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“[U]nfortunately, I would not be interested.” DTX021.001. “This decision was made due to a lack of commercial interest.” JTX10.098. “[W]e can’t revive it because it was intentionally abandoned” JTX019. “The undersigned *certifies* that the delay in payment of the maintenance fee to this patent was *unintentional*.” JTX09.063 (emphasis added). The false certification’s only possible purpose was to induce the PTO to revive the ’475 Patent. Schubert treats this undisputed evidence, and more, as a “work of fiction,” Resp. 5, 8, 10, because all evidence points against him.

BU was correct, not mistaken, when it chose not to pay the fee due to lack of commercial interest. Lee knew that, but after Schubert pestered him, instructed Anderson to trigger the petition to revive. Connors certified that, based on either personal knowledge or a reasonable inquiry, he knew the delay was unintentional. *See* 37 C.F.R. § 10.18 (2008). But he didn’t know, and he did not investigate at all. The best gloss on Connors’ conduct is that Stevens lied to him about the circumstances to smooth the path to revival. But each reasonable inference pins inequitable conduct on somebody. No reasonable inference absolves everyone.

Schubert has made millions off his fraudulent scheme. To appropriate the patent, he lied to the government agencies that financed his research. For 8 years, he failed to produce emails showing he knew the patent could not honestly be revived, and pretended they did not exist. He lied in this Court about the NSF investigation into his ethics. The inequitable conduct here should render the ’475 Patent unenforceable; otherwise, patentees have no incentive to pay maintenance fees until commercial interest develops. At a minimum, Schubert’s unclean hands bar enforcement.

I. THE ’475 PATENT IS UNENFORCEABLE DUE TO INEQUITABLE CONDUCT

A. The Equities Bar Enforcement of This Falsely Revived Patent

Schubert insists that, even if the Court finds inequitable conduct, the ’475 Patent is still enforceable because the “charges against [him personally] are frivolous.” Resp. 2. But Schubert is chargeable with all inequitable conduct that caused a rightfully expired patent to revive under false

pretenses. *See In re Rembrandt Techs. L.P.*, 899 F.3d 1254, 1273-74 (Fed. Cir. 2018).

Schubert's own inequitable conduct was substantial. He ignored Lee's ethical objections and worked with BU to snatch the federally funded patent from the public domain. He lied to the Navy to persuade it to assign the patent to him, falsely stating that he had asked BU not to abandon the patent. Tr. 343:17-20, 440:19-441:21; Lumileds' Request for Judicial Notice (RJN), Karasek Dec. Schubert, his lawyers, and BU collected millions from Osram and Cree without disclosing the "we can't revive it" email exchange that could have prevented those settlements. D.I. 326 DFF ¶¶ 60-62, 72; JTX-19; *see* Op. Br. 17. Only when Lumileds won its motion to include inequitable conduct in its amended complaint did Schubert finally produce this smoking-gun evidence. D.I. 326 DFF ¶¶ 70-74.

At trial, Schubert was not a credible witness. Like the BU witnesses, Schubert conveniently forgot the substance of every conversation and meeting about revival. *See* Tr. 303:2-304:22; 332:2-15; 333:23-25. This "suspiciously selective" memory weighs against his credibility. *Avid Identification Sys. v. Crystal Imp. Corp.*, 603 F.3d 967, 975 (Fed. Cir. 2010). He claimed to be oblivious to the ethical implications of BU's "we can't revive it" email (Op. Br. 19), and cannot explain why he responded to an interrogatory as though the email did not exist. *See* Op. Br. 17. Nor does he respond to the evidence (Op. Br. 6 n.2) showing that he lied in testifying that he didn't want the patent if Stocker did (Tr. 310:22-312:6). Schubert offers no excuse for his lie at trial that he was "absolutely unaware" of any allegations of NSF-related fraud and conflict of interest against him. Tr. 328:10-13. Schubert recalled those allegations only when confronted with his and his wife's scores of FOIA requests relating to the NSF's investigation and his forced resignation from an NSF-funded research center. Tr. 323:6-20, 324:22-25; 329:25-330:3; <https://www.nsf.gov/policies/logs/foia-log-2011.pdf>, pp. 3-13, 16-20; *id.*, p. 18 (forced

resignation); <https://www.nsf.gov/policies/logs/foia-log-2010.pdf>; D.I. 326 at DFF ¶ 24.

