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**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

MICHE BAG, LLC, a Utah limited liability company,)	Civil Action No. 2:10-cv-00781-TS
)	
)	
Plaintiff,)	
)	
v.)	
)	
THIRTY ONE GIFTS LLC, an Ohio limited liability company,)	Judge Ted Stewart
)	
)	

**DEFENDANT’S MEMORANDUM IN OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

Defendant, Thirty-One Gifts, LLC, by and through counsel, hereby makes this Motion to Dissolve the Temporary Restraining Order of this Court [Doc. 14], and a Response in Opposition to Plaintiff's Motion for Preliminary Injunction, and for an expedited hearing on this Motion.

In view of the preliminary nature of these proceedings, Defendant wishes to appear for the purpose of preliminary relief adjudication only, and wishes to reserve the right to contest all other matters at a later date, including but not limited to issues of jurisdiction and venue.

BACKGROUND

On August 11, 2010, Plaintiff Miche Bag, LLC (“MICHE”) filed a Complaint against Defendant Thirty One Gifts, LLC (“TOG”) for patent infringement. On September 3, 2010, MICHE filed an Amended Complaint and a Motion for Temporary Restraining Order. The Court held a hearing on September 10, 2010 and granted MICHE’s motion and issued an Order on September 13, 2010. MICHE filed a bond in the amount of \$10,000 on September 14, 2010 and notified TOG of the order on September 16, 2010.

TOG was not present at the Temporary Restraining Order hearing because it was not aware of the hearing. Though Plaintiff’s counsel had previously written to TOG at its corporate offices in Johnstown, Ohio, the Amended Complaint, Motion for the Temporary Restraining Order and the Notice of Hearing were served on a registered agent in New Jersey, wherein TOG is a registered foreign corporation. The delay caused by serving the agent New Jersey resulted in TOG not receiving the documents until the day before the hearing and not seeing the Notice of Hearing until after the hearing had occurred. (The summons served with the Amended Complaint indicated that TOG had 21 days to response). TOG has filed a motion to increase the security posted by MICHE and is also filing concurrent herewith a motion to dissolve the temporary restraining order.

TOG now files this Memorandum in Opposition to the Motion for Preliminary Injunction because MICHE completely fails to set for an entitlement to extraordinary relief or a preliminary injunction.

ARGUMENT

I. MICHE IS UNLIKELY TO PREVAIL AND FAILS TO MEET THE BURDEN FOR A PRELIMINARY INJUNCTION.

Defendant has excellent defenses in this action at all levels, particularly the level of preliminary relief. In particular, Defendant can demonstrate that any claim interpretation which would cause the accused products to infringe would hopelessly invalidate the patent-in-suit under 35 U.S.C. § 102, for full anticipation by the prior art.

1. MICHE's Case Fails Every Prong of the Traditional Four-Pronged Test for the Granting of Preliminary Relief.

A. MICHE Cannot Demonstrate a Likelihood of Success on the Merits

MICHE cannot demonstrate a likelihood of success on the merits. When a plain-language construction of the claims is made, the accused products cannot possibly infringe the patent-in-suit. If MICHE's (apparent) claim constructions are accepted instead of the plain-language of those claims, the patent can be easily shown to be invalid under 35 U.S.C. § 102 for lack of novelty. In addition, Defendant has known equitable defenses which severely call into question the enforceability of the patent-in-suit.

1. The accused products do not have at least one fastener attached to at least two surfaces.

Despite MICHE's assertion that the only claim terms which require construction are "outer shell having an open end," and "hook and loop fasteners," both Claims 1¹ and 8 contain a very severe limitation that is not found in the accused products:

¹ Claim 1 is very similar to Claim 8, but does not contain the last limitation as to types of fasteners used. *See* Exhibit 5.

8. A handbag comprising:

an outer shell having an open end;

at least one first fastener attached to at least two interior surfaces of said outer shell;

an inner bag having an open end;

at least one second fastener attached to at least two exterior surfaces of said inner bag;

where said inner bag is capable of being placed within said outer shell so that the first fastener engages the second fastener, such that the inner bag can be removed from said outer shell by disengaging the first fastener from the second fastener;

wherein said first and second fasteners are selected from the group consisting of hook and loop fasteners, magnetized materials, buttons and zippers.

This construction, in which at least one fastener wraps around an interior or exterior corner of the bag that is “attached to at least two...surfaces” shell is clearly demonstrated in all Figures of the patent-in-suit. (Exhibit 5; Figs. 1, 2, 3). Additionally, this construction is mandated by the claim language itself. The term “at least one” has been widely construed by the Courts as meaning “one or more.” There is no physical way that “one” fastener can be “attached to at least two...surfaces” given the design of the product, without wrapping around one or more corners of the bag.

