UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GS CLEANTECH CORPORATION,
Plaintiff-Appellant,

v.

ADKINS ENERGY LLC,
Defendant-Cross-Appellant,

2016-2231, 2017-1838

Appeals from the United States District Court for the Northern District of Illinois in No. 1:10-cv-04391, Judge Larry J. McKinney.

GS CLEANTECH CORPORATION, GREENSHIFT CORPORATION,
Plaintiffs-Appellants,

CANTOR COLBURN LLP
Interested Party

v.

BIG RIVER RESOURCES GALVA, LLC, BIG RIVER RESOURCES WEST BURLINGTON, LLC, LINCOLNLAND AGRI-ENERGY, LLC, IROQUOIS BIO-ENERGY COMPANY, LLC, CARDINAL ETHANOL, LLC, LINCOLNWAY ENERGY, LLC, ICM, INC., BUSHMILLS ETHANOL, INC., AL-CORN CLEAN

FUEL, CHIPPEWA VALLEY ETHANOL COMPANY, LLP, HEARTLAND CORN PRODUCTS, GEA MECHANICAL EQUIPMENT US, INC., AS SUCCESSOR-IN-INTEREST TO GEA WESTFALIA SEPARATOR, INC. PURSUANT TO THE NOTICE OF MERGER FILED ON 4/28/2011, ACE ETHANOL, LLC, BLUE FLINT ETHANOL, LLC, UNITED WISCONSIN GRAIN PRODUCERS, LLC, FLOTTWEG SEPARATION TECHNOLOGY, INC., ADKINS ENERGY LLC, AEMETIS, INC., AEMETIS ADVANCED FUELS KEYES, INC., LITTLE SIOUX CORN PROCESSORS, LLLP, GUARDIAN ENERGY, LLC, WESTERN NEW YORK ENERGY, LLC, SOUTHWEST IOWA RENEWABLE ENERGY, LLC, PACIFIC ETHANOL MAGIC VALLEY LLC, PACIFIC ETHANOL STOCKTON, HOMELAND ENERGY SOLUTIONS, LLC, PACIFIC ETHANOL, INC., DAVID J. VANDER GRIEND,

Defendants-Appellees,

2017-1832

Appeals from the United States District Court for the Southern District of Indiana in Nos. 1:10-cv-00180-RLM-DML, 1:10-cv-08000-RLM-DML, 1:10-cv-08001-RLM-DML, 1:10-cv-08002-RLM-DML, 1:10-cv-08003-RLM-DML, 1:10-cv-08004-RLM-DML, 1:10-cv-08005-RLM-DML, 1:10-cv-08006-RLM-DML, 1:10-cv-08007-RLM-DML, 1:10-cv-08008-RLM-DML, 1:10-cv-08009-RLM-DML, 1:10-cv-08010-RLM-DML, 1:10-cv-08011-RLM-DML, 1:10-ml-02181-RLM-DML, 1:13-cv-08012-RLM-DML, 1:13-cv-08013-RLM-DML, 1:13-cv-08014-RLM-DML, 1:13-cv-08015-RLM-DML, 1:13-cv-08016-RLM-DML, 1:13-cv-08017-RLM-DML,

1:13-cv-08018-RLM-DML, 1:14-cv-08019-RLM-DML,
1:14-cv-08020-RLM-DML, Judge Larry J. McKinney.

APPELLEES' JOINT OPPOSITION TO PETITION FOR REHEARING EN BANC

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GS CleanTech Corp. **v.** Big River Resources - Galva LLC

Case No. 17-1832

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
GEA Mechanical Equipment US, Inc.	GEA Mechanical Equipment US, Inc.	See Attachment A
Ace Ethanol, LLC	Ace Ethanol, LLC	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:
Patterson Belknap Webb & Tyler LLP: Gregory L. Diskant, Brian N. Lasky, Edward R. Tempesta, Sean R. Marshall

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

GS Cleantech Corp. v. Adkins Energy LLC, No. 16-2231 (Fed. Cir.)
GS Cleantech Corp. v. Adkins Energy LLC, No. 17-1838 (Fed. Cir.)
GS Cleantech Corp. v. Adkins Energy LLC, No 10 C 4391 (N.D. Ill.)

Date

Signature of counsel

Please Note: All questions must be answered

Michael F. Buchanan

Printed name of counsel

cc: _____

Reset Fields

Attachment A

GEA North America, Inc. is the direct parent corporation of GEA Mechanical Equipment US, Inc. and owns 10% or more of its stock. GEA Group Aktiengesellschaft, a company publicly traded on the German Stock Exchange, is an indirect parent corporation of GEA Mechanical Equipment US, Inc.