B. There Is No Reasonable Inference that the Certification Was In Good Faith

As the Court observed, “nobody on [BU or Schubert’s] side has a story” that would provide a “reasonable inference. Got nothing here.” Tr. 432:1-15. Schubert still has nothing.

1. Schubert Cannot Claim Reliance On Legal Advice

The Court told Schubert that he was “not going to be able to rely on” Connors’ analysis or advice, Tr. 369:6-371:6. Yet in arguing that Lee relied on Stevens, Resp. 8-9, Schubert claims that *Stevens* relied on advice of counsel: “In response to Dr. Lee’s inquiry ..., Dr. Stevens acted responsibly by contacting his patent counsel, Mr. Connors,” and left “the revival process ... to patent counsel.” Resp. 10, 11. Claiming one “relied on counsel to make the final determination” about PTO submissions, absent full disclosure, improperly uses privilege as a sword and shield. *Brigham & Women’s Hosp., Inc. v. Teva Pharms. USA, Inc.*, 707 F. Supp. 2d 463, 470-71 (D. Del. 2010). Schubert cites no contrary authority. He cannot rely on Connors’ supposed advice by laundering it in an “indirect way” through Stevens. Pretrial Conf. Tr. 5:18-21.

2. There Is No Reliable Evidence that Stevens Spoke with Connors

Though Schubert asserts that the “existence of [Stevens’ discussion with Connors] is uncontested” (Resp. 11), the only reasonable inference is that Stevens did not speak with Connors. Neither Lee’s December 10, 2009 email to Schubert (JTX18.001) nor any other document mentions a conversation between Stevens and Connors. Schubert relies on Stevens’ testimony that he spoke with Connors between December 2 and 10, 2009. Tr. 160:15-19. But Connors testified that his “next involvement” with the ’475 Patent after 2005 was “reviving the patent” in “2010.” Tr. 247:7-24. Connors “rarely” communicated with Stevens, as Anderson was his primary contact (Tr. 245:24-246:6), and didn’t recall any contact with Stevens about the ’475 Patent (Tr. 245:15-17). Stevens claimed he told Connors that BU was “not aware of commercial interest ... and that

we had determined not to pay the second maintenance fee accordingly.” Tr. 137:16-138:3. Yet Connors testified that he “ha[s] no knowledge of” “the reason why BU did not timely pay the ... fee.” Tr. 249:8-10; *see also id.* at 263:25-264:4. If Connors was genuinely “surprised” by what he saw during his deposition, Tr. 377:4-20 (the Court), Stevens’ version must be untrue.

3. There Was No “Mistake”

Not only was there no “mistake” about commercial interest in September 2009 (Op. Br. 5), no witness testified that BU had a “mistaken belief” (Resp. 14). Nor is there any evidence of “miscommunication” (Resp. 16), or “breakdown[] in the decision chain” (*id.* 14) regarding BU’s documented decision not to pay the maintenance fee. Connors was “familiar with” and regularly “consult[ed]” the MPEP and CFR, Tr. 238:20-239:16, which contain the PTO’s 1997 “clear guidance on this precise issue” of changed interest in a patent. *Rembrandt*, 899 F.3d at 1272-73. *Network Signatures, Inc. v. State Farm Mutual Automobile Insurance Co.*, 731 F.3d 1239, 1243 (Fed. Cir. 2013), also makes time of the essence in correcting a real mistake, yet BU delayed for months after Schubert changed his mind.

C. The Evidence Shows Intent to Deceive the PTO.

1. Economic Pressure Gave Lee and Stevens Motives to Deceive the PTO

The simplest inference is that a knowing falsehood was intentional. *eSpeed, Inc. v. BrokerTec USA, L.L.C.*, 480 F.3d 1129, 1138 (Fed. Cir. 2007). As to motive, Schubert asserts that “there is no evidence that Dr. Stevens was worried about his job, the budget, or aware of any possible money from Dr. Schubert.” Resp. 10. But Schubert told the Court that “Stevens was probably being told that he no longer has a job there.” Tr. 391:12-25. And the evidence shows that Lee and Stevens participated in BU’s “collective” decision not to pay maintenance fees due to the “constant struggle” with the budget. Tr. 123:4-16, 140:21-22. They told the patent committee that revival was “a good opportunity for BU to recover at least a portion of prior patent costs,” noting

that Schubert's offer to pay "up-front money" was unusually favorable for BU. JTX10.095; Tr. 172:3-6. Schubert surely communicated to BU his optimism about suing the LED industry (Tr. 300:1-7), making BU's 10% interest an especially promising bet.