2. A broader construction of the claims renders the patent invalid under 35 U.S.C. § 102

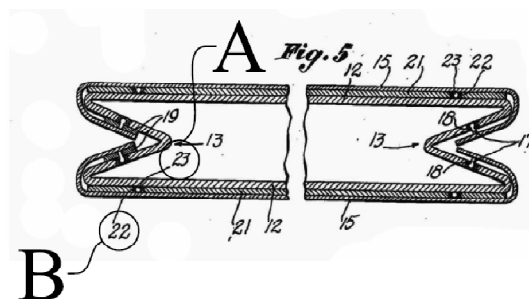
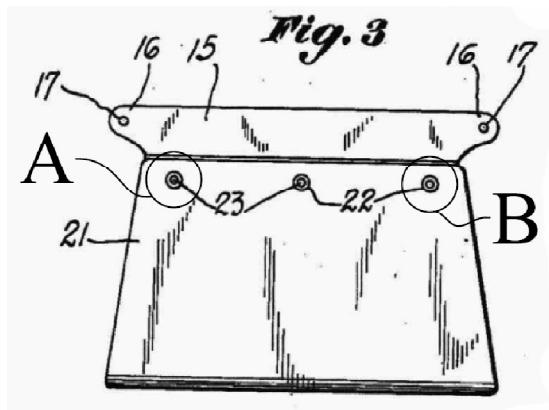
In its Memorandum in Support of Motion [Doc. 7, pages 12-13] and during the patent prosecution [Exhibit 17, “Amendment under 37 C.F.R. 1.111,” August 22, 2000, pps.9-11], MICHE has bound itself to a construction that there must be one fastener attached to one side of the interior and exterior shells, OR, there must be more than one like-type fasteners attached to more than one of the interior and exterior sides of both shells.

This construction results in a literally breathtaking quantity of prior art. There are no less than seven prior art patents that fully anticipate the proffered construction, and each and every one is sufficient, in and of itself, to invalidate the patent-in-suit under 34 U.S.C. 102, for lack of novelty. There are also at least three design patents that anticipate the patent-in-suit, and it is well established that design patents may be used to anticipate and invalidate a utility patent if they suffice to teach the relevant functional aspects of a utility application. *In re Hargraves*, 53 F.2d 900 (C.C.P.A. 1931); *Application of Thomas Lamb*, 327 F.2d. 679 (C.C.P.A. 1963); *Application of Jerry L. Aslanian*, 590 F.2d 911 (C.C.P.A. 1979)

a. USPN 2,131,382

The construction of TOG's bags; namely that of one or more like-type fasteners individually appearing on generally opposed inner and outer sides of a bag and insert, with no wrap-around of the corners, is essentially identical to a handbag patented in 1937. This patent is attached as Exhibit 9 (USPN 2,131,382; hereafter the '382 patent), and fully anticipates the patent-in-suit. A comparison of the drawings of the '382 patent and claim 1 of MICHE's '201 patent is attached hereto as EXHIBIT 19.

In particular, note that the construction of fasteners on more than one exterior surfaces of the inner bag (identified at "A") is accompanied by cooperating fasteners on the interior surfaces of the outer bag (identified at "B").



Figs. 3 and 5 from USPN 2,131,382

Comparing the claimed elements of the '382 patent with the claims of the patent -in-suit (hereafter the "'201 patent'"), it is immediately seen that each and every element of claim 1 of the '201 patent is shown in (i.e. anticipated by) the '382 patent, thus satisfying the basic case for invalidity under 35 U.S.C. § 102. References to the corresponding elements of the '382 patent to the '201 patent are bracketed. ([]):

1. A handbag system comprising;

- a first outer shell having an open end; [Fig 4, element 14 of '382]
- a second outer shell having an open end; [Fig. 4, element 14]
- at least one first fastener attached to at least two interior surfaces of said first outer shell; [Figs. 3 and 5, element 22]
- at least one first fastener attached to at least two interior surfaces of said second outer shell; [Figs. 3 and 5, element 22]

an inner bag having an open end; [Figs. 3 and 5, element 21]
at least one second fastener attached to at least two exterior surfaces of said inner bag; [Figs. 3 and 5, element 23]
where said inner bag is placed within said first or said second outer shell so that the first fastener engages the second fastener, such that the inner bag can be removed from the outer shell by disengaging the first fastener from the second fastener. [All Figures, all elements]

To the extent that this piece of prior art does not explicitly depict a “second shell,” it is instructive that the ‘201 patent does not either. In obtaining the ‘201 patent the inventor argued, successfully, that there is no need for an illustration of a second shell or bag, [Exhibit 17, “Amendment under 37 C.F.R. 1.111, August 22, 2000, pps. 7-8”] since “one skilled in the art would clearly understand the description of “another outer shell” and a “new outer shell” as referring to a second outer shell.” The ‘382 patent, similarly speaks of covers being interchangeable. (‘382 patent at Col. 3, lines 3-4). Thus, Claim 1 is invalid.

