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

Becton, Dickinson and Company and Nova Biomedical Corp.'s Response to Abbott's Petition for Rehearing *En Banc*

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FORM 9. Certificate of Interest

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 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:

Please see attached

18 March 2010
Date

Signature of counsel

Bradford J. Badke
Printed name of counsel

Please Note: All questions must be answered

cc: Rohit Singla, 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

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Abbreviation	Explanation
'551	U.S. Patent No. 5,820,551
'382	U.S. Patent No. 4,545,382
Abbott	Plaintiffs-Appellants Abbott Diabetes Care, Inc. and Abbott Laboratories
EPO	European Patent Office
JA ___	Page __ of Joint Appendix
Ptn. ___	Page __ of Abbott's February 24, 2010 Petition for Rehearing
PTO	United States Patent and Trademark Office
R&D	Research and Development

Emphasized Text: unless otherwise noted, all emphasis in quoted text has been added.

The District Court's finding that Abbott's U.S. Patent No. 5,820,551 ("'551 patent") was procured by inequitable conduct was correctly decided and affirmed. Abbott's rehearing request, which grossly mischaracterizes the record, should be denied. If ever a case clearly and convincingly compelled a finding of inequitable conduct under the highest standard dictated by this Court, it would be this one.

Abbott had prosecuted the '551 patent for thirteen years without success. The claims were rejected 11 times based on Abbott's own U.S. Patent No. 4,545,382 ("'382 patent") or its European counterpart. Then in 1997, faced with increasing market competition, Abbott's prosecuting attorney, Mr. Pope, and its Director of R&D, Dr. Sanghera, who acted as a liaison to Abbott's patent lawyers, brainstormed a way to get around the '382 patent and secure its issuance. The plan they devised was to submit, for the first time, new claims directed to a glucose sensor lacking a membrane component. *TheraSense, Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1289, 1301 (Fed. Cir. 2010). But the '382 patent already disclosed membraneless sensors and explained that membranes were only optional:

> ***Optionally, but preferably when being used on live blood***, a protective membrane surrounds both the enzyme and the mediator layers, permeable to water and glucose molecules.

Id. at 1295. At a November 1997 interview, Mr. Pope convinced the Examiner to allow him to submit extrinsic evidence to overcome the rejection by showing that the above sentence would be understood by a person of skill in the art differently

than the plain meaning of its words. *TheraSense, Inc. v. Becton, Dickinson & Co.*, 565 F. Supp. 2d at 1088, 1109 (N.D. Cal. 2008). Mr. Pope then submitted an affidavit by Dr. Sanghera explaining that a skilled person would not read the '382 patent to mean what it actually says but, instead, would believe otherwise, *i.e.*, it *required* a membrane:

> [O]ne skilled in the art would have felt that an active electrode comprising an enzyme and a mediator ***would require a protective membrane*** if it were to be used with a whole blood sample. Therefore, he is sure that one skilled in the art ***would not read*** [the "optionally, but preferably" language at] lines 63 to 65 of column 4 of U.S. Patent No. 4,545,382 ***to teach that the use of a protective membrane with a whole blood sample is optionally or merely preferred.***

TheraSense, 593 F.3d at 1302. Mr. Pope, recognizing the '382 patent as "the key reference," relied on Dr. Sanghera's affidavit to argue how a skilled person would read it. *Id.* Their plan worked, and the '551 patent was allowed. *Id.*

But Mr. Pope and Dr. Sanghera did not tell the PTO the whole story. They intentionally withheld Abbott's prior assertions to the EPO, which the affiant, Dr. Sanghera himself, helped draft, saying the exact opposite. There, Abbott saved the European counterpart to the '382 patent by arguing that it "not only *does not require* a membrane but must not have a membrane." *TheraSense*, 565 F. Supp. 2d at 1112. Abbott pointed to the same "optionally, but preferably" language to argue to the EPO that it meant exactly what it said:

> It is submitted that this disclosure is unequivocally clear. The protective membrane ***is optional***, however, it is preferred when used on live blood . . .

