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Plaintiff Miche Bag, LLC (“Miche Bag”) hereby submits this Reply Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction.

## **I. INTRODUCTION**

Defendant Thirty One Gifts LLC (“Defendant”) has failed to rebut Miche Bag’s strong showing that it is entitled to a temporary restraining order and preliminary injunction in this action. Because each of the relevant factors weigh in favor of an injunction, as set forth below, the Court should grant Miche Bag’s Motion for Preliminary Injunction.

## **II. ARGUMENT**

### **A. Likelihood of Success on the Merits**

#### **1. Defendant Infringes at Least Valid Claims 1 and 8 of the ’201 Patent**

Having virtually copied the invention of the ’201 patent, Defendant attempts to construe the claim language to fabricate non-infringement positions where none exist. Scrutiny of Defendant’s arguments, however, exposes them for what they are: inconsistent, litigation-inspired claim constructions divorced from both common sense and the relevant legal standards.

##### **a) Defendant’s Infringing Products Undeniably Have Fasteners “Attached to at Least Two . . . Surfaces”**

Defendant argues that its infringing products do not infringe claims 1 and 8 of the ’201 patent because the infringing products do not have “at least one first fastener attached to at least two interior surfaces of said outer shell” and “at least one second fastener attached to at least two exterior surfaces of said inner bag[.]”<sup>1</sup> [Response, at p. 5.] Defendant’s argument is not only internally inconsistent, it also completely ignores controlling claim construction principles and certain express language in the claims.

As part of its non-infringement argument, Defendant argues that the phrase “at least one” has been “widely construed by the Courts as meaning ‘one or more.’” [*Id.*] Substituting

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<sup>1</sup> These claim elements appear in both claims 1 and 8 of the ’201 patent. Because the same argument is being made with regard to both the first and second fasteners in both claims, this memorandum will only address the argument in context of the first faster in claim 8 for reasons of simplicity.

Defendant's own construction into claim 8, the limitation reads "one or more first fastener(s) attached to at least two interior surfaces of said outer shell." The infringing products have eight "first fasteners," four located on each of two different interior surfaces of the outer shell. Thus, under Defendant's construction, the infringing products literally satisfy this claim limitation.

After arguing for the claim construction discussed above, Defendant does an immediate about-face and argues that its products do not infringe because "[t]here 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." [Response, at p. 5.] Defendant's own claim construction, however, does not require a single fastener to be attached to "at least two surfaces." While a single fastener may satisfy this limitation by wrapping from one side to a second side, the claim is not limited to this embodiment.

Defendant's argument that "there is no physical way" that a single fastener can attach to two surfaces without "wrapping around one or more corners" further demonstrates that its argument is flawed. Just as Defendant's hook and loop fasteners cannot wrap around corners, the same is true with buttons, both of which must be capable of meeting the "two surfaces" limitation because they are explicitly recited in claim 8. Further, Defendant's non-infringement argument violates the basic claim construction principle that independent claims must be construed broadly enough to encompass claims depending there from. *See Wright Med. Tech. v. Osteonics Corp.*, 122 F.3d 1440, 1445 (Fed. Cir. 1997) (holding that the Court "must not interpret an independent claim in a way that is inconsistent with a claim which depends from it[.]" (internal citation omitted)). Dependent claims 6 and 13 require the "two surfaces" recited in claims 1 and 8 to be on "opposite sides." Defendant's argument that the fastener must wrap around a corner improperly narrows the scope of claims 1 and 8 such that they are inconsistent with claims 6 and 13. Defendant's argument would also improperly preclude claims 1 and 8 from encompassing the preferred embodiment disclosed in the specification. *Adams Resp. Therapeutics v. Perrigo Co.*, 2010 U.S. App. LEXIS 16189, at \*20 (Fed. Cir. Aug. 5, 2010) ("A claim construction that excludes the preferred embodiment 'is rarely, if ever, correct and would

require highly persuasive evidentiary support.” (quoting *Vitronics Corp. v. Conceptronic Inc.*, 90 F.3d 1576, 1583-84 (Fed. Cir. 1996))). Because Defendant’s argument violates these basic canons of claim construction, claims 1 and 8 are not limited to fasteners that “wrap around corners” as Defendant argues. The claim language encompasses fasteners that do not wrap around corners, such as buttons and Defendant’s hook and loop fasteners, so long as such fasteners are located on “at least two . . . surfaces.” Defendant’s products infringe.