b. USPN 5,207,254

The construction of Defendant’s bags; namely that of one or more like-type fasteners individually appearing on generally opposed inner and outer sides of a bag and insert, with no wrap-around of the corners, is very close to a handbag patented in 1993. This patent is attached as Exhibit 10 (USPN 5,207,254; hereafter the ‘254 patent), and fully anticipates the patent-in-suit. Annotated drawings of the ‘254 patent and claim 1 of the ‘201 patent are shown in EXHIBIT 20. In particular, note that the construction of fasteners on more than one exterior surfaces of the inner bag (A) is accompanied by cooperating fasteners on the interior surfaces of

the outer bag (B). Each element of Claim 1 of the 201 patent is shown in the '254 patent. Therefore, Claim 1 is invalid.

. In addition, since the '254 describes the use of "hook and loop" fasteners, i.e. VELCRO™ (Col. 3, lines 54-58, Claim 6, and Figs. 1, 2, 4, 5, and 6); the '254 patent also anticipates, and therefore invalidates Claim 8 of the patent-in-suit.

c. USPN 4,907,633

The construction of Defendant's bags; namely that of one or more fasteners individually appearing on generally opposed sides of a bag, with no wrap-around of the corners, is also very close to a handbag patented in 1990. This patent is attached as Exhibit 11 (USPN 4,907,633; hereafter the '633 patent), and fully anticipates the patent-in-suit. Select drawings of the '633 patent and claim 1 of the '201 patent are shown in Exhibit 21. Thus, claim 1 is invalid.

d. USPN 1,978,971

The construction of Defendant's bags; namely that of one or more fasteners individually appearing on generally opposed sides of a bag, with no wrap-around of the corners, is also very close to a handbag patented in 1934. This patent is attached as Exhibit 12 (USPN 1,978,971; hereafter the '971 patent), and fully anticipates the patent-in-suit. Select drawings from the '971 patent and claim 1 of the '201 patent are attached as Exhibit 22. As shown therein, each element of claim 1 is shown in the '971 patent and is, therefore, invalid.

e. USPN 2,118,400

The construction of Defendant's bags; namely that of one or more fasteners individually appearing on generally opposed inner and outer sides of a bag and insert, with no wrap-around of the corners, is also very close to a handbag patented in 1938. This patent is attached as Exhibit

13 (USPN 2,118,400; hereafter the '400 patent), and fully anticipates the patent-in-suit. Select drawings of the '400 patent and claim 1 of the '201 patent are shown in Exhibit 23.

Since all the elements of this claim are met by the prior art, claim 1 is invalid. In addition, since the '400 patent describes the use of button fasteners, (Col. 3, lines 42-56, Figs. 1, 2, and 4) the '400 also anticipates, and therefore invalidates Claim 8 of the '201 patent.

f. USPN 6,003,573

The construction of Defendant's bags; namely that of one or more fasteners individually appearing on generally opposed inner and outer sides of a bag and insert, with no wrap-around of the corners, is also very close to a handbag patented in 1999. U.S. Patent No. 6,003,573 (the '573 patent) was filed for on October 20, 1997. Unless MICHE can prove that the actual date of invention for the '201 patent was nearly two years prior to the July 28, 1999 filing date of the '201 patent, the '573 patent is invalidating prior art. This patent is attached as Exhibit 14 (USPN 6,003,573; hereafter the '573 patent), and fully anticipates the patent-in-suit. This issue can only be resolved through discovery. Select figures of the '573 patent and claim 1 of the '201 patent are attached hereto as Exhibit 24.

Since all the elements of this claim are met by the prior art, claim 1 is invalid. In addition, since the '573 describes the use of zipper fasteners, (Col. 3, lines 15-20, Figs. 1 and 2) the '573 also anticipates, and therefore invalidates Claim 8 of the '201 patent.

g. U.S. Patent D408,146

The construction of Defendant's bags; namely that of one or more fasteners individually appearing on generally opposed inner and outer sides of a bag and insert, with no wrap-around of

the corners, is also very close to a handbag patented in 1999. This patent was filed for on May 28, 1997, so unless the Patentee (and thereby MICHE who stands in her place today), can prove that the actual date of invention was prior to July 28, 1999, this patent stands as prior art. In the absence of proof to the contrary, the date of invention stands presently as the date of the application, July 28, 1999, and therefore, in the absence of discovery to the contrary, the '146 patent is prior art under 35 U.S.C. 102(a). This patent is attached as Exhibit 15 (USPN D408,146; hereafter the '146 patent), and if confirmed as Section 102 prior art, fully anticipates the patent-in-suit. This issue can only be resolved through discovery.

