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BANKRUPTCY, INEQUITABLE CONDUCT, AND THE THERASENSE DECISION: AN ANALYSIS OF DIPPIN' DOTS INC.

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ABSTRACT

Dippin' Dots Inc., a Kentucky manufacturer of cryogenically frozen ice cream, found itself garnering much attention in late 2011 due to its bankruptcy. However, Dippin' Dots was also of interest for other reasons in 2011. Specifically, the Therasense federal patent decision and the subsequent updated guidelines on Inequitable Conduct put out by the US Patent Office fit very closely with a 2003 patent case involving Dippin' Dots. These guidelines resolved an important ambiguity and lack of clarity in US patent doctrine. Had these guidelines existed in 2003, it is possible the Dippin' Dots bankruptcy may not have occurred, or may have occurred in a different format.

INTRODUCTION: WHY THIS SUBJECT SHOULD BE OF INTEREST

The patent system has been an integral part of the United States economy for over 150 years. The explicit definition, as given by the U.S. Patent and Trademark Office (2012), is a property right granted by the Government of the United States of America to an inventor "to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States" for a limited time in exchange for public disclosure of the invention when the patent is granted. This process is in place to seemingly protect an inventor may result in financial benefits from the aforementioned invention. One would tend to think it absurd that the patent application process and subsequent approval would hasten the financial collapse of a corporation.

However, in 2003, Curt Jones, the majority owner of an innovative ice cream company called Dippin' Dots, received a jury verdict of having committed Inequitable Conduct¹ before a federal government agency, specifically the U.S. Pat-

¹ Within this document, the words "Issue", "Issued", "Issuance", "Inequitable Conduct", "Assignment", "Assign", "Examiner", and "Applicant" will be capitalized to signify that they are legal terms of art within the patent industry, and thus have a legal significance beyond their ordinary meaning.

ent Office (Dippin' Dots, Inc. v. Mosey, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007). Inequitable Conduct was in the past sometimes referred to as "fraud on the patent office". Such a finding is extremely rare, and usually arises only from egregious and abusive conduct. Many felt that this verdict of Inequitable Conduct for Mr. Jones was undeserved, unjustified, and disproportionate to his offense.

In 2011, the US Patent Office came out with improved guidelines for Inequitable Conduct ("Guidelines on Inequitable Conduct", Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633). Also in 2011, Dippin' Dots Inc. declared bankruptcy ("Dippin' Dots Tries to Avoid Meltdown", Wall St. Journal, November 28, 2011, by Katy Stech).

In considering the information given above, as well as several other factors, this analysis will attempt to answer the following questions:

1. If the updated guidelines had existed in 2003, would the verdict of Inequitable Conduct against Curt Jones have occurred?
2. Did the 2003 verdict of Inequitable Conduct contribute to Dippin' Dots 2011 bankruptcy?
3. Was Curt Jones treated reasonably and fairly by the US patent system?

4. What are the ramifications for other corporations?

**BACKGROUND:
DIPPIN' DOTS, CURT JONES, AND
INEQUITABLE CONDUCT**

Dippin' Dots, Inc. (DDI) is an ice cream company headquartered in Paducah Kentucky. The Dippin' Dots products are mainly tiny beads of ice cream (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007). In 1988, microbiologist Curt Jones used his background in cryogenic technology to invent Dippin' Dots. More information about Dippin' Dots can be found at www.dippindots.com, and this site remains active even during the company's bankruptcy. In 1992, Mr. Jones was awarded a patent for his method of manufacturing ice cream. (U.S. Patent No. 5,126,156) That patent, hereafter referred to as the '156 patent, Mr. Jones eventually Assigned to the company he founded, DDI. (U.S. Patent No. 5,126,156)

The '156 patent had 14 claims. A patent "claim" is a mechanism for establishing the boundaries of an invention (Method of Patent Examining Procedure (MPEP) § 2106 C). Most patents have more than one claim. During the process of obtaining a patent, the Applicant and the Examiner engage in a process of modifying and altering the various claims within a patent application, depending on numerous factors. The Patent Office charges a fee for each separate claim above a certain minimum (U.S. Patent and Trademark Office Fee Schedule, effective September 26, 2011 (Last Revised on January 10, 2012)).

