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11
12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION JUDICIAL DISTRICT

15 CERTAINTEED GYPSUM, INC.,

16 Plaintiff,

17 v.

18 PACIFIC COAST BUILDING PRODUCTS,
19 INC. AND PABCO BUILDING
20 PRODUCTS, LLC,

21 Defendants.

CASE NO. _____

**PLAINTIFF'S COMPLAINT FOR
DECLARATORY JUDGMENT**

1 Plaintiff CertainTeed Gypsum, Inc. (“CertainTeed”) brings this action against Pacific
2 Coast Building Products, Inc. (“Pacific Coast”) and Pabco Building Products, LLC (“Pabco”)
3 (collectively, “Defendants”) for a declaratory judgment that the patents at issue are
4 unenforceable and that the claims of the patents at issue are not infringed.

5 INTRODUCTION

6 1. This action concerns Pacific Coast’s inequitable conduct when seeking and
7 obtaining issuance of U.S. Patent Nos. 10,125,492 and 10,132,076 (“the ’492 patent” and “the
8 ’076 patent,” respectively) (collectively the “patents-in-suit”). The ’492 and ’076 patents issued
9 from applications that purport to be a continuation and divisional, respectively, of the application
10 that issued as U.S. Patent No. 9,388,568 (“the ’568 patent”), which has been the subject of prior
11 suits in this District. *See generally* Compl., *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Corp.*,
12 No. 5:17-cv-0116-LHK (N.D. Cal. Mar. 3, 2017) (“2017 N.D. Cal. Action”), Dkt. 1; Compl.,
13 *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal.
14 Jan. 16, 2018) (“2018 N.D. Cal. Action”), Dkt. 1.

15 2. Pacific Coast twice sued CertainTeed in this District for infringement of the ’568
16 patent. CertainTeed provided Pacific Coast with extensive information demonstrating the
17 invalidity of ’568 patent claims based on, among other things, the indefiniteness of “scored
18 flexural strength” claim terms and prior art references such as Unexamined Japanese Patent
19 Application Publication No. 2004-42557 (A) (“Hirata”). For example, CertainTeed provided a
20 44-page declaration of Dr. D. Paul Miller supported by testing and explaining multiple reasons
21 why the claim terms are indefinite. On November 29, 2018, this Court determined that the
22 “scored flexural strength” claim terms are indefinite, relying significantly on Dr. Miller’s
23 declaration. Pacific Coast then stipulated to judgment of invalidity on the basis of the Court’s
24 ruling.

25 3. Pacific Coast then fled this forum and filed a third lawsuit in the Western District
26 of Arkansas (“Arkansas Action”) against CertainTeed Gypsum Manufacturing, Inc. for alleged
27 infringement of the ’492 and ’076 patents. Pacific Coast added Pabco as a co-plaintiff to the
28 Arkansas Action, which Pacific Coast had tried to do in the prior action in this District in order

1 to assert a lost profits damages theory. This Court denied Pacific Coast’s prior request, stating
2 “Two years, the litigation, and you still don’t have the right party for your lost profits theory.
3 Undue delay. It’s not coming in.” Hr’g Tr. 49:9-52:5, *Pac. Coast Bldg. Prods., Inc. v.*
4 *CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Nov. 30, 2018), Dkt. 105.

5 4. Pacific Coast and Pabco have no apparent or alleged connection to the Western
6 District of Arkansas. In contrast, they both have places of business in California, Pabco’s
7 gypsum wallboard manufacturing facility is within this District, in Newark, California, and, as
8 noted above, Pacific Coast previously sued CertainTeed in this District, alleging the same
9 SilentFX QuickCut product infringes the parent patent of the patents-in-suit.

10 5. The ’492 and ’076 patents are children of the ’568 patent, have substantially the
11 same specifications, and have claims that are very similar to the ’568 patent, including claims
12 with “scored flexural strength” terms. These patents, whose applications were originally filed on
13 March 1, 2013, issued on November 13, 2018 and November 20, 2018, respectively. Thus,
14 Pacific Coast prosecuted these patents concurrently with the prior litigation in this
15 District. Indeed, the same outside counsel represented Pacific Coast in the litigation and
16 prosecution—e.g., Jason Mueller and Galyn Gafford of the law firm Sheppard, Mullin, Richter &
17 Hampton LLP.

18 6. The ’492 and ’076 patents are unenforceable due to inequitable conduct. In
19 prosecuting the ’492 and ’076 patents before the Patent Office, Pacific Coast (through its outside
20 counsel) withheld information and made misrepresentations that were material to the
21 patentability of claims in these patents. For example, Pacific Coast failed to disclose to the
22 Patent Office the existence of the litigation in this District, information that this Court relied on
23 in holding that the “scored flexural strength” terms are indefinite (such as Dr. Miller’s
24 declaration), the Hirata prior art reference, CertainTeed’s invalidity contentions, and other
25 material information. In addition, on May 22, 2018, Pacific Coast, and specifically Galyn
26 Gafford, represented to the Patent Trial and Appeal Board that removal of the paper from the
27 inner surfaces of the gypsum boards is “what distinguishes [the then-pending claims in the
28 applications that issued as the ’492 and ’076 patents] from the prior art and I don’t think, and I

1 still haven't seen any prior art that shows these laminated panels made without the interior
2 paper." *See* Record of Oral Hr'g at 6, *Ex parte Brandon D. Tinianov*, Appeal Nos. 2016-03810,
3 2016-03995 (PTAB May 22, 2018). But, prior to this statement to the Patent Office, on April 12,
4 2018, Pacific Coast represented that "Hirata only discloses gluing two of boards together to
5 increase the strength of the board without face paper because otherwise the strength would be
6 inadequate to be used in a traditional manner and discloses that the boards could be glued in
7 other configurations (paper-to-paper or paper-to-exposed) to achieve same results" in its
8 Responses to CertainTeed's Interrogatories served in the prior litigation in this District, which
9 were signed by Galyn Gafford.

