

**United States Court of Appeals
for the Federal Circuit**

UNITED CANNABIS CORPORATION,

Plaintiff-Appellee,

— v. —

PURE HEMP COLLECTIVE INC.,

Defendant-Appellant.

*On Appeal from the United States District Court for the
District of Colorado in No. 1:18-cv-01922-WJM-NYW
Honorable William J. Martinez, Judge*

BRIEF FOR PLAINTIFF-APPELLEE

ORION ARMON
COOLEY LLP
1144 15th Street, Suite 2300
Denver, CO 80202-2686
Telephone: (720) 566-4000
Fax: (720) 566-4099
oarmon@cooley.com

DOUGLAS CHEEK
COOLEY LLP
1299 Pennsylvania Ave NW
Washington, DC 20004
Telephone: (202) 842-7800
Fax: (202) 842-7899
dcheek@cooley.com

Counsel of Record for United Cannabis Corporation

JUNE 29, 2022

ASSERTED PATENT CLAIMS

U.S. Patent No. 9,730,911 (the '911 Patent)

1. A liquid cannabinoid formulation, wherein at least 95% of the total cannabinoids is tetrahydrocannabinolic acid (THCa).
5. A liquid cannabinoid formulation, wherein at least 95% of the total cannabinoids is tetrahydrocannabinol (THC).
10. A liquid cannabinoid formulation, wherein at least 95% of the total cannabinoids is cannabidiol (CBD).
12. The formulation-of claim 10, further comprising at least one terpene/flavonoid.
14. The formulation of claim 12, wherein the terpene/flavonoid is d-limonene linalool, 1,8-cineole (eucalyptol), α -pinene, terpineol-4-ol, p-cymene, borneol, Δ -3-carene, β -sitosterol, β -myrcene, β -caryophyllene, cannflavin A, apigenin, quercetin or pulegone.
16. A liquid cannabinoid formulation, wherein at least 95% of the total cannabinoids is THCa and cannabidiolic acid (CBDa).
20. A liquid cannabinoid formulation, wherein at least 95% of the total cannabinoids are THC and CBD.
21. The formulation-of claim 20, further comprising at least one terpene/flavonoid.
22. The formulation of claim 20, wherein the formulation comprises no more than 4% terpene.
25. A liquid cannabinoid formulation, wherein at least 95% of the total cannabinoids are CBD, cannabinol (CBN) and THC.
27. The formulation-of claim 25, further comprising at least one terpene/flavonoid.

28. The formulation of claim 25, wherein the formulation comprises no more than 4% terpene.
31. The formulation of any one of the proceeding claims, wherein the formulation is infused in a medium chain triglyceride (MCT).
33. The formulation of claim 1, 5, 10, 16, 20, or 25, formulated for oral, sublingual, buccal, or topical administration.

FORM 9. Certificate of Interest

Form 9 (p. 1)
July 2020

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 22-1363

Short Case Caption United Cannabis Corporation v. Pure Hemp Collective Inc.

Filing Party/Entity United Cannabis Corporation

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 01/25/2022

Signature: /s/ Orion Armon

Name: Orion Armon

FORM 9. Certificate of Interest

Form 9 (p. 2)
July 2020

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. <input checked="" type="checkbox"/> None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. <input checked="" type="checkbox"/> None/Not Applicable
United Cannabis Corporation		

☐ Additional pages attached

FORM 9. Certificate of Interest

Form 9 (p. 3)
July 2020

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable

☐ Additional pages attached

Orion Armon	Mark A. Zambarda	Douglas W. Cheek

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☒ None/Not Applicable

☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable

☐ Additional pages attached

TABLE OF CONTENTS

	Page
STATEMENT OF RELATED CASES	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. Standard of Review	9
II. Under the Totality of the Circumstances, Pure Hemp Cannot Establish That The District Court Abused Its Discretion In Denying Pure Hemp’s Motion Because Three of Pure Hemp’s Five Bases for Relief Were Objectively Baseless.....	10
III. The District Court Properly Denied Pure Hemp’s Fee Motion Under Section 285 Because It Was Bound by Rule 56 and Genuine Disputes Over Material Facts Existed Over Pure Hemp’s Inequitable Conduct Allegations	11
IV. The District Court Did Not Abuse its Discretion in Rejecting Pure Hemp’s Inequitable Conduct Theories as to Whittle.....	15
A. Pure Hemp Fails to Establish the District Court Abused its Discretion in Rejecting the Purported Materiality of Whittle.....	17
B. The District Court Did Not Abuse Its Discretion In Finding That Pure Hemp Failed To Establish Specific Intent to Deceive the Patent Office	24
V. The District Court Did Not Abuse Its Discretion in Declining to Award Fees Based on Pure Hemp’s Theories as to the Prosecution of Unrelated Patent Applications	29
VI. The District Court Did Not Abuse Its Discretion in Denying Pure Hemp’s Request for an Award of its Attorneys’ Fees Under 28 U.S.C. § 1927 or the Court’s Inherent Authority.....	34
VII. The District Court Properly Considered “All of the Parties’ Arguments” and Was Not Required to Reveal Every Assessment of Every Consideration.....	37

TABLE OF CONTENTS
CONTINUED

	Page
VIII. Pure Hemp’s Request for an Affirmative Determination Adverse to UCANN Lacks Legal Basis	41
IX. Pure Hemp Has Failed to Establish That a Contrary Prevailing- Party Determination Would Have Changed the Outcome of its Fee Motion	41
CONCLUSION	43

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>1st Media, LLC v. Elec. Arts, Inc.</i> , 694 F.3d 1367 (Fed. Cir. 2012)	29
<i>AdjustaCam, LLC v. Newegg, Inc.</i> , 861 F.3d 1353 (Fed. Cir. 2017)	38, 39, 40, 41
<i>Am. Calcar v. Am. Honda Motor Co.</i> , No. 06-cv-2433, 2012 WL 1328640 (S.D. Cal. Apr. 17, 2012)	26
<i>Amsted Indus. Inc. v. Buckeye Steel Castings Co.</i> , 23 F.3d 374 (Fed. Cir. 1994)	9, 31, 35
<i>Bayer CropScience AG v. Dow AgroSciences LLC</i> , 851 F.3d 1302 (Fed. Cir. 2017)	10
<i>Braley v. Campbell</i> , 832 F.2d 1504 (10th Cir. 1987)	31, 34
<i>Bridgeport Music, Inc. v. London Music, U.K.</i> , 226 Fed. App'x 491 (6th Cir. 2007)	43
<i>Bridges v. Wilson</i> , 996 F.3d 1094 (10th Cir. 2021)	42
<i>Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources</i> , 532 U.S. 598 (2001)	9
<i>Burke v. Regalado</i> , 935 F.3d 960 (10th Cir. 2019)	10
<i>Carroll Touch, Inc. v. Electro Mech. Sys., Inc.</i> , 15 F.3d 1573 (Fed. Cir. 1993)	37
<i>CCC Grp., Inc. v. Martin Eng'g Co.</i> , 683 F. Supp. 1201 (D. Colo. 2010)	25, 26
<i>Chambers v. NASCO, Inc.</i> , 501 U.S. 32 (1991)	34, 35

TABLE OF AUTHORITIES

CONTINUED

	Page(s)
<i>Consolidated Aluminum Corp. v. Foseco Int’l Ltd.</i> , 910 F.2d 804 (Fed. Cir. 1990)	38
<i>Energy Heating, LLC v. Heat On-The-Fly, LLC</i> , 889 F.3d 1291 (Fed. Cir. 2018)	16
<i>Hamilton v. Boise Cascade Express</i> , 519 F.3d 1197 (10th Cir. 2008)	9
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983).....	6
<i>Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.</i> , 572 U.S. 559 (2014).....	9
<i>Impax Lab’ys Inc. v. Lannett Holdings Inc.</i> , 893 F.3d 1372 (Fed. Cir. 2018)	41
<i>KangaROOS U.S.A., Inc. v. Caldor, Inc.</i> , 778 F.2d 1571 (Fed. Cir. 1985)	13
<i>Kotteakos v. U.S.</i> , 328 U.S. 750 (1946).....	42
<i>Leviton Mfg., Co. v. Universal Sec. Instruments, Inc.</i> , 606 F.3d 1353 (Fed. Cir. 2010)	11, 12
<i>Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP</i> , 473 Mass. 336, 42 N.E.2d 199 (2015).....	32
<i>Mformation Techs., Inc. v. Research in Motion Ltd.</i> , 830 F. Supp. 2d 815 (N.D. Cal. 2011).....	24
<i>Molins PLC v. Textron, Inc.</i> , 48 F.3d 1172 (Fed. Cir. 1995)	32
<i>Motorola, Inc. v. Interdigital Tech. Corp.</i> , 121 F.3d 1461 (Fed. Cir. 1997)	10
<i>Network Signatures, Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 731 F.3d 1239 (Fed. Cir. 2013)	13