2. There Is No Evidence that Lee Believed the Patent Could Be Honestly Revived.

Lee recognized that the patent could not be honestly revived because BU couldn't "explain[] in good faith that the abandonment was unintentional." JTX019. Schubert claims that Lee's December 10, 2009 email is "clear proof that [Lee] changed his mind." Resp. 8. But that email says only that Lee "was able to speak to [Stevens], and *his* brief reaction was that we could *probably* work something out." JTX18.001 (emphasis added). As the Court observed, Lee's email "doesn't say *our* reaction." Tr. 388:19-389:11 (emphasis added). Stevens himself testified that reliance on his "reaction" would be "ill advised." Tr. 181:21-25. The Court asked if Lee's December 10 email "is ... the best you have for saying Lee came to believe that it was ... okay to revive it?" Tr. 389:12-16. Schubert has nothing else.

Lee never recanted his prior email. Schubert cannot explain the supposed "clear and unmistakable meaning" of the December 10 email (Resp. 11), *i.e.*, "how Dr. Lee thought it could be worked out" (Tr. 302:19-21). Schubert claims that Lee relied on Stevens' "view" to conclude that the patent could be truthfully revived (Resp. 8-9), but Stevens did not recall "ever discussing with Sean Lee what it means for an abandonment to be unintentional." Tr. 158:25-159:2. He instead testified that Lee "agreed" to transfer a "dead patent" to Schubert. Tr. 172:22-24.

Lee wrote the memorandum telling the patent committee that the patent could "be revived for a filing fee of \$2,500" without flagging the "unintentional" delay issue. DTX36; JTX10.094-95. After he and Stevens "presented" the "request" to the committee, JTX15.001, Lee stayed the course after Stevens left, instructing Anderson to have Connors revive the patent. (In claiming that

“[t]here is no evidence that Dr. Lee issued [the] instructions” (Resp. 9), Schubert ignores the evidence that no one else could have done so (Op. Br. 9 n.3.)

3. Stevens Intended to Deceive the PTO

Schubert accuses Lumileds of “false[ly] stat[ing] that Dr. Stevens ‘could not explain’ his basis for defending his recommendation to the Patent Committee.” Resp. 13 & n.7. Yet Stevens testified that he (1) did not recommend revival (Tr. 133:3-9, 168:3-171:17); (2) was “not aware” “why Professor Schubert believed that he would be able to revive the ’475 patent” (Tr. 164:2-5); and (3) did not know what “unintentional” means (Tr. 159:6-16, 175:2-7). Stevens also got tangled in his own tale: After claiming not to recall communicating the “dead patent” “expectation to anyone,” Tr. 133:24-134:14, he claimed Lee “agreed” with the “dead patent” scheme. Tr. 172:17-173:2. Flouting the *in limine* ruling, Schubert responds that Stevens “relied on outside counsel.” Resp. 13 n.7. Yet the most reasonable inference is that Stevens never called Connors. *See* p. 3-4, *supra*. Next most likely, Stevens intentionally withheld information from Connors to grease the skids for revival. The only other possibility: Connors knew the nonpayment was intentional.

Stevens overrode Lee’s ethical objection, withheld information from Connors, had Lee draft the misleading “recommendation to reinstate the ’475 Patent” (PDX007; D.I. 262 at 4; JTX10.095), signed his name to it, and presented it to the patent committee with Lee. Stevens tried to shift blame with farfetched stories because the facts demonstrate his intent to deceive the PTO.

4. Connors Intended to Deceive the PTO

Schubert’s conjecture that Connors “likely concluded that a ‘mistake in fact’ justified the Petition” (Resp. 15) conflicts with the evidence. *See* p. 4, *supra*. And the false certification could have no purpose other than to deceive the PTO into reviving the patent.