TheraSense, 593 F.3d at 1303.

This case does not merit the extraordinary measure of *en banc* review. The majority neither broke from, nor changed, established precedent. It did not apply a negligence standard or hold that Mr. Pope and Dr. Sanghera should have known about the materiality of the EPO submissions – indeed, it is undisputed that they *did* know about those EPO statements and made a conscious decision to withhold them. Intent was not bootstrapped on materiality, but separately found based in part on Mr. Pope and Dr. Sanghera's own admissions and demeanor.

Nor is this a case of mere attorney argument to the PTO about prior art that the Examiner can assess for himself. It is about concealing prior EPO admissions to deceive the PTO into relying on an extrinsic evidentiary affidavit to allow the '551 patent, the claims of which have been affirmed as invalid. *Id.* at 1299-1300. In the arena of extrinsic evidence, such as an affidavit from the perspective of a skilled person, the PTO is unable to fend for itself. *TheraSense*, 565 F. Supp. 2d at 1112. That is precisely why Mr. Pope and Dr. Sanghera's conduct was inequitable under Rule 1.56(b)(2)[1] and Circuit precedent.

The facts of this case cannot support a call for reform. As the majority recognized, this is "one of those rare cases in which a finding of inequitable

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[1] 37 C.F.R. § 1.56(b)(2) deems information that "refutes, or is inconsistent with" an applicant's position in opposing unpatentability is material.

conduct is appropriate." *TheraSense*, 593 F.3d at 1300. Any other result would condone such deceitful action and completely "eviscerate the duty of disclosure." *Id.* at 1305.

I. THE MAJORITY FOLLOWED PRECEDENT

Abbott's claim that intent was inferred from the fact that Mr. Pope and Dr. Sanghera *should have known* the withheld EPO submissions were material, using the negligence standard of *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253 (Fed. Cir. 1997) (Ptn. 8)[2], is incorrect. *Critikon* or its progeny are not cited or applied by either the District Court or the majority, nor is any *should have known* language ever used by the majority.

The sole mention that Mr. Pope "knew or should have known" the withheld information was highly material is in a single line of the District Court's opinion. But the suggestion that a *should have known* standard was applied, let alone that it was the *only* standard used (Ptn. 6-7), is wrong. The District Court went on to evaluate Mr. Pope's conduct and concluded that intent to deceive "was clearly in [his] mind." *TheraSense*, 565 F. Supp. 2d at 1114. Indeed, the primary cases used to *find* and *affirm* intent were *Kingsdown Med. Consultants Ltd. v. Hollister, Inc.*, 863 F.2d 867 (Fed. Cir. 1988), and *Star Scientific, Inc. v. R.J. Reynolds Tobacco*

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[2] "Ptn. __" refers to the specified page(s) of Abbott's February 24, 2010 Petition for Rehearing. Amicus arguments are largely duplicative of the Petition and addressed without reference to specific amicus.

Co., 537 F.3d 1357, 1366 (Fed. Cir. 2008), which rejected the negligence standard. *TheraSense*, 593 F.3d at 1305; *TheraSense*, 565 F. Supp. 2d at 1111-12.

Kingsdown requires that, in determining intent, the totality of the evidence, including that of good faith, must indicate sufficient culpability. *Kingsdown*, 863 F.2d at 876. Abbott itself admits that deceptive intent can be inferred from "circumstantial evidence that the applicant *actually knew and appreciated* the materiality of information" it withheld. (Ptn. 5) (emphasis in original). *Star Scientific* explains that this is because bald admissions of deceptive intent are a rarity. *Star Scientific*, 537 F.3d at 1366. Yet, Abbott ignores that this was precisely the standard used to both find and affirm inequitable conduct here.