An Applicant and an Examiner usually start out at different positions regarding the scope of claims within a patent application. This is at least because the Examiner has an incentive to protect the integrity of the patent system, while the Applicant has an interest in being awarded a strong, broadly enforceable patent. The result is a negotiation process in which an Examiner may try to weaken a claim, or refuse to Allow any claims, while an Applicant may try to strengthen a claim.

This negotiation process requires the Applicant to be completely forthcoming with the Examiner. Often, an Applicant will have better and more complete information about a particular area of

technology than an Examiner. Consequently, it is important for the integrity of the patent process for an Applicant to be completely forthcoming to the Examiner, and to the entire U.S. Patent Office. There is no dispute that Mr. Jones was not completely forthcoming. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007)

Claim 1 of the '156 patent reads as follows.

A method of preparing and storing a free-flowing, frozen alimentary dairy product, comprising the steps of: preparing an alimentary composition for freezing; dripping said alimentary composition into a freezing chamber; freezing said dripping alimentary composition into beads; storing said beads at a temperature at least as low as -20° F. so as to maintain said beads free-flowing for an extended period of time; bringing said beads to a temperature between substantially -10° F. and -20° F. prior to serving; and serving said beads for consumption at a temperature between substantially -10° F. and -20° F. so that said beads are free flowing when served (U.S. Patent No. 5,126, 156, claim 1).

Within the initial application that eventually issued as the '156 patent, filed on March 6, 1989, claim 1 omitted the final "serving" step. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007) After some negotiation between the Examiner and Mr. Jones, the '156 patent Issued in June 1992. (prosecution history of U.S. Patent No. 5,126,156)

Much of Mr. Jones' problems arose from sales made at the Festival Market in Lexington, Kentucky, more than one year before Mr. Jones filed his patent application. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007) This is because of an important patent statute known as 102(b), partially reproduced herein.

35 U.S.C. § 102 Conditions for patentability; novelty and loss of right to patent.

A person shall be entitled to a patent unless -

...

(b) the invention was patented or described in a printed publication in this or a foreign country or **in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States...**

(35 United State Code Section 102(b), emphasis added)

As shown above, sales made more than one year before a patent application's priority date are barred by the "in public use or on-sale" portion of 35 U.S.C. § 102(b). For the '156 patent, this critical date is March 6, 1988. Unfortunately, starting on July 24, 1987, Mr. Jones sold cryogenically-prepared, beaded ice cream at the Festival Market. During Mr. Jones's time at Festival Market, which lasted at least until July 29th, 1987, over 800 customers purchased his beaded ice cream while others received free samples. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007)

It is undisputed that the Festival Market sales were never disclosed to the U.S. Patent Office during prosecution of the '156 patent. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007) Further, the declaration of commercial success which ultimately persuaded the examiner to grant the patent contained a sworn statement by Jones that "[t]he initial sales were in March of 1988," which was on or after the critical date. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007) Thus, not only were the Festival Market sales not disclosed, but Mr. Jones made a statement that was arguably misleading.

In testimony, Mr. Jones argued around this by stating that at Festival Market he only practiced the first three steps of the claimed method, not the storing, bringing, or serving steps. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007) He also testified that he considered the evidence of what had happened at Festival Market to be irrelevant to patentability. Specifically, at least the "bringing" and "storing" steps were not practiced at the time in question. This in turn bolstered Mr. Jones' contention that he could not have

committed Inequitable Conduct. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007)

Nevertheless, despite the aforementioned information, in 2003 a jury found Mr. Jones to have committed Inequitable Conduct before the U.S. Patent Office. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007) However, the reasons the jury did so may have been based on the fact that the standards for Inequitable Conduct were somewhat unclear, even to experts in the patent field. Paradoxically, the jury awarded zero damages for this commission, although eventually Dippin' Dots was forced to pay some portion of the attorney costs of their opponent. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007) This 2003 verdict was upheld by the Court of Appeals of the Federal Circuit (CAFC) in 2007. (*Dippin' Dots, Inc. v. Mosey*, Court of Appeals of the Federal Circuit, 476 F.3d 1337, February 9, 2007)