**b) Defendant’s Infringing Products Have “Hook and Loop” Fasteners**

Importantly, Defendant’s second non-infringement position pertains only to claim 8 of the ’201 patent. Thus, regardless of how the Court construes “hook and loop fasteners,” Defendant’s products infringe claim 1 of the ’201 patent, which is sufficient alone to grant a preliminary injunction.

Defendant does not dispute that the fasteners on the infringing products use a “hook” that attaches through a “loop” to fasten the outer shell to the inner bag, as those terms are construed according to their ordinary meaning. Instead, Defendant argues that the construction of “hook and loop” fasteners should be limited to include only VELCRO®-type fasteners. [Response, at p. 16.] Defendant’s argument is based on the use of Latin “i.e.” as opposed to “e.g.” in the specification. [*Id.*] Such minutia in the specification is insufficient to disclaim claim scope. The specification must contain “words or expressions of manifest exclusion” or “explicit disclaimers . . . to disavow claim scope.” *Gillette Co. v. Energizer Holdings, Inc.*, 405 F.3d 1367, 1374 (Fed. Cir. 2005) (internal quotations and citations omitted). Thus use of “i.e.” as opposed to “e.g.” is not an “explicit disclaimer” or “manifest exclusion” to disavow hook and loop fasteners of the type used by Defendant, and the Court should adopt Miche Bag’s proposed construction of “hook and loop” fasteners.

Even if the Court were to adopt Defendant’s proposed construction of “hook and loop” fasteners, Defendant’s infringing products infringe claim 8 under the doctrine of equivalents. Defendant argues that its hook and loop fasteners are not equivalent to the fasteners recited in

claim 8 because the specification states that “magnets and Velcro are especially advantageous because they permit removal of the inner bag without having to disconnect individual fasteners.” [Response, at p. 18.] Defendant argues that because its hook and loop fasteners are “discrete,” they are not equivalent to Velcro-type or magnet fasteners. [*Id.*] Defendant’s argument, however, ignores the fact that the fasteners of claim 8 also include “buttons,” which are indisputably “discrete” fasteners. Thus, Defendant’s attempt to distinguish the fasteners of its infringing products on this basis is without merit and should be rejected. Defendant’s cannot escape their clear infringement of both claims 1 and 8 of the ’201 patent.

**2. Defendants Have Failed to Raise Any Substantial Question Concerning the Validity of Claims 1 and 8 of the ’201 Patent**

Defendant prefaces its entire invalidity argument with the heading: “A broader construction of the claims renders the patent invalid under 35 U.S.C. § 102[.]” [Response, at p. 5.] This is a tacit admission that under Defendant’s own construction of “at least one,” which construction Miche Bag does not herein dispute or attempt to “broaden,” the claims are valid. Notwithstanding the foregoing admission of validity, the substantive merits of Defendant’s invalidity arguments are severely lacking.

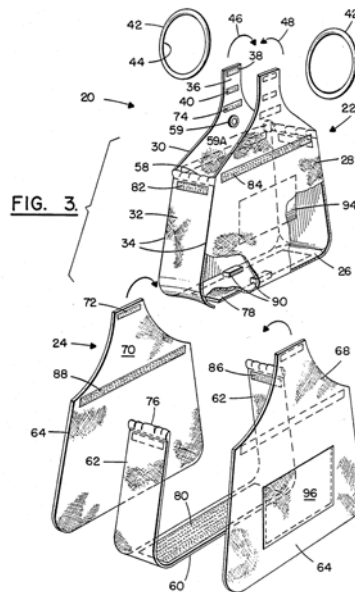
**a) Prior Art Overcome During Prosecution of the ’201 Patent Does Not Challenge the Validity of Claims 1 and 8**

Defendant argues that “there are no less than seven prior art patents” that invalidate the claims of the ’201 patent. [Response, at p. 6 (emphasis in original).] Of the prior art patents raised by Defendant, at least five (U.S. Patent No. 2,131,382, U.S. Patent No. 5,207,254, U.S. Patent No. 4,907,633, U.S. Patent No. 1,978,971, and U.S. Design Patent No. D408,146) were each expressly considered and overcome during the prosecution of the ’201 patent.

