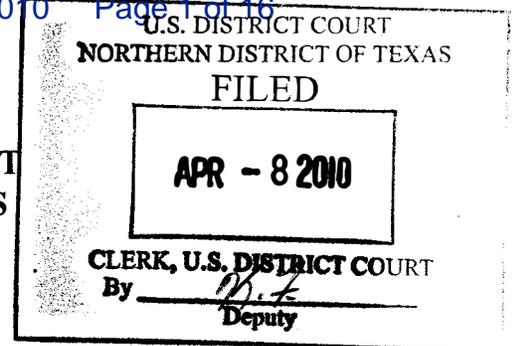


DISCLAIMER FOR OUTCOMES AND PAST PERFORMANCE

In considering the following opinion of the United States District Court for the Northern District of Texas, which constitutes a report on our prior performance, you should be aware that: (1) each legal matter is unique; (2) this performance is not necessarily representative of all our matters; and (3) you should not rely on this performance to predict future success in similar matters.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOOVY L.L.C. AND ALBERT T.
FAIRCLOUGH,
Plaintiffs,

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v.

No. 3:06-CV-616-F

TARGET CORPORATION,
Defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW AND GRANTING IN PART AND DENYING IN PART TARGET'S MOTION FOR JUDGMENT AS A MATTER OF LAW

BEFORE THE COURT are cross-motions for judgment as a matter of law filed by Plaintiffs Joovy L.L.C. and Albert T. Fairclough's (the "Plaintiffs") (Docket No. 376) and Defendant Target Corporation ("Target") (Docket No. 377) as well as the subsequent responses and replies for each motion. The Court held an evidentiary hearing on the motions on March 4, 2010. For the reasons stated below, the Court DENIES Plaintiffs' Motion for Judgment as a Matter of Law¹ and GRANTS IN PART AND DENIES IN PART Target's Motion for Judgment as a Matter of Law.² Plaintiffs' original Motion for Judgment as a Matter of Law (Docket No. 362) is DENIED AS MOOT.³

I. BACKGROUND

This case presents a dispute over U.S. Patent No. 5,622,375 (the '375 Patent). Plaintiff Albert T. Fairclough alleged that he invented a self-contained stroller framework

¹ (Resolves Docket No. 376).

² (Resolves Docket No. 377).

³ (Resolves Docket No. 362).

that includes an element to safely carry a sitting child and a standing child on a platform. Plaintiffs allege that Baby Trend infringed the '375 Patent and sold the infringing strollers to Target, who in turn sold them to customers despite its knowledge of patent infringement. The issue of the validity of the '375 Patent was bifurcated from the issue of damages. A jury trial was held in January 2010 on the issue of validity. Target acknowledged that it had infringed the '375 Patent, but argued that the patent was invalid due to (1) anticipation; (2) obviousness; and (3) inequitable conduct. Plaintiffs disagreed and presented evidence that none of Target's three theories rendered the '375 Patent invalid. After hearing the evidence, the jury found that the '375 Patent was not anticipated or obvious, but advised the Court of its opinion that the patent was acquired through inequitable conduct.⁴ Target now asks the Court to find inequitable conduct, and to reject the jury's findings on anticipation and obviousness. Plaintiffs ask the Court to accept the jury's decisions on anticipation and obviousness, but to reject the jury's opinion on inequitable conduct.

II. DISCUSSION

A. Anticipation

An invention is patentable, in relevant part, when it is not anticipated by prior art. 35 U.S.C. § 102; *In re Powelson*, 49 F.2d 832, 834 (CCPA 1931). "A patent claim is invalid by reason of anticipation if 'the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country,

⁴ Inequitable conduct, as discussed below, is an equitable issue for the Court's determination.

before the invention thereof by the applicant for patent.” *Amgen, Inc. v. F. Hoffmann-La Roche, Ltd.*, 580 F.3d 1340, 1366 (Fed. Cir. 2009) (quoting 35 U.S.C. § 102(a)). “Anticipation under § 102(a) generally requires the presence in the prior art of each and every limitation of the claimed invention.” *Id.* (citation omitted). The determination of whether a particular prior art anticipates the disputed patent is a factual question for the jury to decide. See *Elan Parms., Inc. v. Mayo Found. For Med. Educ. and Research*, 346 F.3d 1051, 1054 (Fed. Cir. 2003) (“Whether an invention is anticipated is a question of fact (citation omitted)).