In 2003, the standard for sustaining a verdict of Inequitable Conduct required a presence of both materiality and intent. (*Therasense v. Becton-Dickenson*, Court of Appeals for the Federal Circuit; May 25, 2011) If materiality was high, a verdict of guilty was still sustainable even if intent was low. Thus, the two could exist in inverse proportion, sometimes referred to as a "sliding scale". (*Therasense*) Unfortunately, this makes it difficult to know in advance what the boundaries are for Inequitable Conduct, which in turn makes it difficult for patent attorneys to know how to advise their clients. (*Therasense*) It also means that juries, usually unfamiliar with U.S. patent doctrine, are sometimes charged with making very difficult and complex legal judgments. The jury that found against Mr. Jones is one example of this.

In 2011, the CAFC criticized this practice, stating that placing intent and materiality together on a sliding scale further weakens the showing needed to establish Inequitable Conduct (*Therasense*) This modification to the inequitable conduct doctrine held patents unenforceable based on a reduced showing of intent if the record contained a strong showing of materiality, and vice versa. In effect, this change conflated, and diluted, the standards for both intent and materiality. (*Therasense*)

Along comes *Therasense* (too late for Curt Jones)

Therasense, Inc. (now Abbott Diabetes Care, Inc.) and Abbott Laboratories (collectively, “Abbott”) filed numerous patent applications. In 1997, Abbott studied the novel features of their application and decided to present a new reason for a patent. The new claims were presented to the examiner based on a new sensor that did not require a protective membrane. It was asserted that this distinction overruled a prior art reference being asserted by the Examiner, which required a protective membrane. The Examiner requested an affidavit to show that the prior art required a membrane for whole blood at the time of the invention. To meet this evidentiary request, Abbott submitted a declaration to the U.S. Patent and Trademark Office (“PTO”).

However, several years earlier, while prosecuting the European counterpart to the U.S. patent, Abbott made contradictory representations to the European Patent Office. Specifically, to distinguish a German reference labeled D1, which required a membrane, Abbott’s European patent counsel argued that their invention did *not* require a membrane. (*Therasense*, emphasis added)

Ultimately these contradictory statements eventually caught up to Abbott. They said one thing at the European Patent Office in order to get a European patent. (*Therasense*) They made a completely opposite and damaging claim before the United States Patent Office in order to get a US patent. (*Therasense*) Eventually the truth came out, and both patents were found invalid due to Inequitable Conduct. (*Therasense*) However, the (higher) CAFC sent it back to the (lower) District Court to re-litigate the issues using the “but for” standard, rather than the confusing “sliding scale” standard.

In this case, the district court held the ’551 patent unenforceable for Inequitable Conduct because Abbott did not disclose briefs it submitted to the EPO regarding the European counterpart of the ’382 patent. (*Therasense*) However, because the district court found statements made in the EPO briefs material under the PTO’s Rule 56 materiality standard, not under the but-for materiality standard, the *Therasense* court vacates the district court’s findings of materiality. (*Therasense*) On remand, the district court will determine whether the PTO would not have granted

the patent but for Abbott’s failure to disclose the EPO briefs.

Therasense and the US PTO

In conformity with the *Therasense* holding, 37 CFR 1.56(b) is proposed to be amended as follows:

... information is material to patentability if it is material, where materiality is determined by:

1. The Office would not allow a claim if it were aware of the information, applying the preponderance of the evidence standard and giving the claim its broadest reasonable construction; or
2. The applicant engages in affirmative egregious misconduct before the Office as to the information. Neither mere non-disclosure of information to the Office nor failure to mention information in an affidavit, declaration, or other statement to the Office constitutes affirmative egregious misconduct.

(“Guidelines on Inequitable Conduct”, Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633)

Applying the above to Dippin’ Dots principal facts, it is still likely that Mr. Jones’ pre-critical date sales would be considered material. These sales would likely have affected the Examiner’s decision, thus part (1) is met. The more important issue is part (2), which explicitly states that *non-disclosure of information would not constitute affirmative egregious misconduct*. This matches very closely with the behavior of Mr. Jones.

