does not require this. Dec. on Pet. 8. Instead, claim 1 requires “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*" (emphasis added). Patent Owner continues to argue (albeit implicitly) that the upper edge of the belly panel must encircle a wearer's torso just beneath the wearer's breast area. PO Resp. 13–14 (citing Ex. 2018, 78:13–79:1), 22 (same).<sup>8</sup> Patent Owner's argument is contrary to the language of the claims.

The term "at or above" connotes an imprecise location for the upper edge of the belly panel in relation to the upper abdomen region. Further, the frame of reference for the location of the upper edge portion (i.e., the upper abdomen region) is not identified precisely. The '563 patent does not define the upper abdomen region or the lower abdomen region, or expressly describe their boundaries. The '563 patent, however, does state that in Figure 1A, which is reproduced above, "the belly panel 124 extends at least somewhat above the maximum girth of the abdomen, even during a later stage of pregnancy, such that the belly panel 124 positions the torso encircling circumference 134 at least somewhat above the location of maximum girth to resist slipping down over the abdomen." Ex. 1001, 3:46–51.

Thus, in light of the specification, the broadest reasonable construction of "upper abdomen region" would be that portion of the

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<sup>8</sup> Exhibit 2018 is a transcript of a deposition of Petitioner's witness Frances Harder.

abdomen superior to the maximum girth of the abdomen.<sup>9</sup> Thus, an individual wearer's upper abdomen region can vary, such as during different stages of pregnancy. In fact, according to Patent Owner, the upper abdomen region may be "well below the breast area" in some instances but the abdomen may reach "near the breast[s]" when the "belly region is larger, such as in later stages of pregnancy." PO Resp. 7.<sup>10</sup> Also, different wearers would have differently sized and shaped abdomens. *See* Ex. 1001, 3:27–31 (acknowledging that wearers would have "different body types").

The limitation "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" requires the upper edge portion to encircle the wearer's torso at any location that is superior to the location of maximum girth of the wearer's torso.

Because of claim 1's reference's to a wearer, a garment may satisfy the claim for one wearer but not another because of differences in the wearers' body types. *See* Ex. 1001, 3:27–31. Likewise, a garment may satisfy claim 1 for a wearer in one instance but not another because the

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<sup>9</sup> Likewise, the broadest reasonable construction of "lower abdomen region" would be that portion of the abdomen inferior to the maximum girth of the abdomen.

<sup>10</sup> At oral argument, counsel for both parties were asked whether there is any distinction between the terms "abdomen" and "belly" in the context of the '563 patent (and the related '531 patent), and they agreed that there is none. Tr. 10:21–11:2 (statement of counsel for Petitioner), 42:23–43:6 (statement of counsel for Patent Owner).

wearer's abdomen may change, for example, during pregnancy. *See* PO Resp. 7.

5. *Claim 7: "belly panel . . . adapted to substantially cover and fit over different body types"*

Claim 7 recites "[t]he garment portion of claim 1, wherein said belly panel is adapted to substantially cover and fit over different body types." Patent Owner does not propose an express construction for claim 7, but it argues that a belly panel cannot meet the claim merely by being stretchable. PO Resp. 44 ("Finally, the mere fact that something can expand does not equate to expanding to a degree needed to conform to different body types as required by Claim 7."). But, Patent Owner does not provide any quantification for the amount of stretching that it implies to be required of the claim.

The broadest reasonable construction of "different body types" means two or more body types that are not identical. Thus, claim 7 is met by a belly panel if it is capable of substantially covering and fitting over the belly region of two or more non-identical body types.