TABLE OF AUTHORITIES

CONTINUED

	Page(s)
<i>Octane Fitness, LLC v. ICON Health & Fitness, Inc.</i> , 572 U.S. 545 (2014).....	16, 31, 38, 41
<i>Ohio Willow Wood Co. v. Alps S., LLC</i> , 735 F.3d 1333 (Fed. Cir. 2013)	13
<i>Paragon Podiatry Lab., Inc. v. KLM Labs., Inc.</i> , 984 F.2d 1182 (Fed. Cir. 1993)	12
<i>ParkerVision, Inc. v. Qualcomm Inc.</i> , 924 F. Supp. 2d 1314 (M.D. Fla. 2013).....	23
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (en banc)	18
<i>Phonometrics, Inc. v. ITT Sheraton Corp.</i> , 64 Fed. App'x 219 (Fed. Cir. 2003)	36
<i>Propat Int'l Corp. v. Rpost, Inc.</i> , 473 F.3d 1183 (Fed. Cir. 2007)	10
<i>In re Rembrandt Techs. LP Pat. Litig.</i> , 899 F.3d 1254 (Fed. Cir. 2018)	14
<i>Romag Fasteners, Inc. v. Fossil, Inc.</i> , 866 F.3d 1330 (Fed. Cir. 2017)	10
<i>Rothschild Connected Devices Innovations, LLC v. Guardian Protection Services, Inc.</i> , 858 F.3d 1383 (Fed. Cir. 2017)	39, 40, 41
<i>Sage Prod., Inc. v. Devon Indus., Inc.</i> , 126 F.3d 1420 (Fed. Cir. 1997)	32
<i>Serio-US Indus., Inc. v. Plastic Recovery Techs. Corp.</i> , 459 F.3d 1311 (Fed. Cir. 2006)	37
<i>Shields v. Shetler</i> , 120 F.R.D. 123 (D. Colo. 1988)	34

TABLE OF AUTHORITIES

CONTINUED

	Page(s)
<i>Shinseki v. Sanders</i> , 556 U.S. 396 (2009).....	42
<i>Snap-on Inc. v. Robert Bosch, LLC</i> , No. 09 CV 6914, 2016 WL 1697759 (N.D. Ill. Apr. 28, 2016)	14
<i>Spineology, Inc. v. Wright Med. Tech.</i> , 910 F.3d 1227 (Fed. Cir. 2018)	14
<i>Stone Basket Innovations, LLC v. Cook Med. LLC</i> , 892 F.3d 1175 (Fed. Cir. 2018)	<i>passim</i>
<i>Straight Path IP Grp., Inc. v. Cisco Sys., Inc.</i> , 411 F. Supp. 3d 1026 (N.D. Cal. 2019).....	33
<i>Therasense, Inc. v. Becton, Dickinson & Co.</i> , 649 F.3d 1276 (Fed. Cir. 2011) (en banc)	16, 22, 25
<i>Thermolife Int’l LLC v. GNC Corp.</i> , 922 F.3d 1347 (Fed. Cir. 2019)	14
<i>U.S. v. Alpha Med., Inc.</i> , 102 Fed. App’x 8 (6th Cir. 2004)	43
<i>U.S. Water Servs., Inc. v. Novozymes A/S</i> , 843 F.3d 1345 (Fed. Cir. 2016)	22
<i>Univ. of Utah v. Max-Planck-Gesellschaft zur Foerderung der Wissenschaften e.V.</i> , 851 F.3d 1317 (Fed. Cir. 2017)	10, 38
<i>Vaughn v. Principi</i> , 336 F.3d 1351 (Fed. Cir. 2003)	9
<i>Wedgetail Ltd. v. Huddleston Deluxe, Inc.</i> , 576 F.3d 1302 (Fed. Cir. 2009)	37, 38
<i>White v. Am. Airlines, Inc.</i> , 915 F.2d 1414 (10th Cir. 1990)	34

TABLE OF AUTHORITIES

CONTINUED

	Page(s)
<i>Young v. Lumenis, Inc.</i> , 492 F.3d 1336 (Fed. Cir. 2007)	22

Statutes

28 U.S.C.	
§ 1927.....	<i>passim</i>
§ 2111.....	42
35 U.S.C.	
§ 101.....	2, 4
§ 285.....	<i>passim</i>

Other Authorities

ABA Model Rule 1.7	32
David Pressman, <i>Patent It Yourself</i> 181 (13th ed. 2008)	25
Gene Quinn, <i>Ropes & Gray Seeks Dismissal of Patent Malpractice Lawsuit</i> , IPWATCHDOG (Mar. 28, 2010).....	25, 28

Rule

11.....	39
38.....	12
47.5.....	1
56.....	6, 11, 12

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, United Cannabis Corporation (“UCANN”) states as follows:

- a) No previous appeal has been taken in this action.
- b) No other case pending in this or any other court or agency will directly affect or be directly affected by this court’s decision in the pending appeal.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in declining to order UCANN or its counsel to reimburse Pure Hemp's attorneys' fees under 35 U.S.C. § 285.
2. Whether the district court abused its discretion in declining to order UCANN or its counsel to reimburse Pure Hemp's attorneys' fees under 28 U.S.C. § 1927.
3. Whether the district court abused its discretion in declining to order UCANN or its counsel to reimburse Pure Hemp's attorneys' fees under the court's inherent authority.

STATEMENT OF THE CASE

UCANN sued Pure Hemp in the United States District Court for the District of Colorado for infringement of U.S. Patent No. 9,730,911 ("the '911 patent") on July 30, 2018. During the litigation, UCANN prevailed on all or nearly all substantive disputes. First, the district court denied Pure Hemp's early motion for summary judgment, finding that the '911 claims are patent-eligible under 35 U.S.C. § 101. (Appx133-148.) Second, the district court denied Pure Hemp leave to brief the invalidity of a certificate of correction of the '911 patent. (Appx159-165.) Third, the district court adopted UCANN's construction of "cannabinoids." (Appx166-177.) Thereafter, Pure Hemp *stipulated* to infringement as to all but one of the

asserted patent claims and to damages in the form of a 10% royalty on the sales it had made before effectuating a design-around to the '911 patent. (Appx178-182.)

Despite UCANN's success during the litigation, UCANN was forced to dismiss its infringement claims after it was discharged from bankruptcy proceedings. (Appx183-193.) In response to UCANN's dismissal of its infringement claims, Pure Hemp dismissed its invalidity and inequitable conduct counterclaims, waiving any right to a pre-judgment jury or bench trial on those defenses. (*Id.*) After the district court ordered the case closed (Appx186), Pure Hemp moved for attorneys' fees and costs pursuant to 35 U.S.C. § 285, 28 U.S.C. § 1927, and the court's inherent authority. (Appx194-210.) Pure Hemp never requested a post-judgment evidentiary hearing and later reiterated to this Court during this appeal that it "did not request an evidentiary hearing at the district court, and is not requesting one here." (ECF No. 12 at 6.)

Relying solely on non-expert attorney argument, Pure Hemp's counsel advanced two primary theories supporting its request for attorneys' fees: (i) that UCANN's prosecution counsel intentionally withheld an allegedly material reference, U.S. Patent Pub. No. 2004/0033280 ("Whittle"), from the Patent Office during prosecution of the '911 patent-in-suit, and (ii) that different attorney groups who work for the same law firm took "inconsistent positions" before the Patent Office and district court as to who invented "[a] liquid cannabinoid formulation,

wherein at least 95% of the total cannabinoids is cannabidiol (CBD).” Pure Hemp’s second argument was raised for the first time in its fee motion, was never pleaded, never included in its invalidity contentions, and never at-issue before the case was closed. In lieu of expert testimony, Pure Hemp’s counsel submitted an attorney declaration containing mathematical calculations purportedly showing that Whittle and the unrelated patent applications are but-for material to claims of the ’911 patent. (Appx211-223.)

Before the district court, Pure Hemp advanced three additional theories of inequitable conduct and “exceptional” behavior that it failed to prove and has since abandoned on appeal. First, relying solely on a January 2012 Facebook post referring to “CBD Tinctures,” Pure Hemp alleged that ’911 patent inventor Tony Verzura “attempted to hide” evidence of patent-embodiment prior commercial activity and claimed that Mr. Verzura submitted a “deceptive and misleading” declaration to the district court seven years later. (Appx207.) Second, ignoring that the complete definition was submitted to the Patent Examiner, Pure Hemp accused UCANN’s prosecuting attorney of violating her duty of candor by allegedly truncating the Gold Book definition of “resin” to overcome a Section 101 rejection during prosecution of the application that led to issuance of the ’911 patent-in-suit. (Appx198.) Third, and notwithstanding the fact that no local rule or case management order required such narrowing, that Pure Hemp never filed any motion

requesting relief, and that Pure Hemp stipulated to infringing all but one of the eleven asserted claims, Pure Hemp accused UCANN of “refus[ing]” to further narrow UCANN’s eleven asserted claims of the ’911 patent-in-suit before expert discovery. (Appx178-181, Appx195, Appx222-223.) Pure Hemp abandoned these theories on appeal after it was unable to respond to UCANN’s rebuttal arguments and evidence. (Appx583-586.)