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GS CleanTech Corporation **v.** Big River Resources Galva

Case No. 16-2231 / 17-1832

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

Al-Corn Clean Fuel, LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Al-Corn Clean Fuel, LLC	Al-Corn Clean Fuel, LLC	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Jonathan C. Miesen and John J. Brogan (former Stoel Rives LLP partner and associate no longer with the Firm)

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GS Cleantech Corp. v. Adkins Energy LLC, Case No. 10 C 4391 (N.D. Ill.)

	/s/ Marc A. Al
Date	Signature of counsel
Please Note: All questions must be answered	Marc A. Al
	Printed name of counsel

cc: _____

Reset Fields

FORM 9. Certificate of Interest **Form 9**
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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GS CleanTech Corporation v. Big River Resources - Galva LLC

Case No. 17-1832

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

Blue Flint Ethanol LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Blue Flint Ethanol LLC	Blue Flint Ethanol LLC	Midwest AgEnergy, LLC

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:
Donald T. Campbell of Stinson Leonard Street LLP

FORM 9. Certificate of Interest **Form 9**
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GS Cleantech Corp. v. Adkins Energy LLC, No. 17-1838 (Fed. Cir.)
GS CLEANTECH CORPORATION V. ADKINS ENERGY LLC, Case No. 10 C 4391 (N.D. Ill.)

_____
Date

s/Ruth Rivard
Signature of counsel

Please Note: All questions must be answered

Ruth Rivard
Printed name of counsel

cc: _____

Reset Fields

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GS Cleantech Corporation v. Big River Resources - Galva LLC

Case No. 17-1832

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

Bushmills Ethanol, Inc., Chippewa Valley Ethanol Company LLLP, Heartland Corn Products, LLC and United Wisconsin Grain Producers, LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Bushmills Ethanol, Inc.	Bushmills Ethanol, Inc.	None
Chippewa Valley Ethanol Company LLLP	Chippewa Valley Ethanol Company, LLLP	None
Heartland Corn Products, LLC	Heartland Corn Products, LLC	None
United Wisconsin Grain Producers, LLC	United Wisconsin Grain Producers, LLC	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

None

FORM 9. Certificate of Interest **Form 9 Rev. 10/17**

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GS Cleantech Corp. v. Adkins Energy LLC, No. 17-1838 (Fed. Cir.)

GS Cleantech Corp. v. Adkins Energy LLC, No. 10 C 4391 (N.D. Ill.)

_____
Date

/s/ John C. Scheller
Signature of counsel

Please Note: All questions must be answered

John C. Scheller
Printed name of counsel

cc: _____

Reset Fields

FORM 9. Certificate of Interest **Form 9**
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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GS CLEANTECH CORPORATION **v.** BIG RIVER RESOURCES GALVA

Case No. 17-1832

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Homeland Energy Solutions, LLC	Homeland Energy Solutions, LLC	None
Pacific Ethanol, Inc.	Pacific Ethanol, Inc.	None
Pacific Ethanol Stockton, LLC.	Pacific Ethanol Stockton, LLC.	Pacific Ethanol, Inc.
Aemetis, Inc.	Aemetis, Inc.	None
Aemetis Advanced Fuels Keyes, Inc.	Aemetis Advanced Fuels Keyes, Inc.	Aemetis, Inc.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Camille L. Urban and Michael A. Dee of Brown, Winick, Graves, Gross, Baskerville & Schoenbaum PLC

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

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GS CleanTech Corp. v. Adkins Energy LLC, No. 17-1838 (Fed. Cir.)
GS CleanTech Corp. v. Adkins Energy LLC, Case No. 10 C 4391 (N.D. Ill.)

