

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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**PANTIES PLUS, INC.,**  
Petitioner,

v.

**BRAGEL INTERNATIONAL, INC.,**  
Patent Owner

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Case No. **IPR2017-00044**  
Patent No. **7,144,296 B2**

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**DECLARATION OF FRANCES HARDER IN SUPPORT OF PATENT  
OWNER'S PRELIMINARY RESPONSE**

I, Frances Harder, hereby declare the following under penalty of perjury:

## **I. INTRODUCTION**

1. I have been retained by Lewis Roca Rothgerber Christie LLP on behalf of Patent Owner Bragel International, Inc. (“Bragel”). I have been asked by counsel to provide my independent expert opinion as to the validity of U.S. Patent No. 7,144,296 (the “’296 Patent”).

2. More specifically, I have been asked to provide my independent expert opinion as to whether the ’296 Patent is anticipated by, or would have been obvious in view of, any of the prior art asserted by Petitioner Panties Plus, Inc. (“PPI” or “Petitioner”) in its Petition for *Inter Partes* Review (“IPR”), Case No. IPR2017-00044, and the accompanying declaration of Ms. Karin Yngvesdotter (the “Yngvesdotter Declaration”) (Ex. 1002).

### **A. Background and Qualifications**

3. I am currently the Founder and President of Fashion Business Incorporated, a 501(c)(3) Educational Non-profit. Fashion Business Inc. began operation in 1999, and has since gained a reputation as the premiere resource where manufacturers and brands can gain reliable business information, skill development, certified job retraining and assistance to help them better compete in the fashion industry.

4. I am also currently assigned as a United Nations Apparel Consultant (6 years) to Alpaca related products produced in Peru, and Cashmere related products produced in Nepal. As a United Nations Apparel Consultant, I consult on all aspects of product development, merchandising, costing, production, marketing and producing for the US market.

5. I am the author of an extensive series of textbooks relating to the business side of starting an apparel company- (Harder Publications). Fashion For Profit 10th edition is the main text that explains the process from product development, brand building, costing, business planning, financial requirements through to production, marketing and to opening a retail store. The two accompanying books Costing for Profit and Branding for Profit are also part of the series.

6. I am invited to present various seminars twice yearly at the MAGIC International, Las Vegas (16 years), LA Textile Show (16 years), the Hong Kong World Boutique (2 years) DGExpo, New York, San Francisco, Miami, and Dallas, (5 years). In addition, I am active in numerous organizations. I am a Member of the Department of Export Council in Southern California (DEC), on the Dean's Advisory Board of the California Polytechnic State University Fashion Department, and have been voted by California Apparel News as one of LA's most

influential people from 2002 through 2009. My CV is attached hereto as Appendix A, which includes full details for my past experience.

7. From 1992 to 2000, I was an Associate Professor and full time faculty member at the Otis College of Art and Design. I taught classes in design, patternmaking and draping in both Junior and Senior Studios, which encompasses the design process through to the production of final garments. I was also responsible for curriculum development in Entrepreneurship for the continuing education department.

8. From 1994 to 1999, I was a consultant and designer. My name, "Frances Harder," was under license to a Japanese clothing manufacturer. I was responsible for all product development and production in Los Angeles. Also consultant/ designer for the development of two clothing lines for Priscilla Presley that were sold through Home Shopping TV. I also provided design and product development consulting services to companies in the United States, England, Germany, Japan, Brunei, Turkey, Guatemala, and China.

9. From 1985 to 1992, I was a full-time faculty member at the Fashion Institute of Design & Merchandising (FIDM) in Los Angeles. Responsible for lectures on design development, production procedures, and studio classes for draping and patternmaking.

10. From 1984 to 1986, I was a principal owner of Toggs, a business startup specializing in contemporary clothing for preteens.

11. From 1979 to 1983, I was a full-time faculty member at Seattle Central Community College, where I was responsible for classes in design, patternmaking, draping, sewing, and the History of Costume.

12. I graduated with a Bachelor of Arts degree in Fashion Design in 1966 from the University of Salford in the UK. I began my career as a designer/patternmaker and educator in England. I have since then (45 years) been involved with all aspects of the design/patternmaking/draping and the production process in all areas of apparel related products..

13. In regards to intimate apparel, I consulted to “Emile Bola” in 1995 to 1996, under their label I designed for Macy’s. While working there I also consulted/designed for Fredrick’s of Hollywood, Victoria’s Secret and Hustler regarding intimate apparel under their respective private labels. Later, I went on to assist in launching a new line, Malani Lingerie intimate apparel.

14. I have been retained as an apparel expert in other cases. The following is a list of all other cases in which I have testified as an expert:

15. *Blackbird Tech LLC d/b/a Blackbird Technologies vs. Lululemon Athletica, Inc.*, Case No. 1:15-cv-00930-RGA (Expert for the Defendant)

16. *Acmet, Inc., vs. Stage Stores, Inc.*, Case No. 2:15-cv-04666-GHK (JCx) (Expert for the Plaintiff)

17. *Fabric Selection, Inc., vs. Romex Textiles*, Case No. 2:-cv-07645-SVW (MRWx) (Expert for the Plaintiff)

18. *Neman Brothers & Assoc., Inc., vs. Burlington Stores, Inc., Ross Stores, Inc. d/b/a DD'S Discounts, One Step Up Ltd, Rainbow USA Inc.*, Case No. 2:15-cv-03837 RGK (SSx) (Expert for the Plaintiff)

19. *Walrus Brands L.L.C v Peaches Uniforms, Inc.*, Case # 1:12-cv-04892 (Expert for Plaintiff).

20. *Star Fabrics, Inc. v J.C. Penney Corp., Inc.*, et al. cv14-1019 (Expert for the Plaintiff)

21. *L.A. Printex Industries, Inc. v. Royal Printex, Inc., et al.*, Case Number 2:13-cv-08960-FMO-FFM (Expert for the Plaintiff)

22. *Minx International, Inc. v Pacific Eurotex, Inc., et al.*, cv13-05950 (Expert for the Plaintiff)

23. *Minx International, Inc. v M.R.R. Fabrics, Inc., et al.*, cv13-05947 (Expert for the Plaintiff)

24. *Target v. Destination Maternity Corporation*, Case No. IPR2013-00530 (U.S. Patent N. RE43,563) (Expert for the Plaintiff)

25. *Destination Maternity Corporation v. Target Corporation, Cherokee Inc., and Elizabeth Lange LLC*, Case No. 2:12-cv-05680-AB (Expert for the Defendant)

26. *Star Fabrics, Inc., v. Joyce Leslie, Inc. et al.*, cv13-02771 (Expert for the Plaintiff)

27. *Callan v. Christian Audigier, Inc.*, 2:08-cv-08072 GW (JwJx) (C.D. Cal. 2009) (Expert for Plaintiff)

28. *Peace & Love Jewelry By Nancy Davis LLC v. Kohl's Department Stores, Inc. et al.*, 2:10-cv-00417 GW (VBKx) (C.D. Cal. 2010) (Expert for Defendant)

29. *United Fabrics International v. Pat Rego, Inc.*, 2:10-cv-05988 PSG (RZx) (C.D. Cal. 2010) (Expert for Plaintiff)

30. *Varsity Brands, Inc. v. Star Athletica, L.L.C.*, Case No. 2:10-cv-02508-RHC-cgc (W.D. Tenn. 2011) (Expert for Plaintiff).

31. I have also been retained as an apparel expert in two litigation matters related to this IPR and involving Bragel and PPI that are currently pending before the Central District of California. I have testified as an expert by deposition in each of those matters. Those matters are Bragel International, Inc. v. Charlotte Russe, Inc., Case No. 2:15-cv-08364-R (FFMx) (Expert for Plaintiff) and Bragel

International, Inc. v. Styles for Less, Inc., Case No. 8:15-cv-01756-R (FFMx)  
(Expert for Plaintiff).

32. I am compensated in this matter at a rate of \$395/hour for review, research, analysis and consultation and \$495/hour for a deposition. My compensation is in no way affected by the outcome of this matter.

**B. Materials Considered**

33. In preparation of this declaration, I have reviewed the '296 Patent, its file history, the file histories of its parent applications, and the prior art cited by PPI in the Petition, as well as Exhibits 1001-1024 to PPI's Petition.

34. I also reviewed the following prior art references, each of which was listed in the Yngvesdotter Declaration:

U.S. Patent No. 6,852,001  
U.S. Patent No. 6,758,720  
U.S. Patent No. 2,793,369 ("Panighini")  
U.S. Patent No. 2,579,365 ("Conde")  
U.S. Patent No. 5,584,883 ("Wild")  
U.S. Patent No. 6,283,820 ("Huang")  
U.S. Patent No. 2,869,553 ("D'Or")  
U.S. Patent No. 2,728,079 ("Williams I")  
U.S. Patent No. 3,297,036 ("Williams II")  
U.S. Patent No. 2,882,905 ("Barg")  
U.S. Patent No. 5,538,502 ("Johnstone")



U.S. Patent No. 6,200,195 (“Furuno”)

U.S. Patent No. 4,553,550 (“Hattori”)

U.S. Patent No. 2,553,825 (“Langs I”)

U.S. Patent No. 2,596,567 (“Langs II”)

35. In addition, I have reviewed the following materials in preparation for this declaration:

Various commercial embodiments of the Patent-in-Suit sold by Bragel, including products sold at Target, American Eagle and Victoria’s Secret

Various backless, strapless bras in the market

## **II. SUMMARY OF OPINIONS**

36. My opinions and basis for my opinions are set forth in this declaration. In this section, I summarize my opinions based on my analysis.

37. Based on my review of the documents listed in Section I.B., I have determined that the ’296 Patent is not anticipated or obvious over the prior art.

38. In addition, I have researched the market and reviewed commercial embodiments covered by the ’296 Patent. Based on my review, I have determined that the patented features of the commercial embodiments allow them to create volume and cleavage in a backless, strapless bra, unlike other backless, strapless options on the market. These features put the commercial embodiments in their own distinct market.

39. I have also reviewed evidence of secondary considerations related to the commercial embodiments covered by the '296 Patent. In my opinion, one of ordinary skill in the art would understand that the product was a commercial success, fulfilled a long-felt unmet need, was subject to industry praise, was subject to initial industry skepticism and was subject to copying and knock-offs by others.

### **III. LEGAL PRINCIPLES**

40. I am not an attorney. Information regarding legal concepts, such as the legal standards for construing patent claims, has been explained to me by counsel for Bragel. In forming my opinions in this case, counsel provided me with an understanding of the prevailing principles of U.S. patent law that govern the issues of patent validity.