Since design patents do not have their individual elements called out by reference number, appreciating the anticipation requires an examination of the total structures of the '146 patent as see in Figs 1-4. All the figures clearly show a row of snap-type fittings along the sides of the inner bag. In particular, note that the construction of fasteners on more than one exterior surfaces of the inner bag (A) is necessarily accompanied by cooperating fasteners on the interior surfaces of the outer bag (B).

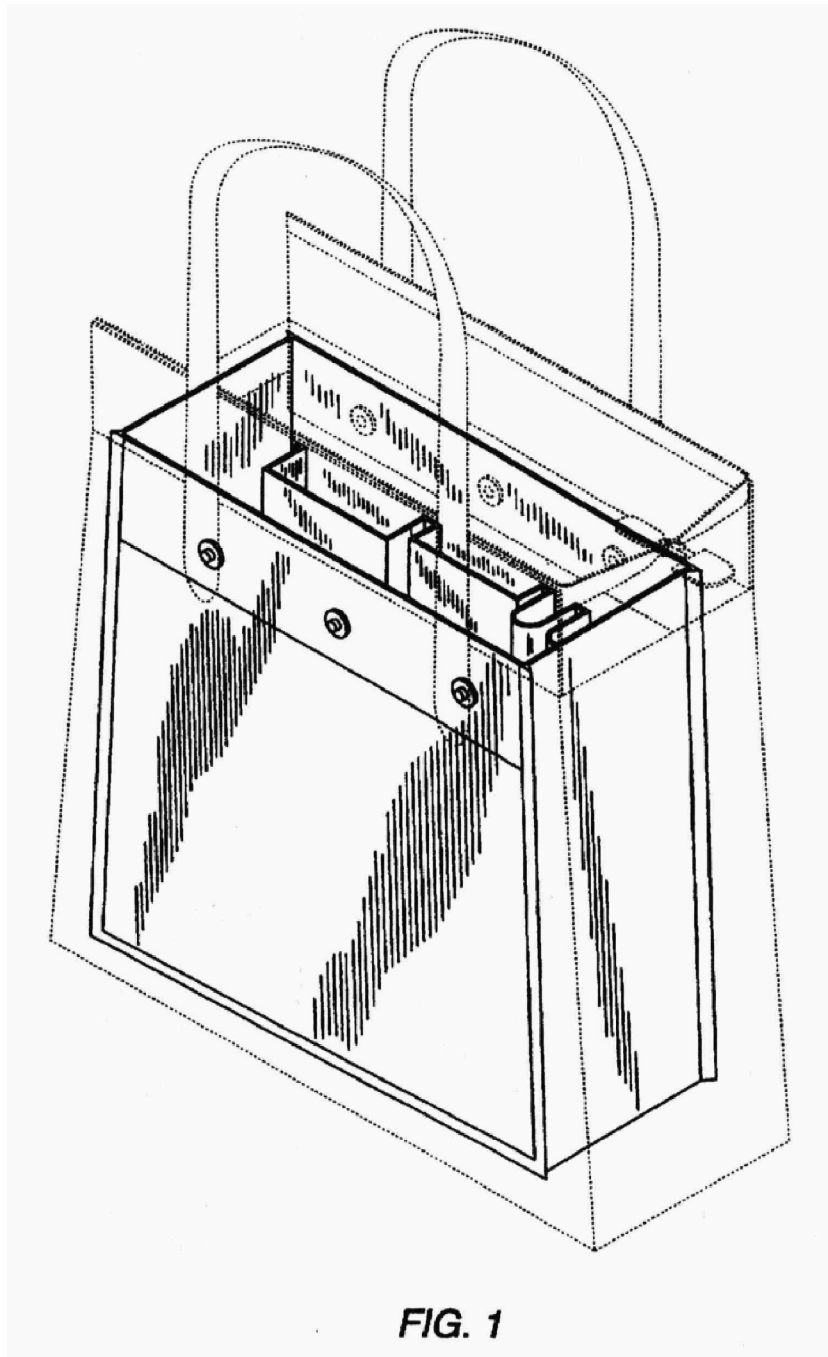


Fig. 1 from USPN D408,146

Since the outer shell is not claimed, it is depicted only as broken lines, without detail. However, there would be no purpose to the fasteners on the inner bag without corresponding fasteners on the outer bag.

