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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 FOOTBALANCE SYSTEM INC. and  
12 FOOTBALANCE SYSTEM OY,  
13 Plaintiffs,  
14 v.  
15 ZERO GRAVITY INSIDE, INC., et al.,  
16 Defendants.  
17

Case No.: 15-CV-1058 JLS (DHB)

**ORDER ON MOTION TO STRIKE**

(ECF No. 59)

18 Presently before the Court is Plaintiffs’ Motion to Strike Defendants’ Affirmative  
19 Defenses. (“MTS,” ECF No. 59.) Also before the Court are Defendants’ Response in  
20 Opposition to Plaintiffs’ MTS, (“Opp’n,” ECF No. 65), and Plaintiffs’ Reply in Support of  
21 their MTS, (“Reply,” ECF No. 66). The Court vacated the hearing on the matter and took  
22 the motion under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1).  
23 (ECF No. 67.) After considering the parties’ arguments and the law, the Court rules as  
24 follows.

25 **LEGAL STANDARD**

26 Rule 12(f) provides that the court “may strike from a pleading an insufficient defense  
27 or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f).  
28 “The function of a 12(f) motion to strike is to avoid the expenditure of time and money that

1 must arise from litigating spurious issues by dispensing with those issues prior to trial . . . .”  
2 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quoting *Fantasy,*  
3 *Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517  
4 (1994)). Accordingly, “[a] defense may be struck if it fails to provide ‘fair notice’ of the  
5 basis of the defense.” *Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1048 (N.D.  
6 Cal. 2004); *see also Wyshak v. City Nat’l Bank*, 607 F.2d 824, 826 (9th Cir. 1979).

7 “Motions to strike are ‘generally disfavored because they are often used as delaying  
8 tactics and because of the limited importance of pleadings in federal practice.’” *Cortina v.*  
9 *Goya Foods, Inc.*, 94 F. Supp. 3d 1174, 1182 (S.D. Cal. 2015) (quoting *Rosales v. Citibank,*  
10 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001)). “[M]otions to strike should not be granted  
11 unless it is clear that the matter to be stricken could have no possible bearing on the subject  
12 matter of the litigation.” *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339  
13 (N.D. Cal. 1991). “When ruling on a motion to strike, this Court ‘must view the pleading  
14 under attack in the light most favorable to the pleader.’” *Id.* (citing *RDF Media Ltd. v. Fox*  
15 *Broad. Co.*, 372 F. Supp. 2d 556, 561 (C.D. Cal. 2005)).

16 Finally, this Court recently held that the *Twombly* and *Iqbal* pleading standard  
17 applies to affirmative defenses. *Rahman v. San Diego Account Service*, No. 16CV2061-  
18 JLS (KSC), 2017 WL 1387206 (S.D. Cal. Apr. 18, 2017). While the Court acknowledged  
19 that district courts are split on the issue, it ultimately determined that *Wyshak*’s “fair notice”  
20 standard, which relied on the sole case of *Conley v. Gibson*, 355 U.S. 41 (1957), had  
21 necessarily been abrogated by the Supreme Court’s decisions in *Twombly* and *Iqbal*. *Id.* at  
22 \*2. “Accordingly, ‘fair notice’ necessarily now encompasses the ‘plausibility’ standard;  
23 whatever standard ‘fair notice’ previously encompassed no longer exists.” *Id.* Thus, the  
24 Court here reviews Defendants’ affirmative defenses for plausibility.

## 25 ANALYSIS

26 Plaintiff seeks to strike Defendants’ Second Affirmative Defense of Invalidity,  
27 Fourth Affirmative Defense of Equitable Doctrines, Seventh Affirmative Defense of  
28 Inadequate Pre-Suit Investigation, Eighth Affirmative Defense of Inequitable Conduct, and

1 Ninth Affirmative Defense of Fraud on the United States Patent and Trademark Office  
2 (“USPTO”). (*See generally* MTS.) The Court considers each in turn.

