2008-1511, -1512, -1513, -1514, -1595

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

THERASENSE, INC. (now known as Abbott Diabetes Care, Inc.)
and ABBOTT LABORATORIES,

Plaintiffs-Appellants,

v.

BECTON, DICKINSON AND COMPANY,
and NOVA BIOMEDICAL CORPORATION,

Defendants–Appellees,

and

BAYER HEALTHCARE LLC,

Defendant–Appellee.

Appeals From the United States District Court for the Northern District of California in Consolidated Case Nos. 04-cv-2123, 04-cv-3327, 04-cv-3732, and 05-cv-3117, Judge William H. Alsup

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OPPOSITION TO MOTION FOR LEAVE TO INTERVENE ON APPEAL

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Appellees Becton, Dickinson and Company ("BD") and Nova Biomedical Corporation ("Nova") (collectively, "BD/Nova") oppose Lawrence S. Pope's motion for leave to intervene in this appeal because Mr. Pope was not a party in the underlying suits and he therefore lacks standing to appeal from the district court's judgment. Furthermore, Mr. Pope fails to meet the requirements of Fed. R. Civ. P. 24 governing intervention in the district courts. Finally, Mr. Pope has other, more appropriate, tribunals in which to address his concerns.

I. STATEMENT OF FACTS

In 2005, Abbott sued Defendants-Appellees BD/Nova for alleged infringement of four patents, among them United States Patent No. 5,820, 551 ("the '551 patent"). *TheraSense v. Becton, Dickinson and Company*, 565 F.Supp.2d 1088, 1091 (N.D.Cal. 2008). Later in 2005, Abbott also brought suit against Defendant-Appellee Bayer Healthcare LLC ("Bayer") for patent infringement, including the '551 patent. Abbott's suits against BD/Nova and Bayer were consolidated. In response to Abbott's infringement suit, both BD/Nova and Bayer asserted affirmative defenses that the '551 patent was invalid and unenforceable for inequitable conduct. Following a bench trial concerning the issues of invalidity and inequitable conduct in the summer of 2008, the district court found the '551 patent invalid and unenforceable due to, *inter alia*, the inequitable conduct of Abbott's in-house counsel responsible for prosecuting the

'551 patent, Mr. Lawrence S. Pope. *Id.* at 1112-15.

Mr. Pope is not and has never been a party to this litigation. His only involvement in this case was as a deponent and a trial witness. *Id.* at 1091-92. Initially, Abbott's counsel and even Mr. Pope himself represented that Mr. Pope would not appear as a live witness at trial. *Id.* at 1091-92, 1113. However, before trial began, Abbott requested that it be permitted to call Mr. Pope live during its case-in-chief. *Id.* While the district court denied Abbott's request at first, it eventually did allow Mr. Pope to testify live at trial at both Abbott and Mr. Pope's insistence. *Id.* at 1113. Mr. Pope voluntarily traveled from Chicago to San Francisco to testify at trial. Both at deposition and at trial, Mr. Pope was represented by Abbott's outside counsel. At deposition, Mr. Pope was defended by Abbott's counsel at Baker Botts. At trial, counsel from Munger, Tolles and Olsen (a second firm that also represented Abbott) questioned and defended Mr. Pope.

Based, in part, on Mr. Pope's trial testimony, the district court found that during the prosecution of the '551 patent, Mr. Pope made a conscious decision to withhold from the United States Patent and Trademark Office ("USPTO") highly material and flatly inconsistent information Abbott represented to the European Patent Office ("EPO"). *Id.* at 1112-15. Additionally, the district court found that Dr. Sanghera, an Abbott employee who worked with Mr. Pope on the prosecution of the '551 patent and submitted a key declaration during the '551

patent prosecution, likewise knowingly withheld the same highly material information from the USPTO. *Id.* at 1115-17. Thus, the district court found that both Mr. Pope and Dr. Sanghera had committed inequitable conduct, rendering the '551 patent unenforceable. On July 2, 2008, the district court entered judgment in favor of BD/Nova and Bayer on all claims relating to the '551 patent.