However, taken as a whole, the '146 patent discloses an inner bag with a multiple of like-type fasteners on the two sides of the inner bag, and an outer bag with a multiple of fasteners on the two inner side surfaces (by necessary implication), and a bag structure to allow separation and interchangeability of the inner and outer bags by separating the fasteners. Therefore, D408,146, if confirmed as Section 102 prior art, fully anticipates the patent-in-suit. This issue can only be resolved through discovery.

h. USPN D334,661

The construction of Defendant's bags; namely that of one or more fasteners individually appearing on generally opposed inner and outer sides of a bag with insert, with no wrap-around of the corners, is also very close to a handbag patented in 1993. This patent is attached as Exhibit 16 (USPN D334,661; hereafter the '661 patent), and fully anticipates the '201 patent-in-suit.

Since design patents do not have their individual elements called out by reference number, appreciating the anticipation requires an examination of the total structures of the '661 patent as see in Figs 1-4. All the figures clearly show a row of snap-type fittings along the sides of the inner bag (A) which would be necessarily accompanied by cooperating fasteners on the interior surfaces of the outer bag (B).

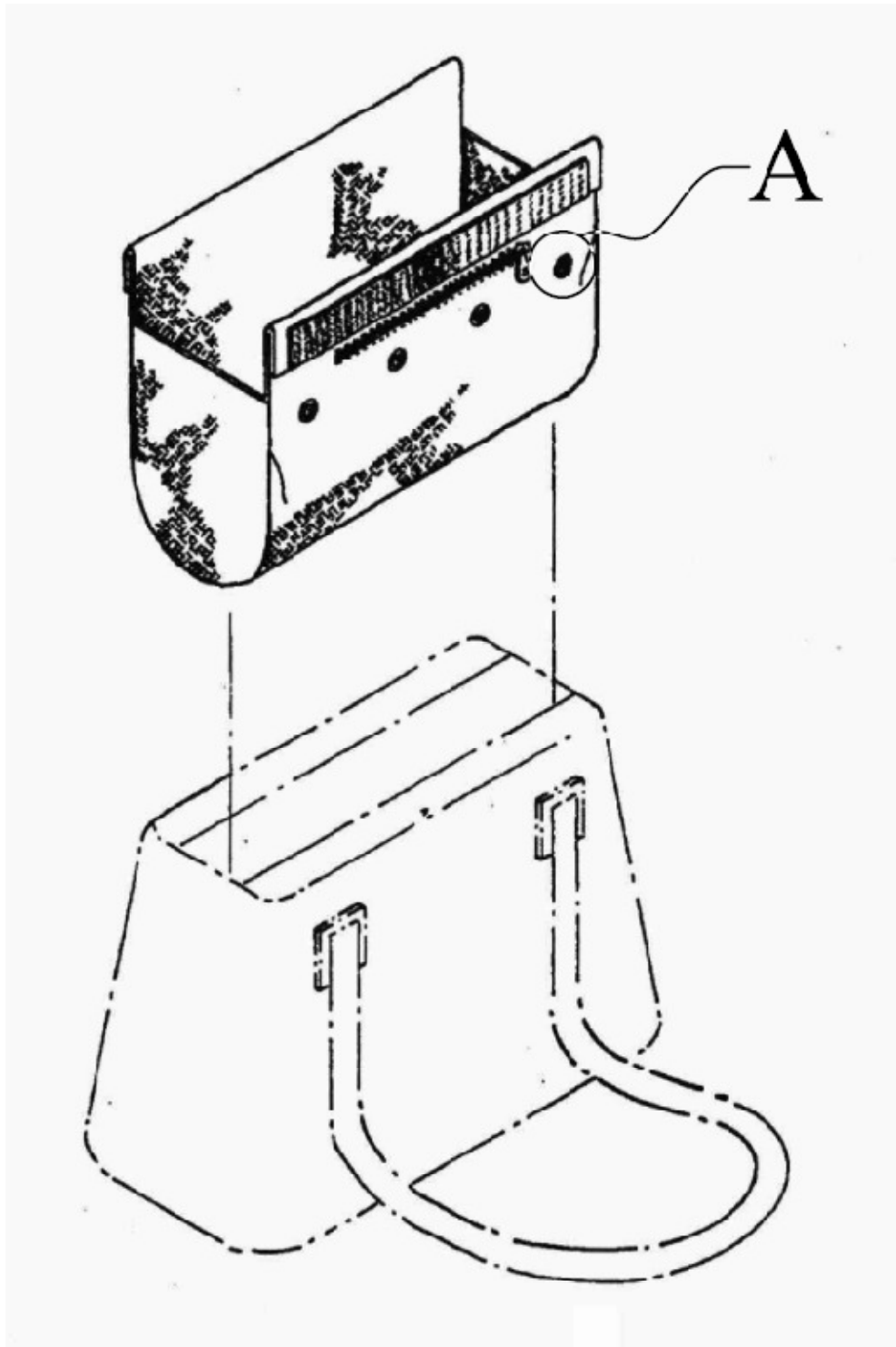


Fig. 1 from USPN D334,661

Since the outer shell is not claimed, it is depicted only as broken lines, without detail. However, there would be no purpose to the fasteners on the inner bag without corresponding fasteners on the outer bag.