3 **I. Second Affirmative Defense of Invalidity**

4 Defendants’ second affirmative defense of invalidity alleges: “One or more claims  
5 of the ’433 patent and ’589 patent are invalid for the failure to satisfy the preconditions of  
6 patentability set forth in 35 U.S.C. §§ 101, 102, 103, 112, and/or 116.” (MTS 7–8<sup>1</sup> (citing  
7 Def. Zero Gravity Inside, Inc.’s (“ZGI”) Ans. 9, ECF No. 54).) Plaintiffs argue that this  
8 assertion fails to place Plaintiffs on notice of the particular factual or legal basis for this  
9 alleged defense. (*Id.* at 8.)

10 The Court agrees. As discussed above, in the absence of binding authority to the  
11 contrary, the Court applies the *Twombly/Iqbal* standard to Defendants’ pleading of their  
12 affirmative defenses. The Court previously explained that

13  
14 [s]ince *Twombly* and *Iqbal*, district courts in the Ninth Circuit have come to  
15 differing conclusions regarding whether those cases necessitate a different  
16 interpretation of *Wyshak*’s “fair notice” standard. *See, e.g., J & J Sports*  
17 *Prods., Inc. v. Scace*, No. 10CV2496-WQH-CAB, 2011 WL 2132723, at \*1  
18 (S.D. Cal. May 27, 2011) (discussing split). Ultimately, this Court agrees with  
19 the numerous district courts that have concluded the *Twombly* and *Iqbal*  
20 “plausibility” standard applies with equal force to the pleading of affirmative  
21 defenses. Although there is a valid question as to whether the logic of  
22 *Twombly* and *Iqbal*—rendered in the context of Rule 8(a)—applies with equal  
23 force to Rule 8(c) governing affirmative defenses, this Court concludes that  
24 *Wyshak* compels application of the plausibility standard to pleading  
25 affirmative defenses. Specifically, the only case *Wyshak* cited to support its  
26 “fair notice” standard is *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957),  
27 *Wyshak*, 607 F.2d at 827, and *Conley* has since been abrogated insofar as it  
permitted pleading at a standard lower than *Twombly*’s plausibility standard,  
*see Twombly*, 550 U.S. at 555, 560–61 (citing *Conley* for “fair notice” rule  
statement immediately prior to articulating “plausibility” standard and  
expressly abrogating *Conley*’s “no set of facts” language). Accordingly, “fair  
notice” necessarily now encompasses the “plausibility” standard; whatever

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28 <sup>1</sup> Pin citations to docketed material refer to the CM/ECF numbers electronically stamped at the top of each page.

1 standard “fair notice” previously encompassed no longer exists. *E.g.*, *Madison*  
2 *v. Goldsmith & Hull*, No. 5:13-CV-01655 EJD, 2013 WL 5769979, at \*1  
3 (N.D. Cal. Oct. 24, 2013); *Gonzalez v. Heritage Pac. Fin., LLC*, No. 2:12-  
4 CV-01816-ODW, 2012 WL 3263749, at \*2 (C.D. Cal. Aug. 8, 2012); *Perez*  
5 *v. Gordon & Wong Law Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL  
6 1029425, at \*6–8 (N.D. Cal. Mar. 26, 2012).

7 *Rahman*, 2017 WL 1387206, at \*2; *see also Malibu Media, LLC v. Peterson*, No. 16-CV-  
8 786 JLS (NLS), 2017 WL 1550091, at \*3 (S.D. Cal. May 1, 2017) (applying the  
9 *Twombly/Iqbal* standard to pleading affirmative defenses). Although Defendants urge the  
10 Court to reverse course, (Opp’n 10–11), the Court will not do so based simply on non-  
11 binding caselaw that predates this Court’s *Rahman* decision. (*See id.* (citing *Kohler v.*  
12 *Staples the Office Superstore, LLC*, 291 F.R.D. 464, 468 (S.D. Cal. 2013).)