10 7. Further, the SilentFX QuickCut product does not infringe these patents for one of
11 the same reasons that it does not infringe the '568 patent—as a result of the manufacturing
12 process used to create SilentFX QuickCut products, there is paper cladding on the inner surface
13 of the gypsum cores.

14 8. Pacific Coast's inequitable conduct and CertainTeed's non-infringement
15 arguments are inextricably intertwined with the litigation in this District and renders the '492 and
16 '076 patents unenforceable and not infringed.

17 NATURE OF THE ACTION

18 9. This action arises under the patent laws of the United States, 35 U.S.C. § 100 *et*
19 *seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

20 THE PARTIES

21 10. Plaintiff CertainTeed is a corporation organized and existing under the laws of
22 Delaware with its corporate headquarters at 20 Moores Road, Malvern, PA 19355.

23 11. On information and belief, Defendant Pacific Coast is a corporation organized
24 under the laws of California with a principal place of business at 10600 White Rock Road,
25 Building B, Suite 100, Rancho Cordova, CA 95670.

26 12. On information and belief, Defendant Pabco is a limited liability company
27 organized under the laws of Nevada with a principal place of business at 10600 White Rock
28 Road, Building A, Suite 150, Rancho Cordova, CA 95670.

1 such, both Jason Mueller and Galyn Gafford had a duty to disclose information that is material to
2 the patentability of the claims that they were requesting that the Patent Office issue. *See*
3 37 C.F.R. § 1.56; Manual of Patent Examining Procedure § 2001.06(c).

4 29. As explained further below, Pacific Coast and its outside counsel, Jason Mueller
5 and Galyn Gafford, did not disclose to the Patent Office the numerous filings, contentions, and
6 fact discovery from the prior actions in this District, which contained information regarding the
7 indefiniteness of the “scored flexural strength” claim terms and the Hirata prior art reference that
8 was and is material to the patentability of the claims in the ’492 and ’076 patents.

9 30. Pacific Coast sued CertainTeed Corporation on March 3, 2017 in the Northern
10 District of California, alleging that the same product at issue in the current litigation, the
11 SilentFX QuickCut product, infringes the ’568 patent. *See Compl., Pac. Coast Bldg. Prods., Inc.*
12 *v. CertainTeed Corp.*, No. 5:17-cv-0116-LHK (N.D. Cal. Mar. 3, 2017), Dkt. 1.

13 31. The ’568 patent, at issue in the 2017 N.D. Cal. Action, is the parent patent of the
14 two patents that that are at issue in this action and that Pacific Coast is asserting in the Arkansas
15 Action—i.e., the ’492 and ’076 patents. The application that issued as the ’492 patent purports
16 to be a continuation of the application that issued as the ’568 patent, and the application that
17 issued as the ’076 patent purports to be a divisional of the application that issued as the ’568
18 patent.

19 32. On April 21, 2017, Pacific Coast filed an Amended Complaint in the 2017 N.D.
20 Cal. Action. *See First Am. Compl., Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*,
21 No. 5:17-cv-0116-LHK (N.D. Cal. Apr. 21, 2017), Dkt. 24. Pacific Coast’s Amended Complaint
22 changed the CertainTeed entity accused of infringement, replacing CertainTeed Corporation with
23 CertainTeed Gypsum, Inc. (“CertainTeed”), the plaintiff in this action.

24 33. On May 5, 2017, CertainTeed answered, asserting affirmative defenses and
25 counterclaims that the ’568 patent claims are invalid because, among other things, the “scored
26 flexural strength” terms in those claims are indefinite. *See Defs.’ Answer, Defenses, &*
27 *Countercls., Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:17-cv-0116-LHK
28 (N.D. Cal. May 5, 2017), Dkt. 34.

1 34. Claims from each of the patents-in-suit in the current action—i.e., the ’492 and
2 ’076 patents—include limitations reciting “scored flexural strength.” *See* ’492 patent, cls. 7 & 8;
3 ’076 patent, cls. 7 & 8.

4 35. On July 28, 2017, CertainTeed wrote to Pacific Coast, explaining why the claims
5 of the ’568 patent were invalid because the “scored flexural strength” terms of the ’568 patent
6 are indefinite. *See* Ex. A to Rives Decl. in Supp. of CertainTeed’s Mot. for Att’y’s Fees, *Pac.*
7 *Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal.
8 Jan. 23, 2019), Dkt. 121-1, 121-2.

9 36. On August 18, 2017, CertainTeed filed a First Amended Answer, Defenses, and
10 Counterclaims in the 2017 N.D. Cal. Action. *See generally* Defs.’ First Am. Answer, Defenses,
11 & Countercls., *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:17-cv-0116-
12 LHK (N.D. Cal. Aug. 18, 2017), Dkt. 56. CertainTeed again pled that the ’568 patent claims are
13 invalid because the “scored flexural strength” terms in those claims are indefinite. CertainTeed
14 also pled, on a limitation-by-limitation basis, that at least claim 21 of the ’568 patent is invalid
15 for anticipation and/or obviousness based on Hirata. *See id.*

16 37. On August 30, 2017, CertainTeed served invalidity contentions on Pacific Coast,
17 which again explained how the “scored flexural strength” terms are indefinite. *See generally*
18 Ex. C to Rives Decl. in Supp. of CertainTeed’s Mot. for Att’y’s Fees, *Pac. Coast Bldg. Prods.,*
19 *Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Jan. 23, 2019) Dkt. 121-1,
20 121-4. These invalidity contentions also explained, on a limitation-by-limitation basis, that
21 claim 21 of the ’568 patent is invalid for anticipation and/or obviousness based on Hirata.

