

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

**CERTAIN LED LIGHTING DEVICES, LED  
POWER SUPPLIES, AND COMPONENTS  
THEREOF**

**Inv. No. 337-TA-1081**

**ORDER NO. 27: GRANTING COMPLAINANTS' MOTION TO STRIKE  
RESPONDENTS' INEQUITABLE CONDUCT AND PATENT  
MISUSE DEFENSES**

(February 20, 2018)

**I. BACKGROUND**

On November 3, 2017, the Commission issued a Notice of Investigation upon a complaint alleging violations of section 337 of the Tariff Act of 1930, as amended, by reason of infringement of certain claims of U.S. Patent No. 6,586,890 (“the ’890 patent”); U.S. Patent No. 7,038,399 (“the ’399 patent”); U.S. Patent No. 7,256,554 (“the ’554 patent”); U.S. Patent No. 7,262,559 (“the ’559 patent”); and U.S. Patent No. 8,070,328 (“the ’328 patent”). The Commission ordered that an investigation be instituted to determine:

whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain LED lighting devices, LED power supplies, and components thereof by reason of infringement of one or more of claims 14, 22, and 30 of the ’890 patent; claims 1, 2, 4, 5, 7, 8, 17-19, 34, 35, 47, 48, and 58-60 of the ’399 patent; claims 1, 2, 5-7, 12, 46, 47, and 49-51 of the ’554 patent; claims 6 and 12 of the ’559 patent; and claims 1, 2, 4, 7, and 9 of the ’328 patent; and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

Notice of Investigation at 2. The Investigation was instituted upon publication of the Notice of Investigation in the *Federal Register* on Wednesday, November 8, 2017. 82 Fed. Reg. 51872-73 (2017); *see* 19 C.F.R. § 210.10(b). The complainants are Philips Lighting North America Corp. of Somerset, New Jersey, and Philips Lighting Holding B.V. of Eindhoven, Netherlands (“Philips”). Notice of Investigation at 2. The respondents are Feit Electric Company, Inc. of Pico Rivera, California, Feit Electric Company, Inc. (China) of Xiamen, China (“Feit”), Lowe’s Companies, Inc. of Mooresville, North Carolina (“Lowe’s”), LG Sourcing, Inc. of North Wilkesboro, North Carolina (“LG”), MSi Lighting, Inc. of Boca Raton, Florida (“MSi”), Satco Products, Inc. of Brentwood, New York (“Satco”), Topaz Lighting Corp. of Holtsville, New York (“Topaz”), and Wangs Alliance Corporation d/b/a WAC Lighting Co. of Port Washington, New York, and WAC Lighting (Shanghai) Co. Ltd. of Shanghai, China (collectively, “WAC”). *Id.* at 2-3.<sup>1</sup>

On November 20, 2017, Respondents were granted an extension of time to file responses to the complaint and Notice of Investigation. Order No. 3. Respondents Feit, Satco, and WAC, *inter alia*, filed responses to the complaint and Notice of Investigation on December 8, 2017.

On January 3, 2018, Philips moved to strike the affirmative defenses of inequitable conduct and patent misuse raised by Feit, and of patent misuse raised by Satco and WAC (the “Motion”). Motion Docket No. 1081-006. On January 16, 2018, Feit filed its opposition (“Feit Opp.”), and WAC and Satco jointly filed an opposition (“WAC Opp.”).

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<sup>1</sup>On January 8, 2018, an initial determination terminating Respondent Topaz Lighting Corp. was entered based on a settlement agreement. Order No. 9. An initial determination finding respondent MSi Lighting, Inc. in default was entered on January 31, 2018. Order No. 20.