In its response to Pure Hemp’s primary two arguments, UCANN demonstrated that (i) Whittle is not material to the ’911 patent, (ii) specific intent to deceive is *not* the single most reasonable inference to be drawn from the evidence, and (iii) Pure Hemp’s characterizations of the unrelated patent applications have no relevance to UCANN’s litigation with Pure Hemp. (Appx571-716.) After reviewing the parties’ arguments, the district court agreed with UCANN and denied Pure Hemp’s motion, explaining:

The Court has fully considered all of the parties’ arguments regarding Defendant’s request for attorney’s fees and costs. (ECF Nos. 91, 93, 94, 95.) Ultimately, the Court finds that Defendant has failed to establish that it is the prevailing party under section 285, that this is an “exceptional” case warranting an attorney’s fee award, or that Plaintiff’s counsel has acted in a vexatious or otherwise unreasonable manner. In making this determination, the Court notes that the parties stipulated to dismissal of this case before many of the factual disputes Defendant cites were adjudicated on the merits. (ECF No. 91.) The record on the substantive merits and the materiality of Plaintiff’s purportedly inequitable conduct is woefully undeveloped, and as such, does not paint a persuasive picture for awarding fees. Accordingly, the Court denies Defendant’s request for attorney’s fees pursuant to section 285, section 1927, or the court’s inherent authority.

(Appx2-3.) Pure Hemp subsequently appealed to this Court.

SUMMARY OF THE ARGUMENT

Pure Hemp failed to demonstrate that the district court abused its discretion in denying Pure Hemp's fee motion under 35 U.S.C. § 285, 28 U.S.C. § 1927, or the court's inherent authority.

Pure Hemp's appeal of the denial of its motion for attorneys' fees, which it filed on a "woefully undeveloped" record after dismissing its invalidity and inequitable conduct counterclaims before they were adjudicated, and after waiving a hearing on its fee motion, is "one of the least socially productive types of litigation imaginable." *Hensley v. Eckerhart*, 461 U.S. 424, 442 (1983) (Brennan, J., dissenting).

Pure Hemp argues that the district court abused its discretion by refusing to "wade into" a record that was rife with disputes of material fact. That argument was (and is) frivolous. Pure Hemp does not dispute that its dismissal of its counterclaims and its waiver of any post-judgment hearing created a procedural posture in which the district court was obligated to decide the inequitable conduct allegations underlying its motion under Rule 56, and therefore was prohibited from "wad[ing]into" and deciding underlying disputed issues of material fact. (*See* ECF Nos. 11-13.) The district court did not abuse its discretion in finding that the record

underlying Pure Hemp's contained disputes of material fact, or in denying Pure Hemp's motion under Section 285 on that basis.

Pure Hemp's appeal also fails on the merits. Pure Hemp's district court fee motion identified five bases for relief. Three of those bases were so weak that Pure Hemp abandoned them before the district court and on appeal. On the totality of circumstances, in light of UCANN's consistent success on the merits and the objective baselessness of three of Pure Hemp's five grounds for requesting a fee award, the district court did not abuse its discretion in denying Pure Hemp's motion.

As for its arguments concerning Whittle and GW Pharma, Pure Hemp is unable to show any abuse of discretion in the district court's findings that (i) "[t]he record on the substantive merits and the materiality of Plaintiff's purportedly inequitable conduct is woefully undeveloped, and as such, does not paint a persuasive picture for awarding fees [under Section 285]," and (ii) "Defendant has failed to establish ... that Plaintiff's counsel has acted in a vexatious or otherwise unreasonable manner [under Section 1927 or the court's inherent authority]." (Appx2-3.)

The district court did not abuse its discretion in finding that Pure Hemp failed to establish that Whittle is but-for material to any claim of the '911 patent because (i) the disclosed compositions in Whittle contain levels of CBD and THC well below the claimed "at least 95% of total cannabinoids"; and (ii) the Patent Office granted

a divisional of the '911 patent that included identical limitations to the asserted claims of the '911 patent over Whittle and Pure Hemp's invalidity contentions, demonstrating Whittle's non-materiality to the '911 patent.

Pure Hemp also fails to show that the district court abused its discretion when it concluded that Pure Hemp failed to carry its burden of proving that UCANN's prosecution counsel had a specific intent to deceive the Patent Office. UCANN's prosecution counsel denied having any intent to deceive the Patent Office and offered a credible explanation for her conduct. The district court did not abuse its discretion in finding that Pure Hemp failed to establish that intent to deceive the Patent Office was the single most reasonable inference to be drawn from the evidence. Instead of showing any abuse of discretion, Pure Hemp improperly reargues the facts and implicitly encourages this Court to reweigh the evidence.

Pure Hemp similarly fails to show that the district court abused its discretion when it concluded that Pure Hemp failed to carry its burden of proving that representation by separate attorney groups of UCANN in district court and GW Pharma in patent prosecution matters provided any basis for a fee award. Like Pure Hemp's other allegations, its conclusory arguments were "woefully undeveloped" and failed to identify any conduct by UCANN or its counsel that was exceptional, vexatious, or unreasonable.

Finally, Pure Hemp erroneously faults the district court for failing to write a more fulsome order (which this Court does not require) and mistakenly requests that this Court find this case exceptional and award Pure Hemp its fees (in disregard for this Court's role as an appellate tribunal).

Pure Hemp's ill-advised appeal violates the well-settled principle that fee motions "should not result in a second major litigation." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 532 U.S. 598, 609 (2001) (quoting *Hensley*, 461 U.S. at 437); *Vaughn v. Principi*, 336 F.3d 1351, 1359 (Fed. Cir. 2003). The district court's denial of Pure Hemp's motion should be affirmed.

ARGUMENT

I. Standard of Review

This Court reviews the denial of a motion for an award under 35 U.S.C. § 285, under 28 U.S.C. § 1927, and under the court's inherent authority for abuse of discretion. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 561 (2014) (Section 285); *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir. 2008) (Section 1927); *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 23 F.3d 374, 378 (Fed. Cir. 1994) (court's inherent authority). In the Tenth Circuit, a "district court abuses its discretion when it renders an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Burke v. Regalado*, 935 F.3d 960, 1011 (10th Cir. 2019) (quotations omitted).

“Abuse of discretion is a highly deferential standard of appellate review.” *Bayer CropScience AG v. Dow AgroSciences LLC*, 851 F.3d 1302, 1306 (Fed. Cir. 2017). “In matters of judicial discretion, especially with respect to litigation procedures, the appellate court should exercise restraint in substituting its view for that of the judge who was on the spot.” *Romag Fasteners, Inc. v. Fossil, Inc.*, 866 F.3d 1330, 1346 (Fed. Cir. 2017) (citing *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1468 (Fed. Cir. 1997) (concurrency-in-part)).

II. Under the Totality of the Circumstances, Pure Hemp Cannot Establish That The District Court Abused Its Discretion In Denying Pure Hemp’s Motion Because Three of Pure Hemp’s Five Bases for Relief Were Objectively Baseless

Pure Hemp’s district court fee motion identified five bases for relief. (Appx194-210.) Three of those bases were so weak that Pure Hemp abandoned them before the district court and on appeal. (Appx717-729; ECF No. 8.) On the totality of the circumstances, in light of UCANN’s consistent success on the merits (*see supra* Statement of the Case) and the objective baselessness of three of the five grounds underlying Pure Hemp’s fee motion, the district court did not abuse its discretion by denying Pure Hemp any relief, and affirmance is warranted on this basis regardless whether this Court finds any error in any particular aspect of the district court’s findings. *Univ. of Utah v. Max-Planck-Gesellschaft zur Foerderung der Wissenschaften e.V.*, 851 F.3d 1317, 1321-323 (Fed. Cir. 2017) (affirming district court’s denial of attorneys’ fees under § 285); *Propat Int’l Corp. v. Rpost*,

Inc., 473 F.3d 1187, 1195 (Fed. Cir. 2007) (affirming district court’s denial of attorney’s fees under § 275 and § 1927).

III. The District Court Properly Denied Pure Hemp’s Fee Motion Under Section 285 Because It Was Bound by Rule 56 and Genuine Disputes Over Material Facts Existed Over Pure Hemp’s Inequitable Conduct Allegations

The district court did not abuse its discretion in denying Pure Hemp’s fee motion under Section 285 because Pure Hemp created a procedural posture in which denial of its motion was obligatory. Pure Hemp voluntarily dismissed its invalidity and inequitable conduct counterclaims before adjudication on the merits and elected not to request a post-judgment evidentiary hearing. Pure Hemp reiterated to this Court that it “did not request an evidentiary hearing at the district court, and is not requesting one here.” (ECF No. 12 at 6.)

The district court did not abuse its discretion when it denied Pure Hemp’s fee motion after observing that Pure Hemp’s allegations were “woefully undeveloped” and that disputed issues of material fact pervaded the record. (Appx2-3.) By dismissing its counterclaims and electing to forego a post-judgment evidentiary hearing, Pure Hemp effectively converted its motion into a pseudo summary judgment motion. *Leviton Mfg., Co. v. Universal Sec. Instruments, Inc.*, 606 F.3d 1353, 1358 (Fed. Cir. 2010) (treating as summary judgment motion district court’s ruling on inequitable conduct made as part of § 285 decision after infringement case voluntarily dismissed with prejudice). Pure Hemp does not dispute that, as a result

of its waivers and the unique procedural posture of this case, the district court was obligated to decide the inequitable conduct allegations underlying Pure Hemp's fee motion under Rule 56. Pure Hemp had the opportunity to address this issue when it responded to UCANN's Rule 38 motion for sanctions, and Pure Hemp did not argue otherwise. (*See generally* ECF No. 12.)