During prosecution of a patent, the examiner gives the claims their “broadest reasonable interpretation consistent with the specification.” Manual of Patent Examining Procedure, § 2111 (8<sup>th</sup> ed., Rev. 7, July 2008) (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005)). At enforcement, however, claims are construed more narrowly to the meaning they would have to a person of ordinary skill in the art at the time the patent was filed. *See, Phillips*, 415 F.3d at

1313 (string citation omitted). Where, as here, Defendant is asserting prior art that was overcome during prosecution of the application, Defendant must carry an “even heavier burden” than clear and convincing evidence to show invalidity, which heavier burden is “especially difficult” to meet. *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1368 (Fed. Cir. 2004) (“Where, as here, the PTO previously considered the prior art reference, [the defendant] bears an even heavier burden to prove invalidity.”); *Hewlett-Packard Co. v. Baush & Lomb Inc.*, 909 F.2d 1464, 1467 (Fed. Cir. 1990) (“This burden [to prove invalidity by clear and convincing evidence] is especially difficult when the prior art was before the PTO examiner during prosecution of the application.”). Defendant cannot meet this “heavier burden.”

For example, Defendant asserts that U.S. Patent No. 4,907,633 (the “Puzzle Purse”) “fully anticipates the patent-in-suit.” [Response, at p. 24.] The Puzzle Purse, which is depicted below and has been provided as Exhibit 11 to the Response, is vastly different from the system claimed in claims 1 and 8 of the ‘201 patent.



The Puzzle Purse clearly fails to teach or suggest even the very first element of claims 1 and 8: “a first outer shell having an open end.” The Puzzle Purse also does not teach “a second outer shell having an open end” and is not configured such that the inner bag can be placed



“within” the first and second outer shells. Defendant’s argument that the Puzzle Purse meets the “heavier burden” required to anticipate the claims of the ’201 patent demonstrates the fallacy of Defendant’s invalidity arguments based upon prior art overcome during prosecution.

**b) U.S. Design Patent No. D334,661 Does Not Present a Challenge to the Validity of the ’201 Patent**

Defendant also asserts that U.S. Design Patent No. D334,661 (the “’661 design patent”), which was not considered during prosecution, “fully anticipates” the claims of the ’201 patent. [Response, at pp. 13 and Exh. 16.] Importantly, Defendant admits that a design patent may be used to invalidate a utility patent only if the design patent “teach[es] the relevant functional aspects of a utility application.” [*Id.* at 6 (citing *In re Harraves*, 53 F.2d 900 (C.C.P.A. 1931); *Application of Thomas Lamb*, 327 F.2d 679 (C.C.P.A. 1963)).] It is a very rare circumstance where a design patent discloses detail sufficient to teach the relevant functional aspects of a utility patent, as evidenced by Defendant’s citation of cases from 1931 and 1963. Typically, design patents do not teach the functionality of the product, and, therefore, cannot rise to the clear and convincing evidence standard needed to invalidate utility patents claiming functional limitations. Such is the case here. The ’661 design patent contains no teaching of the following functional features, each of which are required to anticipate claims 1 and 8 of the ’201 patent:

- How the “removable pocketbook liner” fits into the “pocketbook”
- If the “removable pocketbook liner” attaches to the “pocketbook” (there is nothing that could possibly be construed as a “fastener” disclosed on the “pocketbook”)
- How the “removable pocketbook liner” attaches to the “pocketbook” (if in fact they do attach) and
- Whether the “removable pocketbook liner” is part of a “system.”