*B. Claims 1–3 and 6–8 are Anticipated by the JCP Fold-Over Panel Jeans*

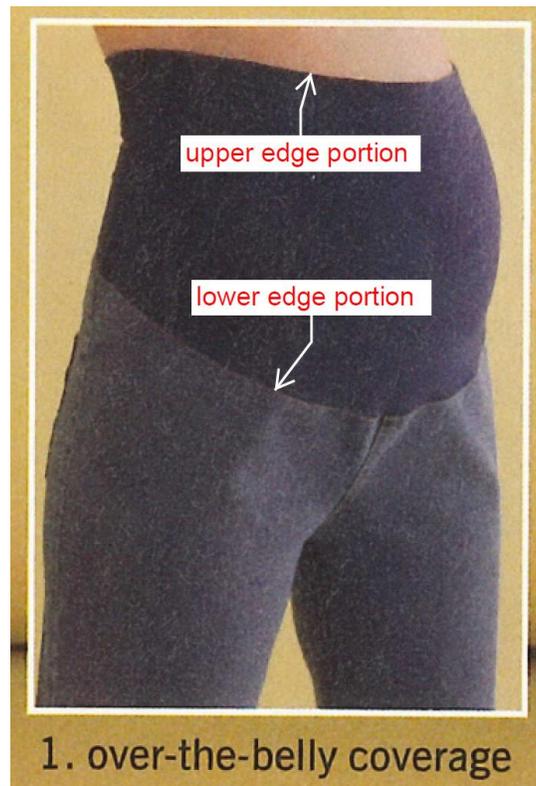
Petitioner asserts that claims 1–3 and 6–8 are anticipated by the JCP fold-over panel jeans. Pet. 31–34. The JCP fold-over panel jeans appear on page 15 of the JCP catalog. Ex. 1002, 2. An excerpt of page 15 is reproduced below.



The photo excerpt depicts a series of inset photographs of the JCP fold-over panel jeans, and accompanying text. As seen, the garment has distinct upper and lower garment portions that are joined to one another proximate the waist. The lower portion consists of jeans. The upper portion is referred to as a “fold-over panel” that is designed to allow wear before, during, and after pregnancy, and during different stages of pregnancy. Ex. 1002, 2. The photographs show the garment in three configurations: panel unfolded, panel folded once, and panel folded twice. In the unfolded configuration, the panel appears to cover the entire belly or abdomen of the model. The garment is said to “stretch for comfort.” *Id.*

*1. Claim 1*

The JCP fold-over panel jeans has “an expansible belly panel” within the meaning of the claim. Its panel stretches and, thus, is expansible. It is “adapted to substantially cover a wearer’s entire belly region,” as shown in one of the photographs, which is reproduced again, in larger form and with annotations, below.



The photograph includes annotations showing upper and lower edge portions of the fold-over panel. Ex. 1002, 2. As shown, the upper edge portion encircles the wearer’s torso “at or above the wearer’s upper abdomen region” because it does so superior to the maximum girth of the abdomen. Also, the lower edge portion encircles the torso “about the wearer’s lower abdomen region” because it does so inferior to the maximum girth of the abdomen. The lower edge portion of the fold-over panel is attached to jeans,

which meet the “garment lower portion” limitation of claim 1. The top of the jeans recedes downward in the front and, thus, at least partially below the wearer’s belly. Consequently, the top of the jeans has “a torso encircling circumference that recedes downward to make way for expansion of the belly panel.”

Patent Owner argues that the JCP fold-over panel jeans do not anticipate claim 1 because the fold-over panel does not extend high enough on the wearer’s body. In particular, Patent Owner argues that the fold-over panel does not extend to just beneath the wearer’s breast area. PO Resp. 21–32. Patent Owner’s argument is misplaced. As discussed above, claim 1 recites that the belly *region* of the wearer begins just beneath the wearer’s breast area but does not require the belly *panel* to begin there. As shown on page 15 of the JCP catalog, the fold-over panel substantially covers the wearer’s entire belly region. Further, the panel is adapted to cover even more of the belly region of different wearers, such as those of shorter stature and/or having smaller bellies.

Petitioner has shown by a preponderance of the evidence that claim 1 is anticipated by the JCP fold-over panel jeans.

## 2. *Claims 2, 3, and 6–8*

Claim 2 depends from claim 1 and additionally requires “a pair of trousers attached to said lower edge portion.” Ex. 1001, 5:51–52. The JCP fold-over panel jeans, as the name suggests, employ a pair of jeans attached to the lower edge portion of the fold-over panel. Ex. 1002, 2. Jeans are a type of trousers.

Claim 3 depends from claim 2 and additionally requires that the trousers “comprise denim jeans.” The JCP catalog does not describe expressly the fold-over panel jeans as being made of denim. Ex. 1002, 2. We previously found that, in the photographs, the jeans appear to be made of denim. Dec. on Pet. 12 (citing Ex. 1002, 2). In particular, we found the photograph showing the entire leg portions of the jeans persuasive. Dec. on Pet. 12 (citing Ex. 1002, 2). Patent Owner does not argue to the contrary. *See* PO Resp. 41–42. We maintain our finding that JCP fold-over panel jeans disclose denim jeans. Ex. 1002, 2.

