

Section 337's Latest Twist: Contention Interrogatories

Law360, New York (July 02, 2012, 12:55 PM ET) -- The date for response to contention interrogatories in U.S. International Trade Commission Section 337 procedural schedules has traditionally served as a safe harbor. By setting a date well into the discovery period for contention interrogatories, the responding party bearing the burden of proof has the opportunity to obtain the information outside of its control necessary to respond without facing a motion to compel.

The classic paradigm is complainant's infringement contention claim charts, which may only be completed after obtaining detailed information on the accused products. Two recent rulings, however, are part of an emerging body of authority that calls into question the continuing utility of requesting a date certain for responses to contention interrogatories.

Post-Deadline Supplementation Denied

In *Certain Light-Emitting Diodes and Products Containing Same*, Administrative Law Judge Thomas B. Pender imposed sanctions on the complainant, OSRAM, by precluding any supplementation of contention interrogatories after the date they were due.[1] The complainant served supplemental contention interrogatory responses 13 days after the agreed upon deadline for responses had passed, mostly consisting of approximately 4,000 pages of claim charts. The complainant had not sought an extension of the deadline. ALJ Pender issued an order to show cause why complainant should not be sanctioned for the untimely supplementation, including detailed instructions to the complainant of information to be provided for the ALJ's consideration on why the information in the supplementation was not provided by the deadline and why complainant had not sought an extension.[2]

ALJ Pender's order imposing sanctions meticulously examined the nature and sequence of the information obtained by the complainant. In general, ALJ Pender based his decision on factual findings: that the complainant had the information necessary to make timely responses and that if it did not, it should have moved to compel; and that the complainant had not sought an extension to the agreed upon deadline.

Less than two weeks earlier, in a different case with the same name but a different judge, OSRAM as a respondent was successful in having the complainant's supplemental contention interrogatory responses excluded.[3] ALJ Robert K. Rogers granted OSRAM's motion to exclude a supplementation that was made 19 days after the deadline for contention interrogatory responses.

Tension With Rule 210.27(c)(1)

Commission Rule 210.27(c)(1) is the ITC analog to Fed. R. Civ. P. 26(e). It provides for the duty to supplement discovery responses: “A party is under a duty seasonably to amend a prior response to an interrogatory ... if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” Arguably, a duty to supplement carries with it the right to supplement. The ALJ’s in the recent orders, however, applied this differently.

Citing an extensive number of decisions by ALJ Rogers, the ALJ’s held that that supplementation of contention interrogatories after the deadline is only permissible if information reflected in the supplementation is acquired after that date. Supplementation after the date is not permissible where a party chooses to supplement to change its position on an issue.[4]

Conclusion

As in the two cases above, limitation of the right to supplement will tend to inure to the benefit of respondents rather than complainants. It is complainant that must come forward with detailed infringement proofs in discovery. Respondents’ typical primary defenses, anticipation and obviousness, are rooted in the prior art, disclosure of which is controlled by the date for the notice of prior art, not the date to respond to contention interrogatories.

Complainants may wish to consider requesting no date in the procedural schedule for contention interrogatories, instead relying upon supplementation under Rule 210.27(c). The parties may have fared better in these two rulings had there been no date certain. Where the procedural schedule does provide for a date certain for responses to contention interrogatories, a party should file motions to compel and to extend such deadline as needed well in advance.

Finally, even with something as seemingly straightforward as interrogatory responses, parties would be well advised to heed ITC ALJ Rogers’ admonition: “Putting on a case before the ITC is not the same as putting on a case in the district courts. It’s different. The pace is faster ... We don’t have the time and we cannot make allowances for a lack of experience or a lack of preparation.”[5]

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[1] Inv. No. 337-TA-785, Order No. 31 (May 16, 2012).

[2] *Id.*, Order No. 22 (March 20, 2012).

[3] Certain Light-Emitting Diodes and Products Containing Same, Inv. No. 337-TA-802, Order No. 14 (May 10, 2012).

[4] *Id.*, Order No. 15 (Denying Motion for Leave for Interlocutory Appeal or Reconsideration) (May 21, 2012).

[5] Certain Muzzle Loading Firearms and Components Thereof, Inv. No. 337-TA-777, Order No. 17 at 7 (Nov. 7, 2011).

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