Absent any teaching of these functional aspects, let alone a clear and convincing teaching, this reference cannot, as a matter of law, invalidate any claim of the ’201 patent. Defendant has not presented any compelling argument that the claims of the ’201 patent will not be upheld as valid.

**c) U.S. Patent No. 2,118,400 Does Not Present a Challenge to the Validity of the '201 Patent**

Defendant also asserts that U.S. Patent No. 2,118,400 (the “’400 patent”) “fully anticipates” the claims of the ’201 patent. [Response, at pp. 9-10 and Exh. 13.] It is telling that this vague five-sentence argument is buried in the Response after the five references that were overcome during the prosecution of the ’201 patent. The ’400 patent is even less relevant than the references overcome during prosecution. The ’400 patent uses knobs on the handbag to attach a cover thereto. The cover, however, does not have any fasteners attached to the outer shell, as required by both claims 1 and 8. Instead, the cover of the ’400 patent merely has holes in it. [Response, at Exh. 13, Fig. 2.] The knobs of the handbag pass through the holes. [*Id.* at Fig.1.] Consequently, the knobs of the handbag attach to the outer surface of the cover, not the inner surface as required by the claims. This construction of the ’400 patent eviscerates the advantage of concealing the fasteners that results from practicing claims 1 and 8. Contrary to Defendant’s assertion, the ’400 patent does not anticipate any claim of the ’201 patent.

**d) U.S. Patent No. 6,003,573 Does Not Present a Challenge to the Validity of the '201 Patent**

Defendant’s assertion of U.S. Patent No. 6,003,573 (the “’573 patent”) as invalidating art fails no better. [Response, at p. 10 and Exh. 14.] As with Defendant’s other invalidity arguments, the ’573 patent is missing numerous limitations of claims 1 and 8 of the ’201 patent. For example, the ’573 patent fails to teach “at least one second fastener attached to at least two exterior surfaces” of the inner bag. Here again the fastener is visible, similar to the ’400 patent overcome above. The zipper on the inner bag of the ’573 patent is on the upper edge of the inner bag, not on an “exterior surface.” Defendant has raised no prior art teaching that was not overcome during prosecution of the ’201 patent. Defendant’s “new” art was rightfully relegated to the end of the invalidity section in the Response because it is merely cumulative of the art cited by the examiner. Claims 1 and 8 are valid.

**3. Defendant's Speculation of Possible "Additional Defenses" Are Insufficient to Rebut Miche Bag's Showing of a Likelihood of Success**

Defendant's contention that the revival of the '201 patent for late payment of the maintenance fee "has not been tested" [Response, at p. 20] amounts to nothing more than hopeful speculation that "the late payment does not meet the legal requirements." Such bare speculation is insufficient to raise any issue regarding Miche Bag's likelihood of success on its claims. Similarly, Defendant's argument that "it is easy to posit that Defendant may have acquired [intervening] rights" to sell the infringing products is completely unsubstantiated. Defendant knows the exact date the '201 patent was revived, February 13, 2010, but does not state whether Defendant began selling its products prior to that date. This information is in Defendant's possession, and Defendant's refusal to provide this information suggests that it has been withheld because it would not be favorable. These "possible" defenses are simply not enough to defeat Miche Bag's motion for preliminary injunction.

**B. Miche Bag Is Suffering and Will Continue to Suffer Irreparable Harm Absent an Injunction**

Defendant makes only two arguments in its unsuccessful attempt to rebut Miche Bag's strong showing of irreparable harm: (1) that Miche Bag delayed "two years and seven months" to bring this action, and (2) that Defendant holds a significant share of the changeable purse market. [Response, at pp. 18-19.] Notably, Defendant does not deny that its infringing products are of inferior quality [*see also* Affidavit of Michele Donat, ¶ 8, attached hereto as Exhibit 1], that its infringing actions cause price erosion, market share loss, damage to Miche Bag's reputation, and loss of business opportunities [*see* Affidavit of Chris Seegmiller, ¶¶ 13-18, attached hereto as Exhibit 2]. Defendant also does not dispute that these harms are irreparable because they cannot be remedied with monetary damages. In short, Defendant simply argues that because it has been inflicting these irreparable harms on Miche Bag for over two years, that it should be able to continue to do so. No case law cited by Defendant supports this position, and this Court should not be the first to condone such a preposterous proposition.