Claims 6–8 depend from claim 1. Claim 6 additionally requires that the “belly panel is adapted to cover the wearer’s belly region during different stages of weight gains and losses.” Claim 7 additionally requires that the “belly panel is adapted to substantially cover and fit over different body types.” Claim 8 additionally requires that “the belly panel is elastically expansible and contractible.” The JCP fold-over panel jeans meets these limitations because the panel can change size and shape by stretching. Ex. 1002, 2.

With respect to claim 7, Patent Owner argues that the JCP catalog does not disclose (1) that the panel of the JCP fold-over panel jeans stretches for purposes of covering different body types or (2) that it stretches enough to cover different body types. PO Resp. 42–44. The reference need not teach stretching for purposes of covering different body types. It need only teach a belly panel that is “adapted to substantially cover and fit over different body types.” The broadest reasonable construction of “different body types” means two or more body types that are not identical. Also,

claim 7 does not require the identical amount of coverage for the different body types, just that each of two non-identical body types is substantially covered and fitted. Thus, the limitation recited in claim 7 is very broad. The stretchable panel of the JCP fold-over panel jeans satisfies the limitation introduced in claim 7.

With respect to claim 8, Patent Owner argues that the JCP catalog does not disclose explicitly that the panel of the JCP fold-over panel jeans is contractible. PO Resp. 45. However, the catalog states that the JCP fold-over panel jeans “stretch for comfort” and are made, in part, with spandex. Ex. 1002, 2. Thus, we are persuaded that after the panel is stretched and the stretching force is removed, it will contract.

Petitioner has shown by a preponderance of the evidence that claims 2, 3, and 6–8 are anticipated by the JCP fold-over panel jeans.

*C. Claims 3 and 4 Would Have Been Obvious Over JCP Fold-Over Panel Jeans and JCP Maternity Bootcut Jeans*

Petitioner asserts that the subject matter of claims 3 and 4 would have been obvious over the JCP fold-over panel jeans and JCP maternity bootcut jeans. Pet. 34–37.

Page 19 of the JCP catalog describes and shows the maternity bootcut jeans. Ex. 2002, 3. The catalog states that the garment includes a “[f]aux fly” and “an all-around elastic belly panel that can be folded up or down depending on your stage of pregnancy.” In the photographs, the all-around belly panel is concealed partially by a shirt, as Petitioner concedes. Pet. 35. Thus, and despite its name, it is not clear whether it is “adapted to

substantially cover a wearer's entire belly region," as required by base claim 1.

Claim 3 depends from claim 2 and additionally requires that the trousers "comprise denim jeans." Claim 4 depends from claim 3 and additionally requires that the "denim jeans comprise one or more pockets and a sewn zipperless fly front." The JCP maternity bootcut jeans disclose these additional limitations. The photographs clearly depict the jeans portion of the garment as being denim and having pockets.<sup>11</sup> Ex. 1002, 3. Also, a front fly, which is visible in one photograph, is described as faux. *Id.* Thus, we are persuaded that it is sewn and zipperless.

Petitioner provides reasoning with rational underpinning for substituting the jeans portion of the JCP fold-over panel jeans with the jeans portion from the JCP maternity bootcut jeans, thereby resulting in the subject matter of claims 3 and 4. Pet. 35–36. In particular, Petitioner points out that both products are jeans having attached belly panels, which could be swapped easily with one another through routine modification. Pet. 35. Petitioner's witness, Frances Harder, testified that swapping panels would have been an obvious design choice to a person of ordinary skill in the art, and that it was desired by customers. Ex. 1011 ¶ 25. Further, the swapping of the panels and jeans does no more than yield predictable results. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007) ("The combination of

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<sup>11</sup> The photographs of the JCP maternity bootcut jeans better show the denim aspect than the photographs of the JCP fold-over design jeans. *Compare* Ex. 1002, 2, *with id.* at 3.

familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.”).

Patent Owner argues that claims 3 and 4 are not obvious because objective indicia, or secondary considerations, demonstrate their non-obviousness.<sup>12</sup> PO Resp. 46–50; *see also Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966) (“Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy.”).