22 38. On September 12, 2017, Pacific Coast and CertainTeed met—at a meeting
23 attended by business representatives, senior in-house counsel, and outside litigation counsel.
24 Pacific Coast’s outside litigation counsel present at this meeting was Jason Mueller, who also is
25 outside counsel for Pacific Coast in the current litigation and was an attorney of record with the
26 Patent Office for prosecution of the applications that issued as the ’492 and ’076 patents.

27 39. During the September 12, 2017 meeting, CertainTeed again explained why the
28 “scored flexural strength” terms in claim 21 of the ’568 patent are indefinite. *See generally*

1 Ex. D to Rives Decl. in Supp. of CertainTeed’s Mot. for Att’ys’ Fees, *Pac. Coast Bldg. Prods.,*
2 *Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Jan. 23, 2019), Dkt. 121-
3 1, 121-5.

4 40. Less than one month after this meeting, on October 3, 2017, Pacific Coast
5 dismissed its claims and CertainTeed, in turn, dismissed its counterclaims without prejudice in
6 the 2017 N.D. Cal. Action. *See* Stip. & Order of Dismissal, *Pac. Coast Bldg. Prods., Inc. v.*
7 *CertainTeed Corp.*, No. 5:17-cv-0116-LHK (N.D. Cal. Oct. 3, 2017), Dkt. 59.

8 41. On January 16, 2018, Pacific Coast refiled its case against CertainTeed in the
9 Northern District of California, again asserting claim 21 of the ’568 patent against the same
10 SilentFX QuickCut product that is at issue in this case. *See* Compl., *Pac. Coast Bldg. Prods.,*
11 *Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Jan. 16, 2018), Dkt. 1.

12 42. On February 13, 2018, CertainTeed answered the complaint in the 2018 N.D. Cal.
13 Action, raising the same affirmative defenses and counterclaims of invalidity, including that the
14 “scored flexural strength” terms are indefinite and that claim 21 of the ’568 patent is anticipated
15 by and/or would have been obvious over Hirata. *See* Defs.’ Ans., Defenses, & Countercls., *Pac.*
16 *Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal.
17 Feb. 13, 2018), Dkt. 32.

18 43. On March 1, 2018, CertainTeed served two interrogatories directed to Pacific
19 Coast’s understanding of the “scored flexural strength” terms. *See* Ex. E (Interrog. Nos. 17 &
20 18) to Rives Decl. in Supp. of CertainTeed’s Mot. for Att’ys’ Fees, *Pac. Coast Bldg. Prods., Inc.*
21 *v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Jan. 23, 2019), Dkt. 121-1,
22 121-6. Another interrogatory requested the basis for Pacific Coast’s contentions, if any, that
23 claim 21 of the ’568 patent is not invalid in light of the prior art, including Hirata.

24 44. On April 12, 2018, Pacific Coast responded to the interrogatory regarding
25 invalidity in light of the prior art stating, in part, that “Hirata only discloses gluing two of boards
26 together to increase the strength of the board without face paper because otherwise the strength
27 would be inadequate to be used in a traditional manner and discloses that the boards could be
28

1 glued in other configurations (paper-to-paper or paper-to-exposed) to achieve same results.”
2 Galyn Gafford signed these interrogatory responses on Pacific Coast’s behalf.

3 45. Pacific Coast’s responses to the interrogatories on “scored flexural strength” were
4 deficient, and CertainTeed sent Pacific Coast several letters requesting supplementation. *See*
5 Exs. F-H to Rives Decl. in Supp. of CertainTeed’s Mot. for Att’ys’ Fees, *Pac. Coast Bldg.*
6 *Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Jan. 23, 2019),
7 Dkt. 121-1, 121-7 – 121-9.

8 46. Although Pacific Coast supplemented its responses to these interrogatories on
9 “scored flexural strength” twice, Pacific Coast failed to address many deficiencies and ultimately
10 stopped responding to CertainTeed’s deficiency letters. *See* Exs. F-H, J to Rives Decl. in Supp.
11 of CertainTeed’s Mot. for Att’ys’ Fees, *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum,*
12 *Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Jan. 23, 2019), Dkt. 121-1, 121-7 – 121-9, 121-11.
13 Pacific Coast took the position that it “had fully complied with its discovery obligation”
14 regarding Interrogatory No. 17, and Pacific Coast stood on its objections to Interrogatory No. 18,
15 deferring its response until “expert opinions” and “the Court’s schedule for claim construction.”
16 *See* Ex. J to Rives Decl. in Supp. of CertainTeed’s Mot. for Att’ys’ Fees, *Pac. Coast Bldg.*
17 *Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Jan. 23, 2019),
18 Dkt. 121-1, 121-11.

19 47. On May 22, 2018, before the Patent Trial and Appeal Board, Galyn Gafford
20 argued an appeal of the examiner’s rejection of then-pending claims in the applications that
21 issued as the ’492 and ’076 patents. Galyn Gafford did not inform the Board during the May 22,
22 2018 hearing that there was pending litigation involving allegations that the “scored flexural
23 strength” terms in the ’568 patent are indefinite or that Hirata anticipated and/or rendered
24 obvious claim 21 of the ’568 patent.

25 48. In fact, Galyn Gafford argued to the Board on May 22, 2018 that removal of the
26 paper from the inner surfaces of the gypsum boards is “what distinguishes [the then-pending
27 claims in the application that issued as the ’492 and ’076 patents] from the prior art and I don’t
28 think, and I still haven’t seen any prior art that shows these laminated panels made without the

1 interior paper.” *See* Record of Oral Hr’g at 6, *Ex parte Brandon D. Tinianov*, Appeal Nos. 2016-
2 03810, 2016-03995 (PTAB May 22, 2018).

3 49. On May 22, 2018, when Galyn Gafford argued to the Board regarding the
4 patentability of the then-pending claims in the applications that later issued as the ’492 and ’076
5 patents, Pacific Coast, Jason Mueller, and Galyn Gafford owed a duty to disclose material
6 information to the Patent Office regarding the patentability of those pending claims.