Taken as a whole, the '661 patent discloses an inner bag with a multiple of like-type fasteners on the two sides of the inner bag, and outer bag with a multiple of fasteners on the two inner side surfaces (by necessary implication), and a bag structure to allow separation and interchangeability of the inner and outer bags by separating the fasteners. Therefore, D334,661 fully anticipates the '201 patent-in-suit.

3. The accused products do not use fasteners selected from the group consisting of hook and loop fasteners, magnetized materials, buttons and zippers.

MICHE's proposed interpretation of "hook and loop" fasteners is simply wrong, as well as disingenuous, and has misled the Court into believe that these fasteners are other than what they truly are. As MICHE should know, "hook and loop" fasteners is a term of art in the relevant art², and is used to generically describe the product commonly known as VELCRO™. It is also universally used to describe VELCRO™ type products in the language of patenting³, as the

² The definitions of hook and loop fasteners as "Velcro" are legion in the commercially relevant prior art and literally far too numerous to cite here, but include, the Oxford English Dictionary, 2d Ed. 1989; "Hook and loop fasteners or "touch fasteners" are what most people commonly know as Velcro."; <http://www.wisegeek.com/what-is-a-hook-and-loop-fastener.htm>; "Hook and loop fasteners consist of two layers of fabric. The first layer is covered with tiny hooks. The second layer is covered with tiny loops."; [http://www.globalspec.com/LearnMore/Mechanical Components/Mechanical Fasteners Hardware/Hook Loop Fasteners](http://www.globalspec.com/LearnMore/Mechanical%20Components/Mechanical%20Fasteners%20Hardware/Hook%20Loop%20Fasteners); "Our hook and loop and elastic are used in many industries including sporting, equestrian, healthcare, and apparel. Compare our hook and loop to Velcro®." <http://www.jontay.com/notions.htm>.

³ The term of art "hook and loop" fastener appears, according to the records of the USPTO, no less than 2546 times in patents issued since 1976. While it is impossible to search every one of

United States Patent Office explicitly recognizes “hook and loop” fasteners as “VELCRO” in the official Manual of Patent Examining Procedure (“MPEP”):

VELCRO

Notion - namely, a synthetic material sold in ribbon, sheet, or piece goods form, said material having complementary parts which adhere to each other when pressed together and adapted for use as a closure fastener, or button for closing garments, curtains, or the like; separable fasteners-namely, hook and loop-type fasteners and components thereof.

MPEP; Appendix I (emphasis supplied)

The intrinsic evidence of the patent language itself confirms this, as the patent speaks first of “the fasteners 130 and 135 are made from strips of hook & loop tape, i.e., Velcro” (Col 3, lines 1-2). The abbreviation, “i.e.,” the Latin abbreviation for “id est” or “that is,” is noticeably used, denoting that the second term is identical to, and fully encompasses the first, and not “e.g.,” the Latin abbreviation for “exempli gratia,” which denotes that the second term is merely an example of the first.⁴ (Definitions from www.merriam-webster.com; www.wordnetweb.princeton.edu/perl/webwn)

The patent further distances itself from the structure of the accused products when it elaborates on its fasteners, stating, “Magnets and Velcro are especially advantageous because they permit removal of the inner bag without having to disconnect individual fasteners.” (Exhibit 5, column 3, lines 15-17). “Disconnecting individual fasteners” is the only way the

these patents for an emergency petition such as this, it is clear that the overwhelming, if not exclusive use, over a wide range of years, of the term “hook and loop” fastener is used to describe VELCRO™ type products: “hook and loop fasteners such as VELCRO:” USPN 7,793,451; “hook and loop fastener element to form, for example, Velcro.TM. fasteners:” USPN 6,974,433; “using hook and loop fastener such as VELCRO(.TM.):” USPN 6,361,516.

⁴ “Exempli gratia (e.g.)—for example. One or more examples from a greater list of possibilities. Compares with id est, or i.e., that is, which indicates a full, definitive list of all possibilities.” Latin Contract Terms, from www.matmanmag.com

accused products can be made to operate. No other possible construction for “hook and loop” fastener is shown, described, illustrated, or even suggested in any part of the patent-in-suit.

As a point of reference, the type of individual fastener used in the accused product is also subject to a term of art, and that is “hook and eye” fasteners. Again the references to this type of fastener are legion⁵ (see, e.g. Exhibit 6), and a simple illustration is appended hereto as Exhibit 7.

