

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

BAYER AG and )  
BAYER CORPORATION, )  
 )  
Plaintiffs and )  
Counterclaim Defendants, )  
 )  
v. ) Civil Action No. 01-148-SLR  
 )  
HOUSEY PHARMACEUTICALS, INC., )  
 )  
Defendants and )  
Counterclaim Plaintiffs. )

**MEMORANDUM ORDER**

At Wilmington this 23rd day of October, 2003, having reviewed Housey Pharmaceuticals, Inc. ("Housey") motion to supplement the record (D.I. 293) and Bayer AG and Bayer Corp.'s (collectively "Bayer") response thereto;

IT IS ORDERED that Housey's motion (D.I. 293) is granted for the following reasons:

1. In this patent action, Bayer has alleged that Dr. Gerard Housey, the president and CEO of Housey, committed inequitable conduct before the U.S. Patent and Trademark Office by, inter alia, purportedly failing to properly disclose a 1986 paper by Dr. Wendy Hsiao. Hsiao, Wendy & Weinstein, I. Bernard, Oncongene-Induced Transformation of a Rat Embryo Fibroblast Cell Line is Enhanced by Tumor Promoters, Molecular and Cellular Biology, 1943 (June 1986).

2. A four day bench trial was held between December 3, 2002

and December 9, 2002.

3. On August 29, 2003, Bayer filed a brief in a German court related to its intervention in an action concerning Housey's European patents. According to Housey, in that brief Bayer characterizes the 1986 paper by Hsiao et al. as not having "established a screening process." (D.I. 298 at 2; D.I. 294, Ex. A) Bayer's characterization of the Hsiao 1986 paper resulted from its effort to distinguish a subsequent article published by Hsiao.

4. Housey argues that the proffered additional evidence suggests that Bayer has made contradictory statements with respect to the materiality and significance of the Hsiao 1986 paper.

5. Bayer contends that its statements are not relevant to the issue of materiality and would not alter the outcome of this case. (D.I. 295)

6. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In the present case, whether Hsiao et al. is material is relevant to both the initial threshold finding of materiality, as well as the court's duty to weigh materiality in light of the patentee's deceptive intent, in reaching a conclusion that inequitable conduct justifies an

invalidation of the patent. See Florida State University Board of Educ. v. American Bioscience, Inc., 333 F.3d 1330, 1343 (Fed. Cir. 2003).

7. Consequently, the court finds that Bayer's statements in its filings before a German court are relevant and should be admitted as to the question of the materiality of the 1986 paper by Hsiao et al.

Sue L. Robinson  
United States District Judge