Where genuine issues of material fact exist in the context of summary judgment, the district court cannot find inequitable conduct. *Leviton*, 606 F.3d at 1362-64 (vacating district court's exceptional case determination because genuine issues of material fact existed as to intent); *Paragon Podiatry Lab., Inc. v. KLM Labs., Inc.*, 984 F.2d 1182, 1190 (Fed. Cir. 1993) ("[A] disputed finding of intent to mislead or to deceive is one for the judge to resolve, not the jury, *albeit not on summary judgment if there is a genuine dispute.*") (emphasis added).

As further discussed below in Part IV.B, Pure Hemp alleges that UCANN's prosecution counsel intentionally withheld allegedly material prior art during prosecution of the '911 patent, but concedes that prosecution counsel denied any intent to deceive. (Op. Br. at 24; *see* Appx282-284 at 48:12-50:12 ("I didn't withhold Whittle from the patent office. I deemed it not to be material in 2014 when I was drafting the application."); Appx298 at 64:6-20). In other words, Pure Hemp tacitly acknowledges the existence of genuine issues of material fact at least as to specific intent to deceive—a necessary element of Pure Hemp's inequitable conduct

allegations. (Op. Br. at 2 (acknowledging “factual disputes” that have not been “adjudicated on the merits”), 13-14 (“The only possible dispute in this case involves whether the failure to disclose was done with specific intent to deceive, and the district court refused to wade into that question.”), 24 (“The only possible reasons there could be a factual dispute regarding inequitable conduct is because the prosecuting attorney did not admit that she withheld the reference with specific intent to deceive.”); *see also* ECF No. 12 at 9 (“Pure Hemp . . . identified [specific intent] as . . . possibly in dispute.”)).

Because there is no dispute that genuine issues of material fact exist as to at least specific intent to deceive, the district court properly exercised its discretion when it denied Pure Hemp’s fee motion. *Ohio Willow Wood Co. v. Alps S., LLC*, 735 F.3d 1333, 1351 (Fed. Cir. 2013) (“The facts, when viewed in a light most favorable to Alps, preclude summary judgment on the issue of deceptive intent.”); *Network Signatures, Inc. v. State Farm Mut. Auto. Ins. Co.*, 731 F.3d 1239, 1244 (Fed. Cir. 2013) (finding genuine issues of material fact as to intent, noting “[t]he district court’s summary judgment of inequitable conduct cannot stand.”).¹

¹ *See also KangaROOS U.S.A., Inc. v. Caldor, Inc.*, 778 F.2d 1571, 1573-577 (Fed. Cir. 1985) (finding genuine issues of material fact as to intent, noting “[a] summary judgment of fraud or inequitable conduct, reached while denying to the person accused of the fraud or inequitable conduct the opportunity to be heard on the issue, is a draconian result.”).

Pure Hemp cites no case or authority to show that the district court was incorrect in finding disputes of fact existed, or that it acted outside its discretion in concluding that those disputes required the denial of Pure Hemp's fee motion. *Thermolife Int'l LLC v. GNC Corp.*, 922 F.3d 1347, 1357 (Fed. Cir. 2019) ("This is an unusual basis for fees, and we have emphasized the wide latitude district courts have to *refuse* to add to the burdens of litigation by opening up issues that have not been litigated but are asserted as bases for a fee award.") (emphasis in original) (citing *Spineology, Inc. v. Wright Med. Tech.*, 910 F.3d 1227, 1230 (Fed. Cir. 2018)); *In re Rembrandt Techs. LP Pat. Litig.*, 899 F.3d 1254, 1275-76 (Fed. Cir. 2018) ("It is undisputed that Rembrandt did not request an evidentiary hearing at any point before the district court made its exceptional-case determination. . . . Rembrandt waived its procedural objection to the lack of an evidentiary hearing.").

The facts of this case parallel *Snap-on Inc. v. Robert Bosch, LLC*, in which the accused infringer dismissed its inequitable conduct claims and subsequently sought attorneys' fees. No. 09 CV 6914, 2016 WL 1697759, at *4 (N.D. Ill. Apr. 28, 2016). Because it had waived a full hearing on the merits, the existence of factual disputes precluded a finding of materiality or specific intent. *Id.* ("This scanty record is insufficient proof to establish a material misrepresentation (or omission) was made with specific intent to deceive the PTO, even by a preponderance of the evidence standard."). Like *Snap-on*, Pure Hemp's motion *at best* raised disputed

issues of fact that could not be resolved by the district court, as Pure Hemp waived any right it may have had to a full hearing on the merits. (*See* ECF No. 12 at 6.)

Considering that genuine issues of material fact pervade the record below, the district court did not abuse its discretion in holding that “Defendant has failed to establish that . . . this is an ‘exceptional’ case warranting an attorney’s fee award. . . . The record on the substantive merits and the materiality of Plaintiff’s purportedly inequitable conduct is woefully undeveloped, and as such, does not paint a persuasive picture for awarding fees. Accordingly, the Court denies Defendant’s request for attorney’s fees pursuant to section 285.” (Appx2-3.)

The existence of genuine issues of material fact, unresolvable in Pure Hemp’s favor, was alone sufficient for the district court to deny Pure Hemp’s motion under Section 285. *See Stone Basket Innovations, LLC v. Cook Med. LLC*, 892 F.3d 1175, 1184 (Fed. Cir. 2018) (“The District Court analyzed but ultimately found unpersuasive [the accused infringer’s] arguments, and we see no reason to upset the District Court’s findings here. Therefore, we affirm the District Court’s determination that this case is not exceptional under 35 U.S.C. § 285.”).

IV. The District Court Did Not Abuse its Discretion in Rejecting Pure Hemp’s Inequitable Conduct Theories as to Whittle

Pure Hemp fails to demonstrate that the district court abused its discretion in rejecting its inequitable conduct theories as to Whittle and finding that this case is not “exceptional” warranting an award of fees. Specifically, the district court did

not abuse its discretion in rejecting Pure Hemp’s contentions that: (1) Whittle is allegedly but-for material; and that (2) UCANN’s prosecution counsel allegedly “acted with the specific intent to deceive the PTO.” *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1290-91 (Fed. Cir. 2011) (en banc). Further, the district court did not abuse its discretion when it refused to find that this case “stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014).

And even if the district court had found inequitable conduct (which it did not), it was still within the district court’s discretion to decline to award fees. *Energy Heating, LLC v. Heat On-The-Fly, LLC*, 889 F.3d 1291, 1307 (Fed. Cir. 2018) (“[D]istrict courts may award attorneys’ fees after finding inequitable conduct, but are not required to do so.”). Pure Hemp fails to recognize the dual nature of the district court’s discretion under the governing law, and offers no argument regarding why it was an abuse of discretion for the district court to decline to award fees regardless of the merits of Pure Hemp’s arguments. Pure Hemp’s inability to show that the district court abused its discretion when it concluded that Pure Hemp was not entitled to any fee award provides a standalone basis for affirmance.

A. Pure Hemp Fails to Establish the District Court Abused its Discretion in Rejecting the Purported Materiality of Whittle

Pure Hemp failed to establish that the district court abused its discretion in rejecting Pure Hemp's theory that Whittle is but-for material. (Appx2-3 ("The record on the substantive merits and the materiality of Plaintiff's purportedly inequitable conduct is woefully undeveloped, and as such, does not paint a persuasive picture for awarding fees.").) First, Pure Hemp overlooks that the disclosed compositions in Whittle contain levels of CBD and THC well below the "at least 95% of total cannabinoids" recited in claims 10 and 20 of the '911 patent. *See infra* Part IV.A.a. Second, Pure Hemp fails to reconcile its allegations of materiality with the fact that the Patent Office granted a divisional of the '911 patent that included identical claim limitations after reviewing Whittle and Pure Hemp's invalidity contentions, thereby confirming that Whittle is non-material. *See infra* Part IV.A.b.

a. The District Court Did Not Abuse Its Discretion In Finding That Pure Hemp Failed To Establish That Whittle Discloses Formulations in Which at Least 95% of the "Total Cannabinoids" Are Either CBD or THC and CBD

The district court did not abuse its discretion in finding that Pure Hemp failed to establish that Whittle was but-for material to patentability, because UCANN offered evidence that Whittle does not disclose formulations in which at least 95%

of the “total cannabinoids” are either CBD or THC and CBD.²

When inventors set forth specific definitions of patent-claim terms, the “inventor’s lexicography governs.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc). The ’911 patent specification indicates that “at least 85 different cannabinoids” have been isolated from the cannabis plant, and specifically identifies at least 26. (Appx18-19 at 4:54-56, 5:1-20; *see also* Appx600 (indicating over 113 cannabinoids are known today).) UCANN showed that a POSA would interpret the claimed “95% of total cannabinoids” limitations in claims 10 and 20 of the ’911 patent to require the calculation of cannabinoid concentration in light of *all* cannabinoids present. *Phillips*, 415 F.3d at 1316.