13 To be sure, Defendants attempt to distinguish *Rahman* in their efforts to avoid  
14 applicability of the *Twombly/Iqbal* pleading standards to their affirmative defenses. They  
15 first argue that “the clear distinguishing point” is that *Rahman* did not involve patent  
16 infringement claims. (Opp’n 11.) But there is nothing inherently clear about that. Nor do  
17 Defendants explain why that difference matters, much less why it *clearly* matters. To the  
18 contrary, this Court—and others—have recently held that *Twombly/Iqbal* applies, for  
19 example, to complaints for patent infringement. *See, e.g., Scripps Research Inst. v.*  
20 *Illumina, Inc.*, No. 16-CV-661 JLS (BGS), 2016 WL 6834024, at \*5 (S.D. Cal. Nov. 21,  
21 2016) (explaining that *Twombly/Iqbal* apply to pleading patent infringement claims);  
22 *Footbalance Sys. Inc. v. Zero Gravity Inside, Inc.*, No. 15-CV-1058 JLS (DHB), 2016 WL  
23 5786936, at \*3 (S.D. Cal. Oct. 4, 2016) (same and further noting that the Court “is not  
24 convinced that holding [plaintiff’s] complaint for patent infringement to the same standard  
25 as nearly every other civil action filed in federal court would be unjust or impracticable”).

26 Defendants’ argument that the Patent Local Rules obviate the need for plausible  
27 pleadings is a bit stronger, but still fails to carry the day. Specifically, Defendants argue  
28 that Patent Local Rule 3.3 addresses the timing for the disclosure of factual support for an

1 affirmative defense. (Opp’n 11–12.) That is partially true, but Defendants’ characterization  
2 is misleading. Specifically, Defendants are right that Patent Local Rule 3.3, titled  
3 “Invalidity Contentions,” requires each party opposing a claim of patent infringement to  
4 serve its invalidity contentions, which, among other things, contain the party’s factual  
5 support and legal arguments that a patent is invalid.

6 But Defendants are wrong that Patent Local Rule 3.3 “addresse[s] the timing for the  
7 disclosure of factual support for an affirmative defense.” (Opp’n 11–12 (emphasis added);  
8 *see also id.* at 12 n.2 (“This Court’s Local Patent Rule 3.3 sets forth the time in which  
9 Defendants must detail facts to support an affirmative defense. Through the motion to  
10 strike, Plaintiffs attempt to impose a different schedule on Defendants to set forth their  
11 invalidity theories, which is plainly inconsistent with this Court’s Rules.”).) As an initial  
12 matter, Patent Local Rule 3.3 does not reference a party’s pleading obligations, much less  
13 specifically address the time to disclose factual support for the same. So Defendants’  
14 argument is wrong on its face.

15 Furthermore, even if it did, these Patent Local Rules cannot supplant the Supreme  
16 Court’s directives in *Twombly/Iqbal*, which clarified the pleading standards under the  
17 Federal Rules of Civil Procedure. *See, e.g.*, Fed. R. Civ. P. 83(a)(1) (noting that a local rule  
18 must be consistent with federal statutes and rules adopted under 28 U.S.C. §§ 2072 and  
19 2075). In other words, Defendants are bound by the pleading standards announced in  
20 *Twombly* and *Iqbal*, regardless of what a local rule says.