A. The evidence of deceptive intent was clear and convincing

Far from a case where the applicant *should have known* of materiality, it is undisputed that both Mr. Pope and Dr. Sanghera were well aware of the EPO submissions and that the plain language of those submissions contradicted their statements to the PTO. *TheraSense*, 593 F.3d at 1306. But, after thirteen years of continuous prosecution, their collusive motivation to secure issuance of the '551 patent by any means, and use it to suppress competition in the rapidly developing diabetes care field prevailed.[3] *TheraSense*, 565 F. Supp. 2d at 1105-07. They

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[3] The very day the '551 patent issued, Abbott sued a major competitor for infringement and moved for a preliminary injunction. *TheraSense*, 565 F. Supp. 2d at 1105. Mr. Pope was the attorney of record and Dr. Sanghera submitted a

consciously withheld from the PTO the EPO statements drafted by Dr. Sanghera himself, and submitted only his explicitly contradictory affidavit despite the clear mandate of Rule 1.56. *TheraSense*, 593 F.3d at 1306.

The District Court, as required by *Kingsdown*, took into consideration their excuses as to why they withheld this material information and rejected them as incredible. *TheraSense*, 565 F. Supp. 2d at 1113-16. The District Court's carefully considered finding of intent does not contravene *Star Scientific*. Indeed, the District Court "insist[ed] on every inch of the clear-and-convincing standard" and found that standard was met. *Id.* at 1117.[4]

II. INTENT WAS CONSIDERED INDEPENDENT OF MATERIALITY

Contrary to Abbott's assertion (Ptn. 9), neither the District Court nor the majority bootstrapped intent onto materiality. Instead, these elements were considered separately and, once threshold levels were met, properly balanced. *TheraSense*, 593 F.3d at 1300, 1308; *TheraSense*, 565 F. Supp. 2d at 1114-17.[5]

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declaration analyzing infringement. JA3014-15. Thus, while prosecuting the '551 patent, they had an eye towards enjoining a primary competitor.

[4] Abbott's own cited cases upholding a finding of intent when applicants said one thing to the PTO and knowingly said another to a separate tribunal shows that intent was correctly found here. *See Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1179-82 (Fed. Cir. 1995); *see also Bruno Indep. Living Aids, Inc. v. Acorn Mobility Servs. Ltd.*, 394 F.3d 1348, 1354-55 (Fed. Cir. 2005).

[5] Abbott's reliance on *Halliburton Co. v. Schlumberger Tech. Corp.*, 925 F.2d 1435, 1442-43 (Fed. Cir. 1991), is misplaced. There, intent was based on the

Intent was found and affirmed on a number of grounds, not just Mr. Pope and Dr. Sanghera's unconvincing reasons for withholding the EPO submissions.

A. Witness demeanor was not the only basis for finding intent

The dispute here on materiality was not cloaked in the guise of credibility to evade review (Ptn. 8); witness credibility was among several factors on which intent was found. Independent of witness credibility, the District Court first found that (1) Mr. Pope and Dr. Sanghera's statements to the PTO were critical to overcome the '382 patent, (2) the prior EPO statements were to the contrary, and (3) they consciously withheld the EPO submissions from the PTO.[6] *TheraSense*, 565 F. Supp. 2d at 1113-16. Given their strong motivation to secure the '551 patent, this sufficiently showed intent.

Faced with this clear and convincing evidence of intent, Abbott called Mr. Pope and Dr. Sanghera in its case to explain themselves.[7] But that only further confirmed intent. The District Court rejected their excuses for withholding the

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applicant's gross negligence in failing to disclose allegedly highly material art. Here the District Court did not derive intent based on negligence (*supra* at 4).

[6] To the extent the first two factual findings support materiality, that does not preclude them from supporting the applicants' motivation to deceive the PTO. *See Molins*, 488 F.3d at 1180-82 (facts about prosecutor's representations and citation of the withheld art in foreign prosecution supported materiality and intent).

[7] The District Court allowed Mr. Pope to testify at Abbott's insistence that he be given a chance to explain his actions despite Abbott's previous representations that he would not be a trial witness. *TheraSense*, 565 F. Supp. 2d at 1092.