## **A. The affirmative defenses**

### **1. Feit allegations**

Feit alleged in its eighth affirmative defense that the '399 patent and the '328 patent are unenforceable due to inequitable conduct. Feit alleged that “the inventors and/or others prosecuting the '399 Patent failed to disclose numerous prior-art references cited in U.S. Patent No. 7,064,498” (“the '498 Patent”). Feit Response to the Complaint and Notice of Investigation (“Feit Response”) at 48. Feit said the prior-art references in the '498 patent were not disclosed to the patent office notwithstanding that, among other things, the '399 patent claimed direct priority the '498 patent, and that “at least some” of these references “are material to the claims of the '399 patent.” *Id.* at 48-49. Feit also claimed unenforceability based on the alleged failure to inform the patent office examiner “of the existence of the application that became the '498 patent – which would have been particularly important considering that different Examiners reviewed the two applications.” *Id.* at 49.

Feit claimed further that “the inventors and/or others prosecuting the '328 patent failed to disclose at least one prior art reference that is material to the patentability of the claims of the '328 patent.” Feit pointed to LED Recessed Lighting Fixture, Model No. LR6 (“the LR6 product”), bearing the patent no. 7,213,940. According to Feit, the LR6 product “was cited during the prosecution of at least nine different patents assigned to the various Philips entities.” *Id.* In addition, Feit pointed to several publications allegedly discussing LED lighting fixtures “and/or the LR6.” *Id.*

With respect to patent misuse, Feit alleged in its fifth affirmative defense that “Philips is using this Investigation and the threat of an exclusion order based on the Asserted Patents as a mechanism to coerce Feit Electric to purchase a portfolio license on unfair and unreasonable terms.” *Id.* at 45. Feit alleged that Philips “seeks to overextend its patent rights by initiating

actions against both manufacturers of LED products and downstream customers.” *Id.*

According to Feit, Philips “is only entitled to a single royalty under the doctrine of patent exhaustion.” *Id.* In addition, Feit alleged that Philips uses “its marketplace power and its large lighting patent portfolio . . . to leverage the licensing of such patents whether such patents are valid or not and whether the products and methods of its intended target licensees are within the scope of the claims of the patents-in-suit or not.” *Id.* at 46. Feit alleged further that Philips uses “a list of licensees” on its website to coerce targets “into accepting Philips licenses.” *Id.* Feit alleged that Philips “uses its economic might to bully third parties to accept illegal patent licenses . . . upon the threat of expensive patent litigation . . . with anticompetitive effect.” *Id.* Feit alleged that Philips activities render the asserted patents unenforceable. *Id.* at 47.

Feit alleged further that Philips “knows, or should have known,” that “at least” the ’890 and ’399 patents are invalid. Feit cites as an example a European counterpart of the ’890 patent that was deemed unpatentable over two references. *Id.* Feit alleged that Philips was aware or should have been aware that the ’399 patent was invalid for “obviousness-type double patenting” over certain claims of the ’498 patent. *Id.*

## **2. WAC and Satco allegations**

WAC in its seventh defense alleged patent misuse based on two theories. First, WAC alleged that Philips indiscriminately asserts “its entire EnabLED patent portfolio (directed to old and inapplicable technology) based on allegations of infringement directed to a few broadly written claims that are likely invalid against a broad range of products without actually assessing whether such products actually infringe.” WAC Response to Complaint and Notice of Investigation (“WAC Response”) at 45-46. WAC asserted that “the cost to defend” is Philips’s “key weapon in requesting improper royalty payments.” *Id.* at 47. WAC claimed that Philips “has impermissibly broadened the scope” of its patents “with anticompetitive effect by raising

prices through the imposition of unfair royalties . . . and by forcing parties who refuse to take a license to expend money to defend spurious claims of infringement.” *Id.* at 48.

