IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TEVA PHARMACEUTICALS INTERNATIONAL GMBH and TEVA PHARMACEUTICALS USA, INC.,

Plaintiffs,

v.

ELI LILLY AND COMPANY,

Defendant.

Civil Action No.
1:18-cv-12029-ADB

[redacted]

FILED UNDER SEAL
LEAVE TO FILE GRANTED
06/06/2022 (ECF NO. 385)

PLAINTIFFS' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT REGARDING INEQUITABLE CONDUCT AND UNCLEAN HANDS

[redacted]

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I. INTRODUCTION

Lilly's opposition largely ignores the Federal Circuit's decision in *Therasense, Inc. v. Benton, Dickinson & Co.*, 649 F.3d 1276 (Fed. Cir. 2011) (en banc), which imposed heightened standards for both materiality and intent. No factfinder, on this record, could reasonably conclude that Lilly has satisfied *either* standard, let alone both.

Lilly's primary inequitable conduct claim rests on the lack of disclosure of [redacted] and the Shaw prior art reference that *was disclosed* in prosecuting two of the three Patents-in-Suit. As to the materiality of [redacted], the examiner already knew that not all antibodies that bind CGRP also antagonize it. Shaw, which the PTO *actually considered* before issuing two of the Patents-in-Suit, also did not disclose anything the examiner did not know. And [redacted]. Even Lilly's experts were unable to opine that any of this was particularly important: The best they could muster was that [redacted] "could have been relevant" and that [redacted] would have been "germane." Neither this tepid expert testimony nor anything else in the record permits the but-for materiality finding that *Therasense* requires.

Lilly's case for specific intent to deceive is even weaker. Knowledge of a reference and its materiality—even if proven—is insufficient to show a specific intent to deceive. *E.g.*, *Therasense*, 649 F.3d at 1290; *1st Media, LLC v. Elec. Arts, Inc.*, 694 F.3d 1367, 1374–75 (Fed. Cir. 2012). Yet Lilly's entire intent case rests on the theory that [redacted] knew of Shaw and [redacted] and knew they were important. But Lilly offers *no* evidence that [redacted] actually considered disclosing this information and chose not to do so. Moreover, an inequitable conduct claim fails if there are "reasonable inferences that may be drawn" *other than* the intent to deceive. *Therasense*, 649 F.3d at 1290–91. Lilly has not adduced evidence from which a factfinder could reject as "unreasonable" the "other inferences that can be drawn from the

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