

19-1746

United States Court of Appeals for the Federal Circuit

FORD GLOBAL TECHNOLOGIES, LLC,

Plaintiff-Appellee,

v.

NEW WORLD INTERNATIONAL, INC., AUTO LIGHTHOUSE PLUS,
LLC, and UNITED COMMERCE CENTERS, INC.,

Defendants-Appellants,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS IN CASE NO. 3:17-CV-03201-N
UNITED STATES DISTRICT JUDGE DAVID C. GODBEY

CORRECTED BRIEF FOR THE APPELLANTS

October 30, 2019

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FORM 9. Certificate of Interest

Form 9
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Ford Global Technologies, LLC v. New World International, Inc., et al

Case No. 19-1746

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
New World International, Inc.	None	None
United Commerce Centers, Inc.	None	None
Auto Lighthouse Plus, 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:

Cardelli Lanfear P.C., Paul M. Kittinger, Thomas G. Cardelli; Robert Maris, Glast, Phillips & Murray, P.C., Maris & Lanier, George Tompkins, Tompkins, P.C., Peter V. Schroeder, Booth Albanesi Schroeder, PLLC.

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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).

Automotive Body Parts Association v. Ford Global Technologies, LLC; 18-1613

10/30/2019

Date

/s/ Robert G. Oake, Jr.

Signature of counsel

Please Note: All questions must be answered

Robert G. Oake, Jr.

Printed name of counsel

cc: All Counsel of Record by CM/ECF

cc:

Reset Fields

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CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, appellants provide as follows:

(a) There have been no previous appeals in this case.

(b) The title and number of any case known to counsel to be pending in this or any other Court that will directly affect or be directly affected by this Court's decision in the pending appeal:

Automotive Body Parts Association v. Ford Global Technologies, LLC; 18-1613; Decided by this Court; Time for filing Petition for Writ of Certiorari not yet expired.

JURISDICTION

New World International, Inc. (NWI), Auto Lighthouse Plus, LLC (ALP), and United Commerce Centers, Inc. (UCC) (collectively Appellants), appeal from the following final determinations in the action entitled *Ford Global Technologies, LLC, v. New World International, Inc., Auto Lighthouse Plus, LLC, and United Commerce Centers, Inc.*, No. 3:17-cv-03201-N: Final Judgment (Appx59-60;[384]) entered April 9, 2019, Order denying Appellants' motion to alter or amend final judgment (Appx96-97) entered June 28, 2019, Order awarding Ford Global Technologies, LLC (FGTL) attorneys' fees, costs, additional lost profits, pre and post judgment interest, and injunctive relief, and denying Appellants' motions for judgment as a matter of law and for new trial (Appx61-70;[383]) entered April 9, 2019; and additional taxation of costs on May 7, 2019 Appx94-93;[393]). Appellants also appeal all non-final judgments, orders, and rulings which produced or are related to the Judgments and Orders referred to above, including without limitation Judgment (Appx91-93;[374]) entered March 4, 2019, the order on FGTL's motion for partial summary judgment (Appx75-86;[320]) entered November 5, 2018, the order on FGTL's motion for summary judgment regarding functionality and patent exhaustion (Appx72;[202]) entered March 12, 2018, and the order addressing the parties' claim construction briefing (Appx71;[165]) entered December 12, 2017.

The determinations set forth above became final for appeal when the district court entered an order (Appx96-97;[407]) on June 28, 2019 denying Appellants' motion to alter or amend final judgment (Appx12754;[386]). Pursuant to Rule 4(a)(1)(A), Appellants filed a Second Amended Notice of Appeal on July 26, 2019 (Appx12834;[411]).

This Court has jurisdiction under 28 U.S.C. § 1295(a)(1), granting it exclusive jurisdiction over final determinations of a district court if the jurisdiction of that court was based, in whole or in part, on 28 U.S.C. § 1338. The district court of the Northern District of Texas had subject matter jurisdiction over this action under 28 U.S.C. § 1338(a), as the action arose under Title 35.