41. I understand that determining whether a patent claim is invalid requires a two-step analysis. First, the claims are construed to determine their scope and meaning. Second, the claims, as properly construed, are analyzed to determine whether they are met by the prior art.

#### **A. Claim Construction**

42. I have been informed that claim terms are construed from the perspective of one of ordinary skill in the art at the time of the invention. I have

been informed that claims are generally given the ordinary meaning they would have to a person of ordinary skill in the art at the time the invention was made, after that person has read the entire patent. I have been informed that, in construing the claims, the Board will give the claims their broadest reasonable interpretation consistent with and supported by the specification. The broadest reasonable interpretation of the claims must be consistent with the interpretation that those skilled in the art would reach.

43. I have been informed that in interpreting an asserted claim, the Board should look first to the intrinsic evidence of record, i.e., the patent itself, including the claims, the specification and, if in evidence, the prosecution history. Claims must be read in light of the specification, of which they are a part. The specification is therefore highly relevant to claim construction analysis and typically is the single best guide to the meaning of a disputed term.

44. I have been informed that extrinsic evidence, which consists of all evidence external to the patent specification and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises, may also be used to assist in claim construction. However, I understand that extrinsic evidence is less significant than the intrinsic record in determining the legally operative meaning of claim language. While extrinsic evidence may be useful to the Board,

it is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence, and it must be discounted if it is at odds with the intrinsic evidence.

**B. Level of Ordinary Skill in the Art**

45. I am informed by counsel that the person of ordinary skill in the art is a hypothetical person who is presumed to have known the relevant art at the time of the invention. Factors that may be considered in determining the level of ordinary skill in the art may include: (A) the type of problems encountered in the art; (B) prior art solutions to those problems; (C) the rapidity with which innovations are made; (D) sophistication of the technology; and (E) educational level of active workers in the field. I understand that in a given case, every factor may not be present, and one or more factors may predominate.

**C. Anticipation**

46. I understand that a patent claim is invalid if it is anticipated by prior art. I have been informed that to establish anticipation based on prior art, the prior art must disclose each and every element of the claim at issue, either explicitly or inherently. I understand that an analysis for anticipation requires a comparison of the properly construed claim language to the prior art on a limitation-by-limitation basis. I understand that prior art can include printed publications, patents and

published patent applications, and products and prior art devices. I am informed that for anticipation by an “inherent” disclosure, a prior art reference may anticipate a claim without disclosing a feature of the claimed invention if the missing feature is necessarily present in the single anticipating reference or product. I further understand that the disclosure included in a reference does not have to use the exact same words as in the claim, but that all of the limitations of the claim must be described in sufficient detail to enable one of ordinary skill in the art to make and use the claimed invention.

**D. Obviousness**

47. I understand that even if a patent claim is not anticipated, it may still be invalid as being obvious. I am informed that a patent claim is obvious if the differences between the patented subject matter and the prior art are such that the subject matter as a whole would have been obvious to a person having ordinary skill in the art at the time the invention was made.

48. I am informed that the determination of obviousness includes the consideration of various factors including: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claims at issue and the prior art; and (4) evaluation of any relevant secondary

considerations or objective evidence of non-obviousness to the extent that they exist.

49. I further understand that an analysis for obviousness requires a comparison of the properly construed claim language to the prior art on a limitation-by-limitation basis. I understand that an obviousness determination is made from the perspective of a person of ordinary skill in the art. I have applied this perspective in rendering my opinions below.

50. I understand that, when combined, multiple references may render a patent claim obvious. I have been informed, however, a patent claim is not obvious merely by demonstrating that each element was independently known in various prior art references. Rather, I am informed that an obviousness analysis generally requires an explanation of some underlying rationale or reasons as to why it would be obvious to combine the prior art. I am informed that an obviousness analysis can involve an evaluation of whether there is teaching, suggestion, or motivation to achieve the claimed invention, although proof of this is not a requirement. I am also informed that it is more likely that a claimed invention is not obvious if the prior art teaches away from combining the references to achieve the claimed invention. I am also informed that “hindsight

reconstruction” of the claimed invention cannot be used to combine references together to reach a conclusion of obviousness.

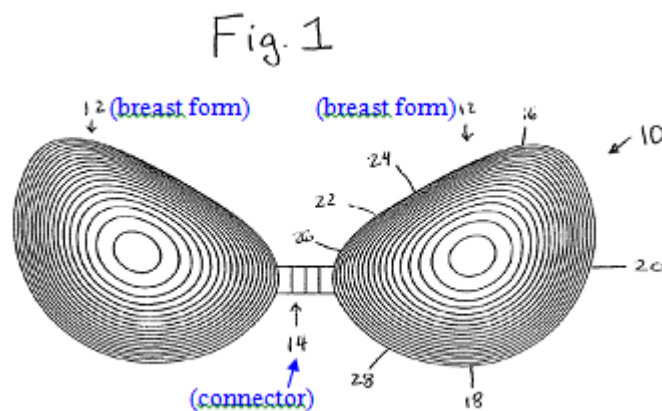
51. I understand that, when present, secondary considerations are to be examined to determine whether the claimed invention would have been obvious to one of ordinary skill in the art. I understand that there must be a nexus between the merits of the claimed invention and the evidence of secondary considerations. I further understand that some secondary considerations of non-obviousness may include the following: (1) commercial success of products embodying the invention; (2) a long-felt, but unresolved, need for the solution provided by the claimed invention; (3) praise of the invention by others; and (4) copying of the claimed invention by others; and (5) skepticism by others of the invention.

#### **IV. OVERVIEW OF THE '296 PATENT**

##### **A. The '296 Patent**

52. The '296 Patent issued on December 5, 2006 and is entitled “Attachable Breast Form Enhancement System.” The '296 Patent is a continuation of a patent application that matured into U.S. Patent 6,825,001, which is a continuation of a patent application that matured into U.S. Patent 6,758,720. The '296 Patent describes a backless, strapless breast form system that can be worn in place of a traditional bra. Each breast form includes a volume of silicone gel

encased between thermoplastic film material, and a concave interior surface facing toward a user's breast having a pressure sensitive adhesive layer for securing the breast form to the user's breast. The breast form system also includes a connector that is adapted to adjoin the breast forms together. Figure 1 of the '296 Patent, below, shows an example from the '296 Patent with two breast forms 12 adjoined by a connector 14.



**Figure 1 of the '296 Patent (annotated)**

## **B. The Challenged Claims**

53. PPI has challenged the validity of Independent Claim 1 and Dependent Claims 2 and 5. These claims are reproduced below.

### **Independent Claim 1**

*1. An improved backless, strapless breast form system to be worn in place of a traditional bra, comprising:*



*a pair of breast forms, wherein each breast form comprises:*

*a volume of silicone gel encased between thermoplastic film material;*

*a concave interior surface facing towards a user's breast having a pressure sensitive adhesive layer for securing the breast form to the user's breast; and*

*a connector adapted to adjoin the breast forms together, wherein the connector is positioned between inner sides of each of the breast forms.*

**Dependent Claim 2**

*2. The breast form system of claim 1 wherein the connector comprises a first portion attached to the inner side of one of the breast forms and a second portion attached to the inner side of the other breast form, and the first portion and the second portion are adapted to cooperatively engage.*

**Dependent Claim 5**

*5. The breast form system of claim 2 wherein the first portion and the second portion are permanently attached to the breast forms.*

**C. Benefits of the Claimed Breast Form System**

54. There are at least three advantages for the claimed breast form system that were not found in any single prior art breast form system, as I explain in detail below:

(1) the claimed breast form system replaces a traditional bra and, unlike a traditional bra, can be worn with a full range of clothing, including backless and shoulder-less clothes;

(2) the claimed breast form system provides breast cleavage and push-up enhancement; and

(3) the claimed breast form system provides a natural look and feel.

55. First, the claims recite an “an improved backless, strapless breast form system to be worn in place of a traditional bra.” Ex. 1001 at claim 1. Unlike traditional bras, the claimed backless and strapless breast form system can be worn seamlessly under a full range of women’s clothing and remain hidden from view, even when wearing backless dresses and halter tops. *See id.* at 1:60-65. The inventors of the ’296 Patent recognized an industry demand for such clothing and specifically designed the claimed system to be worn as a replacement for traditional bras to eliminate some of the drawbacks from wearing traditional bras. *Id.* The claimed system allows a user to eliminate traditional bras “by simply attaching the pair of breast forms to the user’s breasts/skin” via the claimed pressure sensitive adhesive layer. *Id.* at 3:10-12. Thus, bra straps arranged around a wearer’s back and/or shoulders are not needed.

56. Second, the claimed breast form system recites a “connector adapted to adjoin the breast forms together” (Ex. 1001 at claim 1), which provides a user with a desired amount of breast size and shape enhancement (*Id.* at 3:17-18). The ’296 Patent explains that women can enhance the size and shape of their breasts by undergoing breast implant surgery, or by using externally worn articles (such as foam pads) known as “breast forms.” *Id.* at 1:27-59. Breast forms can be used to both enhance existing breasts and to replace a breast that has been surgically removed. *Id.* However, the ’296 Patent explains that there were only limited means available for enhancing breast size and shape using known backless and strapless bras. *Id.* at 2:1-7. The ’296 Patent explains by way of example that known backless and strapless bras had full-sized cups that were not designed to easily accommodate breast forms that provide shape and size enhancement. *Id.* The claimed system, through the connector and adhesive layer, allows a user to “control the placement of the breast forms on the users’ skin” and “control how much the breasts are pulled together by the connector.” *Id.* at 3:15-21. As a result, the claimed breast form system “provides users with a single system that allows them to customize the shape and size of their breasts, as well as their breast cleavage and push-up enhancement.” *Id.* at 3:21-24.

57. Third, the claimed breast form system recites “a volume of silicone gel encased between thermoplastic film material.” Ex. 1001 at claim 1. The ’296 Patent describes that this feature allows the breast form system to “look[] like a natural human breast when worn and feel[] natural to the user, thus enhancing the self image and confidence of the user.” *Id.* at 1:51-56. The ’296 Patent explains that a “key feature of such [an] externally worn article is that it look and feel natural so as to complement and not detract from the existing breast that it is used to enhance.” *Id.* at 1:42-44. In contrast to silicone gel breast forms which look and feel natural, other breast forms (such as foam pads and water-filled pads) look unnatural and feel foreign and thus do not provide the wearer these important qualities. *Id.* at 1:56-59.