7 50. On June 18, 2018, CertainTeed provided invalidity contentions to Pacific Coast
8 that again detailed how the “scored flexural strength” terms are indefinite. *See* Ex. K to Rives
9 Decl. in Supp. of CertainTeed’s Mot. for Att’y’s Fees, *Pac. Coast Bldg. Prods., Inc. v.*
10 *CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Jan. 23, 2019), Dkt. 121-1, 121-
11 12. These invalidity contentions also explained, on a limitation-by-limitation basis, that claim 21
12 of the ’568 patent is invalid for anticipation and/or obviousness based on Hirata.

13 51. On July 19, 2018, Pacific Coast, in a submission signed by Galyn Gafford, filed
14 Requests for Continued Examination of the applications that issued as the ’492 and ’076 patents
15 with the Patent Office. The Requests for Continued Examination referred to the decision from
16 the Patent Trial and Appeal Board, made after the May 22, 2018 appeal hearing, and requested
17 that claims, including those reciting “scored flexural strength” limitations, be allowed. The
18 Requests for Continued Examination did not mention that there was pending litigation involving
19 allegations that the “scored flexural strength” terms in the ’568 patent are indefinite or that
20 Hirata anticipated and/or rendered obvious claim 21 of the ’568 patent.

21 52. On July 19, 2018, when Galyn Gafford requested that the Patent Office issue the
22 then-pending claims in the applications that later issued as the ’492 and ’076 patents, Pacific
23 Coast, Jason Mueller, and Galyn Gafford owed a duty to disclose material information to the
24 Patent Office regarding the patentability of those pending claims.

25 53. On July 23, 2018, pursuant to the Northern District of California Patent L.R. 4-2,
26 CertainTeed served claim construction disclosures on Pacific Coast, detailing again why the
27 “scored flexural strength” terms are indefinite. CertainTeed disclosed that its expert, Dr. D. Paul
28 Miller, would testify that the ’568 patent does not provide guidance on how to determine the

1 claimed “scored flexural strength.” *See* Ex. L to Rives Decl. in Supp. of CertainTeed’s Mot. for
2 Att’ys’ Fees, *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-
3 LHK (N.D. Cal. Jan. 23, 2019), Dkt. 121-1, 121-13. CertainTeed notified Pacific Coast that
4 Dr. Miller would testify that the ’568 patent did not provide guidance on at least four specific
5 issues regarding testing for “scored flexural strength.” *See id.*

6 54. On August 17, 2018, Pacific Coast and CertainTeed filed a joint claim
7 construction statement pursuant to N.D. Cal. Patent L.R. 4-3. *See* Joint Claim Constr. & Pre-
8 Hr’g Statement, *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-
9 LHK (N.D. Cal. Aug. 17, 2018), Dkt. 75. CertainTeed submitted a 44-page declaration of
10 Dr. Miller detailing why the “scored flexural strength” terms are indefinite. *See id.*, Dkt. 75-2.
11 Dr. Miller’s declaration included test results showing that the measured “scored flexural
12 strength” varied depending on which of several test methods was used. *See id.*

13 55. Pacific Coast also submitted an expert declaration with the joint claim
14 construction statement. This 4-page report, by Mr. Matthew Risinger, contained only four
15 substantive paragraphs and did not address CertainTeed’s four specific criticisms of the “scored
16 flexural strength” terms. *See id.*, Dkt. 75-1.

17 56. Jason Mueller knew of Dr. Miller’s 44-page declaration regarding the
18 indefiniteness of claims including the “scored flexural strength” terms at least as early as August
19 24, 2018.

20 57. Galyn Gafford knew of Dr. Miller’s 44-page declaration regarding the
21 indefiniteness of claims including the “scored flexural strength” terms at least as early as August
22 24, 2018.

23 58. On August 29, 2018, Pacific Coast, in a submission signed by Galyn Gafford,
24 filed an Amendment and Response in the application that issued as the ’492 patent with the
25 Patent Office. The Amendment and Response provided a complete listing of all pending claims,
26 and requested that claims, including those reciting “scored flexural strength” limitations, be
27 allowed. The Amendment and Response did not mention that there was pending litigation
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1 involving allegations that the “scored flexural strength” terms in the ’568 patent are indefinite or
2 that Hirata anticipated and/or rendered obvious claim 21 of the ’568 patent.

3 59. On August 29, 2018, when Galyn Gafford requested that the Patent Office issue
4 the then-pending claims in the application that later issued as the ’492 patent, Pacific Coast,
5 Jason Mueller, and Galyn Gafford owed a duty to disclose material information to the Patent
6 Office regarding the patentability of those pending claims.

7 60. On September 12, 2018 the Patent Office issued a notice of allowance for the
8 ’076 patent.

9 61. On September 13, 2018 the Patent Office issued a notice of allowance for the
10 ’492 patent.

11 62. On September 17, 2018, outside counsel for Pacific Coast, specifically Galyn
12 Gafford, deposed Dr. Miller regarding his 44-page declaration on the “scored flexural strength”
13 terms.

14 63. On September 24, 2018, CertainTeed wrote to Pacific Coast, noting, among other
15 things, the undeniable evidence in Dr. Miller’s declaration that the “scored flexural strength”
16 terms are indefinite. *See* Ex. M to Rives Decl. in Supp. of CertainTeed’s Mot. for Att’y’s Fees,
17 *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal.
18 Jan. 23, 2019), Dkt. 121-1, 121-14.

19 64. On September 28, 2018, Pacific Coast submitted its Opening Claim Construction
20 Brief, signed by Jason Mueller, in the 2018 N.D. Cal. Action. Galyn Gafford submitted a
21 declaration in support of this brief. Pacific Coast’s opening claim construction brief argued that
22 the “scored flexural strength” terms were definite. Throughout its argument, Pacific Coast cited
23 Dr. Miller’s deposition transcript and the Miller Declaration, and addressed the test results
24 disclosed in the Miller Declaration. *See* Opening Claim Constr. Br., *Pac. Coast Bldg. Prods.,*
25 *Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Sept. 28, 2018), Dkt. 80,
26 80-1.