Connors was familiar with the MPEP and CFR. Tr. 238:20-239:16. He knew that he was certifying both that the entire 7-month delay was “unintentional” and that the certified statement

was “true” to the best of his knowledge, “formed after an inquiry reasonable under the circumstances,” and “ha[d] evidentiary support.” 37 C.F.R. 10.18(b)(1), (2)(iii) (2008); *see also* MPEP Eighth Ed. Rev. 7, § 410.

Unless Stevens lied to Connors, there are only two possible scenarios. (1) Connors knew that BU decided not to pay the fee after Schubert declined the patent, so that the false certification was knowing and intentional. (2) Connors certified that he knew or had evidentiary support that the delay was unintentional when he did not know and had no basis to say so.

Connors could not explain his basis for certifying “unintentional” delay, Tr. 254:4-7; 252:15-19, 253:10-12, so testified that he “might have done it a little different” today. Tr. 280:8-14. As the Court observed, Tr. 382:2-17, there is no evidence that Connors investigated the facts. Tr. 255:8-22. Connors’ testimony (if credited) shows he did not speak with Stevens about revival. When asked if he had “ever become aware of the reason why BU did not timely pay the second maintenance fee,” Connors responded, “I have no knowledge of that.” Tr. 249:8-10. Schubert slyly inserts the word “present” before “knowledge” (Resp. 18), but Connors knew how to specify when he did not recall something. *See* Tr. 245:1-4, 262:21-263:2. Indeed, when accused of inequitable conduct in 2013, Connors did nothing to refresh or preserve his recollection. Tr. 255:23-256:2.

Schubert absurdly relies on *Network Signatures* to speculate about Connors’ mental state three years before the decision issued. *Network Signatures* does not fit. Schubert explicitly *declined* commercial interest, while the patent owner in *Network Signatures* belatedly discovered a timely communication *expressing* interest. A “change of mind” like Schubert’s does not render a delay “unintentional.” *See Goss Intern. Am., Inc. v. MAN Roland, Inc.*, 2006 WL 2251554, at *4-5 (D.N.H. July 31, 2006); *In re Maldague*, 10 U.S.P.Q.2d 1477, 1478 (Comm’r Pat. 1988).

Schubert admits that, under *3D Medical Imaging Systems, LLC v. Visage Imaging, Inc.*,

228 F. Supp. 3d 1331, 1337-39 (N.D. Ga. 2017), one intends to deceive the PTO if he certifies unintentional delay but “never investigated any facts.” Resp. 18. Connors had “no knowledge of” the reason for BU’s delay. Tr. 249:8-10. When a patent practitioner “mak[es] a representation of which he admits he had no knowledge[,] [t]he single most reasonable inference ... is that [he] made the misrepresentation with the specific intent to deceive the PTO.” 3D, 228 F. Supp. 3d at 1339. That is exactly what Connors did.

Connors meets even the heightened willful blindness standard for statutory indirect infringement, which requires subjective knowledge of a “high probability” that a fact is true, coupled with deliberate avoidance of the inquiry that would uncover it. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011). Connors had to know that there was a high probability that BU’s failure to pay was intentional. Of the tens of thousands of patents allowed to expire each year for nonpayment of fees, less than 4% prompted petitions to revive. *See* <https://bulkdata.uspto.gov/data/patent/maintenancefee/MaintFeeEvents.zip>; RJN, Maier Dec. ¶ 13; Mark Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. Rev. 1495, 1503-04 (2001) (2/3 of all “patents lapse for failure to pay required maintenance fees”); Op. Br. 1 (2000 petitions filed last year). Connors certified that he knew or had made a reasonable investigation to confirm “that the delay ... was unintentional.” JTX09.0631; 37 C.F.R. 10.18(b). Yet he knew he didn’t know and had not investigated, so the certification was knowingly false. And he avoided taking any steps that might lead him to know the facts. His blindness, if blindness it was, was as willful as willful gets. *See* 3D, 228 F. Supp. 3d at 1337, 1338.

Connors’ conduct easily meets the standard of recklessness that constitutes intent for fraud. The Supreme Court and Federal Circuit distinguish recklessness from negligence, gross or otherwise. *E.g.*, *Global-Tech*, 563 U.S. at 769-70. That difference was the basis for the remand in

Hewlett-Packard Co. v. Bausch & Lomb, Inc., 882 F.2d 1556, 1562 (Fed. Cir. 1989), for the district court to make findings under a recklessness standard it had recited but not applied.