Target argues that the ‘375 Patent is rendered invalid as anticipated by Canadian Patent No. 2,033,896 issued to Nancy Dronyk (“Dronyk” or the “Dronyk Patent”). The Dronyk Patent discloses a stroller that, like the ‘375 patent, has a seat for a small child to sit in and a platform for a larger child to stand on. Although Plaintiffs acknowledge that Dronyk encompasses most of the claims of the ‘375 Patent, Plaintiffs argue that Dronyk does not disclose “rear wheels of the pushchair mounted adjacent the trailing edge of the platform” as required by the Court’s claim construction of the ‘375 Patent. Mem. Op. in Supp. of Order Den. Mot. for Partial Summ. J. on Invalidity at 7-8 (Docket No. 340) (hereinafter “Partial Summ. J. Order”) (construing claim 1 of the ‘375 Patent).

The Dronyk patent discloses three sets of wheels. There is a set at the front of the stroller and a set at the end of the platform,⁵ and a third set between these two sets of wheels. Plaintiffs believe that the platform disclosed by Dronyk is an attachment to the

⁵ The Dronyk Patent itself only supports the patent with a single wheel, but as explained by the Court earlier, the Dronyk patent “inherently disclose[s] the use of multiple support wheels.”). Partial Summ. J. Order at 9.

stroller. Thus, the support wheels for the platform are not, in Plaintiffs' view, the "rear wheels of the push-chair," but are instead the rear wheels of the platform attachment while the middle set of wheels in the Dronyk patent are the wheels attached to the frame and thus the "rear wheels of the push-chair." In contrast, Target argues that once the platform is attached to the stroller, it becomes part of the stroller, rendering the platform's support wheels the "rear wheels of the push-chair."

The Court agrees with Plaintiffs' that sufficient evidence was presented for the jury to find the '375 Patent to not be anticipated by Dronyk. Dronyk discloses a platform which trails behind the stroller upon which a child can stand. Dr. Beaman testified that nothing in Claim 1 of the '375 Patent required the platform to be attached to the stroller in a particular way. He also testified that Dronyk discloses a platform that is attached by industrial staples forming a "fairly permanent" and "substantial connection" between the platform and the frame of the stroller. But Plaintiffs expert, Dr. Watson, testified that the Dronyk Patent disclosed a platform attachment whose wheels were not the rear wheels of the stroller. The Court finds that this is legally sufficient evidence to support the jury's verdict that Target did not prove anticipation by clear and convincing evidence. Target's Motion for Judgment as a Matter of Law is DENIED with respect to the issue of anticipation.

B. Obviousness

Unlike anticipation the question of whether a patent is invalid due to obviousness is ultimately a legal question for this Court to decide. *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17 (1966) ("[T]he ultimate question of patent validity is one of

law.” (citations omitted)). But the legal obviousness analysis is underpinned by factual questions. *Lucent Tech., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1310 (Fed. Cir. 2009) (citations omitted). A patent is invalid as obvious “if the differences between the [patent] and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person of ordinary skill in the art” 35 U.S.C. § 103(a). The obviousness inquiry involves the examination of four factors: “(1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) any objective indicia of nonobviousness.” *Crown Operations Int’l Inc. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002).

The parties here agree on the scope and content of the prior art as well as the level of ordinary skill in the art. To an extent, the parties also agree that every element of the ‘375 Patent was disclosed by prior art.⁶ There are four prior art patents that are especially significant to the obviousness issue. First, the Dronyk Patent, as discussed above in subpart II(A) discloses a stroller with a place for a seated child and an attached platform for a second child to stand on. Second, U.S. Patent No. 2,917,316 to issued Donald Gill (“Gill” or the “Gill Patent”) discloses a stroller with a seated child and a basket within the frame of the stroller). Third, U.S. Patent No. D321,850 issued to Chai Mong-Hsing (“Mong-Hsing” or the “Mong-Hsing Patent”) discloses a stroller with two seated children and a basket beneath the second seat. Fourth, German Patent No. DE 1 993 805 issued to

⁶ Plaintiffs argue that some elements taught away from Mr. Fairclough’s invention, not towards it.

Emil Bayer & Co. KG (“Bayer” or the “Bayer Patent”) discloses a stroller with a seated child and an attached platform for a second child to stand.