A district court should not use a “sliding scale,” where a weak showing of intent may be found sufficient based on a strong showing of materiality, and vice versa. (“Guidelines on Inequitable Conduct”, Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633) Moreover, a district court may not infer intent solely from materiality. (“Guidelines on Inequitable Conduct”, Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633) Instead, a court must weigh the evidence of intent to deceive independent of its analysis of

materiality. ("Guidelines on Inequitable Conduct", Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633) Proving that the applicant knew of a reference, should have known of its materiality, and decided not to submit it to the PTO does not prove specific intent to deceive. ("Guidelines on Inequitable Conduct", Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633)

Coordination between federal agencies and federal courts

While *Therasense* does not require the Office to harmonize the materiality standards underlying the duty of disclosure and the Inequitable Conduct doctrine, the U.S. Patent Office believes that there are important reasons to do so. ("Guidelines on Inequitable Conduct", Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633) The materiality standard set forth in *Therasense* should reduce the frequency with which applicants and practitioners are being charged with Inequitable Conduct. ("Guidelines on Inequitable Conduct", Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633)

The *Therasense* court stated they are not bound by the definition of materiality in PTO rules (*Therasense*). While the *Therasense* court respected the PTO's knowledge in its area of expertise, the routine invocation of Inequitable Conduct in patent litigation has had adverse ramifications beyond its effect on the PTO. (*Therasense*)

The US Patent Office tries to be a final authority on patent doctrine, but must also defer to the federal courts. The *Therasense* court tightened the standards for finding both intent and materiality in order to redirect a doctrine that has been overused to the detriment of the public. (*Therasense*, emphasis added) Mr. Jones would certainly agree that this doctrine was overused to his detriment.

After *Therasense*, the US PTO breathed a sigh of relief and decided that this would be a good time to clarify the guidelines for Inequitable Conduct. There no longer is any sliding scale, no strange inverse relationship between materiality and intent. Instead, there will now be one standard. The U.S. Patent Office also believes that a unitary materiality standard is simpler for the patent bar to implement. ("Guidelines on Inequitable Conduct", Federal Register/Vol. 76, No.

140/Thursday, July 21, 2011/Proposed Rules 43633) Under the single "but-for-plus" standard of materiality, patent applicants will not be put in the position of having to meet one standard for materiality as defined in *Therasense*, and a second, different materiality standard to fulfill the duty to disclose before the U.S. Patent Office. ("Guidelines on Inequitable Conduct", Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633)

Although the Office is proposing to revise §§ 1.56(b) and 1.555(b) to match the "but-for-plus" materiality standard announced in *Therasense*, the Office recognizes that *Therasense* could be reviewed by the U.S. Supreme Court. ("Guidelines on Inequitable Conduct", Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633)

False Accusations of Inequitable Conduct

A verdict of Inequitable Conduct is rare. The problem is not that Inequitable Conduct is rare. The problem is when Inequitable Conduct is asserted, even on dubious grounds, it is difficult to defend against. Thus, patent litigation counsel frequently assert Inequitable Conduct, knowing a successful verdict is unlikely, but instead to distract and anger their opponent, because it causes so much extra work, and because asserting it is quite easy while defending against it is difficult. "If your opponent is of choleric temperament, irritate him". ("Art of War", Sun Tzu)

A charge of Inequitable Conduct conveniently expands discovery into corporate practices before patent filing, and disqualifies the prosecuting attorney from the patentee's litigation team. (*Therasense*, quoting Stephen A. Merrill et al., Nat'l Research Council of the Nat'l Academies, *A Patent System for the 21st Century* 122 (2004)). Moreover, Inequitable Conduct charges cast a dark cloud over the patent's validity and paint the patentee as a bad actor. Further, prevailing on a claim of Inequitable Conduct often makes a case "exceptional" under 35 U.S.C. § 285, leading potentially to an award of attorneys' fees to the party injured by the Inequitable Conduct. (*Therasense*) Indeed, attorney fees were eventually awarded to Mr. Jones' opponents. Without the verdict of Inequitable Conduct, this award would have been much less likely to have occurred.

With these consequences, it is no wonder that asserting Inequitable Conduct has become a common litigation tactic. One study estimated that eighty percent of patent infringement cases included allegations of Inequitable Conduct. (*Therasense*) The habit of charging Inequitable Conduct in almost every major patent case has become an absolute plague. (*Therasense*) In Mr. Jones' case, one could argue that his opponents made the usual assertions of Inequitable Conduct without a serious expectation that they would be successful, and then somehow landed a lucky punch.

