

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

STC.UNM,

Plaintiff,

v.

Civil No. 10-CV-01077-RB-WDS

INTEL CORPORATION,

Defendant.

ORDER

THIS MATTER comes before the Court on the Magistrate Judge's Report and Recommendation recommending denial of Plaintiff's Motion to Dismiss Intel's Amended Counterclaim and Strike Intel's Affirmative Defense for Unenforceability. (Document 140) The Court, having reviewed the record de novo and considered the United States Magistrate Judge's Report and Recommendations, Plaintiff's objections thereto (Document 141), Intel's response to Plaintiff's objections (Document 143) and being otherwise fully advised, finds that Plaintiff's motion should be denied. The Court acknowledges the new standard for evaluating claims of inequitable conduct set forth in *Therasense, Inc. v. Becton, Dickinson & Co.*, 2011 U.S. App. LEXIS 10590 (Fed. Cir. May 25, 2011). However, in the Court's opinion that new standard is properly applied in this case in the summary judgment setting with all relevant facts before the Court. There is no part of the *Therasense* opinion which changed the standard by which Courts consider motions to dismiss under Rule 12(b)(6).

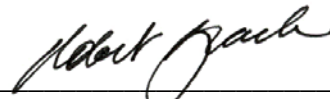
The Court acknowledges Defendant's withdrawal of that part of its affirmative defenses and counterclaims related to allegations that prior art was withheld from the Patent Office. In view of the above findings, there is no need for Defendant to replead its affirmative defenses and

counterclaims.

IT IS THEREFORE ORDERED that, except as noted above, the Magistrate Judge's Report and Recommendation are adopted by the Court.

IT IS FURTHER ORDERED that Plaintiff's Motion to Dismiss is denied without prejudice.

DATED this 23rd day of September, 2011.



Robert C. Brack
United States District Judge