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1 65. Jason Mueller knew of Dr. Miller’s 44-page declaration regarding the
2 indefiniteness of claims including the “scored flexural strength” terms at least as early as
3 September 30, 2018.

4 66. Galyn Gafford knew of Dr. Miller’s 44-page declaration regarding the
5 indefiniteness of claims including the “scored flexural strength” terms at least as early as
6 September 30, 2018.

7 67. On October 10, 2018, Pacific Coast paid the issue fees for the ’492 and ’076
8 patents.

9 68. On October 10, 2018, when Pacific Coast paid the issue fees for the then-pending
10 claims in the applications that later issued as the ’492 and ’076 patents, Pacific Coast, Jason
11 Mueller, and Galyn Gafford owed a duty to disclose material information to the Patent Office
12 regarding the patentability of those pending claims.

13 69. On October 12, 2018, Pacific Coast and its outside counsel, including at least
14 Galyn Gafford and Jason Mueller, received copies of CertainTeed Gypsum, Inc.’s Responsive
15 Claim Construction Brief and supporting declaration and exhibits that was filed in the 2018 N.D.
16 Cal. Action. CertainTeed Gypsum, Inc.’s brief argued that the “scored flexural strength” terms
17 were definite, citing and quoted from the Miller Declaration. *See* Resp. Claim Constr. Br., *Pac.*
18 *Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Oct.
19 12, 2018), Dkt. 82, 82-1.

20 70. On October 19, 2018, Pacific Coast submitted its Reply Claim Construction Brief,
21 signed by Jason Mueller, in the 2018 N.D. Cal. Action. Pacific Coast’s reply claim construction
22 brief argued that the “scored flexural strength” terms were definite and again addressed
23 Dr. Miller’s test results, declaration, and deposition testimony. *See* Reply Claim Constr. Br.,
24 *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal.
25 Oct. 19, 2018), Dkt. 83.

26 71. On October 24, 2018, Pacific Coast responded to CertainTeed’s letter, failing to
27 address or even attempt to rebut the evidence in Dr. Miller’s declaration on “scored flexural
28 strength.” *See* Ex. N to Rives Decl. in Supp. of CertainTeed’s Mot. for Att’ys’ Fees, *Pac. Coast*

1 *Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Jan. 23,
2 2019), Dkt. 121-1, 121-15.

3 72. On November 12, 2018, prior to the issuance of the '492 patent, Pacific Coast,
4 Jason Mueller, and Galyn Gafford owed a duty to disclose material information to the Patent
5 Office regarding the patentability of the then-pending claims in the application that later issued
6 as the '492 patent.

7 73. The Patent Office issued the '492 patent on November 13, 2018.

8 74. On November 19, 2018, prior to the issuance of the '076 patent, Pacific Coast,
9 Jason Mueller, and Galyn Gafford owed a duty to disclose material information to the Patent
10 Office regarding the patentability of the then-pending claims in the application that later issued
11 as the '076 patent.

12 75. The Patent Office issued the '076 patent on November 20, 2018.

13 76. Following briefing by the parties, on November 29, 2018, this Court held a claim
14 construction hearing in which it addressed indefiniteness of the “scored flexural strength” terms
15 in the '568 patent. *See generally* Hr’g Tr., *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum,*
16 *Inc.*, No. 5:18-cv-00346-LHK (N.D. Cal. Nov. 29, 2018), Dkt. 105. Both Jason Mueller and
17 Galyn Gafford appeared, and Jason Mueller argued, on behalf of Pacific Coast at this hearing.

18 77. Hours after the claim construction hearing, this Court issued its claim construction
19 order, holding that the “scored flexural strength” terms in the '568 patent are indefinite. *See*
20 *Order, Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK
21 (N.D. Cal. Nov. 29, 2018), Dkt. 100.

22 78. This Court concluded that the '568 patent claims and specification do not explain
23 how to measure “scored flexural strength,” relying on Dr. Miller’s declaration, which
24 “confirm[ed] that there is no common understanding in the art of how to measure scored flexural
25 strength.” *Id.* at 16.

26 79. On December 11, 2018, Pacific Coast filed an action in the Western District of
27 Arkansas (“Arkansas Action”) against a new CertainTeed entity, accusing the same SilentFX
28 QuickCut product at issue in both the 2017 and 2018 N.D. Cal. Actions of infringing the '492

1 and '076 patents. Both Jason Mueller and Galyn Gafford are identified as attorneys for Pacific
2 Coast on the Complaint.

3 80. On January 9, 2019, this Court entered a stipulated judgment that claim 21 of the
4 '568 patent is invalid as indefinite based on this Court's claim construction order. *See* Stip. &
5 Judgment, *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-LHK
6 (N.D. Cal. Jan. 9, 2019), Dkt. 119.

7 81. On January 23, 2019, CertainTeed moved for a determination that the California
8 cases were exceptional and an award of attorneys' fees based on Pacific Coast's filing and
9 continued pursuit of a claim for alleged infringement of the '568 patent—including specifically
10 Pacific Coast's meritless and nonresponsive positions regarding indefiniteness of the “scored
11 flexural strength” claim terms. *See generally* Def. CertainTeed's Notice of Mot. & Mot. for
12 Att'ys' Fees, *Pac. Coast Bldg. Prods., Inc. v. CertainTeed Gypsum, Inc.*, No. 5:18-cv-00346-
13 LHK (N.D. Cal. Jan. 23, 2019), Dkt. 121. Pacific Coast responded on February 6, 2019, and
14 CertainTeed Gypsum, Inc. will file its reply on February 20, 2019. A hearing on the motion for
15 attorneys' fees is scheduled before this Court on May 30, 2019.