On July 21, 2008, Abbott filed a notice of appeal of the district court's July 2, 2008 judgment, and filed its initial appellate brief concerning the '551 patent issues on October 14, 2008. On October 3, 2008, counsel for '551 prosecuting attorney Mr. Pope filed a motion for leave to intervene in Abbott's appeal of the '551 patent issues. Defendants-Appellees' responsive briefs will be filed by November 24, 2008.

II. LEGAL STANDARD

It is settled law that only parties to a lawsuit may appeal an adverse judgment. *Nisus Corp. v. Perma-Chink Systems, Inc.*, 497 F.3d 1316, 1319 (Fed. Cir. 2007), citing *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). This is true even in cases where a nonparty asserts that the action of the court has an adverse affect on him. *Id.*

An exception to this general rule is that a non-party, such as an attorney or a witness, who is held in contempt or otherwise sanctioned by the court may appeal from the order imposing such sanctions. *Nisus*, 497 F.3d at 1319. This

Court has further explained that the reason underlying this exception is that when the court, in exercising its inherent power to regulate the proceedings before it and its power to punish, enters an order personal as to the sanctioned individual for conduct before the court, such individual may appeal from the adverse judgment ordering sanctions. *Id.*

In contrast, however, where, in the process of resolving the issues in the underlying suit, the court criticizes the conduct of a nonparty, but does not exercise its power to punish, such judicial criticisms are not reviewable on appeal. *Id.* This Court has taken the position that criticism in a court's order of a nonparty's actions is only reviewable when that criticism is intended to be "a formal judicial action" in a disciplinary proceeding. And that "[w]ithout the exercise of the sanctioning power, a finding of inequitable conduct is insufficient to confer appellate jurisdiction over an appeal by the aggrieved attorney." *Id.* at 1321.

In the *Nisus* case, for example, the district court found that the prosecuting attorneys engaged in inequitable conduct for non-disclosure of certain material facts to the USPTO. *Id.* at 1318. Following the district court's entry of judgment, one of the prosecuting attorneys, Mr. Teschner, filed a motion to intervene, which was denied. The prosecuting attorney then later noticed an appeal from both the entry of judgment and the denial of his motion to intervene. *Id.* This

Court affirmed the denial of the motion to intervene and held that Mr. Teschner did not have standing to appeal the finding of inequitable conduct of the district court. *Id.* at 1323. In so holding, this Court stated that while critical comments made by a court may have adverse effects on an individual's reputation, these incidental effects do not "convert the court's statements into a decision from which anyone who is criticized by the court may pursue an appeal." *Nisus*, 497 F.3d at 1319.

With respect to intervention on appeal, except in proceedings to review the action of an agency, the Federal Rules of Appellate procedure do not provide for intervention on appeal. *See* Fed. R. App. P. 15(d). The U.S. Supreme Court however has stated that the policies underlying intervention in the district court may be applicable in the appellate courts. *International Union v. Scofield*, 382, U.S. 205, 217 n. 10 (1965) (stating that an individual may intervene in an appellate court under Fed. R. Civ. P. 24(a) or (b)).

Under Fed. R. Civ. P. 24, intervention may be as of right (Rule 24(a)) or may be granted permissively (Rule 24(b)). Fed. R. Civ. P. 24. Under either Rule 24(a) or (b), the motion to intervene must be timely. Timeliness is assessed in light of the circumstances, and intervention made after judgment has been entered is generally disfavored. *See Elliot Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005) (stating that when intervention is not sought in the district court, intervention on appeal is only permitted "in an exceptional

case for imperative reasons"); James WM. Moore, *Moore's Federal Practice* § 24.21[2] (3d. ed. 2008) (citing cases from the Courts of Appeal from the Second, Fourth, Eighth and Tenth Circuit holding that while entry of final judgment is not an absolute bar to intervention, a strong showing is required by the movant). Moreover, post-judgment intervention is particularly disfavored if the movant had a reasonable basis for knowing that his interests were at risk prior to the entry of judgment. *See Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1231 (1st Cir. 1992) (stating that the more advanced the litigation, the more scrutiny the motion must withstand and citing commentary that courts generally look with disfavor upon motions to intervene after the entry of final judgment).