Date

/s/ Camille L. Urban
Signature of counsel

Please Note: All questions must be answered

Camille L. Urban
Printed name of counsel

cc:

Reset Fields

FORM 9. Certificate of Interest **Form 9**
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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GS CLEANTECH CORPORATION **v.** BIG RIVER RESOURCES GALVA

Case No. 17-1832

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):
(to be continued)

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
ICM, Inc.	ICM, Inc.	ICM Holdings, Inc.
David Vander Griend	David Vander Griend	n/a
Flottweg Separation Technology, Inc.	Flottweg Separation Technology, Inc.	Flottweg SE
Cardinal Ethanol, LLC	Cardinal Ethanol, LLC	None
Big River Resources West Burlington	Big River Resources West Burlington	Big River Resources, LLC
Big River Resources Galva	Big River Resources Galva	Big River Resources, LLC
Lincolnland Agri-Energy	Lincolnland Agri-Energy	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

DICKE, BILLIG & CZAJA, PllC; Paul P. Kempf

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Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary): (to be continued)

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Little Sioux Corn Processors	Little Sioux Corn Processors	None
Guardian Energy LLC	Guardian Energy LLC	None
Western New York Energy	Western New York Energy	None
Southwest Iowa Renewable Energy	Southwest Iowa Renewable Energy	Bunge North America, Inc.
Pacific Ethanol Magic Valley	Pacific Ethanol Magic Valley	Pacific Ethanol, Inc.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Dicke, Billig & Czaja, PLLC: Paul P. Kempf,

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GS CleanTech Corp. v. Adkins Energy LLC, Case No. 10 C 4391 (N.D. Ill.)

_____
Date

/s/John M. Weyrauch
Signature of counsel

Please Note: All questions must be answered

John M. Weyrauch
Printed name of counsel

cc: _____

Reset Fields

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GS CleanTech Corporation **v.** Big River Resources Galva LLC

Case No. 17-1832

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

Iroquois Bio-Energy Company, LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Iroquois Bio-Energy Company, LLC	Iroquois Bio-Energy Company, LLC	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

None.

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

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GS CleanTech Corporation v. Adkins Energy LLC, No. 17-1838 (Fed. Cir.)
GS CleanTech Corporation v. Adkins Energy LC, Case No. 10-cv-4391 (N.D. Ill.)

_____
Date

/s/Spiro Bereveskos
Signature of counsel

Please Note: All questions must be answered

Spiro Bereveskos
Printed name of counsel

cc: _____

Reset Fields

FORM 9. Certificate of Interest

Form 9
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GS Cleantech Corporation v. Big River Galva

Case No. 17-1832

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

Lincolnway Energy, LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Lincolnway Energy, LLC	Lincolnway Energy, LLC	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

None

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

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GS CleanTech Corp. v. Adkins Energy LLC, No. 17-1838 (Fed. Cir.)
GS CleanTech Corp. v. Adkins Energy LLC, Case No. 10 C 4391 (N.D. Ill.)

Date

Signature of counsel

Please Note: All questions must be answered

GLENN JOHNSON

Printed name of counsel

cc: _____

Reset Fields

FORM 9. Certificate of Interest **Form 9**
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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GS Cleantech Corporation **v.** Adkins Energy LLC

Case No. 16-2231

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Adkins Energy LLC	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Attachment A.

FORM 9. Certificate of Interest **Form 9**
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GS CleanTech Corporation v. Big River Resources Galva LLC, Case No. 17-1832

6/10/2020
Date

/s/ Keith D. Parr
Signature of counsel

Please Note: All questions must be answered

Keith D. Parr
Printed name of counsel

cc: All Counsel of Record

Reset Fields

ATTACHMENT A

1. The names of all law firms and the partners and associates that have appeared for the party represented by me in the trial court or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are:

Keith D. Parr
Hugh S. Balsam
James T. Peterka
Wasim K. Bleibel
Locke Lord LLP
111 South Wacker Drive
Chicago, IL 60606

Patrick C. Gallagher
Duane Morris LLP
190 South LaSalle Street, Suite 3700
Chicago, IL 60603

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

En banc consideration is appropriate where "either the merits panel has (1) failed to follow existing decisions of the U.S. Supreme Court or Federal Circuit precedent or (2) followed Federal Circuit precedent that the petitioning party now seeks to have overruled by the court en banc." *See* U.S. Court of Appeals Information Sheet ("Information Sheet"); *see also* Fed. R. App. P. 35(a).[1] This case presents no such issues.

Plaintiffs-Appellants GS CleanTech Corp. and Greenshift Corp. ("CleanTech") state, without support, that the Merits Panel ("Panel") did not follow Supreme Court or this Court's own precedent. CleanTech cannot identify a single place in the decision where the Panel failed to follow the law. CleanTech simply disagrees with how the Panel applied controlling precedent and their petition is little more than an effort to reargue positions the Panel expressly considered and rejected.