16 82. On February 6, 2019, Pacific Coast filed a Notice of Appeal in the 2018 N.D. Cal.
17 Action.

18 **Materiality of the Miller Declaration and Litigation Documents that address “scored**
19 **flexural strength”**

20 83. CertainTeed's disclosures and filings demonstrate that the “scored flexural
21 strength” claim terms are indefinite and are material to the patentability of at least claims 7 and 8
22 of the '492 and '076 patents, as each claim includes “scored flexural strength” terms.

23 84. Based at least in part on the Miller Declaration, this Court determined, by clear
24 and convincing evidence, in the 2018 N.D. Cal. Action that the “scored flexural strength” terms
25 in the '568 patent are indefinite.

26 85. The clear and convincing evidence standard used by this Court in the 2018 N.D.
27 Cal. Action is a higher standard than the standard used by the Patent Office when rejecting or
28 issuing patent claims.

1 86. The Miller Declaration contained material information relevant to the pending
2 claims of the application that issued as the '492 and '076 patents, as certain claims include terms
3 reciting “scored flexural strength.”

4 87. Additional filings and correspondence in the 2017 and 2018 N.D. Cal Actions
5 contained material information relevant to the pending claims of the applications that issued as
6 the '492 and '076 patents. As explained above, these filings and correspondence addressed the
7 indefiniteness of the “scored flexural strength” terms.

8 88. On information and belief, the Patent Office would not have allowed the claims
9 in the '492 and '076 patents that include the “scored flexural strength” terms had it been aware
10 of the Miller Declaration and/or the additional filings and correspondence in the 2017 and 2018
11 N.D. Cal. Actions.

12 **Materiality of Hirata and Litigation Documents that address Hirata**

13 89. Hirata and CertainTeed Gypsum Inc.’s disclosures and filings that explain, on a
14 limitation-by-limitation basis, that claim 21 of the '568 patent is invalid for anticipation and/or
15 obviousness based on Hirata are material to at least claim 1 of the '492 and '076 patents, as each
16 claim is very similar to claim 21 of the '568 patent.

17 90. The below chart reproduces claim 21 of the '568 patent, claim 1 of the '492
18 patent, and claim 1 of the '076 patents side-by-side:

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'568 patent claim 21	'492 patent claim 1	'076 patent claim 1
<p>21. A laminated, sound-attenuating structure which comprises:</p> <p>a first gypsum board having two surfaces, the first of said two surfaces comprising an outer, paper-clad surface and the second of said two surfaces comprising an inner surface, wherein the entire inner surface of the first gypsum board is unclad;</p> <p>a layer of viscoelastic glue on the second of two surfaces; and</p> <p>a second gypsum board over said viscoelastic glue, said second gypsum board having two surfaces, the first of said two surfaces of said second gypsum board comprising an outer, paper-clad surface and the second of said two surfaces of said second gypsum board comprising an inner surface, wherein the entire inner surface of the second gypsum board is unclad;</p> <p>a scored flexural strength of the laminated structure is about 22 pounds per ½ inch thickness of the structure;</p> <p>the scored flexural strength being the flexural strength of the laminated structure after the outer, paper-clad surface of one of the first and second gypsum boards has been scored.</p>	<p>1. A laminated building structure, comprising:</p> <p>a first gypsum board having two surfaces, said two surfaces including a first outer clad surface and a first inner unclad surface, wherein the entire inner surface of the first gypsum board is unclad;</p> <p>a first layer of viscoelastic glue placed directly on the first inner unclad surface; and</p> <p>a second gypsum board located proximate to said first layer of viscoelastic glue, said second gypsum board having two surfaces, said two surfaces including a second outer clad surface and a second inner unclad surface, wherein the entire inner surface of the second gypsum board is unclad.</p>	<p>1. A method of foil ling [sic] a laminated, sound-attenuating structure, comprising:</p> <p>forming a first gypsum board having two surfaces, said two surfaces including a first outer clad surface and a first inner unclad surface, wherein the entire inner surface of the first gypsum board is unclad;</p> <p>placing a first layer of viscoelastic glue directly on the first inner unclad surface; and</p> <p>placing a second gypsum board proximate to said first layer of viscoelastic glue, said second gypsum board having two surfaces, said two surfaces including a second outer clad surface and a second inner unclad surface, wherein the entire inner surface of the second gypsum board is unclad.</p>

1 91. As evident from a comparison of the claim language in the chart in Paragraph 90
2 above, references that anticipate and/or render obvious claim 21 of the '568 patent were and are
3 material to the patentability of at least claim 1 of the '492 and '076 patents.

4 92. Galyn Gafford's statement to the Patent Trial and Appeal Board that removal of
5 the paper from the inner surfaces of the gypsum boards is "what distinguishes [the then-pending
6 claims in the applications that issued as the '492 and '076 patents] from the prior art"
7 demonstrates that references that disclose laminated panels without interior paper are material to
8 the patentability of those claims. See Record of Oral Hr'g at 6, *Ex parte Brandon D. Tinianov*,
9 Appeal Nos. 2016-03810, 2016-03995 (PTAB May 22, 2018).

10 93. As explained above, the filings, contentions, and correspondence in the 2017 and
11 2018 N.D. Cal Actions allege, on a limitation-by-limitation basis, that Hirata anticipates and/or
12 renders obvious claim 21 of the '568 patent.

13 94. Given the similarity of at least claim 1 of the '492 and '076 patents and claim 21
14 of the '568 patent, the Hirata reference and the filings, contentions, and correspondence in the
15 2017 and 2018 N.D. Cal Actions contained information material to patentability of the pending
16 claims of the applications that issued as the '492 and '076 patents. As explained above, Hirata
17 discloses, and these filings, contentions, and correspondence explain that Hirata discloses, under
18 Pacific Coast's construction of the claims, a laminated gypsum wallboard structure where the
19 inner surfaces of the gypsum boards are exposed.