STATEMENT OF THE ISSUES

(1) Whether the district court erred in granting summary judgment of infringement, erred in denying the motions for reconsideration, and abused its discretion in denying Appellant's motion for summary judgment of non-infringement.

(2) Whether the district court erred in construing the claims.

(3) Whether the district court erred in denying Appellants' motion for summary judgment, motion for judgment as a matter of law and new trial on the issues of indefiniteness and lack of enablement.

(4) Whether the district court erred in denying Appellants' motion for judgment as a matter of law and new trial on the issue of actual notice.

(5) Whether the district court erred in granting summary judgment on the issue of right of repair and abused its discretion in denying Appellant's motion for summary judgment on right of repair as moot.

(6) Whether the district court erred in granting summary judgment on the issue of functionality and abused its discretion in denying Appellant's motion for summary judgment on functionality as moot.

(7) Whether the judgment of damages must be reversed and vacated.

(8) Whether the judgment of willful infringement must be reversed and vacated.

- (9) Whether the award of attorney fees and costs must be vacated.
- (10) Whether the permanent injunction must be vacated.
- (11) Whether the district court abused its discretion in failing to clarify the scheduling order, failing to grant requested additional discovery, and failing to allow use of a legal opinion.
- (12) Whether the district court abused its discretion in denying the motion for continuance and additional discovery based on *In re Maatita*.
- (13) Whether the district court abused its discretion in not allowing Appellants' damages expert to rely on certain evidence and to offer an opinion on damages.
- (14) Whether the district court erred in allowing the jury instruction on spoliation.
- (15) Whether the district court abused its discretion in failing to alter or amend the final judgment.

STATEMENT OF THE CASE

On January 29, 2015, FGTL sued Appellants for alleged infringement of nine design patents in the Eastern District of Michigan. (Appx135-167;[1]). Appellants moved to transfer for improper venue. [48]. A detailed and comprehensive scheduling order was entered (Appx910-938;[76]). and modified (Appx2912-2918;[119]). FGTL filed a first amended complaint [15] that dropped two patents and a second amended complaint (Appx1207-1250;[79]). that added patents, making the total thirteen. Appellants answered (Appx1445-1474;[81]). The parties engaged in claim construction briefing. [140,144,145,148,149].

After substantial delay, the case was transferred to the Northern District of Texas after *TC Heartland* was decided by the Supreme Court. [154]. During the delay, Appellants sought to avoid venue waiver by minimizing litigation conduct.

After the case was transferred, Appellants made multiple motions to clarify how the conflicting scheduling orders integrated with each other and to conduct discovery that Appellants were not able to conduct in Michigan due to risk of litigation waiver. [166,167,169,179,]. The motions were denied when the previous scheduling order was vacated. [203]. After briefing by the parties, the district court entered a new scheduling order (Appx3902-3904;[207]). On June 1, 2018, Appellants filed a motion for clarification seeking to resolve numerous conflicts and ambiguities in the schedule that adversely affected Appellants'

substantive rights and ability to properly prepare for trial. (Appx3905-3915;3916-3926;[208,211]). On November 8, 2018, over five months later and five days before trial, the motion was summarily denied. (Appx90;[330]).

The district court construed the patents (Appx71;[165]; Appx90;[330]), granted summary judgment in favor of FGTL on the issues of functionality, patent exhaustion, and the repair doctrine (Appx72;[202]) and denied as moot Appellants' motions for leave to refile motions for summary judgment on the same issues. *Id.* The district court also granted summary judgment in favor of FGTL on the issue of patent infringement and denied Appellants' motion for summary judgment of non-infringement, invalidity based on indefiniteness, and lack of actual notice. (Appx75-86;[320]). Appellants moved for reconsideration of the summary judgment of infringement (Appx8555-8579)[322;323]), which was denied. (Appx88;[329]).