MICHE’s arguments under the Doctrine of Equivalents are highly dubious, unsurprisingly as they are based on reliance on the sixty-year old *Graver Tank*, 339 U.S. 605 (1950), which has been severely limited as to the Doctrine of Equivalents in the case of claims modified during prosecution. Under current law, MICHE is barred from reliance on the Doctrine of Equivalents as to Claims 1 and 8 under the Supreme Court precedent, because the claim was amended during prosecution in order to overcome rejection. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 733-37 (2002)(“A patentee who narrows a claim as a condition for obtaining a patent disavows his claim to the broader subject matter, whether the amendment was made to avoid the prior art or to comply with § 112;” *id.* at 737).

Even clearer, in this matter, MICHE is estopped from asserting the Doctrine of Equivalents between “hook and loop” fasteners, i.e. VELCRO™ type products, and the individual hook and eye fasteners of the accused products by the plain language of the patent that

⁵ “A hook-and-eye closure is a type of fastener.... consists of two parts, a metal hook and an eyeloop for the hook to slip through:” <http://www.wisegeek.com/what-is-a-hook-and-eye-closure.htm>; “A hook-and-eye closure is a clothing fastener that consists of two parts, each sewn to their respective pieces of cloth, one with a small protruding blunt hook, and the other with a small loop (also known as the "eye" or "eyelet") protruding:” http://www.apparesearch.com/definitions/Miscellaneous/Hook_and_eye_closure_definition.htm; “A hook-and-eye closure is a clothing fastener that consists of two parts, each sewn to their respective pieces of cloth, one with a small protruding blunt hook, and the other with a small loop also known as the "eye" or "eyelet" protruding. To fasten the garment, the hook is slotted into the loop. Simply constructed of bent wire, hook-and-eye closures are typically used in groups to provide great strength to bear the forces involved in normal wear:” http://www.servinghistory.com/topics/Hook-and-eye_closure .

hook and loop fastening is not equivalent to individual fasteners such as hooks and eyes; i.e., “Magnets and Velcro are especially advantageous because they permit removal of the inner bag without having to disconnect individual fasteners.” (Exhibit 5, column 3, lines 15-17). If VELCRO™ is “especially advantageous” then it cannot be an “equivalent” of the discrete hook-and-eye fasteners in the accused products.

B. Miche Bag Will Not Suffer Any Irreparable Harm from the Maintenance of the Commercial Status Quo in this Matter.

The accused products have been offered for sale since approximately February, 2008. (Exhibit 8, paras. 9-10). Therefore, the products have existed side-by-side in the marketplace for at least two years and seven months [Complaint, Doc. 4, at ¶ 8]. Therefore, MICHE’s factually unsupported allegations as to price erosion, market share, reputation, and business opportunities are belied by its failure to bring action over those past two years and seven months. *Travel Tags, Inc. v. UV Color, Inc.*, 690 F.Supp.2d 785, 801-02 (D. Minn. 2010)(delay in bringing suit may in and of itself be evidence of lack or irreparable harm, three year delay in bringing suit held fatal to application for preliminary injunction).

MICHE’s application fails the most basic principles behind the granting of an *ex parte* TRO. *Reno Air Racing Ass’n., Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006)(*Ex parte* TRO’s “restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm”) The fact is inescapable that maintenance of the “status quo” would be a continuation of the market competition between the products that has existed for these past years.

In particular, as to market share, Defendant believes the assertion that “Miche Bag presently has no major, legitimate competitors in the bundled purse product market,” is

particularly false, as Defendant has already submitted evidence in this matter that Defendant's profits on the accused products alone are more than \$1,000,000 per month. [Doc. 23-2, para. 6]

Seeking to enforce a patent of dubious validity, against an accused product that arguably does not even read on the claims of the patent-in-suit, and with a two year and seven month delay in seeking relief, MICHE has no basis to make a demonstration of "irreparable harm," and therefore fails another prong of the four-prong test for preliminary relief.

C. The Balance of the Harms Favors Defendant, not MICHE.

Given the lack of irreparable harm, MICHE has little or nothing to advance in a "balance of harms" analysis. All of the cases cited by MICHE fail once there is no "strong" showing of likely success on the merits - and here there is not only the absence of a "strong" showing of infringement, but in fact a strong showing of non-infringement.

While it is exceedingly dubious that Defendant infringes at all; this Court has been misleadingly and wrongly induced to prohibit Defendant from conducting its absolutely lawful and legitimate business. This business is not inconsiderable, with Defendant being blocked from profits on the accused products alone of more than \$250,000 per week, and suffering total losses during the TRO of more than \$300,000. [Doc. 23-2, paras. 6-11; Exhibit 8 at para. 11]

Thus the balance of harms can be simply expressed - on one course of action (granting the injunction) stands the wrongful enjoining of a legal and legitimate business at tremendous financial and human loss, while on the other side (denying the injunction) lies the maintenance of a long-established commercial status quo in the face of a nearly frivolous patent infringement claim.