20 95. On information and belief, the Patent Office would not have allowed the claims
21 in the '492 and '076 patents had it been aware of Hirata, and/or the filings, contentions, and
22 correspondence in the 2017 and 2018 N.D. Cal. Actions that explain Hirata's disclosures.

23 **Individuals with a duty to disclose material information to the Patent Office**

24 96. Each individual associated with the filing and prosecution of a patent application
25 has a duty of candor and good faith in dealing with the Patent Office, which includes a duty to
26 disclose to the Patent Office all information known to that individual to be material to the
27 patentability of the pending claims. See 37 C.F.R. § 1.56(a).

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1 97. The duty to disclose information exists with respect to each pending claim until
2 the claim is cancelled or withdrawn from consideration, or the patent application becomes
3 abandoned. *See* 37 C.F.R. § 1.56(a).

4 98. Where the subject matter for which a patent is or has been involved in litigation
5 and/or a trial proceeding, or the litigation and/or trial proceeding yields information material to
6 the currently pending applications, the existence of such litigation and any other material
7 information arising therefrom must be brought to the attention of the examiner or other
8 appropriate official at the U.S. Patent and Trademark Office. *See* Manual of Patent Examining
9 Procedure § 2001.06(c).

10 99. Individuals associated with the filing or prosecution of a patent application that
11 owe a duty to disclose information material to patentability to the U.S. Patent and Trademark
12 Office during patent prosecution include each attorney or agent who prepares or prosecutes the
13 application. *See* 37 C.F.R. § 1.56(c)(2).

14 100. Jason Mueller is a registered Patent Attorney with the U.S. Patent and Trademark
15 Office (Reg. No. 64,647).

16 101. Jason Mueller is listed as an “Attorney/Agent” for the patent applications that
17 issued as the ’492 patent (i.e., App. No. 13/783,165) and the ’076 patent (i.e., App. No.
18 13/783,179).

19 102. Jason Mueller has been listed as an “Attorney/Agent” for the patent applications
20 that issued as the ’492 patent (i.e., App. No. 13/783,165) and the ’076 patent (i.e., App. No.
21 13/783,179) since at least June 8, 2018.

22 103. Jason Mueller was counsel for Pacific Coast in the 2017 N.D. Cal. Action, and he
23 was and is counsel for Pacific Coast in the 2018 N.D. Cal. Action.

24 104. Galyn Gafford is a registered Patent Attorney with the U.S. Patent and Trademark
25 Office (Reg. No. 52,929).

26 105. Galyn Gafford is listed as an “Attorney/Agent” for the patent applications that
27 issued as the ’492 patent (i.e., App. No. 13/783,165) and the ’076 patent (i.e., App. No.
28 13/783,179).

1 106. Galyn Gafford began signing responses to office actions and other documents in
2 the prosecution history for the application that issued as the '492 patent (i.e., App. No.
3 13/783,165) at least as early as October 1, 2013, and for the application that issued as the '076
4 patent (i.e., App. No. 13/783,179) at least as early as October 2, 2013.

5 107. Galyn Gafford has been prosecuting the application that issued as the '492 patent
6 (i.e., App. No. 13/783,165) since at least October 1, 2013, and for the application that issued as
7 the '076 patent (i.e., App. No. 13/783,179) since at least October 2, 2013.

8 108. Galyn Gafford was counsel for Pacific Coast in the 2017 N.D. Cal. Action, and he
9 was and is counsel for Pacific Coast in the 2018 N.D. Cal. Action.

10 **Pacific Coast's failure to disclose material information and deception of the Patent Office**

11 109. During prosecution of the '492 and '076 patents, Pacific Coast committed
12 inequitable conduct by failing to disclose information material to patentability of the '492 and
13 '076 patents with specific intent to deceive the Patent Office. Such inequitable conduct is
14 inextricably tied to the 2017 and 2018 N.D. Cal. Actions and renders the '492 and '076 patents
15 unenforceable.

16 110. Pacific Coast, and its outside counsel Jason Mueller and Galyn Gafford, received
17 copies and were aware of the Miller Declaration and CertainTeed's additional filings and
18 correspondence in the 2017 and 2018 N.D. Cal Actions regarding the indefiniteness of the
19 "scored flexural strength" claim terms.

20 111. On information and belief, Pacific Coast and its outside counsel, including Jason
21 Mueller and Galyn Gafford, aware that such documents contained information material to the
22 patentability of pending claims in the applications that issued as the '492 and '076 patents,
23 withheld the Miller Declaration and CertainTeed's additional filings and correspondence in the
24 2017 and 2018 N.D. Cal Actions regarding the indefiniteness of the "scored flexural strength"
25 claim terms from the Patent Office.

26 112. Pacific Coast and its outside counsel, including Galyn Gafford and Jason Mueller,
27 had copies and were aware of Hirata and the filings, contentions, and correspondence in the 2017
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1 and 2018 N.D. Cal Actions that allege, on a limitation-by-limitation basis, that Hirata anticipates
2 and/or renders obvious claim 21 of the '568 patent.

3 113. On information and belief, Pacific Coast and its outside counsel, including Jason
4 Mueller and Galyn Gafford, aware that the documents contained information material to the
5 patentability of pending claims in the applications that issued as the '492 and '076 patents,
6 withheld Hirata and the filings, contentions, and correspondence in the 2017 and 2018 N.D. Cal
7 Actions that allege, on a limitation-by-limitation basis, that Hirata anticipates and/or renders
8 obvious claim 21 of the '568 patent from the Patent Office.