The second part of WAC’s misuse allegations was based on Philips’s membership in standard-setting organizations. WAC alleged that Philips was involved in the development of certain lighting standards and that, to the “extent any Respondent has infringed any patent claim that by necessity must be practiced in order for the product to be compliant with” the standards, “Respondent has the irrevocable right to a license on standard (reasonable) and non-discriminatory terms.” *Id.* at 49. WAC alleged that, “By filing the Complaint in the ITC without making such a license available to” WAC, Philips has committed patent misuse and its claims are barred. *Id.*

Satco’s seventh and eighth affirmative defenses echoed the allegations made by WAC with respect to patent misuse. Satco Verified Response to the Complaint and Notice of Investigation (“Satco Response”) at 90-93.

#### **B. The motion to strike**

In its Motion, Philips says that the defenses “across the board” are made on information and belief, are not sufficiently specific, and fail “to address critical elements” of the alleged defenses. Motion at 2. Philips asserts that inequitable conduct must be pled with “a higher level of specificity than general defenses,” and patent misuse, “as an affirmative defense, must be pled with ‘as much specificity as possible.’” Philips’s Reply Br. at 1.

Specifically with regard to inequitable conduct and the ’399 patent, Philips says Feit failed to identify which prior art references were not disclosed, to “make any allegation as to if or how those references were relevant,” or explain their ‘but-for’ materiality.” *Id.* at 2. Philips says Feit disclosed almost 600 references in Appendix B to its response, without specifying which references were “material to any claim of the ’399 patent.” *Id.* at 3. Regarding the ’328 patent,

Philips alleges that Feit did not explain “how the LR6 product anticipates or renders obvious any claim.” *Id.* at 2-3, 4. Philips says Feit failed to make any allegation at all that the inventors and/or others acted with specific intent to deceive the patent office. *Id.* at 3.

Concerning the defense of patent misuse, Philips states that Feit “identified no anti-competitive effect, no relevant market, and in general, no details regarding its allegations” that Philips coerces licenses on unfair and unreasonable terms. Motion at 8-9. Philips says that Feit, Satco and WAC have not identified “any actual anti-competitive effects” from Philips’s licensing practices. *Id.* at 9. Regarding Philips’s participation in standards-setting organizations, Philips states that the respondents “failed to identify which asserted patents are relevant to which standards.” *Id.*

Philips says the respondents have not alleged facts that would constitute patent misuse *per se*, and they must therefore allege a “rule-of-reason misuse defense.” *Id.* at 10-11. Philips identifies three elements under the rule of reason doctrine: (1) whether the patentee has leveraged the patent beyond the scope of the rights grant under the Patent Act; (2) whether the conduct alleged extends the patentee’s statutory rights with an anticompetitive effect; and (3) whether the conduct alleged imposes an unreasonable restraint on competition. *Id.* at 11-12. Philips says the respondents have not alleged facts needed to plead these required elements sufficiently.<sup>2</sup> Philips asserts, “[T]he failure to sufficiently plead anticompetitive effects alone warrants striking the patent misuse defense.” *Id.* at 14. Philips argues that the respondents’ allegations concerning Philips’s involvement in standards-setting organizations fail to provide notice of their patent

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<sup>2</sup> Some of Philips’s arguments address the merits of Respondents’ defenses and would be more appropriate in a motion for summary determination rather than a motion to strike. *See* Motion at 13-14 (“Feit’s generic allegations are unsupported by any proof . . .”).

misuse theory because there is no specific connection alleged between particular patent claims and particular standards. *Id.*

### **C. The oppositions**

In its opposition, Feit claims that it “need only allege facts from which the Court could reasonably infer that the patent applicant made a deliberate decision to deceive the PTO regarding a known material reference.” Feit Opp. at 1 (citing *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1328-29 (Fed. Cir. 2009)). Feit says it is too early to require more specific facts. Feit says there is no prejudice to Philips as a result of the absence of specific detail in its affirmative defenses. If the defenses are found to be pled without sufficient detail, Feit asks for leave to supplement in an amended response. *Id.* at 2.