Whittle, by contrast, was developed twelve years earlier than the ’911 patent—in 2002. Whittle teaches the preparation of “Botanical Drug Substances,” or whole-plant “extract[s] derived from cannabis plant material” (Appx373 at [0042]), but its disclosure concedes that its cannabinoid concentrations were calculated using *only five* “currently assayable cannabinoids”: CBD, CBDA, CBN, THC, and THCA. (Appx383-384 at [0269], [0277], [0281].) Because Whittle accounted for only five of at least 85 cannabinoids found in cannabis, the

² References to “CBD” or “THC” refer to decarboxylated forms and exclude CBDA or THCa, precluding inclusion of THCa or CBDA when calculating concentration. (See Appx168.)

cannabinoid concentrations it discloses are inaccurate and fail to reflect the “total cannabinoids” of the formulation, as required by claims 10 and 20 of the ’911 patent.

UCANN also submitted publications by Vaclavik and McRae that report the concentrations of 16 of the major cannabinoids described in the ’911 patent, including the five cannabinoids assayed by Whittle. (Appx619-620 (Table 9); Appx633 (Table 4).) Those scholarly articles showed that the concentrations of major cannabinoids other than those assayed in Whittle is between 8% and 10% of total cannabinoid content. (*See* Appx637-638.)

UCANN further showed that, using Pure Hemp’s example calculation of 112.5 grams of THC, CBD, CBDA, CBN, and THCA, the whole-plant botanical drug substance described in Whittle would also include *at least* 9.0 grams of other cannabinoids (8% of 112.5 grams), leading to 121.5 grams of total cannabinoids (112.5 grams + 9.0 grams). (*Id.*) In other words, UCANN showed that, using the correct denominator, *at most* the concentration of CBD in Whittle was no more than 82% of total cannabinoids (100 grams CBD / 121.5 grams cannabinoids) and the concentration of CBD + THC of total cannabinoids was no more than 88% (107.5 grams CBD + THC / 121.5 grams cannabinoids). (*Id.*) Therefore, UCANN demonstrated that the disclosed compositions in Whittle contained levels of CBD and THC well below the “at least 95% of total cannabinoids” recited in claims 10

and 20 of the '911 patent, and that Whittle was *not* but-for material to the patentability of any asserted claim of the '911 patent-in-suit. (*Id.*)

Based on the record before the district court, which showed that Whittle does not disclose formulations in which at least 95% of the “total cannabinoids” are either CBD or THC and CBD, the district court did not abuse its discretion in finding that “Defendant has failed to establish that ... this is an ‘exceptional’ case warranting an attorney’s fee award. ... The record on the substantive merits and the materiality of Plaintiff’s purportedly inequitable conduct is woefully undeveloped, and as such, does not paint a persuasive picture for awarding fees. Accordingly, the Court denies Defendant’s request for attorney’s fees pursuant to section 285.” (Appx2-3.) Pure Hemp’s failure to establish that Whittle was but-for material prior art provides a standalone basis for affirmance of the district court’s denial of Pure Hemp’s motion under Section 285. *Stone Basket*, 892 F.3d at 1184.

b. The District Court Did Not Abuse Its Discretion In Finding That Pure Hemp Failed To Establish That Whittle Was But-For Material When The Patent Office Granted a Patent Closely Related to the '911 Patent with the Same Claim Limitations Over Whittle and Pure Hemp’s Invalidity Arguments

The district court did not abuse its discretion in finding that Pure Hemp failed to establish that Whittle was but-for material to the '911 patent for the additional reason that UCANN showed that the Patent Office granted a divisional of the '911 patent with the same claim limitations after reviewing Whittle and Pure Hemp’s

invalidity contentions. UCANN filed a divisional application of the '911 patent on August 14, 2017, U.S. Application No. 15/676,407 (“the '407 application”), which ultimately led to U.S. Patent No. 10,555,928 (“the '928 patent”). The '928 patent has the same specification as the '911 patent. The '928 patent’s claims contain the very same limitations recited in the '911 patent but add requirements about how those formulations are used. (*Compare* Appx25 ('911 Patent) at 18:29-20:30 (*see* Claims 10 and 20), *with* Appx666-667 ('928 Patent) at 18:64-20:46 (*see* Claim 1(c) and 1(e).) After Pure Hemp alleged inequitable conduct, UCANN submitted Whittle to the Patent Office during prosecution of the '407 application. (Appx669 (identifying U.S. Patent Pub. No. 2004/0033280 (“Whittle”)).) UCANN also submitted Pure Hemp’s invalidity contentions, which included Pure Hemp’s invalidity arguments based on Whittle, and its Amended Answer and Counterclaims, which included Pure Hemp’s inequitable conduct allegations. (*Id.* at Appx671-675.)

Primary Examiner Dr. Rei-Tsang Shiao, the same Examiner who examined the '911 patent, examined the '407 application. Dr. Schiao reviewed each document submitted by UCANN, including Whittle; Pure Hemp’s invalidity contentions, which detail its anticipation and obviousness arguments based on Whittle; and Pure Hemp’s First Amended Answer and Counterclaims, which details its inequitable conduct allegations. (Appx678-685.) Dr. Schiao made no claim rejections based on Whittle and allowed the '928 patent to issue—demonstrating that Examiner Schiao

concluded Whittle was not “but-for” material to patentability of any claim. (Appx687-694.)

These Patent Office records were before the district court and showed that Whittle was *not* material to patentability of the ’911 patent. The “but-for” materiality standard for inequitable conduct requires courts to put themselves in the shoes of patent examiners and to “determine whether the PTO would have allowed the claim if it had been aware of the undisclosed reference.” *Therasense*, 649 F.3d at 1291. There was no need for the district court to undertake that hypothetical exercise because a technically skilled Examiner at the Patent Office actually considered all relevant information about Whittle while examining a new patent application that included the exact same limitations recited in claims 10 and 20 and concluded that Whittle was *not* material to patentability.

Pure Hemp’s fee motion failed to account for this real-world evidence, which establishes that a finding of materiality could not have been made. *U.S. Water Servs., Inc. v. Novozymes A/S*, 843 F.3d 1345, 1354 (Fed. Cir. 2016) (finding no but-for materiality where record demonstrated that examiner reviewed allegedly invalidating art in continuation application and “found that the evidence did not affect the ultimate patentability determination”); *see also Young v. Lumenis, Inc.*, 492 F.3d 1336, 1349 (Fed. Cir. 2007) (finding no inequitable conduct where applicant disclosed allegedly material information to the Patent Office after the issue

of non-disclosure was raised in litigation because “[t]he examiner was therefore fully apprised of the [reference] and was able to fully consider it and any potential effects it may have on patentability of the claims”); *ParkerVision, Inc. v. Qualcomm Inc.*, 924 F. Supp. 2d 1314, 1319 (M.D. Fla. 2013) (“One cannot assume that a PTO examiner is an ignorant rube who is easily misled by attorney argument, hyperbole, or understatement.”).

Because a technically skilled Examiner at the Patent Office actually considered all relevant information about Whittle while examining a new patent application that included the exact same limitations recited in claims 10 and 20 and found Whittle not material to patentability, the district court did not abuse its discretion in finding that “Defendant has failed to establish that ... this is an ‘exceptional’ case warranting an attorney’s fee award. ... The record on the substantive merits and the materiality of Plaintiff’s purportedly inequitable conduct is woefully undeveloped, and as such, does not paint a persuasive picture for awarding fees. Accordingly, the Court denies Defendant’s request for attorney’s fees pursuant to section 285.” (Appx2-3.) The real-world evidence that Whittle was *not* but-for material was alone a sufficient basis for the district court to deny Pure Hemp’s fee motion, and that evidence also provides a standalone basis for affirming the district court’s denial of Pure Hemp’s motion under Section 285. *Stone Basket*, 892 F.3d at 1184.

B. The District Court Did Not Abuse Its Discretion In Finding That Pure Hemp Failed To Establish Specific Intent to Deceive the Patent Office

The district court did not abuse its discretion in declining to find any intent to deceive because UCANN submitted credible evidence to the district court showing that UCANN's prosecuting attorney did not consider Whittle material to patentability. *See Mformation Techs., Inc. v. Research in Motion Ltd.*, 830 F. Supp. 2d 815, 830-31 (N.D. Cal. 2011) ("The evidence presented by Plaintiff permits the reasonable inference that Schwartz did not consider the Dimech and Geiger references to be material to the '917 Patent. But if that reasonable inference is drawn, it necessarily leads to the conclusion that Schwartz did not act with the requisite deceitful intent when he failed to disclose the Dimech and Geiger references to the PTO in the prosecution of the '917 Patent.").