D. The TRO is Not in the Public Interest

Because MICHE cannot make a strong showing that their patent is “likely valid and infringed,” the public interest lies in allowing Defendant to continue its legitimate business while this suit is litigated. This legitimate business is not inconsiderable. (Doc. 23-2, paras. 6-11; Exhibit 8 at para. 11) Defendant presently supports approximately 650 direct employees, additional supplier personnel, and upwards of 20,000 home consultant sellers, all of whom become immediately economically advantaged by the restraint of that legitimate business. (Exhibit 12 at para. 12).

To the contrary, the public has no compelling interest in the resolution of a purely monetary dispute between two competitors, who along with their patents, have coexisted in the marketplace for years.

III. Defendant Has Additional Defenses That Lie Outside of the Four Corners of the Patent.

While the above has focused on the patent language, prosecution, and accused products, Defendant clearly has additional defenses that go beyond this. While it is impossible to detail all of these at this early stage of the litigation as this, at least one example can be given.

The patent-in-suit lay abandoned for lack of the required 8 year maintenance fee from Feb. 13, 2008 to February 2, 2010, and was resuscitated only on a claim that there had been an “unintentional” failure to pay. (Exhibit 18; “USPTO Maintenance Fee Records”)

This has two important ramifications for the present matter. The first is that the assertion that the failure to pay the maintenance fee was “unintentional” is wholly untested by discovery at

this point. Strict rules exist governing the revival of patents after failure to pay maintenance fees, and if the petition for acceptance of late payment does not meet the legal requirements for such a petition, then the patent-in-suit is expired and unenforceable.⁶

Even if the petition to revive the patent-in-suit is finally found to remain valid despite the delayed payment of the maintenance fee, and even if the accused products are found to be infringing on top of that, the period of non-payment coincides very closely to the time period in which Defendants began selling its product. It is easy to posit that Defendant may have acquired rights to the sale of its products under the Doctrine of Intervening Rights. Very briefly, this Doctrine, as established by statute, holds that otherwise infringing activity during a period when the patent is not-enforceable may give rise to permanent rights to the use of the product. 35 U.S.C. 41(c). Only case discovery can flesh out the parameters of such intervening rights.

⁶ The United States Patent and Trademark Office does not routinely conduct an independent investigation around the circumstance of non-payment, but simply asks for a fee and a statement that the delay in payment of the maintenance fee was unintentional. 37 C.F.R. 1.378(c)(3).

IV. SUMMARY AND RELIEF REQUESTED

In summary, MICHE filed for a Temporary Restraining Order without informing the Court that there was multiple pieces of prior art that would invalidate its patent, and that a critical claim limitation in the patent-in-suit represented a term of art with a very special meaning.

The Court granted the TRO hearing with seven days notice and expressly ordered MICHE to notify Defendant of the upcoming hearing. MICHE waited a total of four out of the seven days of the notice period before serving Defendants, and then, despite knowing Defendant's location and principal place of business, directed its service to a statutory agent 600 miles from Defendant's location, in a state where Defendant is only a registered "foreign" corporation. In this "service," the only Notice provided to Defendant, unrepresented by Counsel at the time, was a single-page print-out of a PACER entry that MICHE had received from the Court, stuck in the middle, without explanation, of a more than 100 page stack of documents. This package was accompanied by a Summons that clearly indicated that Defendant's had 21 days, or until September 28, 2010, to Answer.

At the TRO hearing, which Defendant had no way to know of, MICHE made false representations to the Court that Defendants was not a major (and long-standing) competitor, who was profiting at the rate of more than \$ 1,000,000 per month, and on the basis of these false representations, induced the Court to wrongfully enjoin defendants and to set a security bond of only \$ 10,000 under F.R.Civ.P. 65(c), vastly less than Defendant's potential damages and costs.

The facts, at best, strain the outer boundaries of ethical practice and fair notice to litigants. Accordingly, in full recognition of the spirit and letter of F.R.Civ.P. 65, this Court should:

1. Dissolve the Temporary Restraining Order;
2. Deny the Motion for Preliminary Injunction;
3. Order the forfeiture of MICHE's security bond to Defendant, and
4. Order such other relief to Defendant as justice may require, with due attention to the misleading and duplicitous manner in which the TRO was obtained.

Respectfully submitted,

GALLAGHER & DAWSEY CO.

and

BATEMAN IP LAW GROUP

/s/Randall B. Bateman

Attorneys for Defendant
Thirty One Gifts

CERTIFICATE OF MAILING/AFFIDAVIT OF SERVICE

I hereby certify that this “DEFENDANT’S MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION” has been filed with the Clerk, United States District Court for the District of Utah, Central Division, on September 21, 2010 and that a copy has been served via CM/ECF to the following:

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/s/ Randall B. Bateman