CleanTech asserts here – as it did on appeal – that the Court must first review the summary judgment decision under a *de novo* standard

[1] Available at http://www.cafc.uscourts.gov/sites/default/files/cmecf/Petitions_Rehearing_En_Banc_-_Information_Sheet.pdf.

because materiality was not part of the inequitable conduct trial. The Panel rejected this argument because it misrepresents the record. As the Panel found, "materiality was squarely before" the district court: CleanTech presented evidence at trial regarding materiality, and the court made numerous factual and legal findings regarding materiality. Dkt. No. 155-1, pp. 41-46. Dkt. No. 164, pp. 20-23, 25 n.15. The law is clear: an en banc petition is not to be used to seek a "do-over."

CleanTech next pivots to claims of "manifest injustice" and "manifest error." Dkt. No. 175, p. 4. These "standards" are inapplicable here and CleanTech's arguments are unsupported by the record.

Last, CleanTech further misrepresents the record and the Panel decision to claim (1) its *Plumtree* argument was preserved, (2) the Panel applied the wrong standard for inequitable conduct, and (3) there were factual issues foreclosing a finding of obviousness for U.S. Patent No. 8,168,037 ("the '037 Patent."). CleanTech is again simply re-hashing arguments the Panel has already considered and properly rejected.

For the reasons discussed below, this case presents no issues that warrant further review. The Panel's decision was a correct and straightforward analysis of applicable precedent. CleanTech has not

met its burden to demonstrate the need for en banc review. Accordingly, CleanTech's petition should be denied.

II. FACTUAL BACKGROUND

A. The Invention, Offer to Sell, and Prosecution History

In the early 2000s, the inventors articulated the simple idea of centrifuging stillage produced by a standard dry mill ethanol plant to recover oil. Dkt. No. 155-1, p. 5. They enlisted Alfa Laval, a large centrifuge manufacturer, to determine whether to centrifuge stillage before or after the evaporation step. *Id*. at 10. An Alfa Laval representative ran a simple test on both products and determined that "the oil can be taken out easily" by centrifuging the post-evaporation product. *Id*. at 11. The invention claims the use of a centrifuge to process post-evaporation stillage produced by a standard dry-mill plant. *Id*. at 5-6.

The claimed invention was reduced to practice twice before the critical date – in June and July 2003. The inventors wrote that the June 2003 test "led us to believe that the process would work on a commercial scale." Appx301; Appx111089.

Throughout June and July 2003, the inventors communicated with a customer ("Agri-Energy"), touting their oil-recovery system. Dkt. No. 155-1, pp. 9-14. They boasted that the technology was available to recover large amounts of oil and provided a quick return-on-investment. *Id*. at 12. They described their system to Agri-Energy as simply centrifuging the evaporated stillage (or "syrup") to recover oil. *Id*. at 10. They prepared a schematic showing the process flow and components of their ethanol oil-recovery system ("Ethanol System Diagram") as a sales tool, *id*. at 14-16, which they eventually shared with Agri-Energy. They created teams to sell and market the system and the recovered oil. Appx135.

These communications and detailed descriptions culminated in a commercial offer to sell a system to Agri-Energy sent via email dated August 1, 2003 ("Offer Letter"). Dkt. No. 155-1, p. 17. The inventors described the Offer Letter to their investors as a "first sale" that would lead to additional sales. *Id*. at 20. Agri-Energy understood the Offer Letter as an offer to purchase the system depicted in the Ethanol System Diagram. *Id*. at 18.

The inventors filed a provisional application on August 17, 2004, weeks after the critical date. Appx900. They told Andrew Dorisio, their patent attorney, about the June and July 2003 testing, leading Dorisio to draft a clearance opinion, Appx111060-111074, and to conclude that they could swear behind prior art claiming the same invention. Appx111060. The clearance opinion stated:

> Past correspondence indicates your actual reduction to practice of the removing oil from syrup aspect of the proposed invention during experiments conducted in early to mid-June 2003.

Appx111065.

The inventors later switched attorneys and prosecuted multiple patents-in-suit to issuance without disclosing to the PTO their June and July 2003 reductions to practice, the Ethanol System Diagram, or their communications with Agri-Energy. Appx900. Instead, they filed with the PTO: (1) a letter stating that feasibility testing was first done in May 2004, thus telling the PTO there was no testing or reduction to practice prior to 2004, Dkt. No. 155-1, p. 87, (2) a declaration falsely stating that the Offer Letter was first delivered to Agri-Energy on August 18, 2003, *id.* at 90, and (3) attorney argument that the Offer Letter was not prior art and, therefore, not material. *Id*. at 36-37.