Dippin' Dots and McDonalds

Dippin' Dots embarrassing verdict did not prevent them from developing a very promising arrangement to sell their products in various McDonalds locations. As shown in court documents filed by Regions Bank in 2011, very close to the time of bankruptcy, Dippin' Dots began borrowing in 2003. The reasons for this borrowing are unclear, but one of them may have been to finance an expansion of their manufacturing capability. (*Regions Bank v. Dippin' Dots, Motion to Appoint Bankruptcy Receiver*, February 25, 2011) This expansion may have been to accommodate a potential increase in demand from McDonalds, a customer/partner with capability of generating very high demand for Dippin' Dots products. (History – DippinDots.com, “regular menu offering” in McDonald's starting in 2002, and “growing to several hundred McDonald's restaurants”)

These factors have nothing to do with Inequitable Conduct, and are instead only meant to provide balance for the contention that the finding of Inequitable Conduct adversely impacted Dippin' Dots. Specifically, McDonald's was still willing to go forward with Dippin' Dots despite the verdict of Inequitable Conduct. (Wall St. Journal, 2005) This suggests that the Inequitable Conduct verdict did not by itself injure Dippin' Dots reputation enough to contribute to their bankruptcy. However, if one takes into account the entire scenario it may have been better for Dippin' Dots if McDonald's had been dissuaded by the adverse verdict. If so, perhaps Dippin' Dots might not have become so heavily leveraged and thus burdened with overwhelming and ultimately unmanageable interest payments.

(*Regions Bank v. Dippin' Dots, Motion to Appoint Bankruptcy Receiver*, February 25, 2011)

DDI, Curt Jones, and the U.S. Patent Office

Mr. Jones' unfortunate verdict in 2003 also did not prevent Dippin' Dots from continuing to make use of the US patent system, as shown in Appendix A. This is another factor in a large group of factors suggesting that the doctrine of Inequitable Conduct was misapplied with respect to Curt Jones and, by extension, his company Dippin' Dots. Clearly Mr. Jones takes the U.S. patent system very seriously. Otherwise, why would he file so many patent applications?


Further (as shown on the facing page), for part of July and August of 2005, Curt Jones was the featured inventor shown on the front page of the US PTO website. (archives of www.uspto.gov, front page, July 18, 2005) This is a very rare honor. This is also symbolic of the ambiguous message that the U.S. Patent Office sent to Mr. Jones. Curt Jones was so popular, and such a strong symbol of a successful independent inventor, that the US Patent Office featured him on the most visible page of their website. (archives of www.uspto.gov, front page, July 18, 2005) At the same time, Mr. Jones was under a verdict of Inequitable Conduct, a rare punishment that has only happened to a handful of persons among literally millions of inventors. This is certainly a “mixed message”. It would be justifiable if Curt Jones felt that the US Patent Office was inconsistent and contradictory in its treatment of him.

CONCLUSION

In putting out the updated guidelines on Inequitable Conduct (“Guidelines on Inequitable Conduct”, Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633), the US Patent Office states that the earlier state of the law in this area was ambiguous and unsatisfactory (see “to the detriment of the general public”, FR page X). Specifically, if these 2011 guidelines existed in 2003 Curt Jones, and by extension Dippin' Dots, may not have had the problems associated with a finding of Inequitable Conduct.

It is the authors' belief that governmental agencies are not in the business of destroying a perfectly good corporation. However, ambiguous

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Dippin' Dots Inventor to Speak at USPTO Independent Inventor Conference

Curt Jones, a microbiologist who made a better ice cream through his knowledge of cryogenic freezing methods, has joined the list of speakers at this year's Independent Inventor Conference. The conference will be held on **August 12 and 13** at the USPTO's new headquarters in **Alexandria, Virginia**.

Dippin' Dots ice cream is now available in thousands of locations throughout the United States. The method Jones invented is based on an old family recipe and utilizes cryogenic freezing to create an unusually fresh and flavorful ice cream treat by flash-freezing the very first tiny beads of ice cream. The resulting dots taste richer and fresher. As one of America's most successful inventors and entrepreneurs, Curt Jones will offer conference attendees unique and valuable perspectives.