UCANN showed that its prosecuting attorney came across Whittle during her search for generic boilerplate language on commonly known information in the art while drafting the '911 patent application. While UCANN's prosecuting attorney did copy generic snippets from Whittle to the '911 patent specification, she confirmed during her deposition that she did not believe Whittle to be material to the patentability of the '911 patent. (Appx282-284 at 48:12-50:12 ("I didn't withhold Whittle from the patent office. I deemed it not to be material in 2014 when I was

drafting the application.”); Appx298 at 64:6-20.)³ Contrary to Pure Hemp’s accusation of “plagiarism,” copying boilerplate language is common and perfectly appropriate.⁴

The two non-binding district court opinions relied on by Pure Hemp are readily distinguishable. (Op. Br. at 22-23 (citing *CCC Grp., Inc. v. Martin Eng’g Co.*, 683 F. Supp. 2d 1201 (D. Colo. 2010), *Am. Calcar v. Am. Honda Motor Co.*, No. 06-cv-2433, 2012 WL 1328640 (S.D. Cal. Apr. 17, 2012).) Unlike this case, the District of Colorado’s decision in *CCC Group* was decided before *Therasense* heightened the inequitable conduct standard and was made after a seven-day bench trial on inequitable conduct. *CCC Grp.*, 683 F. Supp. 2d at 1202. The figure that was copied into the specification was used to provide a “misleading portrayal” of the prior art and was directly relevant to the claimed invention. *Id.* at 1209-10. And

³ UCANN’s corporate witness and ’911 patent inventor Tony Verzura testified that he had never reviewed the GW Pharma patents or applications that Pure Hemp cited in support of its motion. (Appx714 at 91:20-24 (“I was aware that GW had patents, but I wasn’t aware of exactly what they would have had patented or pending or anything like that.”)).

⁴ David Pressman, *Patent It Yourself* 181 (13th ed. 2008) (“If you see any prior-art patent whose specification contains words, descriptions, and/or drawing figures that you can use in your application, feel free to plagiarize! Patents are not covered by copyright and it’s considered perfectly legal and ethical to make use of them.”); Gene Quinn, *Ropes & Gray Seeks Dismissal of Patent Malpractice Lawsuit*, IPWATCHDOG (Mar. 28, 2010) (“The practice of copying segments of published applications, entire patents, and published research works by others is common.”).

the applicant's non-disclosure was compounded by several other material non-disclosures of the applicant's own articles that "would have shown that [the applicant's] design criteria were not new." *Id.* at 1210.

The Southern District of California's decision *American Calcar*, which was similarly decided after a pre-judgment trial on inequitable conduct, is distinguishable because "the circumstantial evidence weigh[ed] overwhelmingly in favor of a finding of intent to deceive." *Am. Calcar*, 2012 WL 1328640, at *9. Specifically, the applicant in *American Calcar* (i) copied nearly the entire specification from the accused infringer's prior art navigation system manual; (ii) took a "test drive" in the accused product to see how the navigation system works; (iii) admitted that his personal experience with the accused product "led to the conception" of his invention; and (iv) had employees take photographs of the navigation system display screen and write letters to the accused infringer for information on the accused product. *Id.*

Here, UCANN showed the district court that its prosecuting attorney copied "boilerplate" snippets from Whittle to the '911 patent specification that merely contained background information on cannabinoids. (*See* Appx357-367 (highlighting portions of the '911 patent that overlap with Whittle).) Exemplary of the mundane portions of the '911 patent copied from Whittle are: (i) "[t]he term 'Cannabis plant(s)' encompasses wild type Cannabis and also variants thereof,

including cannabis chemovars which naturally contain different amounts of the individual cannabinoids”; (ii) “[t]etrahydrocannabinol (THC) is the primary psychoactive component of the Cannabis plant”; and (iii) “[c]annabidiol (CBD) is not psychoactive, and was thought not to affect the psychoactivity of THC.” (Appx359-360 at 4:42-45, 5:21-22, 5:35-36.) It was undisputed before the district court that the boilerplate snippets copied by UCANN’s prosecution counsel did not describe any claimed point of novelty in the ’911 patent.

The passages copied into the ’911 patent are in stark contrast to the material passages copied into the specifications in *CCC Group* and *American Calcar*. Moreover, the circumstantial evidence in *CCC Group* and *American Calcar* that supported a finding of intent to deceive is absent in this case. Pure Hemp offered no evidence of intent to deceive other than an admission from UCANN’s prosecuting attorney that she copied boilerplate snippets from Whittle. In response, UCANN offered evidence to the district court that Whittle was not but-for material to patentability and that its prosecution counsel had no intent to deceive because she did not believe that the portions of Whittle she reviewed were material to patentability. (Appx282-284 at 48:12-50:12; Appx298 at 64:6-20.) And moreover, unlike *CCC Group* and *American Calcar*, Pure Hemp’s inequitable conduct allegations have never been adjudicated on the merits or even been subject to a post-judgment evidentiary hearing. Because the district court was obligated to draw all

reasonable inferences in UCANN’s favor, and because specific intent must be the *single* most reasonable inference, Pure Hemp cannot show that the district court abused its discretion when it found that Pure Hemp failed to establish that UCANN or its counsel intended to deceive the Patent Office.

Pure Hemp’s advocacy for a *per se* rule that copying and pasting from prior art specifications without disclosure should raise a “*prima facie* concern that the reference was relevant to patentability” lacks authority and contravenes established practice in patent prosecution. (Op. Br. at 21.) As Gene Quinn of *IP Watchdog* has explained, “[t]he practice of copying segments of published applications, entire patents, and published research works by others is common.” (Gene Quinn, *Ropes & Gray Seeks Dismissal of Patent Malpractice Lawsuit*, IPWATCHDOG (Mar. 28, 2010).) Moreover, as John White of the PLI Patent Bar Review advises: “It is well understood that boilerplate background or state of the art statements do not need to be originally written when the subject is widely known and acknowledged as such. Generally the copying is done with explicit attribution, *i.e.*, ‘incorporate by reference,’ *but there is no such Official requirement to do so.*” (*Id.* (emphasis added).)

Pure Hemp’s failure to prove that UCANN or its prosecution counsel intended to deceive the Patent Office provides a standalone basis for this Court to affirm the

district court's denial of Pure Hemp's motion under Section 285. *Stone Basket*, 892 F.3d at 1184.

* * *

Pure Hemp fails to establish any abuse of discretion as to the district court's denial of Pure Hemp's underlying allegations of inequitable conduct. The record Pure Hemp offered was inadequate to support any finding of materiality, *and* there was no basis for the district court to conclude that the single most reasonable inference was that UCANN's counsel knew (or believed) Whittle was material *and* made a deliberate decision to withhold it from the Patent Office. *Cf. 1st Media, LLC v. Elec. Arts, Inc.*, 694 F.3d 1367, 1376-77 (Fed. Cir. 2012). Accordingly, the district court did not abuse its discretion in finding that "Defendant has failed to establish that ... this is an "exceptional" case warranting an attorney's fee award. . . . The record on the substantive merits and the materiality of Plaintiff's purportedly inequitable conduct is woefully undeveloped, and as such, does not paint a persuasive picture for awarding fees. Accordingly, the Court denies Defendant's request for attorney's fees pursuant to section 285." (Appx2-3.)

V. The District Court Did Not Abuse Its Discretion in Declining to Award Fees Based on Pure Hemp's Theories as to the Prosecution of Unrelated Patent Applications

The district court did not abuse its discretion in declining to award fees under either Section 285, Section 1927, or the court's inherent authority based on Pure

Hemp’s allegations about prosecution of three unrelated patent applications for GW Pharma. (Op. Br. at 28; *see also id.* at 9 n.17 (citing U.S. Patent App. Nos. 16/570,220, 16/198,141, 16/678,961).)

The conclusory, half-page argument regarding the GW Pharma applications that Pure Hemp included in its fee motion (Appx205-206) failed to identify any pleading, paper, or argument made by UCANN in district court that was unsupported by evidence or not filed in good faith. The district court therefore did not abuse its discretion in finding that Pure Hemp failed to show that UCANN’s district court litigation conduct—the only conduct at issue—was exceptional, vexatious, or unreasonable in any way. *See Octane*, 572 U.S. at 554 (“[A]n ‘exceptional case’ is simply one that stands out from others with respect to the substantive strength of a party’s litigating position . . . or the unreasonable manner *in which the case was litigated.*”) (emphases added); *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (permitting sanctions under § 1927 only “for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney’s duties to the court”); *Amsted*, 23 F.3d at 378 (“Without a finding of fraud or bad faith whereby the ‘very temple of justice has been defiled,’ a court enjoys no discretion to employ inherent powers to impose sanctions.”).

Pure Hemp offered no evidence to support its implicit assumption that UCANN’s litigation counsel had prior awareness of the GW Pharma applications or

their alleged materiality to claim 10 of the '911 patent. Pure Hemp also failed to show any overlap between the attorney groups representing UCANN and GW Pharma.

Pure Hemp similarly failed to offer any evidence that UCANN's counsel took any action to "press their case" or "multiply" proceedings relating to Pure Hemp's infringement of claim 10 of the '911 patent after Pure Hemp introduced the GW Pharma applications as exhibits during Mr. Blackmon's deposition.⁵ Other than Pure Hemp's voluntary stipulation of infringement and damages (Appx178-182), no litigation activity occurred after Mr. Blackmon's deposition. The case was automatically stayed by UCANN's filing of its petition for bankruptcy protection. (Appx183-186.) When the stay was lifted, the parties immediately dismissed their claims and counterclaims. (Appx190-193.) Pure Hemp's assertion that "Cooley ... continued to press this case while other Cooley attorneys were telling the USPTO that GW Pharma was the inventor," (Appx208) was never substantiated in any way.