21 Finally, the requirements of pleading under *Twombly* and *Iqbal* and the information  
22 contained in invalidity contentions under Patent Local Rule 3.3 are separate and not  
23 inconsistent. The Court does not here suggest that Defendants’ affirmative defenses must  
24 contain the same depth of analysis and factual support required by this District’s local rules.  
25 All that *Twombly* and *Iqbal* require is plausibility. As the Court previously explained when  
26 discussing a similar argument made as to the Patent Local Rules governing infringement  
27 contentions:  
28

1 [T]he Court’s holding does not require a patentee to plead with the specificity  
2 required in its infringement contentions, which Plaintiff seems to suggest.  
3 (Opp’n 5, ECF No. 23.) As Plaintiff explains, its infringement contentions  
4 “will provide information concerning how each limitation of the asserted  
5 claims [*is*] met by the accused products.” (*Id.* (emphasis added).) Here,  
6 however, Plaintiff must simply provide sufficient factual allegations  
7 concerning how each limitation of the asserted claims is *plausibly* met by the  
8 accused products. *See e.Digital*, 2016 WL 4427209, at \*4 (“To require a  
9 patentee to plausibly allege that the accused product practices each of the  
10 limitations in at least one asserted claim should not impose an undue burden  
11 on most plaintiffs, because a patentee is already required to perform an  
12 adequate pre-filing investigation before bringing suit.”) (citation omitted); *see*  
13 *also TeleSign Corp. v. Twilio, Inc.*, No. CV 16-2106 PSG (SSX), 2016 WL  
14 4703873, at \*4 (C.D. Cal. Aug. 3, 2016) (“[I]t is irrelevant at this stage  
15 whether Plaintiff’s allegations are accurate, as the Court accepts all of  
16 Plaintiff’s allegations as true . . . . The Court only requires that Plaintiff  
17 plausibly alleges that a product or products of Defendant infringes on at least  
18 one claim of the [asserted] patent.”).

19 *Scripps*, 2016 WL 6834024, at \*6.

20 Finally, Defendants argue that “[a]lthough not required to do so, [they] have  
21 nonetheless addressed in their proposed amended answers Plaintiffs’ arguments regarding  
22 the invalidity defense” and have ostensibly provided more factual allegations that might  
23 nudge their affirmative defenses from conclusory to plausible. (Opp’n 14.) But the Court  
24 does not here assess the plausibility of Defendants’ proposed amended answers, which are  
25 not the target of Plaintiffs’ Motion to Strike. Defendants will, of course, have an  
26 opportunity to amend their answers to include whatever information they believe will  
27 support their affirmative defenses. And the Court may have occasion to assess their  
28 plausibility should Plaintiffs file another motion to strike. But that would be a question for  
another day. Today the Court simply concludes that Defendants’ affirmative defense of  
invalidity is conclusory and thus implausible. Accordingly, the Court **GRANTS** this  
portion of Plaintiffs’ Motion to Strike.

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1 **II. Fourth Affirmative Defense of Equitable Doctrines**

2 Defendants’ fourth affirmative defense of equitable doctrines alleges “Plaintiffs are  
3 barred from asserting the patents-in-suit against Zero Gravity, in whole or in part, by the  
4 equitable doctrines of laches, estoppel, unclean hands, and/or waiver.” (MTS 8 (citing Def.  
5 ZGI’s Ans. 9).) Plaintiffs argue the Court should strike this affirmative defense because it  
6 fails to plead any facts to support their alleged equitable defenses. (*Id.*)

7 The Court agrees—without any factual allegations the Court is unable to determine  
8 whether these defenses are plausible. Defendants again argue that they are not subject to a  
9 heightened pleading standard, (Opp’n 14), which the Court again rejects for the reasons  
10 already stated. Defendants also appear to argue that their amended answers will provide  
11 the necessary factual allegations to support these defenses. (*Id.* at 15.) As discussed, the  
12 Court does not here assess the adequacy of Defendants’ proposed amended answers,  
13 focusing instead on what has been filed and what is before the Court. Defendants are now  
14 on notice that their defenses, including these, must include factual allegations sufficient to  
15 make them plausible. Accordingly, the Court **GRANTS** this portion of Plaintiffs’ Motion  
16 to Strike.