Feit contends that there is no need for a party to plead all the facts in its responses and that affirmative defenses need only meet the requirements of Fed. R. Civ. P. 8(c). According to Feit, a party’s pleadings “must provide fair notice that a patent-holder has impermissibly broadened the scope of the patent in a manner which has caused an anticompetitive effect.” *Id.* at 3 (quoting *Beco Dairy Automation, Inc. v. Global Tech. Sys., Inc.*, 2015 WL 9583012 at \*2 (E.D. Cal. 2015)). Feit cites several district court cases for the proposition that it need only “flag to the complainant what facts are being considered,” and that “an allegation that the patentee was enforcing a patent it knew was invalid, unenforceable, and/or not infringed was all that was required to maintain a patent misuse defense at the pleading stage.” *Id.* at 4.

Feit states that it provided “two specific examples of asserted patents that are invalid, how they are invalid, and how Philips Lighting knows of their invalidity.” *Id.* at 6. Feit points to “a detailed account” of an EPO opposition proceeding of a European counterpart of the ’890 Patent (EP 1459599).” *Id.* Philips allegedly continued to assert the claims of the ’890 patent, “despite knowing that they are unpatentable” and this “constitutes patent misuse,” Feit says. *Id.*

Another example, according to Feit, is that Philips continues to assert the '399 patent despite knowing that its subject matter overlaps with the '498 patent and presents issues of obviousness-type double-patenting. *Id.* at 6-7.

Feit says its response sufficiently describes the alleged inequitable conduct because it identified a “finite and clearly defined set of people,” *i.e.*, the “named inventors and prosecuting counsel” of the '328 patent. *Id.* at 12. Similarly, Feit maintains that its identification of the LR6 product is sufficient to sustain its argument that an examiner would have used the LR6 reference to invalidate the application for the '328 patent, and that a more particularized showing that the product is material to patentability was not required. *Id.* at 13. Feit says specific intent “to commit inequitable conduct may be inferred from indirect and circumstantial evidence.” *Id.* at 14 (citing *Ohio Willow Wood co. v. Alps South, LLC*, 735 F.3d 1333, 1351 (Fed. Cir. 2013)). Feit states that it should be permitted, in the alternative, to amend its pleadings. *Id.* at 17-18.

With respect to alleged patent misuse, Feit asserts that Philips’s licensing practices are not within the grant of the asserted patents and are “inherently anticompetitive.” *Id.* at 7. Feit alleges that Philips is using its patents to acquire a monopoly and that its activities are not protected by 35 U.S.C. § 271(d). *Id.* at 8. Feit maintains that the facts necessary to undertake a rule of reason analysis need not be included at the pleading stage. *Id.* Feit maintains it is entitled to discovery before the sufficiency of its allegations of patent misuse may be dismissed.

WAC’s opposition is limited to the defense of patent misuse. WAC argues that it is entitled to take discovery before its defense is stricken.<sup>3</sup> WAC says it has provided all the

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<sup>3</sup> WAC argues that motions to strike should be denied unless “it is certain that the defense would fail despite any facts which could be proved in support of it.” *Opp.* at 2 (citations omitted) (internal quotation marks omitted). If WAC’s argument were to prevail, no defenses ever could be stricken at the pleadings stage, a result that is contrary to law. *See Bausch & Lomb, Inc. v. Allergan, Inc.*, 136 F.Supp.2d 166, 171 (S.D.N.Y. 2001) (“That is not to say that [] a claim of



information it has concerning alleged impermissible broadening of patent scope and anticompetitive effects. *Id.* at 5-6. Like Feit, WAC says it need not plead the elements of an antitrust violation to establish patent misuse. *Id.* at 7-8 (citing *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1372 (Fed. Cir. 1998)).<sup>4</sup> With regard to the defense that Philips has violated its obligations to standards-setting organizations, WAC argues that its allegations are sufficient because Philips “effectuated the formulation of a standard that incorporated the claims of the asserted patents.” *Id.* at 10-11.