Permissive intervention under Rule 24(b) requires that the movant has a claim or defense that shares a common question of law or fact with the main action, and that the court, in exercising its discretion, consider whether the intervention will unduly delay or prejudice the resolution of the existing parties' rights. Fed. R. Civ. P. 24(b).

In addition to the requirements imposed by Rule 24, courts have held that an intervenor must separately satisfy the same standing requirements as the original parties. *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 576-77 (8th Cir. 1998); *Mausolf v. Babbit*, 85 F.3d 1295,

1299-1300 (8th Cir. 1996); *Building and Construction Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282-83 (D.C. Cir. 1994).

III. ARGUMENT

A. MR. POPE LACKS STANDING TO APPEAL IN THIS CASE

An exception to the general rule that nonparties do not have standing to appeal from judgments or other actions of the court is that a nonparty, such as an attorney held in contempt or otherwise sanctioned, may appeal from the order sanctioning the attorney. *Nisus*, 497 F.3d at 1319. The underlying justification for allowing this exception is that in imposing such a sanction on the nonparty, the court is exercising its inherent power to regulate the proceedings before it, and not adjudicating the legal rights of the parties. *Id.*

Here, Mr. Pope seeks to intervene regarding comments the district court made with respect to his conduct before the USPTO. The district court never imposed formal sanctions on Mr. Pope. Mr. Pope's conduct before the district court as a witness at trial has not been commented upon. Where, as here, the conduct in question is clearly not conduct before the court, but occurs prior to the litigation, that conduct is "plainly outside the scope of the court's authority to impose disciplinary sanctions." *Id.* at 1321.

Further, this Court has taken the position that mere criticism of the conduct of a nonparty, while it may have incidental effects on the reputation of that

individual, is not sufficient to give that individual a basis for appeal. *Nisus*, 497 F.3d at 1320-21. Moreover, in *Nisus*, this Court held that a finding of inequitable conduct, without the exercise of the court's sanctioning power, is insufficient to confer appellate jurisdiction over an appeal by the prosecuting attorney. *Id.* at 1321.

The facts of the *Nisus* case are similar to those here. Like Mr. Pope, the *Nisus* attorney that was found to have committed inequitable conduct, Mr. Teschner, was the prosecuting attorney for the patent at issue. Also like in this case, the district court in *Nisus* found that Mr. Teschner committed inequitable conduct for failing to disclose certain material facts to the USPTO. In the *Nisus* case, the district court made certain findings regarding Mr. Teschner's conduct before the USPTO and reported those comments in its opinion. In holding that the district court's criticism of Mr. Teschner's conduct did not amount to an appealable action, this Court stated that the district court's criticism of Mr. Teschner's conduct could not be characterized as the imposition of a disciplinary sanction against him. *Id.* at 1321. There, this Court held that Mr. Teschner did not have standing to appeal the inequitable conduct ruling and affirmed the denial of his motion to intervene.

Similarly, the district court here made certain findings which it reported in its opinion regarding Mr. Pope's conduct before the USPTO, but again,

imposed no sanctions against him. Like the *Nisus* case, the comments regarding Mr. Pope's conduct before the USPTO cannot be characterized as a disciplinary sanction sufficient to confer standing on Mr. Pope to appeal, nor should his motion to intervene be granted. Mr. Pope, however, fails to address this case in his motion to intervene.

B. MR. POPE DOES NOT MEET THE REQUIREMENTS OF FED. R. CIV. P. 24 AND CANNOT INTERVENE IN THIS APPEAL

Even if this Court were to hold that standing is not required for Mr. Pope to intervene in this appeal (and it should not), Mr. Pope does not meet the requirements of Fed. R. Civ. P. 24 and cannot intervene in this appeal. Indeed, Mr. Pope has been unable to point to a single case in this Court, or any court, allowing intervention in an appeal (under Rule 24 or otherwise) by an attorney whose conduct in the prosecution of a patent was held to rise to the level of inequitable conduct. Nor has BD/Nova been able to find such a case.