Further, the inventors and counsel threatened and attempted to coerce Agri-Energy into corroborating their false, litigation-inspired stories that the June and July 2003 tests were failures and the inventors did not know their system would work for its intended purpose. *Id*. at 89-90. Agri-Energy refused, because those statements were untrue. Appx20361-20363 at 242:11-250:10.

When Appellees proved the falsity of the inventors' declaration about the delivery date of the Offer Letter, CleanTech inundated the PTO with redacted filings from this litigation and three emails from 2003, while failing to disclose other material pre-critical-date information. *See e.g.,* Appx121691-121694. CleanTech did not explain the significance of the emails, did not disclose their June and July 2003 testing or the Ethanol System Diagram, and did not correct the false representations that testing first occurred in May 2004. Dkt. No. 155-1, pp. 38-40.

B. Summary Judgment Decision

The district court issued a 233-page decision granting summary judgment of non-infringement for all Defendants for all claims-in-suit, Appx83; Appx86–92; Appx96, and finding all claims-in-suit invalid for

one or more of: on-sale bar, Appx174; anticipation, Appx181; obviousness, Appx192, 217; incorrect inventorship, Appx202; inadequate written description, Appx195; lack of enablement, Appx197, Appx219; and indefiniteness, Appx205.

C. Inequitable Conduct Trial

Thereafter, CleanTech consented to an inequitable conduct trial before the MDL Court.[2] Master Dkt. No. 1439 in 1:10-ml-02181-RLM-DML. The parties engaged in discovery relevant to materiality and intent, and the court ordered CleanTech to produce documents withheld for "privilege". Dkt. No. 155-1, pp. 41-42. Those documents revealed the inventors unequivocally understood that they reduced their idea to practice in June and July 2003. *Id*. at 42-43.

The district court conducted an eight-day bench trial that included testimony from the inventors, counsel, Agri-Energy, and members of the inventors' sales and marketing team. CleanTech offered evidence and argued, as it did on appeal and does here, that (1) the "invention" was not ready for patenting, (2) the Offer Letter was an offer to test, and (3)

[2] CleanTech made a tactical decision to proceed to trial, consented to jurisdiction before the MDL court, which otherwise lacked venue, and did not seek leave to take an interlocutory appeal. Its argument about piecemeal appeals, Dkt. No. 175, p. 3, is disingenuous and waived.

the experimental-use exception applied. CleanTech presented a materiality trial defense, and the district court rejected it on the merits. *Id*. at 42 (citing Appx294), 45 n.24-27.

In its post-trial decision, the district court concluded that the inventors knew of the on-sale bar, Appx263, the invention was ready for patenting when the inventors offered to sell their invention on August 1, 2003, Appx294, and the experimental use exception did not apply. *Id*. On a patent-by-patent basis, the court found specific instances of the inventors and counsel withholding or misrepresenting material information. Dkt. No. 155-1, pp. 41-46. CleanTech's claim that the trial court treated the summary judgment decision as having "**conclusively** established the 'materiality' prong" is wrong.[3]

The court then addressed intent, finding that the inventors acted with a "complete lack of regard for their duty to the patent office." Appx261. It specifically found the inventors "acted to deceive the PTO about the facts of the discovery process of the invention" and

[3] But for one piece of evidence regarding the prosecution history of a subsequently-issued patent, excluded under Federal Rule of Evidence 403, the district court did not preclude CleanTech from offering evidence relating to materiality. CleanTech has not identified any other evidence or argument that was excluded, and there was none.

"purposefully withheld the information about their dealings with Agri-Energy." Appx261; Appx263. The court pointedly found the testimony from CleanTech's witnesses attempting to recharacterize the 2003 testing to be unreliable. Dkt. No. 155-1, p. 45.

The district court made extensive findings that counsel participated in this conduct with intent to deceive: "[t]he only reasonable inference is that [Cantor] believed the inventors had made an offer for sale and, with the feasibility testing letter already before the PTO in both prosecutions, which implied a later reduction to practice date, they chose advocacy over candor." Appx296, 299, 300, 307-308. (internal citation omitted).

D. Appeal

CleanTech filed a blunderbuss appeal, challenging the court's rulings on non-infringement, all seven invalidity grounds, willful infringement, and inequitable conduct. Dkt. No. 62.

