

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

CERNER CORPORATION,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 04-1033-CV-W-GAF
)	
VISICU, INC.,)	
)	
Defendant.)	

ORDER

Presently before the Court is Visicu, Inc.’s (“Visicu”) Motion to Dismiss Cerner Corporation’s Inequitable Conduct Claims without Prejudice as Moot. (Doc. #577). Plaintiff Cerner Corporation (“Cerner”) opposes. (Doc. #587). While the Court has discretion to dismiss the inequitable conduct claim as moot under the circumstances of this case, *Phonometrics, Inc. v. N. Telecom Inc.*, 133 F.3d 1459, 1468 (Fed. Cir. 1998), the Court finds it is more prudent to proceed with a trial on the merits of Cerner’s claim.

First, the inequitable conduct allegations in this case are not technically moot because a finding of inequitable conduct would render the remaining claims of the patents at issue unenforceable and may result in the unenforceability of child patents and pending patent applications filed by Visicu. *In re Omeprazole Patent Litig.*, 483 F.3d 1364, 1375 (Fed. Cir. 2007) (“The inequitable conduct claim was not technically moot, because it would have rendered the entire '281 patent unenforceable, rather than just the claims that were held invalid.”); *Nilssen v. Osram Sylvania, Inc.*, 504 F.3d 1223, 1230 (Fed. Cir. 2007) (stating “inequitable conduct with respect to one or more patents in a family can infect related applications”). Additionally, the issue of awarding attorney fees based on inequitable conduct is still outstanding, and therefore, the inequitable conduct

claim is not mooted. *Paragon Podiatry Lab., Inc. v KLM Labs., Inc.*, 984 F.2d 1182, 1188 n.6 (Fed. Cir. 1993).

Finally, the Court finds judicial economy and the public interest are best served in this case by resolving the inequitable conduct issue. Much of the prior art relating to the inequitable conduct claim was presented during the recent three-week jury trial and remains fresh to the Court. This inequitable conduct issue has been fully prepared and trial is scheduled to begin in less than two weeks. Furthermore, should Visicu successfully reverse this Court on appeal, the Federal Circuit will be able to decide all claims at issue in this case at the same time. *Trimble Navigation Ltd. v. RHS Inc.*, No. C 03-1604 PJH, 2007 WL 2727162, at *1 (N.D. Cal. Sept. 17, 2007). For these reasons, Visicu's Motion is **DENIED**.

IT IS SO ORDERED.

s/ Gary A. Fenner
Gary A. Fenner, Judge
United States District Court

DATED: February 2, 2010