Target relies on its expert, Dr. Beaman, who explained that he believed the ‘375 Patent was obvious (1) based on Dronyk alone—by shortening the platform in Dronyk; (2) based on Gill in view of Dronyk or Bayer—by substituting Gill’s basket with the platform from Dronyk or Bayer; and (3) Mong-Hsing in view of Dronyk or Bayer—by removing the rear seat of Mong-Hsing and replacing it with the platform disclosed by Dronyk or Bayer. While Plaintiffs do not agree with Dr. Beaman’s conclusions, they do not dispute that every element of the ‘375 Patent has been previously disclosed. The Court finds that a person of ordinary skill in the art, if given the motivation to construct a stroller where one child sits and another stands, would find the ‘375 Patent obvious in light of the prior art.

But the issue here is one of motivation. “[A] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR Intern. Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Target argues that once a strong showing of obviousness has been made, secondary considerations cannot rebut the showing. The Court overruled Target at the trial and does so again now. *See, e.g., Ortho-McNeil Pharm., Inc. v. Mylan Labs, Inc.*, 520 F.3d 1358, 1365 (Fed. Cir. 2008) (“evidence of objective criteria showing non-obviousness . . . is not just a cumulative or confirmatory part of the obviousness calculus but constitutes independent evidence of non-obviousness”). Plaintiffs argue that they have provided considerable evidence of secondary considerations to support validity:

evidence of commercial success, copying, unexpected results, acceptance by others, and respect for the patent. The Court finds particularly important the evidence Plaintiffs provided that no person of ordinary skill in the art would have the motivation to combine the previously disclosed evidence. Target argues that Plaintiffs are relying on the Federal Circuit's "teaching, suggestion, or motivation" ("TSM") test which has now been rejected by the Supreme Court. *See KSR*, 550 U.S. at 415 (rejecting the TSM test).

The Federal Circuit's TSM test was rejected because it was too rigid. *Id.* Under the TSM test, the Federal Circuit would only find obviousness if the prior art dealt with "the precise problem that the patentee was trying to solve." *Id.* at 414 (quoting *KSR Intern. Co. v. Teleflex Inc.*, 119 Fed. Appx. 282, 288 (Fed. Cir. 2005)). The Supreme Court rejected this approach, *id.* at 415, and observed that obviousness could also be determined by looking at "design incentives and other market forces." *Id.* at 417. Two errors were committed by the Federal Circuit in its analysis: (1) only looking to the problem that the patentee was attempting to solve; and (2) assuming that persons of ordinary skill in the art attempting to solve a problem would only look to prior art attempting to solve the same problem. *Id.* at 420. Thus, the Supreme Court's rejection of the TSM test was merely in its rigidity—the Supreme Court noted that the Federal Circuit had articulated a less rigid test and explicitly held that it was not ruling on this less rigid test that required "consideration of common knowledge and common sense." *Id.* at 421 (quoting *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1367 (Fed. Cir. 2006)).

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While *KSR* definitely broadens what can be considered to determine if there is a motivation to combine elements of different designs, the Court finds that it must still consider if the motivation exists. Although obviousness is a legal question to be decided by this Court, factual questions underpin the legal question. *Lucent Tech.*, 580 F.3d at 1310. Where, as is the case here, the jury makes no explicit factual findings, the Court must presume that factual disputes were resolved in favor of the verdict, including disputes as to the motivation to combine elements from the prior art. *See I4i Ltd. P'ship v. Microsoft Corp.*, ___ F.3d ___, 2010 WL 801705 at *8, 2010 U.S. App. LEXIS at *22 (Fed. Cir. Mar. 10, 2010) (“[W]e must presume the jury resolved underlying factual disputes in i4i's favor because the jury made no explicit factual findings.” (citation omitted)). At the trial, Plaintiffs presented substantial evidence that there was no motivation within the industry to create a stroller with a unrestrained child. One of the important reasons the Supreme Court rejected the “rigid” TSM test was because it did not account for market forces as plaintiffs have done in the present civil action. *See KSR*, 550 U.S. at 419 (rejecting the TSM test’s formalistic reliance on patents and published articles which does not take into account “that market demand, rather than scientific literature, will drive design trends”).

The Court finds that the evidence was sufficient for the jury to find that there was no motivation to combine the various elements of the ‘375 Patent disclosed by the prior art. Relying on the jury’s factual findings implicit with their verdict, the Court finds that Target has not met its burden of proof in showing obviousness by clear and convincing

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evidence. Target's Motion for Judgment as a Matter of Law is DENIED with respect to the issue of obviousness.