1. Mr. Pope's Motion For Leave To Intervene Is Untimely

Fed. R. Civ. P. 24 requires that the motion to intervene be timely. Mr. Pope never addresses this requirement in his brief. For the reasons stated below, Mr. Pope's post-judgment motion to intervene on appeal is clearly untimely.

Although generally courts look to a number of factors to assess the timeliness of a motion to intervene, such as the length of time the intervenor knew

or should have known of its interest in the case before moving to intervene, prejudice to the existing parties, prejudice to the intervenor, and the existence of any unusual circumstances, post-judgment intervention is generally disfavored. *See Elliot Indus.*, 407 F.3d at 1103; Moore, *supra* § 24.21[3]. Further, where intervention is not sought in the court below, as was the case here, the Court of Appeals for the Tenth Circuit in the *Elliot Industries* case held that intervention on appeal is permitted "only in an exceptional case for imperative reasons." *Elliot Indus.*, 407 F.3d at 1103. Mr. Pope has not made a showing of such an "exceptional case" nor of any "imperative reasons".

Moreover, a review of the facts relating to the factors above militates in favor of a finding of an untimely motion to intervene. There are a number of events throughout the course of the litigation that should have and did alert Mr. Pope that his interests may be affected in this case. For example, he was deposed in June 2007 regarding the prosecution of the patent at issue. In September 2007, BD/Nova amended their answers to include the relevant inequitable conduct defenses, and the upcoming adjudication of such claims was also evident at the pretrial conference in May 2007. Abbott then fought for Mr. Pope to testify at trial and he indeed so testified in May 2008 (presumably to ensure his right to be heard), the district court opinion finding the '551 patent unenforceable was issued on June 24, 2008, and the judgment Mr. Pope seeks to appeal was issued on July 2,

2008. Abbott noticed this appeal on July 21, 2008. Under this Court's rules, any other parties have fourteen days after the first notice of appeal within which to file a separate notice of appeal; in this case, the parties had until August 4, 2008 to file an appeal. Instead of filing his motion to intervene shortly after any one of these events that occurred over the past year and a half, Mr. Pope waited until October 3, 2008 – more than 3 months after the entry of final judgment, a full two months after any other *party* to the case could have filed an appeal, and a mere eleven days prior to the due date of Abbott's opening brief – to file his motion to intervene. Indeed, Abbott has already served its preliminary opening brief in this action. Clearly, this motion is untimely.

Further, allowing intervention would cause undue delay in the case and will unfairly prejudice the existing parties to the case. Currently, BD/Nova must respond to Abbott's opening brief by November 24, 2008, forty days after service of Abbott's brief. On one hand, however, Mr. Pope argues that "[b]ecause the district court has already confronted [the proposed intervenor's] arguments in rendering its decision, there is no reason to fear 'issue proliferation,' 'confusion,' extra cost,' or 'an increased risk of error'" if he is permitted to appeal. (Pope Motion, p. 9 *citing Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 (D.C. Cir. 2004)). On the other hand, Mr. Pope states that he would bring a "unique perspective" and that he and Abbott could present separate arguments regarding

Abbott's conduct before the USPTO. He argues that he "should be allowed to present the pertinent legal and factual issues in the manner he sees fit." Indeed, not only is it unclear *when* Mr. Pope would file his brief, it is certainly unclear *what* he would include in his opening brief and how his "unique perspective" would alter the legal arguments Abbott has already presented.

Further, this motion has already caused BD/Nova to incur extra expense, and will continue to cause such expenses to respond to these "new" legal and factual issues Mr. Pope intends to present.

Moreover, the district court has already ruled that this case is an exceptional case warranting the award of attorney's fees to BD/Nova. Indeed, this case should never have been pursued, and Mr. Pope's intervention will serve to do nothing more than continue to cause BD/Nova additional attorney fees in its defense and to delay the resolution of this case.