## II. DISCUSSION

### A. Inequitable conduct

The Federal Circuit requires that inequitable conduct be pled with particularity, in accordance Fed. R. Civ. P. 9(b). *Exergen Corp. v. Wal-Mart Stores*, 575 F.3d 1312, 1327-31 (Fed. Cir. 2009). “Rule 9(b) requires identification of the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO.” *Exergen*, 575 F.3d at 1327. This rule assures “that only viable claims alleging fraud or mistake are allowed to proceed to discovery.” *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1310 (Fed. Cir. 2011). The rationale for precluding parties from making general allegations of inequitable conduct is

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patent misuse could never be facially insufficient . . . .”) (citing *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997)). Moreover, while motions to strike are disfavored in the federal courts, an affirmative defense should be stricken “when it is insufficient on the face of the pleadings.” 2 James Wm. Moore *et al.*, Moore’s Federal Practice ¶ 12.37[4] (3d ed. 2017). Further, the decision to grant a motion to strike “will be overturned on appeal only for an abuse of discretion,” and striking “an insufficient defense” is permissible, even *sua sponte*, “especially ‘where doing so advances the progress of litigation.’” *Id.* at ¶ 12.37[1] (citing Fed. R. Civ. P. 12(f)(1) (citations omitted)). In addition, Commission Rule 210.13(b) imposes a requirement on a party pleading affirmative defenses that is not found in the federal rules; thus, any analogy to federal practice in this regard is necessarily imperfect. 19 C.F.R. § 210.13(b).

<sup>4</sup> *Bard* does not excuse the requirement to plead anticompetitive effect in order to make out the affirmative defense of patent misuse. See 157 F.3d at 1372; discussion *infra*.

clear: “By eliminating insufficient pleadings at the initial stage of litigation, rule 9(b) prevents” parties from “using discovery as a fishing expedition.” *Id.* (citing *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009)). Permitting inequitable conduct claims “to proceed without meeting the particularity requirement of rule 9(b) would sanction discovery and adjudication for claims that do little more than speculate that the defendant engaged in” such conduct. *Id.* at 1311; *accord, e.g., Dura Operating Corp. v. Magna Int’l*, No. 10-11566, 2011 WL 869372 at \*13 (E.D. Mich. 2011) (“The Federal Circuit in *Exergen* has made it more difficult for parties to plead inequitable conduct claims and thereby be entitled to discovery on facts relevant to inequitable conduct.”).

Feit fails to allege necessary facts with specificity. Feit’s allegations that unnamed inventors or others did not bring material information to the attention of the patent examiner merely set forth possible grounds for finding inequitable conduct, without specifically identifying the culpable conduct or the person who engaged in it, much less circumstances from which specific intent could be inferred. Specific factual allegations concerning the who, what, when, where, and how are missing. Accordingly, Feit’s affirmative defense of inequitable conduct will be stricken.

### **B. Patent misuse**

Patent misuse requires that “the alleged infringer show that the patentee has impermissibly broadened the “physical or temporal scope” of the patent grant with anticompetitive effect.” *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 868 (Fed. Cir. 1997) (quoting *Windsurfing Int’l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1001 (Fed. Cir., *cert denied*, 477 U.S. 905 (1986)), *cert. denied*, 525 U.S. 815 (1998)). The doctrine is narrow in scope and “has largely been confined to a handful of specific practices by which the patentee seemed to be trying to “extend” his patent grant beyond its statutory limits.” *Princo Corp. v. Int’l Trade*

*Comm'n.*, 616 F.3d 1318, 1329 (Fed. Cir. 2010) (quoting *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 510 (7th Cir. 1982)). Patent misuse consists of leveraging “the power of a patent to exact concessions from a licensee that are not fairly within the ambit of the patent right.” *Id.* at 1333.