Connors’ (1) “reckless indifference to the truth” and (2) “studied ignorance” combined with (3) the “absence of good faith” constitutes intent to deceive under *Hewlett-Packard*, 882 F.2d at 1562. In addition to the authorities cited in our opening brief (at 12), the Restatement of Torts (and the decisions cited there) make clear that liability for fraud arises not only for a misrepresentation that the maker (a) “knows or believes ... is false,” but also if the maker (b) “knowingly states or implies a false level of confidence in its accuracy,” or (c) “knowingly states or implies a basis for the representation that does not exist.” Restatement (3d) Torts § 10. *See id.* cmt. a (distinguishing “false statement” made “carelessly, but in good faith”); Restatement (2d) Torts § 526 (materially identical to Rest. (3d) Torts § 10).

Schubert’s claim that Connors had a “good faith belief” that BU’s delay was unintentional is not supported by any evidence. He can’t rely on an unproven conversation between BU and Connors in December 2009 to create an inference of “good faith.” And he has nothing else. Similarly, Schubert’s proposition that a “seasoned patent attorney ... would never” intend to deceive the PTO (Resp. 18-19)—elevates preconception over evidence. Acquaintances routinely say far worse perpetrators “would never” do what they did.

5. Schubert Goaded BU into Reviving and Intended to Deceive the PTO

Schubert claims that he “was not involved in the ’475 Patent revival process” (Resp. 6), but in fact he was “substantively involved” in the decision to revive, and thus owed the PTO a duty of candor. *See Avid*, 603 F.3d at 973. Despite his “suspiciously selective” amnesia, *id.* at 975, the documentary evidence shows that he drove the revival, disregarded Lee’s ethical objections, and pressured Lee, Stevens, and others to revive the ’475 Patent. *See* Tr. 302:22-303:1, 303:10-14, 332:2-15; JTX018; JTX019; JTX029.001-002; JTX030; JTX031; DTX032; DTX089.001. He

even told the Navy he was involved. Tr. 343:17-20. Schubert intended to deceive the PTO by procuring BU to do so. *See GS Cleantech Corp. v. Adkins Energy LLC*, 951 F.3d 1310, 1330 (Fed. Cir. 2020). His later failure to cure confirms his intent.

D. The False Certification of “Unintentional” Delay Was Material

Schubert maintains that the “‘but for’ test for materiality does not apply to maintenance fees as a matter of law.” Resp. 19. But the Federal Circuit in *Rembrandt* squarely held that a false certification of an “unintentional” delay was material because “the PTO would not have revived the patents if it had known that [the patentee] consciously allowed them to expire.” 899 F.3d at 1273. Schubert also insists that materiality requires proof of “egregious misconduct” in the form of “‘deliberately planned and carefully executed scheme[s]’ to defraud the PTO and the court.” *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1292 (Fed. Cir. 2011). But that is the exception, not the rule, *id.*, and here the rule is satisfied.

II. SCHUBERT’S BAD FAITH CONDUCT BARS ENFORCEMENT HERE

Unlike inequitable conduct, unclean hands can rest on “unconscionability” or “bad faith,” not just fraud or intent to deceive. *Abbvie Inc. v. Boehringer Ingelheim Int’l GmbH*, 2018 WL 2604825, at *1 (D. Del. June 4, 2018). The unclean hands doctrine “remains available to supply a remedy” to address egregious conduct before the PTO or in litigation, but bars enforcement only in the litigation at hand. *Therasense*, 649 F.3d at 1287. That is the minimum consequence appropriate here. Schubert’s ability to enforce the patent is “subject to the legal consequences of the previous acts of [BU]” as well as his individual misconduct. *Gen. Tire & Rubber Co. v. Watson-Bowman Assoc.*, 193 U.S.P.Q. 97, 98-99 (D. Del. 1976); *Barnes & Noble, Inc. v. LSI Corp.*, 849 F. Supp. 3d 925, 931-933 (N.D. Cal. 2012) (collecting cases).

CONCLUSION

Given the conduct of Schubert, BU, and their lawyers, the ’475 Patent is not enforceable.

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