C. Inequitable Conduct

A patent applicant who breaches the duty of good faith and candor to the U.S. Patent and Trademark Office ("PTO") may be unable to enforce the patent due to inequitable conduct. *See Purdue Pharma L.P. v. Endo Pharms. Inc.*, 438 F.3d 1123, 1128 (Fed. Cir. 2006). A patent applicant is liable for the inequitable conduct of the patent applicant's attorneys, even if the applicant did not engage in any inequitable conduct. *See Aventis Phama S.A. v. Amphastar Pharms., Inc.*, 525 F.3d 1334, 1352 (Fed. Cir. 2008) (observing that the duty of candor and good faith applies to "[e]ach *individual* associated with the filing and prosecution of a patent application" (quoting, with added emphasis, 37 C.F.R. § 1.56)). A defendant asserting inequitable conduct by a patent applicant must prove by clear and convincing evidence that the applicant (1) "failed to disclose material information;" and (2) "intended to deceive the [PTO]." *Larson Mfg. Co. of South Dakota, Inc. v. Aluminart Products Ltd.*, 559 F.3d 1317, 1326 (Fed. Cir. 2009) (quoting *Star Scientific Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1365 (Fed. Cir. 2008)). Because there is rarely direct evidence of intent to deceive, intent may be inferred from the evidence, but the inference must be the "single most reasonable inference able to be drawn from the evidence." *Larson Mfg.*, 559 F.3d at 1340 (quoting *Star Scientific*, 537 F.3d at 1366).

If the defendant proves materiality and intent to deceive, a trial court must then balance the levels of materiality and intent to determine if it should find inequitable

conduct. *Id.* at 1327. Unlike the issues of anticipation and obviousness, “[i]nequitable conduct is equitable in nature and the trial judge has the obligation to resolve the underlying facts.” *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1110 (Fed. Cir. 2003). Thus, the jury’s decision on the issue of inequitable conduct in this case is advisory.

1. Materiality

The Court finds that the Dronyk patent is highly material. The PTO initially rejected Mr. Fairclough’s patent application in light of the prior art. The ‘375 Patent was distinguished from the disclosed prior art because of two critical factors: a rear-mounted platform with substantially unobstructed space above and behind the platform. None of the disclosed prior art possessed this limitation, while the Dronyk Patent did disclose a platform which met these criteria. In light of the two limitations argued by Mr. Fairclough in the course of prosecuting his patent, the Court finds the Dronyk Patent to be highly material.

2. Intent to Deceive

While not disputing that Dronyk was material,⁷ Plaintiffs zealously argue that Target has not proven intent to deceive by clear and convincing evidence. They believe that the evidence shows that Mr. Fairclough was at most negligent in failing to disclose Dronyk, and that they have produced direct evidence showing that he did not intend to deceive the PTO, while Target characterizes this evidence as “self-serving”. With regard

⁷ Plaintiffs do argue that it is not “highly material.” The Court rejects this argument for the reasons stated in section II(B)(1).

to his European patent attorney, Mr. Harmon, Plaintiffs argue that there is no evidence whatsoever about his intent given that he is in poor health and was unable to be deposed or to testify. After reviewing the testimony, the Court concludes that Target has met its burden of proof in showing an intent to deceive.

There are several events in the patent prosecution that cause the Court to infer the intent. The first is German Patent No. G 91 09 676.6 issued to Johann Königler (“Königler” or the “Königler Patent”). Königler discloses a baby carriage in which an infant lies down with an attached platform for an older child to stand on. The attached platform is outside of the baby carriage’s frame, but is without support wheels. At the time Königler was uncovered during a patent search, Mr. Harmon informed Mr. Fairclough that it was the most troublesome prior art (neither Dronyk nor Bayer was known to Mr. Fairclough or Mr. Harmon at this time): “The problem is, given that a rear platform for a standing child is known for a traditional [baby carriage], is it inventive to transfer that principle to a [stroller].” Trial Ex. 76 at 3. Königler was disclosed to the PTO, but only the original German patent, not an English translation. Plaintiffs argue that its disclosure shows no intent to deceive, while Target argues that the failure to disclose the translation helps show intent to deceive. The Court finds that Königler indicates that Mr. Fairclough knew what would be problematic—strollers, even poorly designed ones, with platform attachments. The decision not to submit a translation of Königler is also, in the Court’s view, some evidence of a failure to meet the duty of candor, though definitely insufficient by itself to show intent by clear and convincing evidence.