As relevant here, CleanTech made the same arguments to the Panel that it makes in its petition: the Court must review the summary judgment on-sale bar decision because (1) it was barred from litigating

materiality at trial and (2) materiality was not before the district court. *Id*. at 105-06.

The Panel rejected CleanTech's arguments as "jejune":

> "The District Court held an eight-day bench trial in which materiality was squarely before it. In addition to incorporating the evidence and findings of materiality that had been presented at the summary judgment stage, the District Court admitted other relevant evidence during the trial, including documents relating to the June and July 2003 testing, and previously unheard testimony from the Inventors and attorneys with Cantor Colburn, all relating to the materiality of the July 2003 Proposal. Moreover, following the bench trial, the District Court determined that "its conclusion [from the Summary Judgment Order] that [the July 2003 Proposal] evidence both elements of the on-sale bar" was "confirm[ed]" and, after incorporating "by reference the findings of fact and conclusions of law in the Summary Judgment Order," the District Court determined that "[f]urther evidence at trial only buttresse[d] the [District] Court's earlier conclusion, particularly with respect to the ready for patenting element of the on-sale bar."

Dkt. No. 164, p. 25, n.15 (internal citations omitted).

In affirming the district court's inequitable conduct judgment and refusing to review the district court's summary judgment decision, the Panel followed this Court's precedent in *Energy Heating, LLC v. Heat On-The-Fly, LLC*, 889 F.3d 1291, 1299 (Fed. Cir. 2018) (affirming inequitable conduct decision and declining to consider validity, claim construction, and infringement issues). Dkt. No. 164, p. 25, n.15. It

reviewed the ultimate equitable issue of unenforceability for abuse of discretion. *Id.* at 23. It reviewed the district court's findings of fact using a clearly erroneous standard, and reviewed its legal conclusions for misapplication or misinterpretation of applicable law or clear error of judgment. *Id.* at 23.

III. ARGUMENT

A. The Panel Applied the Law Correctly

Ignoring this Court's admonition that "petitions for rehearing should not be used to reargue issues previously presented that were not accepted by the merits panel," Information Sheet, CleanTech uses its petition to reargue issues rejected by the Panel and distorts the record in the process.[4] The Panel correctly applied *Therasense* and *Energy Heating*, the controlling precedents, to find the '858 Patent Family unenforceable. *E.g.,* Dkt. No. 164, p. 37.

In *Energy Heating*, the patent holder appealed the district court's judgment of inequitable conduct, summary judgment of obviousness, construction of disputed claim terms, and direct infringement, among

[4] CleanTech employed the same tactic in the merits appeal. For example, the Panel characterized CleanTech's arguments regarding the district court's findings on the *Allen* factors as "meritless and misleading." Dkt. No. 164, p. 29.

other things. This Court reviewed and affirmed the district court's inequitable conduct judgment. Having upheld unenforceability, the Court declined to reach the appellant's remaining arguments, including those regarding the district court's summary judgment of obviousness. *Energy Heating*, 889 F.3d at 1303.

That is the approach the Panel used here: the Panel reviewed the inequitable conduct decision, found that the district court did not: commit clear error in its factual findings;[5] misapply or misinterpret applicable law or commit clear error of judgment; or abuse its discretion on the ultimate equitable decision of unenforceability. *Eg.,* Dkt. No. 164, pp. 26-32. Thus, the Panel affirmed the inequitable conduct judgment without reaching the summary judgment decision or the myriad other issues CleanTech raised. Dkt. No. 164, p. 23, 25 n.15, 31.[6]

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[5] For example, the Panel concluded the district court "did not clearly err" regarding its factual findings relevant to the *Allen* factors, the ready-for-patenting prong, and CleanTech's awareness of the on-sale bar and its requirements. Dkt. No. 164, pp. 30-31.

[6] CleanTech accuses the Panel of "ignoring" arguments. Dkt. No. 175, p. 9 n.1. But the Panel expressly "considered the parties' other arguments and each of the other issues raised on appeal . . . . and find them to be without merit." Dkt. No. 164, p. 38. Failure to explicitly opine on every issue does not mean issues were ignored. *Phil-Insul Corp. v. Airlite Plastics Co.*, 854 F.3d 1344 (Fed. Cir. 2017); Fed. Cir. R. 36.

CleanTech does not argue that the Panel misapplied *Energy Heating* in this regard. Instead, it disagrees with the Panel's decision not to review the summary judgment on-sale bar decision for "abuse of discretion." Dkt. No. 175, p. 6.