Mr. Pope, on the other hand, would not be prejudiced if this Court denied his motion to intervene. If, as Mr. Pope argues, his interest lies in the criticism of his conduct and its effect on his reputation, he has a more appropriate vehicle to seek relief from such criticism. Mr. Pope may instead file a writ of mandamus and request that the objectionable commentary be expunged from the public record. 28 U.S.C. § 1651; *see also Nisus*, 497 F.3d at 1322.

2. **Mr. Pope Fails To Meet The Requirements Of Rule 24(b)**

No common claim or defenses. Mr. Pope argues that "[a]s Rule 24(b) requires", he shares a "common opposition to the district court's finding of inequitable conduct" with Abbott.[1] That he opposes the finding of inequitable conduct and has an objection to the effect on his reputation is irrelevant. Mr. Pope was merely a witness in this case and has no interest in the patent in question and whether the district court's ruling that the patent is unenforceable due to inequitable conduct is affirmed. Therefore, Mr. Pope has no claims or defenses with respect to the main action in this appeal nor has Mr. Pope asserted a claim or defense that may be heard on appeal. Indeed, Mr. Pope has no legal interest in the issue of the enforceability of the '551 patent and a reversal of the district court's

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[1] Mr. Pope does not move for intervention under Rule 24(a); however, he similarly does not meet the requirements under Rule 24(a). Rule 24(a), intervention of right, requires that the motion be timely and that the movant claim an interest relating to the property or transaction that is the subject of the action and be so situated such that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

As already discussed in detail above, Mr. Pope's post-judgment motion is untimely. Further, Mr. Pope has no interest in the main action: the enforceability of the patent in question. Mr. Pope is neither the owner nor a licensee of the patent. He was merely a witness in the action below. Finally, as Mr. Pope states, Abbott shares his opposition to the district court's inequitable conduct findings. Abbott, a party, indeed the Appellant and patent owner, has an interest in opposing the district court's inequitable conduct findings. Mr. Pope has made no showing of how his interest in opposing the inequitable conduct finding would not be adequately addressed by an existing party, namely Abbott.

findings would render no change in Mr. Pope's legal rights with respect to the '551 patent or the issue at bar: the enforceability of the '551 patent.

No substantial interest. Although an "interest" in the underlying litigation is not a requirement under Rule 24(b), Mr. Pope also argues that his "substantial interest" in this appeal supports intervention. However, even if his interest in the litigation were a consideration for intervention, as discussed above, Mr. Pope has no such interest. (Section III.A., *supra*, stating that no formal sanctions were imposed on Mr. Pope, and thus no injury has occurred). Further, this Court has taken the position that the incidental effect that a court's criticism may have on an individual's reputation is insufficient to provide a basis for appeal. *Nisus*, 497 F.3d at 1320-21. Indeed, in the *Nisus* case, this Court held that the district court did not abuse its discretion in denying the attorney's motion to intervene and added an additional reason for the denial – the prosecuting attorney "lack[ed] a substantial interest in the underlying litigation." 497 F.3d at 1322. The same is true here. Mr. Pope, as prosecuting attorney of the '551 and merely a witness in the underlying litigation, has no "significant interest" to form the basis of his intervention.

Undue delay and prejudice to BD/Nova. Further, under Rule 24(b), Mr. Pope must show that such intervention would not cause undue delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P.

24(b). As discussed above with respect to the untimeliness of his motion, Mr. Pope's intervention in this case would cause both undue delay in the resolution of the issues on appeal, as well as unduly prejudice BD/Nova in resolving these issues.