In particular, Patent Owner states that “[t]he success of the patented Secret Fit Belly<sup>®</sup> styles, which practice all of the instituted claims of the Patents-in-Suit including the claims challenged for obviousness, is evidenced in the attached commercial success report.” PO Resp. 48 (citing Ex. 2022<sup>13</sup> ¶¶ 31–37; Ex. 2017, Exhibit 2). This is not an argument. It is an invitation to scour Patent Owner’s evidence.

Also, Patent Owner’s reference to “the attached commercial success report” is not clear. Nothing is “attached” to Patent Owner’s Response (nor should anything be attached). The first citation is to Exhibit 2022, which is entitled “Declaration by Philip Green Regarding Commercial Success” and

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<sup>12</sup> Patent Owner also argues that claims 3 and 4 are not obvious because the JCP fold-over panel jeans do not teach the subject matter of claim 1, from which they ultimately depend. PO Resp. 41–42. That argument fails, as claim 1 is anticipated by the JCP fold-over panel jeans, as discussed above.

<sup>13</sup> Exhibit 2022 is a declaration by Patent Owner’s witness Philip Green.

may very well be what Patent Owner intended as the “attached commercial success report.” However, Patent Owner also cites to Exhibit 2 of Exhibit 2017, which is “a report that [another Patent Owner witness, Dr. Brookstein,] prepared showing that Secret Fit Belly<sup>®</sup> products practice the claimed invention.” Ex. 2017 ¶ 11.

We have reviewed both of the cited sources, and we are not persuaded by the purported evidence of commercial success of the inventions of claims 3 and 4.

Patent Owner asserts that the Secret Fit Belly<sup>®</sup> products embody each of claims 1–4 and 6–8. PO Resp. 48. Patent Owner does not, however, link the alleged commercial success of those products to the inventions of claims 3 or 4, as opposed to the invention of claim 1, for example, which is anticipated by the JCP fold-over panel jeans. *See J.T. Eaton & Co. v. Atl. Paste & Glue Co.*, 106 F.3d 1563, 1571 (Fed. Cir. 1997) (“asserted commercial success of the product must be due to the merits of the claimed invention beyond what was readily available in the prior art”).

Patent Owner’s witness, Mr. Green, concedes that the commercial success of Patent Owner’s products has nothing to do with the unique characteristics of claims 3 and 4, which add limitations directed exclusively to features of the trouser portion of the claimed invention. Claim 3 recites “[t]he garment portion of claim 2, wherein said trousers comprise denim jeans.” Claim 4 recites “[t]he garment portion of claim 3, wherein said denim jeans comprise one or more pockets and a sewn zipperless fly front.”

Mr. Green states that “the commercial success of the Secret Fit Belly bottoms is due primarily to the . . . patented features” earlier referenced in

his declaration. Ex. 2022 ¶ 38. Nowhere in his declaration, however, does Mr. Green reference any patented features unique to claims 3 and 4. In fact, Mr. Green states:

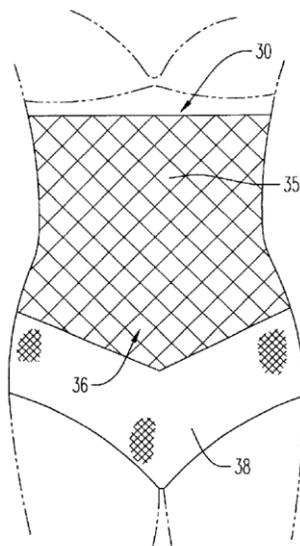
Secret Fit Belly bottoms are available in various sizes, cuts, and colors, including jeans, trousers, capris, skirts, and shorts. [Patent Owner]’s Secret Fit Belly bottoms are similar in style to all other bottoms offerings: *generally the only difference is the expandable panel that is the subject of the patents at issue in this matter.*

Ex. 2022 ¶ 20 (emphasis added).

Petitioner has shown by a preponderance of the evidence that claims 3 and 4 would have been obvious over the JCP fold-over panel jeans and JCP maternity bootcut jeans.

*D. Claim 1 is Anticipated by Browder*

Petitioner asserts that claim 1 is anticipated by Browder. Pet. 49–51. Browder discloses control undergarments. Ex. 1004, 1:7–16. Figure 3 is reproduced below.