**D. The Level of Ordinary Skill in the Art**

58. Based on my technical and educational background and my in-depth experience in the fashion industry, and having read and analyzed the ’296 Patent, I believe one of ordinary skill in the art at the time of the filing of the parent application to the ’296 Patent would have at least 7-10 years of experience in designing and developing apparel, including bras and other intimate apparel, or 4-5 years of experience in designing and developing intimate apparel plus a mechanical or chemical engineering degree.

59. I disagree with the level of ordinary skill proposed by Ms. Yngvesdotter. That level of ordinary skill would reflect a simple invention without any complexity. That is not in line with the effort required to develop the present invention.

60. I have analyzed the claims of the '296 Patent from the perspective of a person of ordinary skill in the art from May 31, 2002, the filing date of U.S. Patent No. 6,758,720, which I understand to be the parent of the '296 Patent. As of May 31, 2002, I have been a person of ordinary skill in the art as defined above.

#### **E. Claim Construction**

61. I have construed the claim language according to its plain and ordinary meaning as understood by one of ordinary skill in the art at the time the invention was made when reading the claim language in view of the whole patent.

### **IV. ANALYSIS OF VALIDITY OF THE '296 PATENT**

#### **A. Analysis of the Prior Art**

62. The Petition and Yngvesdotter Declaration (Ex. 1002) assert three grounds that allegedly render the '296 Patent invalid. The Petition sets forth Ground 1 as a combination of CA Application No. 2,101,509 ("Luckman") (Ex. 1010) and U.S. Patent No. 6,645,042 ("Davis") (Ex. 1011), Ground 2 as a combination of U.S. Patent No. 6,231,424 ("Valentin") (Ex. 1012) and U.S. Patent

No. 6,857,932 (“Chen”) (Ex. 1013), and Ground 3 as a combination of U.S. Patent No. 5,755,611 (“Noble”) (Ex. 1014), U.S. Patent No. 5,922,023 (“Mulligan”) (Ex. 1015), and U.S. Patent No. 3,196,878 (“Hedu”) (Ex. 1016). The Petition and Yngvesdotter Declaration also discuss additional references as prior art, which I have briefly discussed further below. I have provided a general overview of the references discussed by Petitioner, followed by a more detailed analysis of each ground asserted by Petitioner.

## **B. General Obviousness Analysis**

63. As a preliminary matter, Ms. Yngvesdotter and PPI (along with PPI’s co-defendants Styles for Less, Inc. and Charlotte Russe, Inc. in the related litigation matters) have consistently argued “two approaches” to obviousness of challenged claims 1, 2, and 5.

64. According to one approach (applied in Grounds 1 and 2), Ms. Yngvesdotter alleges that it “would be [obvious] for one of skill in the art to start with known silicone breast forms containing a pressure sensitive adhesive layer, such as those disclosed in Luckman or Chen, and then adding known center connectors utilized for backless strapless bras as disclosed in numerous references such as Davis or Valentine [sic] to create a self-adhesive silicon [sic] backless strapless bra with a center connector.” Ex. 1002, ¶ 81.

65. However, a person of ordinary skill in the art would not be motivated to add a connector to breast prostheses, as the connector would hinder their ability to function with traditional bras and the breast prosthesis used in conjunction with a traditional bra and with a connector would either lose its ability to provide cleavage or would not be positioned properly between the breast and the bra. Further, as the art of breast prostheses was trending toward recreating full breasts in their natural position (e.g., so that an observer would not know the breast prosthesis was a prosthesis), the presence of a connector between two prostheses would be at direct odds with this goal.

66. Similarly, there was a general trend toward making stock prostheses having standard dimensions (e.g., as discussed in Luckman). Because not all women who have a mastectomy have a double mastectomy, the attachment of a connector between two prostheses, as suggested by Ms. Yngvesdotter, would inherently require the use of at least two prostheses and would either eliminate from the potential market women who have had a single mastectomy, or create a new need for specially-sized and individually crafted paired prostheses.

67. Further, I expressly disagree with Ms. Yngvesdotter's opinion at ¶ 53 of her Declaration. *See* Ex. 1002, ¶ 53. She opines that "one of skill in the art would have been familiar with women who required the removal of both breasts

due to a medical condition, and would have expected those women to use prostheses to replace both breasts, rather than a single breast. Accordingly, the idea of using a connector to combine two prostheses would have been known and obvious to one of skill in the art, and therefore would provide additional motivation to combine a dual breast form system with a connector with a breast prosthesis.” *Id.* A person of ordinary skill in the art would recognize that breast prostheses were known and used to serve as a replacement for an absent breast. Just as natural breasts do not have a center connector attaching them, there would be no motivation to use breast prostheses with a center connector (recognizing that a person’s sternum, to the extent it may be construed as a “center connector” would not be removed when both her breasts are removed). As such, a person of ordinary skill in the art, even with the knowledge that some women may have a need for two breast prostheses, would not have been motivated to use a connector to combine the two prostheses to form a dual breast form system.

68. According to the other approach (Grounds 2 and 3), Ms. Yngvesdotter argues that combining “a backless, strapless bra containing a connector” (citing Valentin and Noble and Hedu), with a volume of silicone gel that includes the pressure sensitive adhesive layer (citing Chen and Mulligan), would have been obvious to a person of ordinary skill in the art. Ex. 1002, ¶ 84.



69. Under this approach, Ms. Yngvesdotter relies on an alleged motivation to replace fabric cups of a backless, strapless bra with silicone ones. *See* Ex. 1002, ¶ 84. In my opinion, one of ordinary skill in the art would not have been motivated to make such a combination. Firstly, fabric cups and silicone breast forms are constructed completely differently. One cannot simply attach silicone gel to fabric, as is demonstrated by how the invention of the '296 Patent uses a thermoplastic film to contain the silicone gel. It would require a recreation of fabric cups of any of the references cited by Ms. Yngvesdotter to work with a silicone gel and support it.

70. Further, one of the benefits of the connector of the '296 Patent is to provide breast cleavage and push-up enhancement. As such, the backless, strapless bra of the '296 Patent is subject to multidirectional stressful forces - downward forces created by gravity, along with lateral stressful forces supplied by the wearer's breasts when the connector is connected in a way to create cleavage and push-up enhancement. As such, the use of both silicone gel *and* a connector introduce two significant complications in keep the backless, strapless bra in place, with added forces being applied in multiple directions.

71. A person of ordinary skill in the art would not have been motivated to follow either of the approaches described by Ms. Yngvesdotter. While backless,

strapless bras were generally known, the balance of comfort, support, and coverage led to a trend in weight reduction of the backless, strapless bras to alleviate the concern of these bras from becoming unintentionally detached from a wearer without requiring the use of painfully strong adhesive that could irritate the skin of the wearer. On the other hand, while silicone breast prostheses were generally known, the desire to create full breasts in their natural position led to a trend in weight *increase* of silicone breast prostheses that more closely resembled the female breast and that had an increased volume of silicone to make the breast look fuller.

72. In addition, based on communications with co-inventor David Chen, it is my understanding that Mr. Chen faced a significant stress engineering challenge in combining a connector to a breast form film. It is my understanding that the thermoplastic film that encases the silicone gel of a breast form is thinner than a human hair. This is typical, as a thicker thermoplastic film would significantly detract from the desired features of a natural-looking breast form and a comfortable breast form, as a thicker thermoplastic film would alter the manner in which the breast form flexes and conforms to a wearer's breast. Accordingly, a person of ordinary skill in the art would understand the significant difficulty in attaching a connector to such a breast form, particularly where connection by

sewing would not be possible (because the thermoplastic film is too thin to support a sewed connector and sewing would rupture the silicone gel) and connection by other methods would be extremely difficult without ripping the thin thermoplastic film, which would release the encased silicone gel. A method of attaching a connector to this thin thermoplastic film is not a problem addressed by any of the prior art references on which Ms. Yngvesdotter relies in Grounds 1, 2, and 3.

### **C. Obviousness Analysis of Grounds Asserted in Petition**

#### **1. Ground 1**

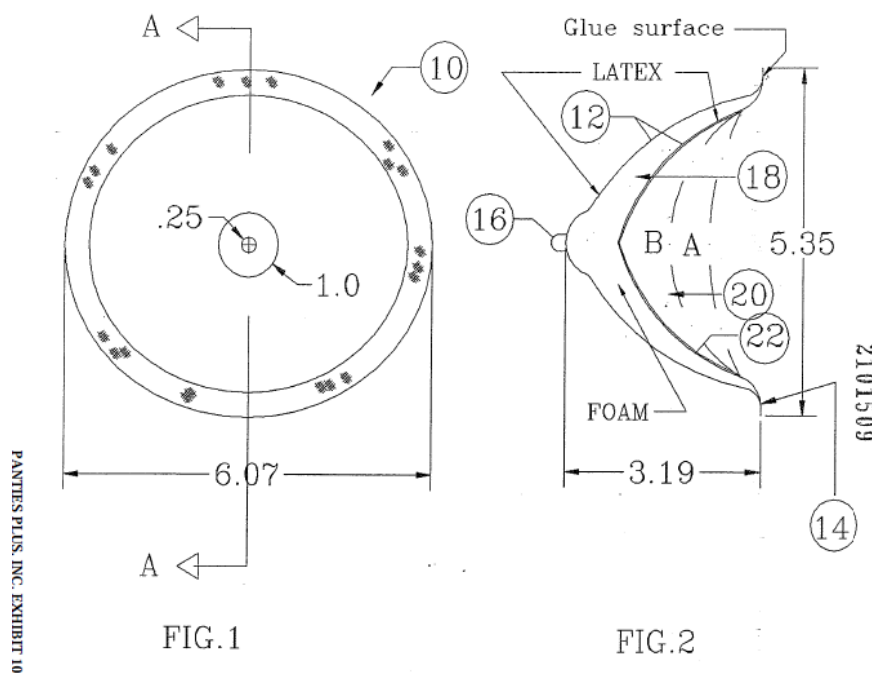
##### **a. Luckman**

73. Luckman describes an “external breast enhancement” for attachment to a “user’s chest wall, over the natural breasts, with medical adhesive.” Ex. 1010, Abstract; p. 3, lines 7-8. As such, Luckman does not disclose “*a pressure sensitive adhesive layer on a concave interior surface facing toward a user’s breasts.*” Instead, the “concave rear wall portion” provides “suction” with the user’s skin. (*Id.*, p. 3, lines 16-18) and an external adhesive is applied to a “peripheral edge” of the prosthesis for attachment to the user’s chest wall” (*Id.*, p. 4, lns. 11-13). Even further, Luckman discloses: “This thin flexible margin is important. The thin flexible edge allows one prosthesis to fit any chest wall so that this prosthesis can be mass produced and sold as [a] stock item. For example, all women who

normally wear a size ‘A’ or ‘B’ cup bra can wear the prosthesis no matter how small their breasts may be.” *Id.*, p. 5, lns. 12-15. As such, Luckman actually teaches away from using “a pressure sensitive adhesive layer on a concave interior surface facing toward a user’s breasts,” as recited in claim 1 of the ’296 Patent, as the same prosthesis could not then be used on variously sized breasts.