Pure Hemp additionally failed to show that its arguments concerning the GW Pharma applications' alleged relevance to the validity of claim 10 of the '911 patent

⁵ Pure Hemp made no effort to put the GW Pharma applications at-issue in district court before the case was closed. It never sought leave to amend its pleadings or invalidity contentions. As this Court explained in *Stone Basket*, "a party cannot simply hide under a rock, quietly documenting all the ways it's been wronged, so that it can march out its 'parade of horrors' after all is said and done." *Stone Basket*, 892 F.3d at 1181 (quotation marks and citation omitted).

would have affected the outcome of the district court litigation. Pure Hemp stipulated to infringement and damages as to ten of the eleven asserted claims of the '911 patent-in-suit *after* it examined Mr. Blackmon using the GW Pharma applications. (Cf. Appx178-182 (Joint Stipulation Regarding Infringement and Damages (Mar. 5, 2020)); Appx711-713 (Blackmon Depo. Tr. (Jan. 9, 2020)).) Pure Hemp's admission of infringement liability and damages as to nine patent claims that were unaffected by its GW Pharma allegations underscored that not even Pure Hemp believed those allegations provided a complete defense to UCANN's infringement claims.

Pure Hemp's arguments concerning ABA Model Rule 1.7 are newly raised on appeal and therefore waived. *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997) ("If a litigant seeks to show error in a trial court's overlooking an argument, it must first present that argument to the trial court. In short, this court does not 'review' that which was not presented to the district court."). If this Court looks past Pure Hemp's waiver, there was nothing improper about the prosecution of different applications by different attorney groups, years apart, where GW Pharma and UCANN were "were not competing for the same patent, but rather different patents for similar devices." *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 442 N.E.2d 199, 205 (Mass. 2015) (finding no Mass. R. Prof. C. 1.7 violation, noting "Maling's conclusory statement that the inventions were very

similar is precisely the type of legal conclusion that we do not credit.”). Furthermore, as this Court observed in *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1185 (Fed. Cir. 1995), “[w]hether or not there was a conflict of interest . . . is not before is, and we express no opinion thereon.”

The sole case cited by Pure Hemp to support its theories with respect to the unrelated patent applications is a non-precedential district court decision that is distinguishable from the facts of this case. (Op. Br. at 27-28 (citing *Straight Path IP Grp., Inc. v. Cisco Sys., Inc.*, 411 F. Supp. 3d 1026 (N.D. Cal. 2019)).) As Pure Hemp concedes (Op. Br. at 27), the Northern District of California in *Straight Path* found that the patentee’s “narrowing of scope to avoid invalidity before the Federal Circuit, followed by its broadening of scope to accuse others of infringement in the district court” rendered the case “exceptional” within the meaning of Section 285. *Straight Path*, 411 F. Supp. 3d at 1028. Unlike the patentee in *Straight Path*, different attorney groups represented UCANN in district court and GW Pharma before the Patent Office and Pure Hemp failed to identify any argument that UCANN made that was inappropriate in any way, much less any example of a change in position by UCANN’s litigation counsel akin to the narrowing and broadening of claim scope in *Straight Path*.

For all of these reasons, the district court did not abuse its discretion in finding that “Defendant has failed to establish that ... Plaintiff’s counsel has acted in a

vexatious or otherwise unreasonable manner. ... Accordingly, the Court denies Defendant's request for attorney's fees pursuant to ... section 1927, or the Court's inherent authority." (Appx2-3.)

VI. The District Court Did Not Abuse Its Discretion in Denying Pure Hemp's Request for an Award of its Attorneys' Fees Under 28 U.S.C. § 1927 or the Court's Inherent Authority

Fee awards under Section 1927 and the court's inherent authority are "strictly construed" and authorized in "narrowly defined circumstances." *Braley*, 832 F.2d at 1512; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 33, 43-45 (1991). Because the district court did not abuse its discretion in finding no exceptionality, as explained above, the district court necessarily did not abuse its discretion in declining to award fees under Section 1927. *Stone Basket*, 892 F.3d at 1184 n.3 ("Because we uphold the District Court's finding of no exceptionality, we also affirm the District Court's denial of Cook's motion for attorney fees pursuant to 28 U.S.C. § 1927.").

Further, Pure Hemp has failed to establish any abuse of discretion because Pure Hemp fails to allege *any* of the necessary elements for an award of fees under Section 1927, which the Tenth Circuit has cautioned is an "extreme standard" that may be imposed *only* when conduct "manifests either intentional or reckless disregard of the attorney's duties to the court." *White v. Am. Airlines, Inc.*, 915 F.2d 1414, 1427 (10th Cir. 1990); *Shields v. Shetler*, 120 F.R.D. 123, 127 (D. Colo. 1988) ("Three substantial requirements must be met before imposing liability under

Section 1927: (1) a multiplication of proceedings . . . ; (2) by conduct that can be characterized as unreasonable and vexatious; and (3) a resulting increase in the cost of the proceedings.”). Pure Hemp failed to allege any conduct by any attorney that can be characterized as unreasonable or vexations that resulted in multiplication of proceedings or increased cost in proceedings.

As to the court’s inherent authority, Pure Hemp has failed to establish any abuse of discretion because Pure Hemp fails to allege *any* of the necessary elements, which the Supreme Court has advised “ought to be exercised with great caution” and only in “narrowly defined circumstances.” *Chambers*, 501 U.S. at 33, 43-45 (1991) (“[A]n exception allows federal courts to exercise their inherent power to assess such fees as a sanction when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, as when the party practices a fraud upon the court, or delays or disrupts the litigation or hampers a court order’s enforcement.”) (quotation marks and citations omitted); *Amsted*, 23 F.3d at 378 (“Without a finding of fraud or bad faith whereby the ‘very temple of justice has been defiled,’ a court enjoys no discretion to employ inherent powers to impose sanctions.”). Pure Hemp failed to allege any actions by UCANN or its counsel that can be characterized as in bad faith, vexatious, wanton, or oppressive resulting in a fraud upon the court, delays or disruptions to the litigation, or hampering of a court order’s enforcement.

As explained in the Statement of the Case, UCANN prevailed at every stage of this litigation before voluntarily dismissing its claims after filing for, and being discharged from, bankruptcy proceedings. UCANN's consistent success on the merits up to the filing of its bankruptcy petition belies any assertion by Pure Hemp that UCANN or its counsel behaved in a manner that might satisfy the requirements for an award of fees under Section 1927 or the district court's inherent authority.

Additionally, Pure Hemp conceded that UCANN's litigation counsel behaved professionally throughout the district court litigation. (Appx208 ("Pure Hemp will concede that Cooley attorneys representing UCANN in this litigation . . . worked in good faith to resolve the discovery and procedural disputes that arose between the parties and were always professional in that regard.").)

On these facts, where Pure Hemp failed to show any entitlement to fees under Section 285, the district court did not abuse its discretion in declining to impose a fee award under Section 1927 or the court's inherent authority. *Phonometrics, Inc. v. ITT Sheraton Corp.*, 64 F. App'x 219, 221 (Fed. Cir. 2003) (vacating holding of joint and several liability to party's attorneys under Section 1927 even after party "continued to litigate . . . after it knew it could not prevail on the merits.").

Because Pure Hemp failed to allege or prove any vexatious or wanton behavior that "manifests either intentional or reckless disregard of the attorney's duties to the court" or that defiles the "very temple of justice," the district court did

not abuse its discretion in declining to award fees to Pure Hemp under Section 1927 or the court's inherent authority. (Appx2-3.)

VII. The District Court Properly Considered “All of the Parties’ Arguments” and Was Not Required to Reveal Every Assessment of Every Consideration

Unable to show any abuse of discretion, Pure Hemp collaterally attacks the district court's order as providing only a “scant” analysis. This argument overlooks that district courts need not lay out their reasoning in painstaking detail when they deny fee motions. (Op. Br. at 12.) Here, the “Court . . . fully considered all of the parties’ arguments regarding Defendant’s request for attorney’s fees and costs.” (Appx2.) And because there were no underlying findings of inequitable conduct, misconduct during litigation, vexatious or unjustified litigation, or frivolous suit, the district court was not required to provide a lengthy explanation in denying Pure Hemp’s fee motion. *Wedgetail Ltd. v. Huddleston Deluxe, Inc.*, 576 F.3d 1302, 1304–06 (Fed. Cir. 2009) (“Because of the high level of deference owed to district courts on this issue and the limited circumstances that could qualify as exceptional, this court has not imposed a blanket requirement that a district court provide its reasoning in attorney fee cases.”) (citing *Serio-US Indus., Inc. v. Plastic Recovery Techs. Corp.*, 459 F.3d 1311, 1322 (Fed. Cir. 2006)).

This Court has regularly affirmed denials of fee motions in cases with similar facts where district courts denied motions for fees in compactly written opinions.