Contrary to CleanTech's argument, the summary judgment decision of on-sale bar was not "the sole basis for [the] materiality," Dkt. No. 175, p. 8, and CleanTech was not "barred . . . from introducing evidence . . . at trial" on materiality, *id*. at 7. As the Panel determined, "materiality was squarely before" the trial court, including new documents and previously unheard testimony. Dkt. No. 164, p. 25, n.15. Indeed, CleanTech's witnesses testified at trial that the June and July 2003 testing were failures, the Offer Letter was "an offer to test," the experimental-use exception applied, and other arguments relating to both *Pfaff* prongs – testimony the trial court disbelieved. *E.g.*, Appx297 (Cantrell's "testimony about the development process was contradicted by so many other contemporaneously-produced documents that it was not credible."); Appx70149; Appx70174; Appx70647; Appx70654-70656; Appx70854; Appx70924; Appx71095; Appx71370-71372. The Panel did not "refuse" to review the summary judgment decision *de novo*; it found

untrue CleanTech's representation that the summary judgment decision was "the sole basis" for finding materiality, and it reviewed the inequitable conduct decision under the proper standard.

CleanTech argues that the reason for the district court's exclusion of evidence regarding the prosecution history of a subsequently-issued patent is "irrelevant" because it was the only evidence it offered on materiality. This argument is belied by the trial record. Other than this piece of evidence, CleanTech has not and cannot identify any evidence or argument relevant to materiality that was excluded. Furthermore, the district court excluded that evidence, not because CleanTech was "barred" from relitigating materiality, but because "its probative value is outweighed by the way it would confuse and prolong this trial." Appx71952-71953.

CleanTech did not appeal this evidentiary ruling. Thus, the Court should not consider CleanTech's argument that a recently-issued patent "confirmed" the "incorrectness" of the trial court's materiality decision. *Scheurer v. Fromm Family Foods,* 863 F.3d 748, 755 (7th Cir. 2017). Moreover, it is not the PTO's, but the district court's "obligation to

resolve the underlying facts of materiality and intent." *Am. Calcar, Inc. v. Am. Honda Motor Co.*, 651 F.3d 1318, 1333 (Fed. Cir. 2011).

CleanTech's argument also misses the mark. If for no other reason, materiality was established by CleanTech's egregious misconduct in submitting an unmistakably false declaration and its repeated false and misleading statements regarding 2003 testing. Appx291; *Therasense,* 649 F.3d at 1292. ("When the patentee has engaged in affirmative acts of egregious misconduct, such as the filing of an unmistakably false affidavit, the misconduct is material.") (*citing Rohm & Haas Co. v. Crystal Chem. Co.*, 722 F.2d 1556, 1571 (Fed. Cir. 1983) ("there is no room to argue that submission of false affidavits is not material")).

Last, CleanTech's argument that the Court must review the on-sale bar summary judgment ruling *de novo* ignores that different evidentiary standards apply to invalidity and materiality. Invalidity must be shown by clear and convincing evidence. *Pozen, Inc. v. Par Pharm., Inc.*, 696 F.3d 1151, 1165 (Fed. Cir. 2012). But materiality requires only a finding by *a preponderance of the evidence* that a patent would not have issued had the PTO been made aware of the information

at issue. *Therasense*, 649 F.3d at 1291-92; *see also* Appx291. Consequently, withheld information may be material but not invalidating: "Even if a district court does not invalidate a claim based on a deliberately withheld reference, the reference may be material if it would have blocked issuance under the PTO's different evidentiary standards." *Therasense,* 649 F.3d at 1292; *Am. Calcar, Inc. v. Am. Honda Motor Co.*, 768 F.3d 1185, 1189 (Fed. Cir. 2014) ("District courts and the PTO employ different evidentiary standards . . . . The jury's verdict finding the patents at issue non-obvious thus does not weigh on the determination of materiality for inequitable conduct."); *Am. Calcar, Inc.,* 651 F.3d at 1335 ("Even though the jury rejected Honda's invalidity arguments . . . the withheld information may be material if it would have blocked patent issuance under the PTO's preponderance of the evidence standard."). It would be legal error to review the summary judgment decision of invalidity *de novo* when the operative decision is the court's finding of materiality in its inequitable conduct decision.

Because CleanTech's arguments are based on a misrepresentation of the district court proceedings, a distortion of the record, and a mischaracterization of the Panel decision, they fail. This case involves

exactly the kinds of dishonest behavior that *Therasense* seeks to deter. The Panel's decision was a straightforward and correct application of existing law that does not require further examination.