**FIG. 3**

Figure 3 illustrates a front view of high-waist brief 30. Ex. 1004, 2:40–41. The brief includes control area 35 that extends, upward from crotch portion 38, “over the abdomen and ends below the wearer’s breasts.” *Id.* at 3:55–64. The border between the crotch portion and control area recedes downward in the front, as shown. *Id.* at Fig. 3. The control area stretches. *Id.* at 3:39–46.

The control area is “an expansible belly panel” within the meaning of claim 1. It stretches and is, thus, expansible. It is “adapted to substantially cover a wearer’s entire belly region,” as also required by claim 1. *See* Ex. 1004, Fig. 3, 3:55–57 (“control area 35 of high waist brief 30 is extended over the abdomen and ends below the wearer’s breasts”).

An upper edge portion of the control area encircles the wearer’s torso “at or above the wearer’s abdomen region,” and the lower edge portion encircles the torso “about the wearer’s lower abdomen region,” as also required by claim 1. The crotch portion meets the “garment lower portion” limitation of claim 1; trousers are not required by the claim. The top of the crotch portion recedes downward in the front and, thus, at least partially below the wearer’s belly. Consequently, the crotch portion has “a torso encircling circumference that recedes downward to make way for expansion of the belly panel.”

Patent Owner argues that Browder does not anticipate claim 1 because the control area is “designed to tighten, rather than expand.” PO Resp. 35 (conclusion after citing Ex. 1004, 3:37–38). This argument is not persuasive. Patent Owner uses “tighten” as an antonym to “expand,” but

that is not how Browder uses the same root word. With reference to another embodiment, Browder describes how a control area is made, stating:

Control area 25 is an area of the undergarment, in this example brief 10, where increased control is desired. Increased control in control area 25 is accomplished by tightening the fabric of body 15 of brief 10 by using a 1 by 1 (1x1) alternating tuck stitch pattern. Thus, the 1x1 alternating tuck stitch pattern increases the modulus of the fabric. By increasing the modulus of the fabric, the fabric stretches less and controls more. Preferably, the modulus of the fabric is increased between about 6% and about 10%, more preferably about 8%. Increasing the modulus by about 8% provides a desirable compromise between control and comfort.

Ex. 1004, 3:35–46. Thus, the control area does not actively tighten rather than expand when worn by a wearer. Instead, Browder discloses that, during manufacture, the fabric of the control area is tightened to increase its modulus, which makes it stretch less and control more. Ex. 1004, 3:35–46. Browder expressly discloses that it stretches. Therefore, it is expansible.

Petitioner has shown by a preponderance of the evidence that claim 1 is anticipated by Browder.

### III. MOTIONS TO EXCLUDE

Petitioner moved to exclude certain evidence relied upon by Patent Owner to support its arguments for objective indicia of non-obviousness. Paper 44. Resolution of Petitioner's motion is unnecessary to this final written Decision because, even considering the challenged evidence, Patent Owner's arguments that objective indicia demonstrate non-obviousness of claims 3 and 4 are not persuasive. Accordingly, we dismiss Petitioner's Motion to Exclude as moot.

Patent Owner moved to exclude Petitioner's Exhibits 1071, 1072, 1075–1077, 1080–1083, 1086–1092, 1110, 1116, and 2037.<sup>14</sup> Paper 51. Resolution of Patent Owner's motion is unnecessary to this final written Decision because we do not rely on any of those exhibits in rendering our Decision. Accordingly, we dismiss Patent Owner's Motion to Exclude as moot.

#### IV. CONCLUSION

Petitioner has shown by a preponderance of the evidence that claims 1–4 and 6–8 of the '563 patent are unpatentable.

#### V. ORDER

Accordingly, it is

ORDERED that claims 1–4 and 6–8 of U.S. Patent No. RE43,563 E are held unpatentable;

FURTHER ORDERED that both parties' motions to exclude are dismissed; and

FURTHER ORDERED that, because this Decision is final, a party to the proceeding seeking judicial review of the Decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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<sup>14</sup> Despite its number, we understand that Exhibit 2037 was filed in this proceeding by Petitioner. It appears that Petitioner numbered it "2037" because that is the number Patent Owner already had assigned to the same document when filing it as an exhibit being referenced in its motion to amend in the related proceeding IPR2013-00531.

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Patent RE43,563 E

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