74. In addition, Luckman does not disclose “a connector adapted to adjoin the breast forms together, wherein the connector is positioned between inner sides of each of the breast forms.”

75. Figures 1 and 2 of Luckman are reproduced below. Ex. 1010, p. 8.



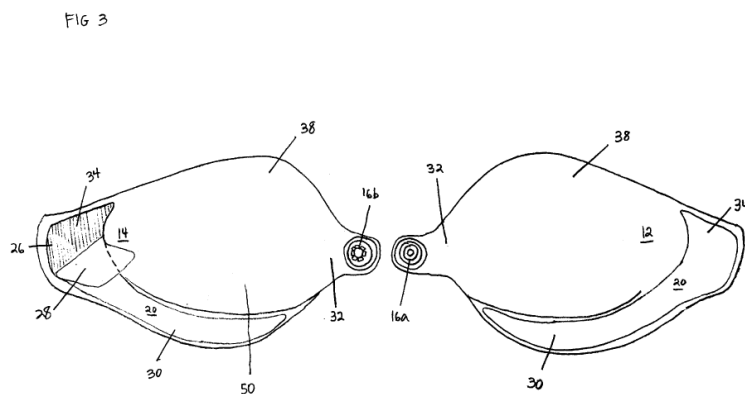
**Figures 1 and 2 of Luckman**

b. Davis

76. Davis describes a “backless closed-cell foam bra with a swivel snap system.” Ex. 1011, 1:6-8. As such, Valentin does not disclose or suggest the limitation of each breast form comprising “*a volume of silicone gel encased between thermoplastic film material*” as recited in the ’296 Patent.

77. Further, Davis does not disclose “*a pressure sensitive adhesive layer on a concave interior surface facing toward a user’s breasts,*” as recited in claim of the ’269 Patent. Instead, Davis discloses a “peripheral portion 30” that is “relatively flat for comfortable placement proximate to the underside and outer sides of the user’s breast” (Ex. 1011, 3:53-55) and that “double-sided adhesive tape 20 may be disposed on the inside surface 50 of each cup, *within the peripheral portion 30 thereof*” (*Id.*, 4:53-55).

78. Figure 3 of Davis is reproduced below. Ex. 1011, p.4



**Figure 3 of Davis**

c. There is No Motivation to Combine Luckman and Davis  
to arrive at any of claims 1, 2, or 5 of the '296 Patent

79. One of ordinary skill in the art would not have been motivated to modify Luckman and Davis to arrive at the claimed invention. First, neither Luckman nor Davis discloses “*a pressure sensitive adhesive layer on a concave interior surface facing toward a user’s breasts,*” as recited in claim of the ’269 Patent, and PPI has not set forth any purported motivation to modify Luckman and Davis to include this feature. As such, even were these references to be combined as PPI argues, they would not yield the claimed invention. An element of the claims would be completely missing. For this reason, the new combination asserted by PPI, based on an argument already rejected by the Patent Office, would not even be capable of invalidating the ’296 Patent. Further, as discussed above, Luckman actually teaches away from placing “*a pressure sensitive adhesive layer on a concave interior surface facing toward a user’s breasts,*” as this would not allow “one prosthesis to fit any chest wall so that this prosthesis can be mass produced and sold as [a] stock item.”

80. In addition, the prosthetic devices of Luckman are designed to be worn to provide the illusion of larger breasts. They include a nipple (Ex. 1010, p. 5, ln. 5; FIGS. 1 and 2) and are designed to be worn in conjunction with a

traditional bra. Further, the devices do not include adhesive, but are intended to be suctioned to a user's breast, with the option to apply adhesive to an outer peripheral edge to adhere the prosthetic to the user's chest wall. The devices cannot be worn as a replacement for traditional bras and are not intended to be used without a bra for support. Further, they do not contain a connector adapted to adjoin them together. A person of ordinary skill in the art would not be motivated to add a connector to such devices, as the connector would hinder their ability to function with traditional bras and the breast prosthesis used in conjunction with a traditional bra and with a connector would either lose its ability to provide cleavage or would not be positioned properly between the breast and the bra. Further, as the art of breast prostheses was trending toward recreating more full breasts in their natural position (e.g., so that an observer would not know the breast prosthesis was a prosthesis), the presence of a connector between two prostheses would be at direct odds with this goal.

81. Even further, fabric cups and silicone prostheses are constructed completely differently. One cannot simply attach silicone gel to fabric, as demonstrated by how the invention of the '296 Patent uses a thermoplastic film to contain the silicone gel. Davis would require different construction techniques to use silicone gel-based cups. In addition, to adhere the bra to the wearer, Davis

applies double-sided tape only to the flat peripheral portion 30. But cups made of silicone gel would be much heavier than fabric cups. A person of ordinary skill in the art would understand that the added weight of silicone gel cups would be at direct odds with the goal of a lightweight backless, strapless bra as the added weight would increase the likelihood of inadvertent removal or repositioning of the strapless, backless bra. As such, Davis teaches away from using heavier materials for the cups, such as silicone gel cups.

82. Accordingly, it is my opinion that a person of ordinary skill in the art would not have been motivated to combine Luckman and Davis to arrive at the recited embodiment of any of claims 1, 2, and 5 of the '296 Patent. As such, Luckman and Davis do not render any of the challenged claims unpatentable as obvious.

## 2. Ground 2 References

### a. Valentin

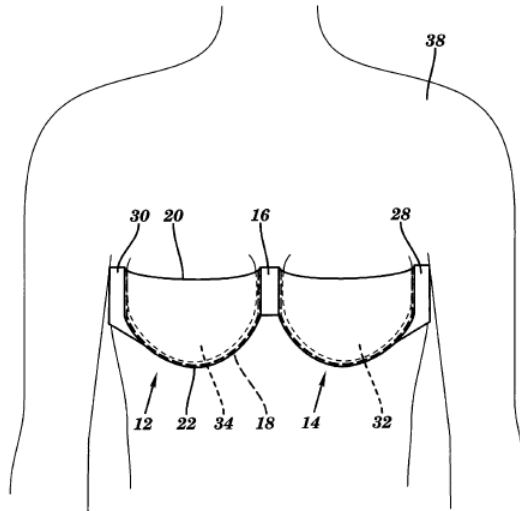
83. Valentin describes a bra that is “preferably constructed from a soft woven or knitted fabric, such as cotton and/or lace.” Ex. 1012 at 3:3-6. As such, Valentin does not disclose or suggest the limitation of each breast form comprising “*a volume of silicone gel encased between thermoplastic film material*” as recited in the '296 Patent.



84. Valentin also describes that adhesion of the bra to the user is accomplished by two sided tape 60 which is connected to each of the tabs 28 and 30 on the outer sides of the cups. Ex. 1012 at 3:46-4:10. Valentin states that the process to attach the bra is as follows: the tape attached to tab 28 is placed in contact with the outer side of a user's body proximate the armpit, and then the bra is pulled and/or stretched across the user's body until the tape attached to tab 30 is proximate the other armpit and adhered to the user. *Id.* Valentin reiterates that the tabs "adhere only to the outer side of the user's breasts." *Id.* at 4:20-21. As such, Valentin does not disclose or suggest the limitation of "*a concave interior surface facing towards a user's breast having a pressure sensitive adhesive layer for securing the breast form to the user's breast*" recited in claim 1.

85. In addition, Valentin disparages various prior art references, stating that "[w]ith bras having two separate cups, however, a number of problems become apparent." Ex. 1012, 1:37-39. As such, Valentin teaches away from a "*connector compris[ing] a first portion attached to the inner side of one of the breast forms and a second portion attached to the inner side of the other breast form, and the first portion and the second portion are adapted to cooperatively engage,*" as recited in claim 2 of the '269 Patent.

86. Figure 2 of Valentin is reproduced below. Ex. 1012, p. 3.



**FIG. 2**

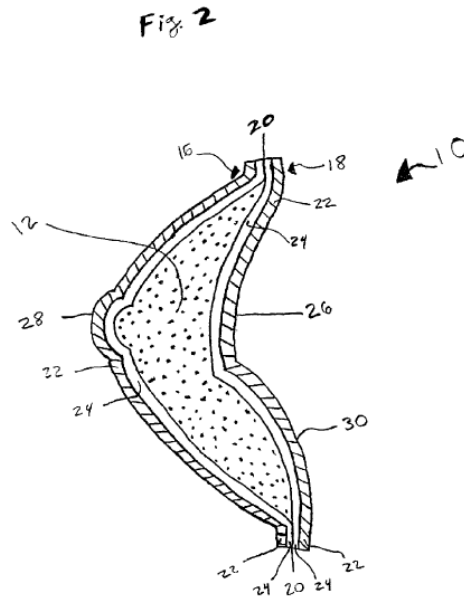
**Figure 2 of Valentin**

**b. Chen**

87. Chen discloses a breast form suitable for “women wishing to enhance their physical appearance in a non-permanent and health-risk free manner.” Ex. 1014, 1:23-24. Chen does not disclose “*a connector adapted to adjoin the breast forms together, wherein the connector is positioned between inner sides of each of the breast forms,*” as recited in claim 1 of the ’296 Patent.

88. Further, counsel informs me that Chen, which is also assigned to Bragel, may not properly be considered as prior art to the ’296 Patent under the applicable patent laws.

89. Figure 2 of Chen is reproduced below. Ex. 1014, p. 2.



**Figure 2 of Chen**

c. There is No Motivation to Combine Valentin and Chen to arrive at any of claims 1, 2, or 5 of the '296 Patent

90. One of ordinary skill in the art would not have been motivated to modify Valentin in view of Chen to arrive at the claimed invention.

91. Fabric cups and silicone breast forms are constructed completely differently. One cannot simply attach silicone gel to fabric, as demonstrated by how the invention of the '296 Patent uses a thermoplastic film to contain the silicone gel. It would require different construction techniques to use silicone gel-based cups, as evidenced by the significant challenges actually faced by Mr. Chen

in combining a connector to a breast form. Neither Valentin nor Chen teaches a solution to this problem of attaching a connector to a silicone gel breast form.