B. The Panel Properly Reviewed the District Court's Findings of Facts Under the Clear Error Standard

Again misrepresenting the record, CleanTech argues that the Panel reviewed the district court's factual findings on materiality and intent for abuse of discretion. That is untrue. The Panel articulated the proper standard for reviewing the court's inequitable conduct ruling and analyzed factual findings and conclusions of law in meticulous detail. As detailed above, the Panel found no clear error in the court's factual findings, citing record evidence directly refuting CleanTech's vacuous arguments. For example, the Panel rejected CleanTech's arguments regarding the experimental-use exception, finding the district court "did not clearly err" in concluding that the Offer Letter was an offer for sale and not for experimentation. Dkt. No. 164, pp. 29-30. With regard to intent, the Panel found the district court's factual findings were "supported by the record," specifically holding that the district court did not "clearly err" in concluding CleanTech was aware of the on-sale bar and knowingly withheld material evidence. *Id.* The

Panel cited five reasons supporting the district court's ruling, each well-grounded in the clear evidence before the Court. CleanTech has not and cannot identify a single finding of fact regarding materiality or intent that was clearly erroneous and it cannot establish that the district court or the Panel misapplied the law.

C. The "Special Rules" Argument was not Preserved

CleanTech asserts that by merely citing *Plumtree* in its summary judgment brief, it preserved an argument that it raised for the first time on appeal that there are "special rules for on-sale bar of method claims." Dkt. No. 62, p. 39. The "special rules" purportedly require a "challenger [to] prove that the patentee either: (i) 'made a commercial offer to perform the patented method;' or (ii) 'in fact performed the patented method for a promise of future compensation.'" *Id.* at 36 (*quoting Plumtree Software, Inc. v. Datamize, LLC*, 473 F.3d 1152, 1162–63 (Fed. Cir. 2006)).

At summary judgment, CleanTech never argued there were "special rules" for method claims. Rather, CleanTech cited *Plumtree* in its summary judgment opposition once, not regarding "special rules," but to argue the Offer Letter was not invalidating because it "did not

unambiguously require use of Plaintiffs' patented methods." Appx26364. That arguments did not "fairly put [the District Court] on notice as to the substance of the issue" regarding "special rules." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000).

CleanTech is also wrong on the law – there are no "special rules" for method claims: a method claim is invalidated by an offer to sell a device that carries out the method. *See Robotic Vision Sys. v. View Eng'g, Inc.*, 249 F.3d 1307, 1310–13 (Fed. Cir. 2001) (affirming application of on-sale bar to method claims for sale of device for carrying out method); *Robotic Vision Sys. v. View Eng'g, Inc.*, 112 F.3d 1163, 1167 (Fed. Cir. 1997) ("The claimed invention in this case is a method. What Robotic is accused of putting on sale in March 1991 is a device for carrying out that method. Thus, an offer to sell the device (or otherwise provide it in a commercial context), if it met the requirements for an on-sale bar, would constitute a bar to the patentability of the claimed method.").

D. The Panel's Ruling on the '037 Patent Did Not "Violate Precedent"

CleanTech argues that the Panel violated precedent because it affirmed the court's finding of obviousness of the '037 patent in a footnote. Dkt. No. 175, p. 16. CleanTech is wrong.

First, CleanTech does not identify any precedent that the Panel ignored or violated. Instead, it repeats the same arguments it made on appeal. *Compare* Dkt. No. 175, pp. 15-16, *with* Dkt. No. 62, pp. 72-75.

The Panel rejected CleanTech's arguments and further expressly stated that it "considered the parties' other arguments and each of the other issues raised on appeal . . . and find them to be without merit." Dkt. No. 164, p. 38. Displeasure with the Panel's application of law is not a basis for rehearing. *Sony Elecs., Inc. v. U.S.*, 382 F.3d 1337, 1339 (Fed. Cir. 2004). And a court's failure to explicitly review every argument raised on appeal does not mean they were "ignored." Fed. Cir. R. 36. Nevertheless, the Panel expressly stated, "the District Court properly determined that a PHOSITA would have been motivated to lower moisture content of syrup, as disclosed in the '037 patent," and summarily affirmed invalidity of the '037 patent. Dkt. No. 164, p. 20 n.13.

IV. CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing en banc.

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Respectfully submitted,

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