In addition to the judicial limitations on the doctrine of patent misuse, Congress in section 271(d) of the Patent Act has enumerated five types of activities that cannot be deemed misuse. As construed by the Federal Circuit, section 271(d) confines patent misuse “with respect to certain licensing practices, to conduct having anticompetitive effects.” *Id.* at 1330.<sup>5</sup> The anticompetitive effects must be related to the patent in suit. *Id.* at 1331. They must be shown to squeeze out “viable potential” competition from the relevant market. *Id.* at 1334, 1337.

The courts have divided the defense of patent misuse into three categories: (1) tying arrangements, “in which a patentee conditions a license under the patent on the purchase of a separable, staple good,” which are *per se* anticompetitive, (2) practices protected under 35 U.S.C. § 271(d)(3), which cannot constitute patent misuse, and (3) “a third set of practices that fall somewhere in the middle.” *Bausch & Lomb, Inc. v. Allergan, Inc.*, 136 F.Supp.2d 166, 169 (S.D.N.Y. 2001) (citing *Virginia Panel*, 133 F.3d at 869). The practices alleged by the respondents in this case fall into the middle category. *See U.S. Philips Corp. v. Int’l Trade Comm’n*, 424 F.3d 1179, 1187-88 (Fed. Cir. 2005) (concluding that “a pure patent-to-patent tying arrangement,” as opposed to a patent-to-product tying arrangement, is not *per se* unlawful.) The distinction between an arrangement that is *per se* unlawful and an arrangement subject to the

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<sup>5</sup> In amending section 271(d) in 1988, “Congress was concerned about the open-ended scope of the doctrine [of patent misuse] and sought to confine it to anticompetitive conduct by patentees who leverage their patents to obtain economic advantages outside the legitimate scope of the patent grant.” *Princo*, 616 F.3d at 1331.

rule of reason is that the latter “does not compel the licenses to use any particular technology covered by any of the licensed patents.” *Id.* at 1188.

Under the rule of reason analysis, the Federal Circuit looks to antitrust principles to determine whether particular licensing arrangements restrain competition. *Princo*, 616 F.3d at 1335-36; *U.S. Philips*, 424 F.3d at 1185. The Federal Circuit has held that package licensing arrangements do not constitute patent misuse unless, under the rule of reason, they broaden the scope of the patent by imposing “an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature and effect.” *Id.* at 1197-98 (quoting *Virginia Panel*, 133 F.3d at 869 (quoting *State Oil Co. v. Khan*, 522 U.S. 3 (1997))).

Feit’s only allegation concerning anticompetitive effect is asserted in its response, in which Feit states: “Feit Electric is informed and believes, and based thereon, alleges that Philips uses its economic might to bully third parties to accept illegal patent licenses of the patents-in-suit, among others, upon the threat of expensive patent litigation. In doing so, Philips Lighting broadens the scope of the patent grant with anticompetitive effect.” Feit Response at 46. WAC’s response does not contain even Feit’s barebones allegation of anticompetitive effect. Satco claims only that “Complainants require licensees to pay royalties for the entire portfolio, regardless of whether products infringe with improper anti-competitive effect.” Satco Response at 91. The respondents make no specific factual allegations concerning how the market has been restrained. Feit claims that the matters relating to this affirmative defense are within the knowledge of Philips, *see* Feit Opp. at 9, but Feit provides no reason to support the assertion that facts concerning relevant market conditions are unavailable to respondents. Feit’s argument that

Philips's practices are "inherently anticompetitive," Feit Opp. at 7, conflicts with the case law, as discussed above.