C. THE PRECEDENT CITED BY MR. POPE FAILS TO SHOW THAT HE HAD A SUBSTANTIAL INTEREST IN THIS APPEAL

Mr. Pope does not provide a single case supporting his motion to intervene. Instead, he relies on inapposite cases in arguing that the district court's commentary and the "seriousness of the charges it levels" amounts to a "public reprimand" and that such reprimand of an attorney's reputation affects an attorney's "most important professional asset[]". In each of the cases on which Mr. Pope relies, however, the lower court formally ordered sanctions on individual attorneys who represented the parties before the court. These sanctions were each related to the attorney's conduct before the particular court, and the individuals were allowed to intervene with respect to the order of sanctions. These cases clearly do not apply here. Indeed, Mr. Pope admits that the "court did not issue formal sanctions," nor was his conduct before the district court the subject of the district court's findings.

Mr. Pope relies on three cases from this Court as alleged support for his position: *Precision Specialty Metals, Inc. v. United States*, *I-10 Industry*

Associates, LLC v. United States, and *In re EchoStar Communications Corp.* 315 F.3d 1346 (Fed. Cir. 2003); 528 F.3d 859 (Fed. Cir. 2008); 448 F.3d 1294 (Fed. Cir. 2006). None of these cases supports Mr. Pope's arguments for leave to intervene because, unlike here, all of the cited cases concern intervention relating to formal sanctions.

In *Precision Specialty Metals*, this Court considered whether a reprimand under Fed. R. Civ. P. 11, which was "explicit and formal", imposed a sanction sufficient to confer appellate jurisdiction. 315 F.3d at 1352. In allowing appellate review of an order that was directed only to the issue of the reprimand, this Court concluded that it did in fact have jurisdiction to review that order, and also stated that "[o]n the other hand, judicial statements that criticize the lawyer, no matter how harshly, *that are not accompanied by a sanction or findings*, are not directly appealable." *Id.* (emphasis added). In later review of the *Precision Specialty Metals* case, this Court explained that "sanctions or findings" refers to the "formal imposition of the court's inherent power to penalize those who appear before it." *Nisus*, 497 F.3d at 1321. Thus, since the *Precision Specialty Metals* case relates to Rule 11 sanctions, it is irrelevant to the case at hand.

Similarly, in the *I-10 Industry* case, this Court allowed appellate review of a *formal* sanction under Rule 11(b) of the Rules of the United States Court of Federal Claims, a rule analogous to Fed. R. Civ. P. 11, for actions by the

attorney in the Court of Federal Claims. 528 F.3d 859. Again, here, the district court did not issue formal (or informal) sanctions against Mr. Pope and merely criticized his pre-litigation conduct before the USPTO.

Mr. Pope also cites to *EchoStar Communications*, but this case, too, is inapposite and readily distinguishable. In *EchoStar Communications*, this Court allowed a law firm to intervene in an appeal of an order that compelled the production of certain privileged documents created by that law firm. Indeed, this was a "formal sanction" by the district court compelling the law firm to act in accordance with its order during the course of the litigation. *In re EchoStar*, 448 F.3d at 1297. Again, in the *EchoStar Communications* case, this Court allowed intervention by a non-party to the underlying suit in the appeal of an order issued within the district court's power to regulate the proceedings before it. Mr. Pope makes no attempt to liken that case to the one here, nor can he. The *EchoStar* case is completely irrelevant to the issues here.

Mr. Pope also relies on *Penthouse International Ltd. v. Playboy Enterprises, Inc.* for the proposition that courts routinely grant motions to intervene where the intervenor has a unique interest in the outcome of the appeal and where that interest is not fully represented by the existing parties. (Pope Motion, p. 10 *citing* 663 F.2d 371, 373 (2d Cir. 1981)). As with the *Precision Specialty Metals, I-10 Industry, and EchoStar* cases, the *Penthouse* case involved intervention by an

attorney who was formally sanctioned for his conduct in the litigation before the district court. Further, this Court reviewed the *Penthouse* case in a case analogous to the base at bar: *Nisus Corp. v. Perma-Chink Systems*, 497 F.3d at 1322. There, this Court distinguished *Penthouse*, and as discussed in Section III.B.2, *supra,* affirmed the district court's denial of the attorney's motion to intervene because the prosecuting attorney "lack[ed] a substantial interest in the underlying litigation." 497 F.3d at 1322. Thus, because Mr. Pope was never formally sanctioned in the current action, and because he has no substantial interest in the underlying litigation here that involves the validity and enforceability of the '551 patent, the *Penthouse* case is also inapplicable.