Carroll Touch, Inc. v. Electro Mech. Sys., Inc., 15 F.3d 1573, 1584 (Fed. Cir. 1993); *Univ. of Utah*, 851 F.3d at 1323 (“[The trial judge] had no obligation to write an opinion that reveals her assessment of every consideration.”); *Consolidated Aluminum Corp. v. Foseco Int’l Ltd.*, 910 F.2d 804, 815 (Fed. Cir. 1990) (affirming district court’s denial of attorneys’ fees motion, noting “[n]o useful purpose would be served by a remand to enable the district court to tell us in express terms what we already know from the record”).

Pure Hemp’s citation to two cases where this Court found abuses of discretion do not distinguish this Court’s observation in *Wedgetail* that “this court has not imposed a blanket requirement that a district court provide its reasoning in attorney fee cases” (*Wedgetail*, 576 F.3d at 1305). (Op. Br. at 16-17 (citing *AdjustaCam, LLC v. Newegg, Inc.*, 861 F.3d 1353 (Fed. Cir. 2017) and *Rothschild Connected Devices Innovations, LLC v. Guardian Protection Services, Inc.*, 858 F.3d 1383 (Fed. Cir. 2017)).) In *AdjustaCam*, this Court reversed a district court’s denial of a motion for attorneys’ fees because the district court (i) ignored this Court’s mandate to evaluate the totality of the circumstances under *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 572 U.S. 545 (2014), (ii) failed to recognize that *AdjustaCam*’s suit became baseless after the district court’s *Markman* order, and (iii) failed to recognize that *AdjustaCam* litigated the case in an unreasonable

manner by pursuing nuisance-value damages against many defendants and settling for less than the cost of litigation. 861 F.3d at 1360-61.

Similarly, in *Rothschild*, this Court reversed a district court's denial of a motion for attorneys' fees because the district court did not address Rothschild's counsels' incongruent statements that they had not conducted an analysis of any of the prior art at-issue in the fee motion, yet possessed a good faith belief that the asserted patent was valid. 858 F.3d at 1388. This Court also found that the district court overlooked Rothschild's vexatious tactics in other litigations⁶ and improperly conflated Rule 11 with § 285, (*id.* at 1389-90), and the patentee's case was characterized as "frivolous on its face" in the concurrence (*id.* at 1390).

The facts of this competitor case are starkly different from *AdjustaCam* and *Rothschild*. The "woefully undeveloped" record on the substantive merits and the existence of unresolvable fact disputes cited in the district court's denial of Pure Hemp's motion for fees were not present in *AdjustaCam* or *Rothschild*. (Appx1-3.) And unlike *AdjustaCam* and *Rothschild*, there is undisputed evidence in this case

⁶ The patentee in *Rothschild* also filed "scores of infringement complaints" against "such diverse products as home automation systems, home security systems, door locks, mobile apps, thermostats, digital cameras, irrigation sprinklers, coffeemakers, washers, dryers, baby monitors, air conditioners, microwave ovens, dishwashers, smoke detectors, ceiling fans, window shades, pool heaters, telephones, and horns." *Id.* at 1391 (Mayer, J., concurring) ("Rothschild's continued assertions that its patent extends to products simply because they are configured using the Internet . . . are risible rather than simply unreasonable.").

that UCANN's infringement claims were meritorious, as demonstrated by UCANN having prevailed on every significant merits issue in this case until filing its bankruptcy petition, and Pure Hemp's formal stipulation as to infringement and damages. *See supra* Statement of the Case.

AdjustaCam and *Rothschild* are further distinguishable in that there is no evidence of litigation misconduct by UCANN's counsel, or of the use of vexatious litigation tactics by UCANN in other district court proceedings. Unlike the patentees in *AdjustaCam* and *Rothschild*, UCANN did not assert the '911 patent against a broad range of defendants for nuisance-level damages, but rather asserted the '911 patent in a single suit, in good faith, and against its direct competitor—Pure Hemp.⁷

In sum, because the district court did not abuse its discretion in “fully consider[ing] all of the parties' arguments regarding Defendant's request for attorney's fees and costs” while declining to reveal every assessment of every consideration when there were no underlying findings misconduct (Appx2-3), the length of the district court's decision cannot be a basis for reversal.

⁷ Pure Hemp stipulated to infringement of all but one of the asserted claims of the '911 patent-in-suit and to a 10% royalty. (Appx178-182.) The aggregate royalty on infringing sales was modest because Pure Hemp changed its product formulations to design-around the asserted claims of the '911 patent shortly after suit was filed.

VIII. Pure Hemp’s Request for an Affirmative Determination Adverse to UCANN Lacks Legal Basis

Pure Hemp’s request that this Court affirmatively find this case “exceptional” and award its fees (Op. Br. at 29-30) overlooks that this Court does not make factual findings in the first instance or reweigh factual findings. *Impax Lab’s Inc. v. Lannett Holdings Inc.*, 893 F.3d 1372, 1382 (Fed. Cir. 2018) (“We do not and should not reweigh evidence or make factual findings anew on appeal.”). In the two cases cited by Pure Hemp—that is, *AdjustaCam* and *Rothschild*—this Court reversed and remanded for an evaluation of the “totality of the circumstances” under *Octane*. *AdjustaCam*, 861 F.3d at 1361-62; *Rothschild*, 858 F.3d at 1390. And for the reasons stated above in Part VII, the facts of *AdjustaCam* and *Rothschild* are in stark contrast to this case where there is undisputed evidence that UCANN’s infringement claims were meritorious, as demonstrated by UCANN having prevailed on every significant merits issue in this case until filing its bankruptcy petition and Pure Hemp’s formal stipulation as to infringement and damages.

IX. Pure Hemp Has Failed to Establish That a Contrary Prevailing-Party Determination Would Have Changed the Outcome of its Fee Motion

Lastly, Pure Hemp has failed to meet its burden of establishing that a contrary prevailing-party determination would have changed the outcome of its fee motion. The district court’s passing statement that Pure Hemp had not carried its burden of

showing that it was the prevailing party was harmless error.⁸ *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (explaining party seeking to set aside judgment has burden of establishing prejudice); *Bridges v. Wilson*, 996 F.3d 1094, 1099 (10th Cir. 2021) (“The appellate court exercises common sense, trying to make a realistic assessment of the practical likelihood that the result in the district court would have been different had the error not occurred.”) (citation omitted).

The federal harmless-error doctrine, codified in 28 U.S.C. § 2111, tells courts to review cases without regard to errors that do not affect the parties’ “substantial rights” to “prevent appellate courts from becoming ‘impregnable citadels of technicality.’” *Sanders*, 556 U.S. at 407 (quoting *Kotteakos v. U.S.*, 328 U.S. 750, 759 (1946)).

Considering the several other grounds underlying the district court’s denial and the reasons stated above, a realistic assessment leaves no doubt that Pure Hemp’s fee motion would have been denied even with a contrary prevailing-party determination. (*E.g.*, Appx2-3 (“In making this determination, the Court notes that the parties stipulated to dismissal of this case *before* many of the factual disputes Defendant cites were adjudicated on the merits. The record on the substantive merits and the materiality of Plaintiff’s purportedly inequitable conduct is woefully

⁸ UCANN has never disputed Pure Hemp’s “prevailing party” status under Section 285. (*See generally* Appx571-592.)

undeveloped, and as such, does not paint a persuasive picture for awarding fees.”) (citation omitted)). As the Sixth Circuit has observed, finding that a district court incorrectly determined the question of prevailing party does not warrant a reversal or remand where the ultimate outcome would remain unchanged. “Reversing the prevailing-party determination and remanding the case to the district court, in short, would have no effect on the ultimate outcome of this appeal.” *Bridgeport Music, Inc. v. London Music, U.K.*, 226 F. App’x 491, 495 (6th Cir. 2007); *United States v. Alpha Med., Inc.*, 102 F. App’x 8 (6th Cir. 2004) (“[E]ven if it is assumed that Alpha is a prevailing party, as the district court determined in this case, the denial of costs is properly affirmed.”).

CONCLUSION

UCANN respectfully requests that this Court affirm the judgment of the district court finding this case not exceptional and denying Pure Hemp any award of attorneys’ fees under Section 285, Section 1927, or the court’s inherent authority.

Dated: June 29, 2022

Respectfully submitted,

/s/ Douglas W. Cheek

Orion Armon

COOLEY LLP

1144 15th Street, Suite 2300

Denver, CO 80202

Telephone: (720) 566-4000

Facsimile: (720) 566-4099

Douglas Cheek

COOLEY LLP

1299 Pennsylvania Ave., NW

Suite 700

Washington, DC 20004

Telephone: (202) 842-7800

Facsimile: (202) 842-7899

Counsel for United Cannabis Corporation

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT****CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS****Case Number:** 22-1363**Short Case Caption:** United Cannabis Corporation v. Pure Hemp Collective Inc.**Instructions:** When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

- ☒ the filing has been prepared using a proportionally-spaced typeface and includes 11,641 words.
- ☐ the filing has been prepared using a monospaced typeface and includes _____ lines of text.
- ☐ the filing contains _____ pages / _____ words / _____ lines of text, which does not exceed the maximum authorized by this court's order (ECF No. _____).

Date: 07/05/2022Signature: /s/ Douglas W. CheekName: Douglas W. Cheek