9 114. On information and belief, Pacific Coast and its outside counsel, including Jason
10 Mueller and Galyn Gafford, withheld material information regarding the “scored flexural
11 strength” claim terms and/or Hirata from prosecution of the applications that issued as the '492
12 and '076 patents with specific intent to deceive the Patent Office. Pacific Coast and its outside
13 counsel, including Jason Mueller and Galyn Gafford, were aware of CertainTeed’s allegations
14 regarding the “scored flexural strength” terms and Hirata for over a year prior to the issuance of
15 the '492 and '076 patents. During that time, Pacific Coast, in filings signed by Galyn Gafford,
16 continued to prosecute the applications that issued as the '492 and '076 patents. Galyn Gafford
17 even argued to the Patent Trial and Appeal Board that he still had not seen prior art that
18 described laminated panels made without interior paper, despite having previously signed Pacific
19 Coast’s interrogatory responses admitting that Hirata discloses a panel made of two boards that
20 have surfaces lacking face paper that are glued together. Moreover, Galyn Gafford deposed
21 CertainTeed’s expert, Dr. Miller, regarding the Miller Declaration and the indefiniteness of the
22 “scored flexural strength” claim terms. Yet at no time during the prosecution of the applications
23 that issued as the '492 and '076 patents did Pacific Coast, Jason Mueller, or Galyn Gafford
24 inform the Patent Office of the existence of the litigation regarding invalidity based on
25 indefiniteness of the “scored flexural strength” terms or on anticipation and/or obviousness in
26 light of Hirata, or any of the multiple filings in the 2017 and 2018 N.D. Cal. Actions that
27 addressed these invalidity contentions.

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1 28 U.S.C. §§ 2201 and 2202. Subject matter jurisdiction is proper under 28 U.S.C. §§ 1331 and
2 1338(a).

3 130. Pacific Coast purports to be the lawful owner by assignment of all rights, title, and
4 interest in the '492 patent, including the right to sue for patent infringement and damages,
5 including past damages. Pabco purports to be the exclusive licensee of the '492 patent. Pacific
6 Coast and Pabco have sued CertainTeed Gypsum Manufacturing, Inc. in the Western District of
7 Arkansas, alleging that the SilentFX QuickCut product infringes the '492 patent.

8 131. CertainTeed sells the SilentFX QuickCut product.

9 132. CertainTeed does not infringe and has not infringed—either directly,
10 contributorily, or by inducement—any valid and enforceable claim of the '492 patent, either
11 literally or under the doctrine of equivalents with respect to the SilentFX QuickCut product.

12 133. CertainTeed does not directly infringe any valid and enforceable claim of the '492
13 patent at least because SilentFX QuickCut products do not embody the limitation that “the entire
14 inner surface of the [first and second] gypsum board is unclad.” As a result of the manufacturing
15 process used to create SilentFX QuickCut products, there is paper cladding on the inner surface
16 of the gypsum cores.

17 134. By reason of the proceedings in the U.S. Patent and Trademark Office during
18 prosecution of the '492 patent—including statements, arguments, amendments, assertions, and/or
19 representations made by or on behalf of the applicant(s) for the '492 patent—the scope of the
20 '492 patent's claims are limited. Prosecution history estoppel bars the assertion of infringement
21 under the doctrine of equivalents against, for example, products for which the entire inner
22 surface of the first and second gypsum boards is not unclad at least because otherwise the
23 limitation that the *entire* inner surface of the gypsum board is unclad would be vitiated. Pacific
24 Coast failed to allege in any of its complaints in the 2017 and 2018 N.D. Cal. and Arkansas
25 Actions infringement under the doctrine of equivalents as to any particular claim limitation, but
26 to the extent that Pacific Coast nevertheless attempts to assert infringement under the doctrine of
27 equivalents, Pacific Coast is estopped from doing so.

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1 '076 patent's claims are limited. Prosecution history estoppel bars the assertion of infringement
2 under the doctrine of equivalents against, for example, products for which the entire inner
3 surface of the first and second gypsum boards is not unclad at least because otherwise the
4 limitation that the *entire* inner surface of the gypsum board is unclad would be vitiated. Pacific
5 Coast failed to allege in any of its complaints in the 2017 and 2018 N.D. Cal. and Arkansas
6 Actions infringement under the doctrine of equivalents as to any particular claim limitation, but
7 to the extent that Pacific Coast nevertheless attempts to assert infringement under the doctrine of
8 equivalents, Pacific Coast is estopped from doing so.

9 143. An actual and justiciable controversy exists between the parties with respect to the
10 '076 patent—including specifically noninfringement of the '076 patent. CertainTeed is entitled
11 to a declaratory judgment that the SilentFX QuickCut products do not infringe the '076 patent.

12 **PRAYER FOR RELIEF**

13 144. WHEREFORE, CertainTeed respectfully requests that this Court enter judgment
14 in its favor as follows:

- 15 a) that the Court find and declare that the '492 patent (including all claims of the
16 '492 patent) is unenforceable due to inequitable conduct, and thus without any force
17 or effect against any of CertainTeed and its officers, employees, agents and attorneys;
- 18 b) that the Court find and declare that the '076 patent (including all claims of the
19 '492 patent) is unenforceable due to inequitable conduct, and thus without any force
20 or effect against any of CertainTeed and its officers, employees, agents and attorneys;
- 21 c) that the Court find and declare that CertainTeed does not infringe and has not
22 infringed any claim of the '492 patent with respect to the SilentFX QuickCut product;
- 23 d) that the Court find and declare that CertainTeed does not infringe and has not
24 infringed any claim of the '076 patent with respect to the SilentFX QuickCut product;
- 25 e) that the Court find and declare that this is an exceptional case under 35 U.S.C. § 285
26 and that CertainTeed be awarded all of its costs, expenses, and attorneys' fees,
27 together with pre-judgment and post-judgment interest; and
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f) that the Court grant CertainTeed such other and additional relief, in law or in equity,
as the Court deems just and proper.

1 Dated: February 14, 2019

Respectfully submitted,

2 CERTAINTEED GYPSUM, INC.

3
4 */s/ Richard G. Frenkel*

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