EPO submissions as being "so incredible that they suggested an intent to deceive." *TheraSense*, 593 F.3d at 1306. The propriety of these findings was revealed by the witnesses' own admissions (*infra* at 9) and further demonstrated by the numerous times Dr. Sanghera was impeached. *TheraSense*, 565 F. Supp. 2d at 1115. As the majority noted, it was only these findings rejecting their excuses that were "based on the [D]istrict [C]ourt's assessment of witness credibility." *TheraSense*, 593 F.3d at 1306.[8] Even so, the majority confirmed that these findings were amply supported by the record and that the District Court did not err in finding bad faith. *Id.* at 1306-08.

Having elected to bring Mr. Pope and Dr. Sanghera to provide an excuse for withholding the EPO submissions, Abbott cannot complain that it was prejudiced simply because the excuse provided was, in fact, incredible.

B. Mr. Pope's and Dr. Sanghera's reinterpretation of the EPO submissions at trial was unconvincing

Even though Mr. Pope and Dr. Sanghera told the PTO that the '382 patent "would require" a membrane and told the EPO and that it does "not require" one,

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[8] Abbott's argument that these witnesses provided plausible testimony (Ptn. 11) suggests that the District Court's witness credibility findings can be completely substituted by a *de novo* opinion as to credibility on appeal. This would not only be directly contrary to precedent, *see LNP Eng'g Plastics, Inc. v. Miller Waste Mills, Inc.*, 275 F.3d 1347, 1361 (Fed. Cir. 2001); *Hambsch v. Dep't of the Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986); *Griessenauer v. Dep't of Energy*, 754 F.2d 361, 364 (Fed. Cir. 1985), but is illogical. The District Court, having actually *observed* the witnesses, is uniquely positioned to render such an opinion.

they each tried to explain away the discrepancy by saying the two were consistent. They offered the implausible theory that "optionally, but preferably" was mere patent phraseology that really meant "required." That, however, did not withstand scrutiny. Dr. Sanghera testified that, "'in general English usage, [he] would not use the terms "optional" or "preferable" to describe something that is required,' and he could not recall 'any instance during the course of [his] scientific career in which [he] use[d] the terms "optional" or "preferable" to refer to something that was required.'" *Id.* at 1307.

Mr. Pope also argued that what Abbott described as "unequivocally clear" to the EPO was not the optional aspect of the membrane at the beginning of the "optionally, but preferably" sentence, but only the last few words of the same sentence describing the type of membrane. *Id.* at 1304. That explanation was equally dubious given that the immediately following sentence plainly stated that the "membrane is optional." (*supra* at 3). As the majority noted, Mr. Pope conceded at trial that the District Court's reading of the EPO submissions was correct "'as a matter of normal English construction.'" *Id.* at 1304 n.10.

Abbott argues that the majority deviated from *Star Scientific* and *Scanner Technologies* by rejecting Mr. Pope and Dr. Sanghera's alternate interpretations of the EPO statements. (Ptn. 11). What Abbott proposes is that the Court must accept *any* alternative inference that could possibly be drawn in favor of the

patentee as an excuse for such conduct, however implausible, and however contrary to the facts, the plain meaning of prior statements, and common sense. That is not the law, nor should it be.

Star Scientific and *Scanner Technologies* only require the Court to accept alternative, *equally reasonable* interpretations, not *all* possible alternative interpretations. Neither case allows for an *unreasonable* interpretation regardless of whether it favors the patentee. *See Scanner Techs. Corp. v. ICOS Vision Sys. Corp. N.V.*, 528 F.3d 1365, 1376 (Fed. Cir. 2008) ("Whenever evidence proffered to show either materiality or intent is susceptible of multiple *reasonable* inferences, a district court clearly errs in overlooking one inference in favor of another *equally reasonable* inference."). If that were the law, anyone could escape a finding of inequitable conduct by reciting a litigation-induced twisting of language that nobody could have possibly intended when written.