92. In addition, to adhere the bra to the wearer, Valentin applies double-sided tape only to the outer tabs 28 and 30. But cups made of silicone gel would be much heavier than fabric cups. A person of ordinary skill in the art would understand that the added weight of silicone gel cups would be at direct odds with the goal of a lightweight backless, strapless bra as the added weight would increase the likelihood of inadvertent removal or repositioning of the strapless, backless bra. As such, Valentin teaches away from using heavier materials for the cups, such as silicone gel cups, and even if Chen were considered proper prior art, a person of ordinary skill in the art would not have been motivated to modify Valentin to incorporate the breast forms of Chen.

93. In addition, as discussed above, Valentin teaches away from the use of separable breast forms. As such, a person of ordinary skill in the art would not have been motivated to modify Valentin to include a *“connector compris[ing] a first portion attached to the inner side of one of the breast forms and a second portion attached to the inner side of the other breast form, and the first portion and the second portion are adapted to cooperatively engage,”* as recited in claim 2 of the '269 Patent.

94. Accordingly, it is my opinion that a person of ordinary skill in the art would not have been motivated to combine Valentin and Chen to arrive at the recited embodiment of any of claims 1, 2, and 5 of the '296 Patent. As such, Valentin and Chen do not render any of the challenged claims unpatentable as obvious.

### 3. Ground 3 References

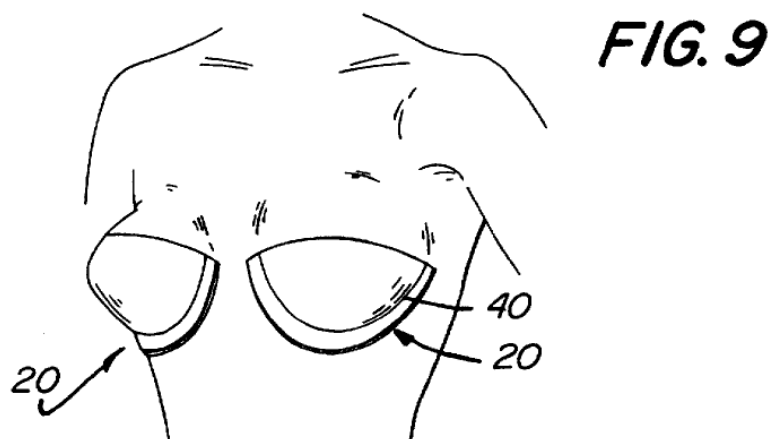
#### a. Noble

95. Noble describes a “breast cup portion 22 (as shown in FIGS. 9-21) and the flattened peripheral flange 24 (as shown in FIGS. 9-17) comprise a soft foam quality LD (low density) #24, supplied by Plasmar Limited of England.” Ex. 1013 at 4:7-10. As such, Noble does not disclose or suggest the limitation of each breast form comprising “*a volume of silicone gel encased between thermoplastic film material*” as recited in claim 1 of the '296 Patent.

96. In addition, one of ordinary skill in the art would understand that the “decorative lace band 50” is not a “*connector adapted to adjoin the breast forms together,*” where the breast forms comprise a volume of silicone gel as recited in claim 1. The decorative lace band is made of “decorative lace material” which is not adapted to adjoin silicone gel breast forms together. The decorative lace is not

adapted to support heavier silicone gel cups, but rather performs an aesthetic function to “look like a normal strapless brassiere.” Ex. 1013 at 6:10-11.

97. Figure 9 of Noble is reproduced below. Ex. 1013, p.5.



**Figure 9 of Noble**

**b. Mulligan**

98. Mulligan is a breast prosthesis, which a person of ordinary skill in the art would recognize is designed to be worn inside of a bra, not as a replacement for a bra. Thus, Mulligan does not disclose “*An improved backless, strapless breast form system to be worn in place of a traditional bra.*”

99. Further, as breast prostheses, Mulligan does not disclose “*a connector adapted to adjoin the breast forms together, wherein the connector is positioned between inner sides of each of the breast forms*” of claim 1.

100. Figure 1 of Mulligan is reproduced below. Ex. 1015, p. 2.

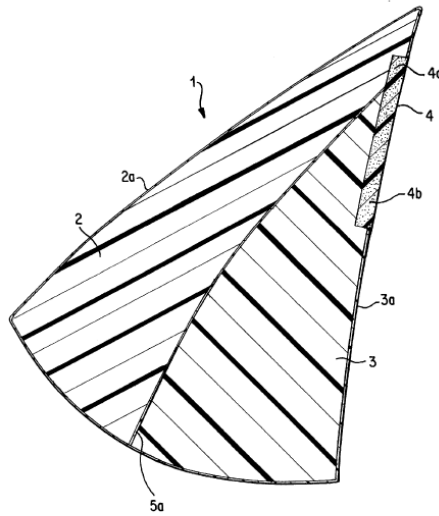


FIG. 1

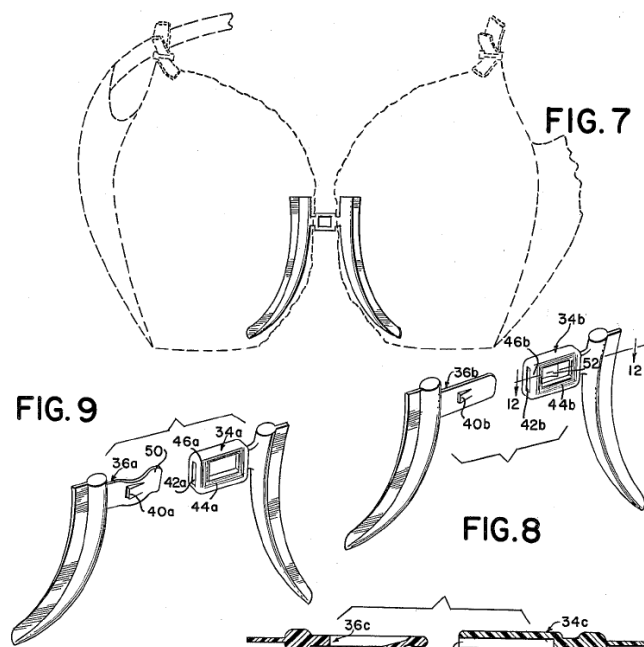
### **Figure 1 of Mulligan**

#### **c. Hedü**

101. The bra shown in Hedü is a traditional bra with a back and straps. Hedü discusses that the invention of Hedü “is especially suited to brassiere construction” where “the torso encircling band is an integral elasticized strap and the detachable connection is placed between the breast cups, adjacent to the wearer’s sternum.” Ex. 1016, 1:19-23. Hedü does not disclose “breast forms,” nor does it disclose a volume of silicone gel encased between thermoplastic film material. Instead, Hedü discloses the use of “usual breast cups” (Ex. 1016, 2:15) and that stay members 10 and 12 “may be held in pockets in the brassiere” (*Id.*, 2:20-22) both of which suggest a fabric construction. Further, this construction does not add volume and does not teach how to connect breast forms of silicone

gel encased between thermoplastic film material. Even further, Hedu does not disclose a pressure sensitive adhesive layer for securing the breast form to the user's breast; instead, Hedu discloses straps and a back.

102. Figures 7-9 of Hedu are reproduced below. Ex. 1016, p. 1.



**Figures 7-9 of Hedu**

d. There is No Motivation to Combine Noble, Mulligan, and Hedu to arrive at any of claims 1, 2, or 5 of the '296 Patent

103. One of ordinary skill in the art would not have been motivated to modify Noble, Mulligan, and Hedu to arrive at the claimed invention. As described above, silicone prostheses are constructed completely differently. One cannot simply attach silicone gel to fabric, as demonstrated by how the invention



of the '296 Patent uses a thermoplastic film to contain the silicone gel. It would require different construction techniques to use silicone gel-based cups. In addition, as described above, one of the benefits of the connector of the '296 Patent is to provide breast cleavage and push-up enhancement. The decorative lace band in Noble is not intended to create cleavage, but rather is intended for women whose breasts are close together already ("have a close separation"). Ex. 1013 at 6:5. The decorative lace band would not be sufficient to create the benefit of cleavage, particularly if the cups were made of heavier silicone gel. Modifying the decorative lace to provide cleavage would hinder the intended purpose of the decorative lace (to "look[] like a normal strapless brassiere"). *Id.* at 6:10-11.

104. Further, one of the objects of Hedu is to allow for vertical adjustment of a connection between traditional bra cups. *See* Ex. 1016, 1:24-32, 1:41-44. These objects of Hedu "are achieved by providing a brassiere with elongated stay members along the inner edges of the cups and a joining member attached to both stays and slideable therealong, and providing resilient means for locking the ends of the joining member within depressions in the stay member." *Id.*, 1:44-49. These elongated stays are made of a "resilient plastic material." *Id.*, 2:34. Accordingly, a person of ordinary skill in the art would understand that the connector of Hedu would add even more weight and stress to a strapless, backless

bra, further diverging from the goal of reducing the weight of strapless, backless bras. A person of ordinary skill in the art would thus be even less likely to combine both the stays and connectors of Hedü with a heavy silicone gel breast prosthesis, as this would add additional weight/stress issues that could result in inadvertent removal of the strapless, backless bra. Similarly, Hedü discloses that “any force tending to pull the clasp members apart will instead force them into further locking engagement.” *Id.*, 3:56-57. As such, the connector of Hedü is designed to apply *additional* lateral forces to the bra, which, as I have discussed above, would be understood by a person of ordinary skill in the art as teaching away from their use in a backless, strapless bra (and particularly one with heavy silicone gel) because this would increase the likelihood that the backless strapless bra would become inadvertently removed at its outer edges. And even further, the elongated stays of Hedü would detract from the natural look and feel of the bra with which they are used, and there is no teaching or suggestion as to how to attach these elongated stays and connector to a volume of silicone gel encased between thermoplastic film material.