Miche Bag has not “delayed” bringing this action. Miche Bag did not discover Defendant’s infringing conduct until recently, and there is no evidence or suggestion to the contrary. [*Id.* at ¶ 11.] Upon discovering Defendant’s infringing products, Miche Bag immediately began investigating Defendant’s infringing products, and moved quickly to bring this action. There has been no appreciable “delay” on the part of Miche Bag. That Defendant has been able to “fly under the radar” for a period of time does not preclude Miche Bag from stopping the irreparable harms now that Defendant’s infringing products have come into the light. Defendant’s market share is relevant to Miche Bag’s irreparable harm in that the greater Defendant’s market share, the greater the irreparable harm being inflicted on Miche Bag. Miche Bag’s unrefuted irreparable harms weigh heavily in favor of an injunction.

**C. The Balance of the Harms Does Not Tip Decidedly in Defendant’s Favor**

Defendant’s alleged financial harms, the only type of harm Defendant claims it will incur under an injunction [*see* Response, at p. 19], pales in comparison to the irreparable harms being inflicted upon Miche Bag as set forth above and in Miche Bag’s moving papers. Defendant is also protected from those financial harms by the posting of an appropriate bond.<sup>2</sup> Further, such alleged financial harms to Defendant are at best a wash in the balancing of harms factor. Any alleged financial harms incurred by Defendant operating under an injunction will be direct financial harms to Miche Bag without an injunction. Thus, Defendant has failed to show that the balance of harms tips “decidedly” in its favor, as it must to defeat the motion for preliminary injunction. Absent such a showing by Defendant, this factor also weighs in favor of issuing the preliminary injunction.

**D. The Public Interest Favors an Injunction in This Case**

Defendant here again argues that its past presence in the market causes the public interest to weigh in its favor. [Response, at p. 20.] Under Defendant’s reasoning, the public interest

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<sup>2</sup> Because Miche Bag has not had the opportunity to test Defendant’s argued lost profits by deposing Defendant’s declarant on financial matters, Miche Bag will present its arguments on this issue at the hearing currently set for September 24, 2010, when Miche Bag will have the opportunity to cross-examine Defendant’s declarants.

should encourage businesses to infringe patents in a manner that avoids detection until they are established in the market place, thereby securing their position and avoiding a preliminary injunction when their infringing activities are ultimately discovered. While such a public policy is patently absurd, it is the net result of Defendant's argument, which should be patently rejected.

Defendant's passing mention of "human loss" and its "650 direct employees" and "20,000 home consultant sellers" that will be "immediately economically advantaged [sic]" is a red herring. Defendant's current catalog markets 44 pages of products. [Exhibit 3 hereto.] The products that would be subject to the injunction are merely two lines of the numerous products offered by Defendant. [See, *e.g.*, *id.* at p. 39.] Thus, neither Defendant, its 650 employees, nor the 20,000 home consultant sellers will be significantly economically disadvantaged by the injunction because they will all be able to continue to sell all of Defendant's other products. On the other hand, there is a strong public interest to uphold the patent system, a public interest Defendant improperly seeks to utterly erase in this case. *See, e.g., PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1567 (Fed. Cir. 1996) (recognizing a "strong public policy favoring the enforcing of patent rights"). The public interest weighs strongly in favor of an injunction in this case.

### III. CONCLUSION

For the reasons set forth above and in Miche Bag's moving papers, Miche Bag respectfully requests the Court to GRANT this motion and issue a preliminary injunction forthwith.

DATED this 23rd day of September, 2010.

WORKMAN | NYDEGGER

By /s/ James B. Belshe  
JAMES B. BELSHE  
CHARLES L. ROBERTS  
JAMES T. BURTON

Attorneys for Plaintiff MICHE BAG, LLC