Here, Mr. Pope's and Dr. Sanghera's tortured, trial-inspired reading of the EPO submissions was, by their own admission, contrary to plain English. Thus, the single most reasonable inference on the record here, as required by *Star Scientific*, is of deceptive intent. Mr. Pope and Dr. Sanghera's reinterpretation of the EPO statements were so incredible that "they suggested intent to deceive." *TheraSense*, 593 F.3d at 1306. Consequently, the majority's dismissal of their

litigation-inspired reinterpretation of the EPO admissions as implausible does not deviate from the *Star Scientific* or *Scanner Technologies* precedent, but follows it.

C. The District Court's rejection of Pope and Sanghera's reinterpretation of EPO readings was well-informed

The District Court did not substitute its own interpretation of the EPO statements to contradict how Mr. Pope, Dr. Sanghera, and Abbott's expert, Dr. Johnson, read those statements. (Ptn. 11). To the contrary, Defendants' technical expert, Dr. Turner, testified at length on the prior art '382 patent and the issues before the EPO. *TheraSense*, 565 F. Supp. 2d at 1102, 1120, 1122. Although Dr. Sanghera told the PTO that a skilled person would have read the '382 patent to require a membrane, Abbott's expert Dr. Johnson, and Dr. Higgins, an inventor of the '382 patent, admitted at trial that the '382 patent does not say a membrane is required. JA02748; *TheraSense*, 593 F.3d at 1296 n.4, 1307.

Nor was inequitable conduct based on random "snippets" from EPO submissions. (Ptn. 2). The critical comments that should have been disclosed to the PTO were about the same "optional, but preferable" language that was the subject of Dr. Sanghera's affidavit (*supra* at 1). Both he and Mr. Pope were given ample opportunity to explain themselves and point to anything else in the EPO submissions to support their testimony. Yet nothing changed the fact that they knowingly told the PTO one thing and the EPO another.

III. DR. SANGHERA'S AFFIDAVIT DID MORE THAN MERELY MISCHARACTERIZE THE PRIOR ART

Abbott mischaracterizes Dr. Sanghera's affidavit as attorney argument (Ptn. 12). The Court ruled otherwise. *TheraSense*, 593 F.3d at 1305 ("[T]he representations to the PTO *were not merely lawyer argument*; they were factual assertions as to the views of those skilled in the art, provided in affidavit form.").

Abbott relies on *Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471, 1482 (Fed. Cir. 1986) to contend that affidavits about prior art are immaterial. But *Akzo* has long been superseded by the *Ferring* line of cases, which state that an affidavit prepared for the PTO must be construed as being intended to be relied upon. *Ferring B.V. v. Barr Labs., Inc.*, 437 F.3d 1181, 1188 n.9 (Fed. Cir. 2006); *Refac Int'l Ltd. v. Lotus Dev. Corp.*, 81 F.3d 1576, 1583 (1996). Plus, here the PTO specifically relied on Dr. Sanghera's affidavit to allow invalid claims.

Abbott's reliance on *Innogenetics N.V. v. Abbott Labs.*, 512 F.3d 1363 (Fed. Cir. 2008) is also misplaced. There, the prior art reference – the *intrinsic* evidence – was before the Examiner, who could draw his own conclusions as to what it taught and was "free to accept or reject" legal arguments that were directed solely to the four corners of that art. *Id.* at 1379. Here, Abbott did not merely present legal argument regarding the art. Mr. Pope convinced the PTO to look beyond the prior art to extrinsic evidence in the form of Dr. Sanghera's affidavit of how a skilled artisan would have understood that art differently than what its plain words

said. *TheraSense*, 593 F.3d at 1301. The PTO had no basis to test the veracity of those statements and no way of knowing that Abbott, and in particular the affiant himself, had argued to the EPO that the same skilled person would have a contrary interpretation of the same art.[9] Thus, as the District Court explained, Mr. Pope "was duty-bound to present any inconsistent extrinsic information known to him" because "[i]n the arena of *extrinsic* evidence, the examiner was unable to fend for himself." *TheraSense*, 565 F. Supp. 2d at 1112. Unlike *Innogenetics*, the PTO was denied the opportunity to fully consider Abbott's arguments because it was unaware of Dr. Sanghera's prior statements to the EPO.

