

1 contend that the omitted prior art, including articles published in connection with a  
2 symposium hosted by Plaintiff and one article authored by an executive officer of  
3 Plaintiff, were material omissions. It is undisputed that these articles were published  
4 more than one year before the '834 Patent's priority date. It is also undisputed that this  
5 prior art was not disclosed to the PTO. Whether the omissions were material presents  
6 a genuine issue fact in light of the court's obviousness and anticipation analysis earlier  
7 in this order. As to intent to deceive, Plaintiffs contend that Defendants have not  
8 provided any independent evidence showing intent to deceive the PTO. This  
9 contention lacks merit. The evidence shows that one piece of prior art is authored by  
10 an executive officer of Plaintiff and some of the other prior art publications were  
11 written as part of Plaintiff's annual feed industry symposium. If credited, this  
12 independent evidence of intent—that the omitted prior art was authored by agents of  
13 Plaintiff—could allow the trier of fact could conclude that Plaintiff, by not disclosing  
14 this prior art, acted with intent to deceive or was reckless . Therefore, summary  
15 judgment finding that Walker Process fraud cannot be established is inappropriate.

### 16 **Sham Litigation**

17 Antitrust liability will also lie for initiating litigation if the plaintiff is engaged  
18 in sham litigation. Q-Pharma, 360 F.3d at 1305. "Sham litigation" is litigation which  
19 is (1) "objectively baseless in the sense that no reasonable litigant could realistically  
20 expect success on the merits" and (2) brought for an improper purpose. Id. The  
21 "objectively baseless" element is met if the patent was obtained through fraud on the  
22 PTO. NobelPharma, 141 F.3d at 1071. As set forth above, Defendants have created  
23 a genuine issue of fact on whether or not Plaintiff acted with intent to deceive.  
24 Therefore, summary judgment is inappropriate on the issue of sham litigation.

25 Nevertheless, the court finds that Defendants cannot prevail at trial on their  
26 antitrust counterclaim because they have not produced sufficient evidence of the  
27 relevant market for the following reasons.

### 28 **Relevant Market**

In support of the relevant market element, Defendants rely on the expert opinion

1 Applicants have a duty to prosecute patents before the PTO in good faith and  
2 with candor. M. Eagles Tool Warehouse, Inc. v. Fisher Tooling Co., Inc., 439 F.3d  
3 1335, 1340 (Fed. Cir. 2006); 37 C.F.R. § 1.56(a). A breach of this duty may constitute  
4 inequitable conduct, rendering the patent unenforceable. Purdue Pharma L.P. v. Endo  
5 Pharmaceuticals Inc., 438 F.3d 1123, 1128 (Fed. Cir. 2006). Inequitable conduct can  
6 arise from a failure to disclose material information coupled with intent to deceive the  
7 PTO. Id.; see also PerSeptive Biosystems, Inc. v. Pharmacia Biotech, Inc. 225 F.3d  
8 1315, 1318-19 (Fed. Cir. 2000). “Once threshold findings of materiality and intent are  
9 established, the trial court must weigh them to determine whether the equities warrant  
10 a conclusion that inequitable conduct occurred.” Id. (citing Molins PLC v. Textron,  
11 Inc., 48 F.3d 1172, 1178 (Fed. Cir. 1995). “Inequitable conduct is . . . an equitable  
12 defense in a patent infringement action and serves as a shield, while a more serious  
13 finding of fraud potentially exposes a patentee to antitrust liability and thus serves as  
14 a sword.” Nobelpharma, 141 F.3d at 1070. Intent may be inferred from the  
15 circumstances by clear and convincing evidence, although the mere fact of an omission  
16 is not enough. Purdue Pharma, 438 F.3d at 1133-34; Hebert v. Lisle Corp., 99 F.3d  
17 1109, 1116 (Fed. Cir. 1996).

18 In addition, patent examiners must reject applications that fail to name the  
19 correct inventors. PerSeptive, 225 F.3d at 1321. Deliberate failure to name the correct  
20 inventor is inequitable conduct that renders a patent invalid and unenforceable. See  
21 Frank’s Casing Crew & Rental Tools, Inc. v. PMR Technologies, Ltd., 292 F.3d 1363,  
22 1370-71 (Fed. Cir. 2002). Plaintiffs argue that Defendants have not provided any  
23 evidence to show that Plaintiff acted with intent to deceive when it failed to disclose  
24 certain prior art to the PTO. As stated above, however, Defendants have come forth  
25 with evidence that the prior art was written by agents of Plaintiff which would allow  
26 a reasonable jury to conclude that Plaintiff’s omissions before the PTO were deliberate.

27 Plaintiff next argues that Defendants’ claim that Plaintiff engaged in inequitable  
28 conduct by failing to name Dr. Pusillo as a co-inventor is not supported by sufficient  
evidence. Defendants contend that Dr. Pusillo, who was hired as a consultant by