Subsequent to the submission of his patent application, but prior to receiving his patent, Mr. Fairclough became aware of the Dronyk patent. It is disputed whether or not Mr. Fairclough gave a copy of Dronyk to Mr. Harmon. Prior to receiving a copy himself, he informed Baby Trend that he had discussed the matter with Mr. Harmon and was frustrated that Ms. Dronyk had not enclosed a copy of her patent when she complained to Baby Trend. *See* Trial Ex. 27 at 1 (“I spoke with my patent agent this morning, his view is that if Nancy Dronyk considers she has a patent that is in any[]way connected to mine she should have done the decent thing and enclosed a copy of it.”) Mr. Fairclough ultimately obtained a copy of the patent, reviewed it, and dismissed its relevance to in a letter to Baby Trend. He characterized the Dronyk Patent as merely pertaining to a trailer attachment. Trial Ex. 869.

The PTO would initially reject Mr. Fairclough’s patent as anticipated by the Gill Patent and U.S. Patent No. 3,061,328 issued to Joseph Konar (“Konar” or the “Konar Patent”). Both of these patents disclosed strollers with a basket over the rear axle. The PTO did not consider the Königer Patent. Mr. Fairclough was able to obtain the patent when his invention was distinguished from the prior art because it described a “platform ‘including a substantially unobstructed trailing edge’ . . . and . . . ‘a substantially unobstructed space formed above the platform and behind the seat.’” Trial Ex. 31 at 103. Both Konar and Gill disclosed baskets which did not have a substantially unobstructed trailing edge. Gill was substantially unobstructed above the basket, but Konar was not. Even though it was not considered by the PTO, it is important to note the Mr. Harmon took the position before the European Patent Office that Königer’s bar was too low, and

thus not substantially unobstructed vertically. *See* Trial Ex. 950 at 2. Unlike the prior art that was disclosed, Dronyk discloses a platform that was unobstructed both vertically and horizontally.

In the Court's view, it is absolutely crystal clear that Dronyk should have been disclosed to the PTO. If Königer had to be disclosed, Dronyk definitely did. Dronyk, like Königer, is arguably an attachment. *See* Trial Ex. 76 at 3 (Mr. Harmon explaining to Mr. Fairclough that Königer was "intended as a supplemental device for fitting to an existing [baby carriage]"). But unlike Königer, it is supported by wheels and thus stable, and is substantially unobstructed horizontally and vertically.

Unfortunately, it is not possible to determine who chose to withhold Dronyk from the PTO, especially since Mr. Harmon was unable to be deposed or testify. The verdict form asked the jury if Target proved by clear and convincing evidence that Mr. Fairclough or any of his attorneys intended to deceive the PTO by failing to disclose Dronyk. The jury answered "yes" despite the difficulty of determining who deceived the PTO. Although this decision was advisory, the Court finds that juries are highly competent in determining questions of intent. The Court's own findings of fact also comport with the jury's finding. There is direct evidence from Mr. Fairclough showing that he consulted Mr. Harmon when the mere possibility of Dronyk arose. The Court finds that upon receiving the copy of Dronyk, the only reasonable inferences that may be drawn are that Mr. Fairclough either gave a copy to his attorney, Mr. Harmon, or he determined it would be problematic and withheld it from his attorney to prevent the PTO from receiving it. If Mr. Harmon received a copy of the Dronyk Patent from Mr.

Fairclough, the only reasonable inference the Court can make is that he intentionally withheld it from the PTO. The record is clear that Mr. Harmon was concerned by the less problematic⁸ Königer Patent, and that he was less than forthcoming about Königer before the PTO. Especially given the limitations placed on Mr. Fairclough's invention during the prosecution, the Court finds that if Mr. Harmon knew about Dronyk, the only reasonable inference that can be drawn for his failure to disclose it was that the failure was intentional.

Intent to deceive may not be inferred unless it is the single most reasonable inference. *Larson Mfg.*, 559 F.3d at 1340. Here, the single most reasonable inference is that either Mr. Harmon or Mr. Fairclough intentionally deceived the PTO. Because inequitable conduct occurred if either intentionally withheld Dronyk from the PTO, *see* 37 C.F.R. § 1.56, the Court finds that Target has proven inequitable conduct by clear and convincing evidence.