Finally, Mr. Pope cites to *Walker v. City of Mesquite* for a proposition that the importance of an attorney's professional reputation obviates the need for a finding of monetary liability or other punishment as a prerequisite for the appeal of a court order finding professional misconduct. 129 F.3d 831. Again, that case is inapposite. There, the Court of Appeals for the Fifth Circuit allowed an attorney to appeal an order of the district court formally sanctioning him for improper litigation tactics before the district court. *Walker*, 129 F.3d at 832-33. The conduct of the attorney in that case was clearly before the district court and within the court's inherent power to regulate the proceedings before it. Here, however, Mr. Pope was merely a participant in the trial as a witness, did not participate as an

attorney before the court, and the questionable conduct did not occur during the proceedings before the court.

D. MR. POPE SHOULD ADDRESS HIS ISSUES IN A MORE APPROPRIATE TRIBUNAL

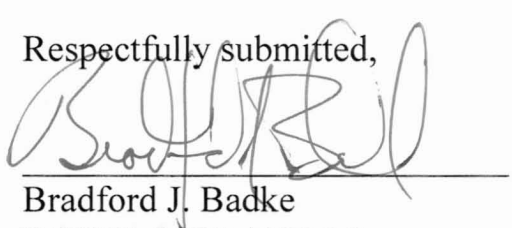
As discussed above, Mr. Pope may, under 28 U.S.C. § 1651, file a writ of mandamus to have any objectionable commentary expunged from the public record. *See Nisus*, 497 F.3d at 1322. This procedural route would serve to protect his interests while not causing further delay and prejudice to BD/Nova.

Mr. Pope also claims that he has "received inquiries" from both the Illinois Attorney Registration and Disciplinary Commission and the USPTO's Office of Enrollment and Discipline. He has not claimed that any formal disciplinary action has been taken against him. In addition, if any formal disciplinary action is ever taken, Mr. Pope will have a full and fair opportunity in each of these venues to be heard on his conduct before the USPTO.

IV. CONCLUSION

For the foregoing reasons, BD/Nova respectfully request that the Court deny Mr. Pope's motion for leave to intervene in this action.

Respectfully submitted,



Dated: October 20, 2008

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Attorneys for Defendants-Appellees

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TheraSense v. Becton

No. 2008-1511, -1512, -1513, -1514, -1595

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Becton, Dickinson & Co. and Nova Biomedical Corp. certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Becton, Dickinson and Company and Nova Biomedical Corporation

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

See attachment

10/20/08
Date

Signature of counsel

Bradford J. Badke
Printed name of counsel

Please Note: All questions must be answered

cc: Jason Rantanen, Rachel Krevans

CERTIFICATE OF INTEREST – Attachment

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Ropes & Gray	Bradford J. Badke Sona De Jeanne Curtis Gabrielle Ciuffreda Neal Dahiya Sanjeev Mehta Brian Biddinger Janice Jabido Brandon Stroy Mark D. Meredith Levina Wong Nina Horan Brien Santarlas Nicholas Vogt John O. Chesley Gabrielle Elizabeth Higgins Mark D. Rowland
Hale and Dorr LLP	William F. Lee Wayne Kennard Lisa J. Pirozzolo Saklaine Hedaraly Timothy Shannon

CERTIFICATE OF SERVICE

I, James Nowell, hereby certify that on the 20th day of October, 2008, I caused one copy to be sent by facsimile transmission and the original and three copies of the enclosed

OPPOSITION TO MOTION FOR LEAVE TO INTERVENE ON APPEAL

to be sent by Federal Express to:

Clerk
United States Court of Appeals
for the Federal Circuit
717 Madison Place N.W.
Washington, D.C. 20439

and one copy of the paper to be sent to each by facsimile transmission to:

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Executed on this 20th day of October, 2008.

James Nowell