105. Further, one of ordinary skill in the art would not have been motivated to use the prosthetic devices of Mulligan as the recited breast forms of claims 1, 2, and 5. The prosthetic devices of Mulligan are typically designed to be worn as a

replacement for breasts that have been partially or completely removed during mastectomy procedures. They are designed to be worn in conjunction with a traditional bra. While such devices contain a small amount of adhesive or tape to attach to the breast, the connection is too weak so as to provide marginal support that would be just enough holding force so that the prostheses do not jostle. The devices cannot be worn as a replacement for traditional bras and are not intended to be used without a bra for support. Further, they do not contain a connector adapted to adjoin them together. One of ordinary skill in the art would not be motivated to add a connector to such devices, as the connector would hinder their ability to function with traditional bras. Further, as these prostheses are typically used as a replacement for breasts that have been surgically removed, the addition of a connector would serve no function because cleavage cannot be created if at least one of the user's breasts has been removed.

106. Accordingly, it is my opinion that a person of ordinary skill in the art would not have been motivated to combine Noble, Mulligan, and Hedu to arrive at the recited embodiment of any of claims 1, 2, and 5 of the '296 Patent. As such, Noble, Mulligan, and Hedu do not render any of the challenged claims unpatentable as obvious.

#### 4. Additional References Cited in the Petition

107. Various additional references are discussed in the Petition and by Ms. Yngvesdotter. I have briefly addressed the deficiencies of these references, below. Based on my review of the prosecution history for the '296 Patent and its parent applications, it is my understanding that many of these references were considered during prosecution of the '296 Patent and its parent applications.

108. U.S. Patent No. 6,283,820 ("Huang") is a bra pad that is designed to work in conjunction with a traditional bra and not as a replacement for a bra. Thus, Huang does not disclose *"An improved backless, strapless breast form system to be worn in place of a traditional bra."* Further, Huang does not disclose any of the other limitations of claim 1: *"a pair of breast forms, wherein each breast form comprises: a volume of silicone gel encased between thermoplastic film material; a concave interior surface facing towards a user's breast having a pressure sensitive adhesive layer for securing the breast form to the user's breast; and a connector adapted to adjoin the breast forms together, wherein the connector is positioned between inner sides of each of the breast forms."*

109. U.S. Patent No. 5,584,883 ("Wild") is a breast prosthesis that is designed to be worn inside of a bra and not as a replacement for a bra, similar to Mulligan. Thus, to the extent that the preamble of claim 1 is limiting, Wild does not disclose *"An improved backless, strapless breast form system to be worn in*

*place of a traditional bra.”* Further, as prostheses, Wild does not disclose “*a connector adapted to adjoin the breast forms together, wherein the connector is positioned between inner sides of each of the breast forms*” of claim 1.

110. U.S. Patent No. 4,553,550 (“Hattori”) is directed to personal wearing articles, some of which are intended to cover the breast. None of the articles include a volume of silicone gel encased between thermoplastic film material. All of the retainers used with the breast covering articles are small and would not work with breast forms including a volume of silicone gel. No connector is shown or suggested that would be adapted to adjoin breast forms.

111. U.S. Patent No. 5,538,502 (“Johnstone”) involves a surgical chest dressing, an application far removed from a backless, strapless bra system. No breast forms including a volume of silicone gel encased between thermoplastic film material are disclosed or suggested. No pressure sensitive adhesive layer is disclosed or suggested. The Velcro fastener shown in Johnstone is for minimalizing stress on a sutured incision and would offer no guidance relative to the present invention.

112. U.S. Patent No. 2,822,905 (“Barg”) is directed to construction of a traditional bra with a back and straps. No breast forms with a volume of silicone

gel encased between thermoplastic film material are disclosed or suggested. No pressure sensitive adhesive layer is disclosed or suggested.

113. U.S. Patent No. 2,793,369 (“Panighini”) shows a breast supporter. The elongated cups of Panighini do not involve a volume of silicone gel. Those elongated cups also are retained in place by the self-adherence and elasticity of the material used, not a pressure sensitive adhesive layer. Such an approach to adherence would not work with breast forms including a volume of silicone gel. Also, the joining element of Panighini is not of a type that would be adapted to adjoin breast forms.

114. U.S. Patent No. 6,200,195 (“Furuno”) discloses an “adhesive pad” in the form of nipple covers. Furuno at 1:5-12. No connector adapted to adjoin these covers is disclosed or suggested. The adhesive pad includes a cup-shaped body 2 made of silicone rubber, and a silicone gel adhesive layer on a surface of the body. Id. at 1:54-56. The silicone gel forms an adhesive layer and could not be encased in the thermoplastic film and still be effective. The body is described as having a “diameter sufficient to cover the nipple area, i.e., a diameter of preferably 35 to 65 mm, more preferably 45 to 55 mm.” In my experience, such nipple covers are designed to cover a small amount of skin such that the nipple is exposed. Such covers do not typically cover a very large portion of the breast. As such, a volume

of silicone gel would not be suggested, nor would any type of connector between the covers. Rather, the teaching would be away from such features.

### **C. Secondary Considerations of Non-Obviousness**

115. I have researched the market and reviewed commercial embodiments covered by the '296 Patent, under the trademark "NuBra," as well as some of the sales history for NuBra. In addition, I have reviewed evidence of secondary considerations provided by Bragel during prosecution of the parent to the '296 Patent in a declaration of Mr. David Chen (the "NuBra Declaration") (Ex. 1007).

116. Below I provide my analysis of the secondary considerations of non-obviousness. Based on my review, in my opinion, one of ordinary skill in the art would understand that the product was a commercial success, fulfilled a long-felt unmet need, was praised by others, was met with initial industry skepticism, and was copied by others.

#### 1. Commercial Success

117. I understand that Bragel first introduced breast form systems covered by the '296 Patent commercially in November, 2002 under the trademark "NuBra." See Ex. 1007 at ¶¶ 2-4. I understand that in the year leading up to introduction of NuBra (2002), Bragel had total sales of \$2,800,000. *Id.* I understand that in the year after NuBra was released (2003), total sales rose to \$18,400,000 with over

\$16,000,000 coming from sales of the NuBra product. I am informed that the sales are a mix of domestic and international sales. I am further informed that within 15 months of launching the NuBra product, sales of NuBra alone were over \$17,000,000. *See also* Ex. 1007, Exhibit C (*e.g.*, “Nubra has been selling out almost as quickly as it arrives.”).

118. In my opinion, one of ordinary skill in the art would understand such a dramatic rise in increase in sales to be evidence of great success of the product. In my experience in the fashion industry, a drastic and immediate rise in sales following the launch of a new product is evidence of the product’s success. This is particularly true where the company had been in existence for many years prior to launch of the new product, and where the sales of the newly launched product represented the majority of the company’s overall sales.

119. Based on my review of the NuBra product, one of ordinary skill in the art would understand that there was a nexus between the claimed invention and the commercial success. The Nubra product is a backless, strapless breast form system to be worn in place of a traditional bra, as claimed in the asserted claims, and it meets all the limitations of the asserted claims. Further, the NuBra product embodies the three benefits of the claimed invention that I described above. The NuBra product is designed to enhance the size and shape of the wearer’s bustline,



is designed to be natural looking and natural feeling to the wearer, and eliminates the need for using a traditional bra such that NuBra can be worn with a full range of women's clothing. A picture of the Nubra product is shown below:

Bragel's Nubra Product



120. Bragel's websites even tout the above benefits of the Nubra products in its sales offering and product descriptions, including statements such as "Silicone bra cups provide a natural look and feel, while enhancing bustline. Center clasp closure allows for cleavage enhancement while maintaining a completely strapless, backless design." and "Center clasp for adjustable cleavage enhancement. *See* Ex. 2036. Prior Nubra advertisements likewise touted these features: saying that the Nubra "is backless, strapless and invisible under clothing," suggesting a natural look and that it eliminates the need for a traditional bra, and that it "[c]reates cleavage with a unique front closure." *See* Ex. 1007, Exhibit B.

## 2. Praise of the Invention

121. In my review of Exhibit 1007, there were many examples of industry praise specifically praising the benefits and advantages of the NuBra. The features that were praised were the three specific advantages of the patented invention I outlined above.

122. For example, one advertisement for the NuBra product praised the NuBra product as a “revolution in comfort,” which is “soft and fleshy, sort of like the real thing,” that it “sticks[s] on and stay[s] put,” and concluded the NuBra is “one of the greatest innovations in undergarment engineering since the introduction of the WonderBra. Actually, it’s better than that. . .” *See* Ex. 1007, Exhibit C. Another advertisement touted it as providing “fabulous cleavage” to answer the “I-have-a-backless-dress-but-still-need-support problem.” *Id.* A further article stated that “you’ll be as curvy as cleavage ideal Selma Hayek.” *Id.* A further article exclaimed “Enter the greatest thing since the Wonder Bra: the Nubra. ‘This is the hottest strapless bra around,’” and “[e]ven better, it can be adjusted to create the desired amount of cleavage.” *Id.* Another article stated that “the bra-style latch that links the twins even gives me a bit of cleavage, and the look and feel is much softer, swingier and more naturally jiggly than a standard molded-cup bra.” *Id.*; *see also id.* (“Nubra will free you from the tyranny of bra

straps.”). In my view, one of ordinary skill in the art would understand this praise in the industry to be evidence of non-obviousness.

### 3. Initial Industry Skepticism

123. I am informed that the PPI and its codefendants in the related litigation matters have contended that there were few sales in the U.S. following launch of the product and most of the sales occurred internationally. I am further informed that PPI and its codefendants in the related litigation matters have claimed that initially, U.S. retailers and distributors were not initially interested in the product and thought it had a displeasing look.

124. Such results are consistent with my experience in the fashion industry. Often, the U.S. market lags behind other countries with regards to anything to do with intimate apparel. Further, there can be initial resistance to products that launch entirely new categories. Industry articles on the Nubra product pointed out that “[b]outique owners were leery at first” and that “[a]t first glance, the jiggly, sticky, breast-shaped cups raise doubts - and eyebrows. But don’t knock ’em til you’ve tried ’em.” *See* Ex. 1007, Exhibit C. In my view, one of ordinary skill in the art would understand these to be examples of initial industry skepticism.

#### 4. Copying

125. I understand that there has been widespread copying of the '296 Patent. *See, e.g.*, Ex. 1007, Exhibit D. I myself have searched the market and located several products which infringe on the patented claims. I also understand that Bragel has enforced its patent rights in over 20 cases since the initial parent application to the '296 Patent issued, and that in each of these cases the alleged infringers stopped selling the accused products.<sup>1</sup> I also understand that there has been widespread copying both in the U.S. and abroad.<sup>2</sup> *See also* Ex. 1007, Exhibit E. In my opinion, this copying by others in the industry is evidence of non-obviousness.