Satco claims patent misuse on the ground that Philips was "involved with setting standards, standard-setting bodies, committees related to the subject matter of the Asserted Patents." Satco Response at 92. Satco identifies several standard setting organizations ("SSOs") and industry standards. *Id.* Satco alleges further: "To the extent that Complainants, through their infringement allegations in this Investigation, are interpreting the Asserted Patents to cover standards or specifications promulgated by the above SSOs, governmental agencies, or other organizations, or any other standards or specifications in which Complainants participated in the drafting of, Complainants' present claims are barred by the equitable doctrine of patent misuse." *Id.* This is the entirety of the information provided in Satco's response, which identifies no particular patents, no particular standards to which those patents are relevant, no action by Philips declaring those patents to be essential, and no allegations that such standards-essential patents are at issue in this investigation. WAC makes the same types of allegations in its eighth defense, claiming that "[t]o the extent that it has infringed a standards-essential patent," it is entitled to a license on reasonable and non-discriminatory terms ("RAND") and Philips's claims are barred. *See* WAC Response at 47. No specific information as to any particular asserted patent in relation to any particular standard is provided, contrary to the representation in WAC's opposition that "much more than" a contingent claim based upon the mere possibility of patent misuse was alleged. WAC Opp. at 10 (citing WAC Response at ¶¶17-18).

Some federal courts have held that allegations of patent misuse based on a complainant's failure to offer a license to a standards essential patent on reasonable terms can give rise to counterclaims and affirmative defenses. *See, e.g., Multimedia Patent Trust v. Apple Inc.*, No. 10-

CV-2618-H (KSC), 2012 WL 6863471 at \*21-23 (S.D. Cal. 2012) (affirmative defense); *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-CV-178-bbc, 2011 WL 7324582 (W.D. Wis. 2011) (counterclaim). In *Multimedia*, the court held that allegations of “standards setting organizations estoppel,” as well as “patent misuse and unclean hands,” could proceed to trial. *Id.* In *Apple*, the court found that a counterclaim based on standards-essential patents was sufficient to state a claim under Rule 12(b)(6), but appeared to proceed under a breach of contract theory rather than patent misuse. *See Id.* at \*9. I have not been directed to any decision of the Commission recognizing a defense of patent misuse based on failure to offer a RAND license to an alleged infringer of a standards-essential patent.

Even assuming, for the sake of argument, that the circumstances generally alluded to by WAC and Satco could constitute an affirmative defense of patent misuse, the respondents have failed to plead sufficient facts to satisfy Rule 210.13(b). Commission Rule 210.13(b) states: “Affirmative defenses shall be pleaded with as much specificity as possible in the response.” 19 C.F.R. § 210.13(b). The respondents’ affirmative defenses lack factual content. If the respondents learn facts that would enable them to plead an affirmative defense of patent misuse based on standards essential patents, they can move for leave to amend their responses. But at this stage, their pleadings with respect to SSOs are inadequate to sustain the alleged affirmative defense. In addition, as discussed above, the respondents’ pleadings contain no allegations of facts relating to anticompetitive effect.

### **C. Leave to re-plead**

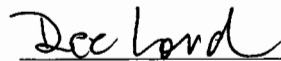
Respondents seek leave to re-plead their affirmative defenses in the event they are deemed insufficient. WAC Opp. at 10, n. 4 (seeking leave to re-plead the same facts under a different equitable defense). The parties provide no convincing reason why such leave should be granted at this time. Respondents have not shown that alternative theories or additional facts

could not have been included in their original responses. Respondents' blanket request for leave to re-plead these affirmative defenses therefore is denied. When and if such defenses can be pled with the specificity required under *Exergen* and Rule 210.13(b), Respondents may seek leave to file supplemental responses.

### **III. CONCLUSION**

For the foregoing reasons, Complainants' motion to strike respondents inequitable conduct and patent misuse defenses (Motion Docket No. 1081-006) is GRANTED, and Respondents' request to re-plead is DENIED at this time.

**SO ORDERED.**



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Dee Lord  
Administrative Law Judge

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served upon the following parties as indicated, on 2/20/2018



Lisa R. Barton, Secretary  
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**CERTAIN LED LIGHTING DEVICES, LED POWER  
SUPPLIES, AND COMPONENTS THEREOF**

**Inv. No. 337-TA-1081**

Certificate of Service – Page 2

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Feit Electric Company, Inc. (China):**

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- Via Express Delivery
- Via First Class Mail
- Other: \_\_\_\_\_