17 **III. Seventh Affirmative Defense of Inadequate Pre-Suit Investigation**

18 Defendants’ seventh affirmative defense of inadequate pre-suit investigation alleges  
19 that “Plaintiffs failed to conduct a proper or adequate investigation prior to filing this suit,  
20 for had they done so, they would have recognized that the thermoplastic component of Zero  
21 Gravity’s product does not extend to the metatarsal phalangeal joint of the foot, which is a  
22 claimed element in all claims of Plaintiffs’ patents, as described in the specification of the  
23 asserted patents and as admitted by Plaintiffs before the PTAB.” (*See, e.g.,* Def. ZGI Ans.  
24 10.) Plaintiffs argue the Court should strike Defendants’ defense of an inadequate pre-suit  
25 investigation because the defense “simply states a legal conclusion and fails to inform  
26 Plaintiffs as to the theory underpinning their alleged defense.” (MTS 9.) While Defendants  
27 do not agree with Plaintiffs’ argument, they note that they have removed this defense from  
28 their proposed amended answers, thus rendering moot this issue. (Opp’n 15–16.) Because

1 the Court will grant Defendants an opportunity to amend their answers, which will  
2 presumably exclude this affirmative defense, the Court **DENIES AS MOOT** this portion  
3 of Plaintiffs' Motion to Strike.

4 **IV. Eighth Affirmative Defense of Inequitable Conduct**

5 Defendants' eighth affirmative defense of inequitable conduct alleges that:

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7 Plaintiffs are not entitled to any legal or equitable relief due to their  
8 inequitable conduct before the United States Patent and Trademark Office  
9 regarding the origin and development of Plaintiffs' patents. The asserted  
10 patents, U.S. Patent No. 7,793,433 ("the '433 patent") and U.S. Patent No.  
11 8,171,589 ("the '589 patent"), are unenforceable due to the inequitable  
12 conduct of Erkki Hakkala, the sole named inventor of the asserted patents and  
13 the founder and CEO of Plaintiffs. Mr. Hakkala filed for exceedingly broad  
14 claims covering subject matter that was unquestionably found in prior art that  
15 Mr. Hakkala was aware of at the time the patent applications were filed. Mr.  
16 Hakkala deliberately withheld the existence of this prior art from the United  
17 States Patent & Trademark Office ("USPTO") in order to obtain allowance of  
18 these broad and plainly invalid claims. Mr. Hakkala also violated his duty of  
19 candor by failing to disclose material information to the examiner through the  
20 Information Disclosure Statement.

17  
18 (Def. ZGI Ans. 10.)

19 Plaintiffs argue that this affirmative defense fails to meet the heightened pleading  
20 standard required for pleading inequitable conduct. (MTS 4–7.)

21 "Inequitable conduct resides in failure to disclose material information, or  
22 submission of false material information, with an intent to deceive, and those two elements,  
23 materiality and intent, must be proven by clear and convincing evidence." *Kingsdown Med.*  
24 *Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 872 (Fed. Cir. 1988). Intent and  
25 materiality are separate requirements. *See Therasense, Inc. v. Becton, Dickinson & Co.*,  
26 649 F.3d 1276, 1289–90 (Fed. Cir. 2011). But-for materiality is required to establish  
27 inequitable conduct. *Id.* at 1291–92.

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1 Under Federal Rule of Civil Procedure 9(b), “[i]n alleging fraud or mistake, a party  
2 must state with particularity the circumstances constituting fraud or mistake.” The Federal  
3 Circuit has held that inequitable conduct must be pled with specificity in accordance with  
4 Rule 9(b). *See Ferguson Beauregard/Logic Controls, Div. of Dover Res., Inc. v. Mega Sys.,*  
5 *LLC*, 350 F.3d 1327, 1344 (Fed. Cir. 2003) (“[I]nequitable conduct, while a broader  
6 concept than fraud, must be pled with particularity.”).<sup>2</sup> “[T]o plead the circumstances of  
7 inequitable conduct with the requisite particularity under Rule 9(b), the pleading must  
8 identify the specific who, what, when, where, and how of the material misrepresentation  
9 or omission committed before the PTO.” *Exergen*, 575 F.3d at 1328. A pleading of  
10 inequitable conduct must include sufficient facts from which a court can “reasonably infer  
11 that a specific individual both knew of invalidating information that was withheld from the  
12 PTO and withheld that information with a specific intent to deceive the PTO.” *Delano*  
13 *Farms Co. v. Cal. Table Grape Comm’n*, 655 F.3d 1337, 1350 (Fed. Cir. 2011). “A  
14 reasonable inference is one that is plausible and that flows logically from the facts alleged,  
15 including any objective indications of candor and good faith.” *Exergen*, 575 F.3d at 1329  
16 n.5.