126. Further, the NuBra product and the products PPI distributes that are accused of infringement in the related litigation case employ nearly identical construction techniques. In particular, an additional patch of material to which the connector is attached has nearly identical dimensions between the two products. In my opinion, this strongly supports an inference of copying by PPI, which is further evidence of non-obviousness.

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<sup>1</sup> Based on communications with co-inventor David Chen.

<sup>2</sup> Based on communications with co-inventor David Chen.

## 5. Long-Felt Need

127. In my opinion, one of ordinary skill in the art would understand that the dramatic sales of the NuBra product demonstrate there was a long-felt need for the patented invention which provides the three advantages described above. I understand that Nubra also touted the invention as a “revolutionary invention” that “answers many women’s prayers.” *See* Ex. 1007, Exhibit C. Another advertisement touted the Nubra product as to answer the “I-have-a-backless-dress-but-still-need-support problem.” *Id.* Another article describes how Nubra provided the technology for the author to finally wear the backless halters remaining unworn in her closet. *Id.* Further, prior to the Nubra product, in the industry, fashionistas would use double-sided tape as a temporary, crude means to create a flattering look. There was a need to hold the breasts in place, but with the additional ability to enhance the size and cleavage of the wearer, unlike the previously used double-sided tape. In my opinion, this long-felt unmet need is evidence of non-obviousness.

**V. CONCLUSION**

128. In conclusion, it is my opinion that none of claims 1, 2, or 5 of the '296 Patent are anticipated or obvious over the prior art.

Dated: January 13, 2017

Frances Harder

Frances Harder

Rolling Hill Est; California

# Appendix A

# Frances Harder

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**Founder/President – The Fashion Business Incorporated- 501c3 Educational Non Profit – [www.FashionBizInc.org](http://www.FashionBizInc.org)**

## **1999 – Present**

Founded the Fashion Business Incorporated (FBI) in 1999 to provide much needed business intelligence and training to startup, fledgling, and fast growing apparel manufacturers within the U.S. apparel sector. Since its inception, the FBI has gained a reputation as THE resource where manufacturers and brands can get reliable business information, skill development, and no-nonsense assistance to help them better compete within the marketplace. Besides entrepreneurial training the FBI has expanded its services and expertise to include industry specific certified job training for incumbent workers and displaced workers. Through the founders industry involvement and contacts all the programs and services are provided by industry experts and consultants who work directly within the current industry. The organization is housed in the California Market Center in the heart of the LA Fashion District. Additionally, these one of a kind industry training opportunities have also be developed for delivery online through webinars, which provides outreach on a global scale. Also, responsible for the annual production “**All Aboard**” fashion show fundraiser for the FBI at the prestigious LA Union Station venue during LA Fashion Week (1,000 people capacity).

**1998 – Present - Author/Publisher – Harder Publications “Fashion for Profit” (now 10<sup>th</sup> edition. Validated and reviewed by 32 industry experts), “Costing for Profit”, “Brand Building for Profit”, “Forms for Profit”, plus three professional DVD’s which accompany the publications.**

## **[www.FashionForProfit.com](http://www.FashionForProfit.com)**

These extensive self-published text books and DVD series explain everything needed to understand when starting an apparel company; from product development, brand building, costing, business planning, financial requirements through the production cycle, sales and marketing, to opening a retail operation. Learning institutions both nationally and internationally use these text books as part of their curriculum.

## **2012 – Present - Consultant – International Trade Center/World Trade**

**Organization/United Nations – Peru and Nepal:** Assist with Product Development, Merchandising, Manufacturing, Costing and Marketing, including online channels for distribution for Alpaca and Cashmere textiles and apparel. These two projects included:



- One on one consulting to assist with product development, brand building, merchandising, costing and marketing. Two trips to Peru and to Kathmandu to meet one on one with manufacturers.
- Preparation to enter the U.S. market, including market analysis. Mentoring with preparation for MAGIC International trade show Las Vegas.
- Assist with Merchandising of product development for US Market entry through MAGIC
- Developed and delivered 5 days of seminars and presentations including one on one meeting with individual companies in Peru and Kathmandu.
- Developed a customized 5 day training program for Peruvian alpaca producers and followed by a training program for Cashmere producers from Kathmandu delivered in LA. These programs incorporated industry experts from the many other diverse sectors; design, trend analysis, market niche analysis, product development procedures for both knit and woven products, brand building, modern production methods and options, marketing, sales markets including online sales, software uses, logistics and distribution within the US.
- Organized tours to include visit to an LA knit factory producing fine alpaca and Cashmere products as well as a guided tour of the Port of Los Angeles and a visit to Donniger Group Buying office.
- Assisted with merchandising and marketing material for Alpaca and Cashmere products displayed at MAGIC Sourcing trade show.
- Reviewed and developed curriculum for Peruvian and Kathmandu further education programs, which incorporated fashion and textile programs. Consulted and assisted in updating and incorporating relevant current industry trends into their further educational programs.

**2010 – Present - IDP- International Design Platform:** Areas of expertise included: product development and consultation to US Brands for Chinese domestic market, brand development and protection, merchandising, international operations and sales.

**2000 – Present - Seminar Presenter:** MAGIC International (UBM - MAGIC Trade Show held in Vegas twice per year, 17 years), LA Textile Show (Twice per year - 17 years), DG Expo NY, Miami and San Francisco (6 years), Hong Kong World Boutique, Phoenix Fashion Week, ASD show (Emerald Exposition), Licensing Show (UBM), along with other important trade shows both nationally and internationally.

**2004- Present - Expert Witness for industry related issues, including: Chargebacks, Trade Mark, Copyright, Trade Dress and Patent infringement issues.**

**2013 – Present, California Polytechnic University, Pomona, CA:** Adjunct Professor & Curriculum Advisor for fashion programs. Dean's advisory board.

**1992 – Present – Product Development Consultant to both U.S. and International companies, including: England, Germany, Japan, Royal House of Brunei, Turkey, Guatemala, Australia, Peru, Nepal and China.**

**1997- Designer & Product Development Consultant**

Designed and developed two lines for **Priscilla Presley**, which sold through **Home Shopping TV**.

**1996- 1998- Technical Designer/Consultant: Territory Ahead, Santa Barbara, CA.**

**1995- 1996 – Designer/Consultant: Emile Bola - Intimate Apparel, Chatsworth, Designed for May Company, also private label for Fredrick’s of Hollywood, Victoria Secrets and Hustler.**

**1994 - Product Development Consultant to the Royal House of Brunei - Sports team apparel.**

**1992 – 1996 - “Frances Harder”** name under license to Japanese manufacturer. Designed, developed and produced in LA.

**1992-2000 - Associate Professor & full time faculty, Otis College of Art & Design – Los Angeles.** Taught classes in Design development, construction, patternmaking and draping, Jr. & Senior Studio. Classes encompassed working with industry brands and was hands on with the design process through to the production of the final garments.

**1997 - Responsible for curriculum development for the entrepreneurship course – Otis Continuing Education Department.**

**1900- 1992 - California Design College (CDC) – (now Hollywood Art Institute)  
Department Chair for founding fashion school**

Responsible of curriculum development for new computer aided fashion focused college, which incorporated the teaching of state of the art software use within the apparel and textile industry.

**1985- 1990- Fashion Institute of Design & Merchandise (FIDM) – Los Angeles**

**Full time faculty:** Design Development, Production Procedures, Studio classes for Draping, Patternmaking and History of Costume.

**1984 – 1986 –“ Toggs” – Preteen line – Principal owner.** Business start-up - Contemporary Preteen line of clothing.

**1979 – 1983 - Seattle Central Community College - Full time faculty:** Responsible for classes in design, patternmaking, draping, sewing, and History of Costume.

**Prior - International Experience - Designer & Educator – England –**

- **High Wycombe College of Art and Design**
- **Designer – Mother Care Maternity - London**
- **Bristol Secondary School Art Teacher**
- **Salford College of Art and Design**
- **Munich, Germany. International School, Art teacher**

**Professional Accomplishments**

- Voted by California Apparel News as one of LA's most influential people (13 years)
- Appointed by US Federal Trade Department as a member of DEC – District Export Council – Southern California. (7 years)
- Founding Member BINSO (Business Incubator Network – Southern California)
- Expert Witness in Legal Disputes
- Deans Advisory Board- Cal Poly University, & Fashion Merchandising Dept.,
- Advisory Board- Hollywood College of Art & Design – Art Institute
- Advisory Board – El Camino Community College – Fashion Dept.,
- Advisory Board – Saddleback Community College – Fashion Dept.,
- Invited guest and speaker as part of international delegations to: China, France, Germany, Australia, Nepal and Peru.
- Member and ex board member of Fashion Group International (FGI)

**Education**

Salford University, Manchester, England - Bachelor of Arts: Fashion Design  
Certified: Teaching from Seattle College of further education  
Fluent in German and English.

**Prior Expert Witness Experience**

- *Blackbird Tech LLC d/b/a Blackbird Technologies vs. Lululemon Athletica, Inc.* Case No. 1:15-cv-00930-RGA (Expert for the Defendant)
- *Bragel International, Inc., vs. Charlette Russe, Inc. and related counterclaim vs. Styles for Less, Inc.,* Case No. 2:15-cv-08364-R (FFMx) & Case No. 8:15-cv-01756-R (FFMx) (expert for the plaintiff)
- *Acmet, Inc., vs. Stage Stores, Inc.,* Case No. 2:15-cv-04666-GHK (JCx) (Expert for the Plaintiff)
- *Fabric Selection, Inc., vs. Romex Textiles,* Case. 2:-cv-07645-SVW (MRWx) (Expert for the Plaintiff)
- *Neman Brothers & Assoc., Inc., vs. Burlington Stores, Inc., Ross Stores, Inc. d/b/a DD'S Discounts, One Step Up Ltd, Rainbow USA Inc.,* Case No. 2:15-cv-03837 RGK (SSx) (Expert for the Plaintiff)