Plaintiffs argue in a supplemental filing that the Federal Circuit's recent *en banc* opinion in *Ariad Pharm., Inc. v. Eli Lilly & Co.*⁹ ("*Ariad I*") forecloses a finding of inequitable conduct where the attorney is given all documentation because it reinstated the Federal Circuit's opinion in *Ariad Pharm., Inc. v. Eli Lilly & Co.*¹⁰ ("*Ariad F*"). *See Ariad II*, 2010 WL 1007369 at *19, 2010 U.S. App. LEXIS 5966 at *64 (reinstating the

⁸ Plaintiffs argue that Königer is more problematic than Dronyk because it only has two sets of wheels. The Court disagrees—the record indicates that Mr. Harmon viewed Königer as an attachment just like Plaintiffs characterize Dronyk.

⁹ ___ F.3d ___, 2010 WL 1007369, 2010 U.S. App. LEXIS 5966 (Fed. Cir. Mar. 22, 2010) (en banc).

¹⁰ 560 F.3d 1366 (Fed. Cir. 2009).

inequitable conduct portion of the opinion in *Ariad I*). The Court disagrees with Plaintiffs' interpretation. There was no intent to deceive in *Ariad I*, not because neither the inventor nor the attorneys had an intent to deceive. *Ariad I*, 560 F.3d at 1378. The inventor had no intent because she disclosed the error to her attorneys. *Id.* The attorneys had no intent, because the trial court found that the submitted information never reached the proper attorney due to various issues. *See generally id.* (discussing the various issues relating to the prosecution, including the decision by a prosecuting attorney to move to a different firm, forcing a new attorney to take control of the prosecution). The issues present at the attorney's office in *Ariad I* are not present here.

3. Enforceability

Having found materiality and intent to deceive, the Court must weigh the materiality of Dronyk and the amount of intent to deceive shown. *Larson Mfg.*, 559 F.3d at 1327 In balancing the level of materiality with the level of intent, the Court finds that Target's proof as to the level of ill intent is not as strong as it could be. Although Target has definitely proven intent to deceive by clear and convincing evidence, it is unable to prove who intentionally deceived the PTO or why this person did so. But any deficiencies here are more than balanced by the high materiality of the Dronyk Patent. The Court finds that the '375 Patent is unenforceable due to inequitable conduct.

Plaintiffs argue that because the jury did not find obviousness, that there was not harm for failing to disclose Dronyk. This argument ignores the burden of proof issue. Target had to prove obviousness by clear and convincing evidence. In contrast, during the patent prosecution, prior art must be given its "broadest reasonable construction."

Phillips v. AWH Corp., 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc). The PTO was already prepared to deny Mr. Fairclough's patent application as anticipated by Konar and Gill. The Court is of the opinion that if the PTO had been given the Dronyk Patent that it would have denied the application even after limitations were placed on it to get around Konar and Gill. Accordingly, the Court DENIES Plaintiffs' Renewed Motion for Judgment as a Matter of Law and GRANTS Target's Motion for Judgment as a Matter of Law on the issue of inequitable conduct.¹¹

IV. CONCLUSION

For the reasons stated above, the Court DENIES AS MOOT Plaintiffs Motion for Judgment as a Matter of Law, DENIES Plaintiffs Renewed Motion for Judgment as a Matter of Law, and DENIES IN PART AND GRANTS IN PART Target's Motion for Judgment as a Matter of Law.¹² The '375 Patent is not invalid as anticipated or obvious, but is unenforceable due to inequitable conduct.

IT IS SO ORDERED.

Signed this 8th day of April, 2010.



Royal Furgeson
Senior United States District Judge

¹¹ The Court is aware that its determination of unenforceability due to inequitable conduct will likely result in a motion for attorney fees pursuant to 35 U.S.C. § 285. A finding of inequitable conduct does not require the Court to award attorney fees. *E.g.*, *Nilssen v. Osram Sylvania, Inc.*, 528 F.3d 1352, 1358 (Fed. Cir. 2008). The Court advises Target that it would not be wise to expend significant resources arguing for attorney fees. Culpability is one of a number of factors the Court must weigh to award attorney fees. *See, e.g., id.* at 1359 (listing factors the Court must weigh).

¹² (Resolves Docket Nos. 362, 376 and 377).