17 Plaintiffs argue that Defendants fail to plead with particularity the who, what, when,  
18 where, and how of the material misrepresentation committed before the USPTO. (MTS 5–  
19 7.) Defendants do not argue that their affirmative defenses, as they currently stand, are  
20 sufficiently pled under this exacting pleading standard. (Opp’n 9.) Rather, Defendants  
21 argue that “as detailed [in their opposition brief], as well as in the proposed amended  
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23 <sup>2</sup> Although procedural matters such as motions to dismiss are typically governed by regional circuit law  
24 rather than Federal Circuit law, the Federal Circuit has expressly held that its law controls over the  
25 question of whether inequitable conduct has been pled with particularity under Rule 9(b). *Central*  
26 *Admixture Pharmacy Servs., Inc. v. Adv. Cardiac Sols., P.C.*, 482 F.3d 1347, 1356 (Fed. Cir. 2007)  
27 (“Whether inequitable conduct has been adequately pled is a procedural matter, but since it bears on an  
28 issue that pertains to or is unique to patent law, we will apply our own law to the question of whether the  
pleadings were adequate.” (internal quotation marks omitted)); *Exergen Corp. v. Wal-Mart Stores, Inc.*,  
575 F.3d 1312, 1326–27 (Fed Cir. 2009) (“[W]e apply our own law, not the law of the regional circuit, to  
the question of whether inequitable conduct has been pleaded with particularity under Rule 9(b).”).

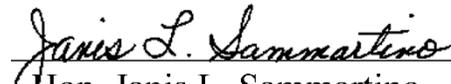
1 answers, the available information regarding . . . inequitable conduct and fraud on the  
2 USPTO is plentiful and more than enough to set forth the defenses.” (*Id.*) Of course, the  
3 Court cannot consider this information in assessing Plaintiff’s Motion to Strike  
4 Defendants’ filed Answers. But Defendants will have an opportunity to amend their  
5 answers to provide this—and other—detail they believe will support a plausible affirmative  
6 defense of inequitable conduct. Accordingly, the Court **GRANTS** this portion of Plaintiffs’  
7 Motion to Strike.<sup>3</sup>

8 **CONCLUSION**

9 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART**  
10 Plaintiffs’ Motion to Strike (ECF No. 59). However, the Court **GRANTS** Defendants  
11 **LEAVE TO AMEND** their answers to address the pleading deficiencies in their  
12 affirmative defenses. Accordingly, Defendants **SHALL FILE** their amended answers on  
13 or before fourteen days from the date on which this Order is electronically docketed.

14 **IT IS SO ORDERED.**

15 Dated: September 5, 2017

16   
17 Hon. Janis L. Sammartino  
18 United States District Judge

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26 <sup>3</sup> The Court also **GRANTS** Plaintiffs’ Motion to Strike Defendants’ ninth affirmative defense of fraud on  
27 the USPTO. Specifically, Plaintiffs’ arguments against this affirmative defense mirror their arguments as  
28 to Defendants’ defense of inequitable conduct. (MTS 4–7.) And Defendants’ response in opposition does  
the same. (Opp’n 9–10.) As discussed, Defendants will have an opportunity to amend their answers to  
include more detail as to their affirmative defense of fraud on the USPTO.