- *Walrus LLC. Vs Peaches Uniforms, Inc.*, Case # 1:12-cv-04892 (Expert for the Plaintiff)
- *Star Fabrics, Inc. v J.C. Penny Corporation, Inc., et al.* cv14-1019 (Expert for the Plaintiff)
- *L.A. Printex Industries, Inc. (“LA Printex”) v. Royal Printex, Inc., et al.*, Case Number 2:13-cv-08960-FMO-FFM (Expert for the Plaintiff)
- *Minx International, Inc. v Pacific Eurotex, Inc.*, et al. cv13-05950 (Expert for the Plaintiff)
- *Minx International, Inc. v M.R.R. Fabrics, Inc.*, et al. cv13-05947 (Expert for the Plaintiff)
- *Target v. Destination Maternity Corporation*, Case No. IPR2013-00530 (U.S. Patent N. RE43,563) (Expert for the Plaintiff)
- *Destination Maternity Corporation, v Target Corporation, Cherokee Inc., and Elizabeth Lange LLC*, Case No. 2:12-cv-05680-AB (Expert for the Defendant)
- *Star Fabrics, Inc., v. Joyce Leslie, Inc. et al.* cv13-02771 (Expert for the Plaintiff)
- *Callan v. Christian Audigier, Inc.*, 2:08-cv-08072 GW (JwJx) (C.D. Ca. 2009) (Expert for Plaintiff)
- *Peace & Love Jewelry By Nancy Davis LLC v. Kohl’s Department Stores, Inc. et al.*, 2:10-cv-00417 GW (VBKx) (C.D. Cal. 2010) (Expert for Defendant)
- *United Fabrics International v. Pat Rego, Inc.*, 2:10-cv-05988 PSG (RZx) (C.D. Cal. 2010) (Expert for Plaintiff)
- *Varsity Brands, Inc., v. Star Athletica, L.L.C.*, 2:10-cv-02508-RHC-cgc (W.D. Tenn. 2011) (Expert for Plaintiff)

#### **Self-Published Works**

- Fashion For Profit, 10th ed. Harder Publications, 2014. ISBN-978-0-9727763-0-1
- Costing For Profit, 2nd ed. Harder Publications, 2010. ISBN-10: 0-984555-0-5
- Brand Building For Profit, 2nd ed. Harder Publications, 2010. ISBN-10: 0-9845550-1-3
- Forms For Profit, 2nd ed. Harder Publications, 2009. ISBN-10: 09727763-8-9
- Fashion For Profit DVD. Harder Publications, 2005. ISBN-10: 0-9727763-2-X
- Starting Your Own Apparel Business DVD. Harder Publications, 2010. ISBN10: 0-9845550-4-8
- Fashion Business Start Up Package, 2nd ed. Harder Publications, 2010. ISBN-10: 0-9845550-3-X
- Costing for Profit – DVD. Harder Publications, 2010. ISBN-10: 0-9845550-6-4
- Brand Building for Profit – DVD. Harder Publications, 2010. ISBN-10: 0-9845550-5-6

#### **Articles**

- “How to Finance the Launch of a Brand” Focus on Retail, August 21016
- “When is a Consulting Service Not a Consulting Service” Fashion Manuscript, February 21016
- “Start-Up 101” Focus On Fashion Retailing, December 2015

- “How to get the Attention of Investors” Focus On Fashion Retailing, August 2015
- “The Future of Retailing” Fashion Manuscript, May 2014
- “Sales: Selling Through Consignment- Pros and Cons” Focus On Fashion Retailing, August 2013.
- “Retailing 101: The Importance of Merchandising” Focus On Fashion Retailing, June 2013.
- “The Importance of Technical Documentation – or Techpacks” Focus On Fashion Retailing, February 2013.
- “So, You’re Starting an Apparel Company?” Focus On Fashion Retailing, July -August 2008.

### **Exemplary Seminars**

- New Business Start-Up - Module 1: Domestic Sourcing “101” Seminar
- New Business Start-Up - Module 1: International Sourcing “101” Seminar
- New Business Start-Up - Module 1: Starting an Apparel Business – From Design Concept to Apparel Manufacturing
- New Business Start-Up - Module 1: Brand Building
- New Business Start-Up - Module 1: Trend Tracking like the Big Brands
- New Business Start-Up - Module 1: Branding and Marketing for Boutiques
- New Business Start-Up - Module 1: Building Your Multi Channel Strategy
- New Business Start-Up - Module 1: Effective Costing-“Look after the cents and the dollars will take care of themselves”
- New Business Start-Up - Module 1: Fashion Retailing- Opening A Retail Store
- New Business Start-Up - Module 1: Writing and Developing a Financial Plan
- New Business Start-Up - Module 1: The Apparel Boot Camp- Lessons for Survival and Success in the Fashion Business™
- New Business Start-Up - Module 1: Labor Compliance and Monitoring
- New Business Start-Up - Module 1: Financing Options For Apparel Manufacturers
- New Business Start-Up - Module 1: Apparel Entrepreneurial Course
- New Business Start-Up - Module 1: What Every Startup Apparel Company Needs to Know about the Legal Issues Affecting its Business
- New Business Start-Up - Module 1: Trademark and Copyright Basics for Fashion Entrepreneurs
- Preparation For Sales - Module 2: How To Recruit & Develop Your Sales Team
- Preparation For Sales - Module 2: How to Create a Well Drafted Sales Rep Agreement
- Preparation For Sales - Module 2: The Art Of Selling In The Apparel Industry
- Preparation For Sales - Module 2: Costing For Market: Are You Priced Correctly To Make A Profit

- Preparation For Sales - Module 2: Getting Ready For Market
- Preparation For Sales - Module 2: How to Build a Trunk Show Business
- Preparation For Sales - Module 2: How to Retain and Motivate Your Sales Team
- Preparation For Sales - Module 2: How to Grow Your Apparel Business With The “Grow Principle”™
- Preparation For Sales - Module 2: Understanding Retail Language
- Preparation For Sales - Module 2: Retail Math For Apparel Manufacturers: How To Make The Retailer Feel Like Your In Tune With The Business
- Preparation For Sales - Module 2: Increase The Profit Of Your Boutique- A fun And Interactive Class That Makes Sense Of Financial Merchandising
- Preparation For Sales - Module 2: Think Like A Buyer Workshop
- Preparation For Sales - Module 2: Retail Online! The A-Z In Starting A Professional Web Store
- Preparation For Sales - Module 2: Building an Effective Website - Using a Template for Easy Internet Sales
- Preparation For Sales - Module 2: Building a Custom Designed Website
- Preparation For Sales - Module 2: Want to Open your Own Showroom
- Business Development - Module 3: The Name of The Game Is Profit-Learn How To Grow A Profitable Apparel Company
- Business Development - Module 3: Operational Management Seminar
- Business Development - Module 3: Production Procedures- Understanding the Flow of Planning Production
- Business Development - Module 3: Updating a Five Year Financial Plan
- Marketing & PR - Module 4: Selling Yourself And Getting PR Public Relations Can Make Your Fashion Business A Success
- Marketing & PR - Module 4: When & Where To Invest Valuable Dollars In Marketing & PR, Fashion Shows, Trade Shows, Plus Other Types Of Marketing Options Available To New Designer/Manufacturers
- Marketing & PR - Module 4: Do Your Own PR Like The Pros
- Marketing & PR - Module 4: Press Releases 101 – Write your own Press Releases, E-Blasts and Blogs
- Marketing & PR - Module 4: Leveraging the LA Trend Phenomenon
- Marketing & PR - Module 4: The Rules of Engagement – Getting the Most PR for Your Buck
- Marketing & PR - Module 4: Point of Sales (POS)-Selling Online vs. a Brick & Mortar Store
- Marketing & PR - Module 4: Web Based Sales
- Marketing & PR - Module 4: Marketing your Company Effectively Thru Your Website

- Marketing & PR - Module 4: The Keys to Online Store Success!
- Marketing & PR - Module 4: eBay “101”: Learn to Sell on eBay, Inc.
- Marketing & PR - Module 4: Your Own eBay Store Workshop "102".
- Business & Financial Support- Module 5: Understanding, Creating & Using Financial Documents & Information
- Business & Financial Support- Module 5: EDI – (Electronic Data Interchange) Seminar
- Business & Financial Support- Module 5: Building World Class Systems Giant Tools for Would-Be Giants
- Business & Financial Support- Module 5: Are Your Business Strategies Working For You? What’s Your Business Strategy and Is It Working?
- Business & Financial Support- Module 5: Chargeback Seminar
- Business & Financial Support- Module 5: Tax Incentive Program: How to make YOUR Business more profitable in the City of Los Angeles
- Production Development - Module 6: Drawing Technical Garment Flats By Hand (Production Flats)
- Production Development - Module 6: Perfecting Fit Workshop
- Production Development - Module 6: Preparing Specifications & Tech Packs
- Production Development - Module 6: Pad System Workshop: Computerized Patternmaking
- Production Development - Module 6: Adobe Illustrator For the Apparel Industry: Beginning Basic Drawing
- Production Development - Module 6: Advanced Illustrator for Fashion Professionals
- Production Development - Module 6: Drawing Flats in Adobe Illustrator
- Production Development - Module 6: Photoshop For Fashion Professionals
- Production Development - Module 6: Adobe Illustrator for Technical Designers
- Production Development - Module 6: Learn Technical Design the Fashion Fundamentals Way™
- Merchandise Development - Module 7: Private Label Manufacturing
- Merchandise Development - Module 7: Private Label Manufacturing For the Retailer
- Merchandise Development - Module 7: FBI Line Review Day - Expert Line Review Opportunity
- International Trade - Module 8: Certified Introduction To Import/ Export Logistics Training Course
- International Trade - Module 8: Exporting California: “What you need to know before you travel or ship your product outside the USA”.
- International Trade - Module 8: Sourcing “102” Seminar
- International Trade - Module 8: Global Sales, Marketing, Off Shore Sourcing Seminar
- International Trade - Module 8: Importing Goods into the US
- International Trade - Module 8: Fundamentals of Sourcing

- Apparel Industry Job - Training Module 9: AIMS Certified Job Training Program: Career Advancement Training
- Apparel Industry Job - Training Module 9: AIMS Apparel Production Course
- Apparel Industry Job - Training Module 9: AIMS Accounts Receivable and Quick Books Integration Course
- Apparel Industry Job - Training Module 9: AIMS Apparel Customer Service Course

### **FBI Seminars**

- Fundamentals of a Fashion Business
- Getting Started and Branding Strategy
- Creating a Business Plan and Investment Deck
- Business Finance, Cash Flow, and Funding
- Legal Requirements, Copyrights, and Intellectual Property Protection
- Textiles, Fabric and Trim Sourcing
- Merchandise Planning
- Design, Tech Pack, Flats, and Line Sheets
- Product Development and Sourcing
- Product Costing
- Production Procedures
- Traditional vs. Online Marketing
- Traditional vs. Online Sales
- Selling Globally
- The Future of Textiles
- Entering the US Market
- Sourcing and the Supply Chain
- Fundamentals of Sourcing and Logistics
- Finding the Right Sales Rep
- How to get the Attention of Investors to Gain Funding
- Starting Your Apparel Business Bootcamp