The fee is \$90 per person or \$60 for seniors 55 and older. The **August 1 registration deadline** is fast approaching. Register online today.

The 10th annual Independent Inventors Conference is co-sponsored by the United States Patent and Trademark Office and the National Inventors Hall of Fame Foundation.

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regulations and overzealous prosecution may have detrimental effects on the capitalist system that so importantly defines the United States economy.

It is interesting to pontificate that if the updated guidelines (a.k.a. the *Therasense* guidelines) had existed in 2003, would the verdict of Inequitable Conduct against Curt Jones have occurred? The evidence shows that this verdict probably would not have occurred. The change of the rules to carve out "mere non-disclosure of information" from Inequitable Conduct might have been written with Curt Jones in mind, as the facts match up very closely. Did the 2003 verdict of Inequitable Conduct contribute to Dippin' Dots 2011 bankruptcy? It can also be argued that this is probably not the case. These events were too far apart in time, and the injury to Dippin' Dots reputation did not prevent them from, for example, further developing their relationship with McDonald's. The PTO even featured Mr. Jones on the front

page of their website as an inventor to be emulated and respected, more than 1.5 years after the verdict of Inequitable Conduct. Was Curt Jones and Dippin' Dots treated reasonably and fairly by the US patent system? Although both sides could make convincing arguments, it would appear that he was not treated fairly. The federal court system and the US PTO together created a carve-out exception which likely would have saved Mr. Jones from the verdict of Inequitable Conduct. However, this carve-out came eight years too late to help Mr. Jones. Also, even after the verdict of Inequitable Conduct, Mr. Jones continued to spend considerable money and resources filing U.S. patent applications. Finally, what are the ramifications for other corporations? It is clearly shown in this study that corporations should make use of protective resources such as the US PTO. However, a clear understanding of the patent process is necessary to successfully navigate the mine field that is corporate America.

<p style="text-align: center;">APPENDIX A TABLE SHOWING SELECTED PATENT FILINGS BY DIPPIN' DOTS (NOT A COMPLETE LIST)</p>			
Title	Application Number	Patent Number	Year Published
Method and apparatus for combining cookie dough and ice cream		7,464,564	2008
Tray for producing particulate food products		7,316,122	2008
Kiosk for vending ice cream		D515,846	2006
Kiosk with lettering for vending ice cream		D515,845	2006
Cleaning drain apparatus for an auger assembly		6,915,896	2005
System for combining ice cream and coatings	20090047393		2009
Method and apparatus for combining cookie dough and ice cream	20090004340		2009
Particulate frozen food product	20080138487		2008
Method and apparatus for combining particulate and soft-serve ice cream	20080011009		2008
Combined particulate and traditional ice cream	20070140044		2007
Method of manufacturing particulate ice cream for storage in conventional freezers	20070134394		2007
Novelty frozen product and method for making same	20070065552		2007
Particulate ice cream dot sandwich	20060093719		2006

REFERENCES

Therasense v. Becton Dickenson, Court of Appeals for the Federal Circuit; May 25, 2011

"Dippin' Dots Tries to Avoid Meltdown", Wall St. Journal, November 28, 2011.

US Patent No. 5,126,156, to Curt Jones, for "Cryogenically Frozen Ice Cream"

Prosecution history, U.S. Patent No. 5,126,156

United States Patent Office patent database, uspto.gov

Sun Tzu, "Art of War", Oxford University Press, 1971

Motion to Appoint Bankruptcy Receiver, February 25, 2011, court filing finding Dippin' Dots in default on payments due Regions Bank

"Guidelines on Inequitable Conduct", Federal Register/Vol. 76, No. 140/Thursday, July 21, 2011/Proposed Rules 43633

www.uspto.gov (archives, front page from July 18, 2005)

www.uspto.gov/main/glossary/ (glossary of terms from uspto.gov)

Stephen A. Merrill et al., Nat'l Research Council of the Nat'l Academies, *A Patent System for the 21st Century* 122 (2004)

Method of Patent Examining Procedure (MPEP) § 2106 C

U.S. Patent and Trademark Office Fee Schedule, effective September 26, 2011 (Last Revised on January 10, 2012)