Pharmacia Corp. v. Par Pharm., Inc., 417 F.3d 1369 (Fed. Cir. 2005), is instructive. There, a finding of inequitable conduct was affirmed, in an opinion joined by Judge Linn, on similar facts. A Pharmacia scientist had submitted a declaration in response to a prior art rejection containing statements that were directly contradicted by the declarant's withheld prior publication. Notably, as here, intent was found based on the declarant's failure to submit his prior conflicting statement. *Id.* at 1373.

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[9] Abbott's argument that the materiality of Dr. Sanghera's own prior inconsistent EPO statements is somehow in doubt fails. (Ptn. 2). 37 C.F.R. § 1.56(b)(2) makes clear that such inconsistent information is material. It was correctly held "highly material" in this case, *TheraSense*, 593 F.3d at 1301, 1305.

Moreover, this is not, as Abbott suggests, merely a case where the applicant failed to appreciate the materiality of withheld information. (Ptn. 8). Rather, in submitting the affidavit to the PTO -- notwithstanding first-hand knowledge of prior inconsistent statements the affiant himself helped draft – the applicants made an affirmative misrepresentation to the PTO that further establishes culpability.

IV. THIS CASE IS NOT DESERVING OF EN BANC REVIEW

The claim that the majority's conclusion here will somehow impose upon prosecutors an enormous new burden of disclosing every statement about the prior art in every tribunal is inaccurate. The holding creates no new obligation. The majority opinion follows Rule 1.56(b)(2), which already requires those with a duty of candor to disclose prior inconsistent statements of which they are aware.[10] As always, to the extent an applicant makes consistent statements about the art in other tribunals, they are outside the scope of the rule.

Whether or not the inequitable conduct doctrine is in need of reform, this is not the appropriate case for it. The holding here is narrow and insufficient to support any significant overhaul of the doctrine. This case does not conflict with *Kingsdown* or *Star Scientific*, let alone further any sweeping change contrary to this precedent. Nor does it exacerbate or expand any existing conflict within the

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[10] The materiality of such statements can be no more evident than where, as here, the prior inconsistent statement was made by an affiant whose sworn affidavit was what the PTO relied on to allow invalid claims.

doctrine. Indeed, it is quite the opposite – a clear decision limited to a narrow set of facts: where applicant(s) submitted a scientist's affidavit saying that a skilled person would interpret art differently than its plain language while withholding prior inconsistent statements of the same affiant made to the EPO. This holding does not reach a case where applicants limit their arguments to the four corners of the art that the PTO can independently assess. Even if the District Court had applied a *should have known* standard, the majority's affirmance – adhering to the highest standard set forth in *Kingsdown* and *Star Scientific* – shows that the ultimate conclusion of inequitable conduct on this record should not be disturbed.

It is difficult to envision a clearer example of inequitable conduct than that which was perpetrated during prosecution of the '551 patent. As the District Court and majority both recognized, this is absolutely "one of those rare cases in which a finding of inequitable conduct is appropriate." *TheraSense*, 593 F.3d at 1300. Moreover, any contrary conclusion on inequitable conduct on the facts of this case would swallow Rule 1.56 and completely "eviscerate the duty of disclosure." *Id.* at 1305.

Dated: March 18, 2010

Respectfully Submitted,

By: _____
Bradford J. Badke

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CERTIFICATE OF SERVICE

I, Brandon H. Stroy, hereby certify that on the 18th day of March, 2010, I caused the original and 18 copies of the foregoing document:

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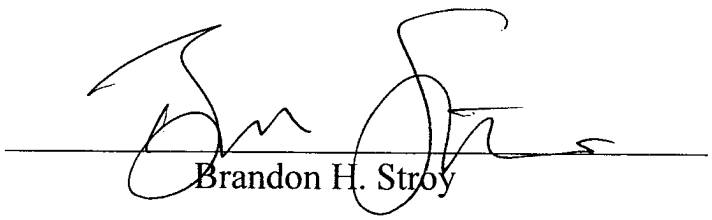

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