Before trial, this Court decided *In re Maatita*, 900 F.3d 1369 (Fed. Cir. 2018), which changed the standard for design patent indefiniteness, at least for design patents with one drawing. Appellants moved for a trial continuance to conduct additional discovery, file a supplemental expert report, and file a new motion for summary judgment. (Appx6604-6624;[257];Appx8408-8419[292])). The district court ruled *In re Maatita* did not apply to design patents with multiple drawings and denied the discovery and continuance. (Appx73-74;[306]).

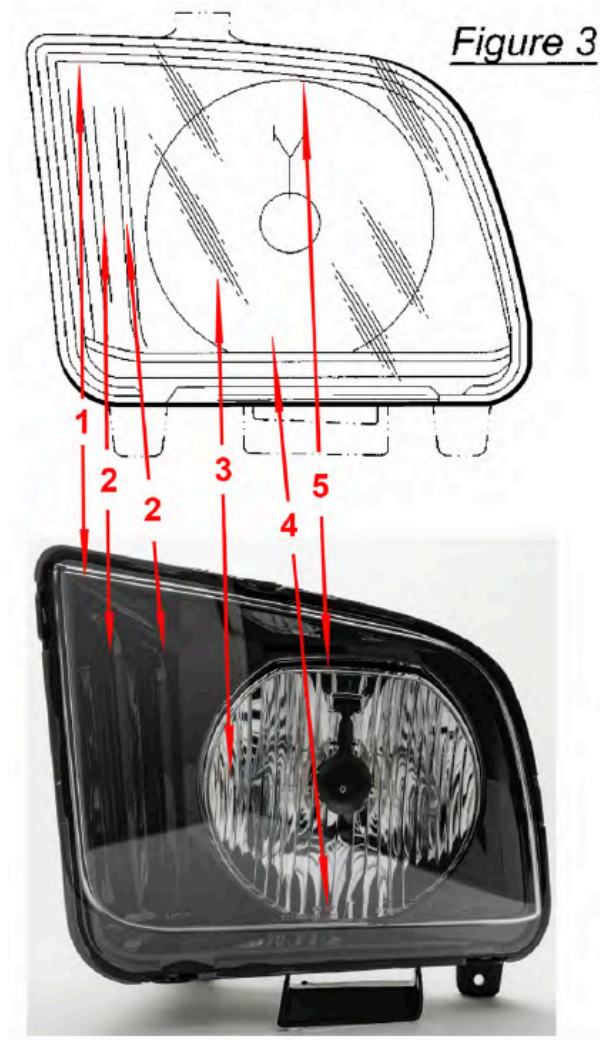
The trial involved thirteen design patents and Appellants requested a minimum of seven days for trial with Appellants receiving at least four days (Appx8426;302], which was denied. The Court granted each side ten hours (Appx8630) for everything from opening statement to evidence presentation, direct and cross examinations of both fact and expert witnesses, and closing argument, and the trial lasted for about three and a half days (November 13, 2018-November 16, 2018).¹

During trial, the jury was instructed that NWI had infringed the patents-in-suit if those patents were not invalid (Appx8604) and the case was tried on the issues of indefiniteness, willful infringement, and damages. (Appx8594-8610). At the close of evidence Appellants moved for JMOL on the issues of indefiniteness, willful infringement, and lack of actual notice, which was denied. (Appx9270-9271).

No jury issues were submitted against ALP or UCC. (Appx8603-8610).

During deliberations, the jury sent out a note stating “on Patent No. D582,065 we consider that New World [NWI] didn’t willfully infringe because the patent is inconsistent with the actual product.” (Appx8615). The front views of D582,065 Figure 3 and the accused Mustang headlamp compared are (Appx6036):

¹ November 12, a Monday, was Veterans day, November 16 was a Friday and the following week was Thanksgiving week.



Appellants moved for reconsideration of the summary judgment of infringement. (Appx9375). The district court stated “I can certainly understand how this note would prompt you to make such a motion,” but the court stated it was going to “stand by the prior ruling.” (Appx9375-9376). After the Court sent a responsive note (Appx8615), the jury sent a note stating “can we meet with you for some clarification?” (Appx8616) and the district court responded “[w]e are required to communicate in writing.” (Appx8616). Soon thereafter, the jury

returned a verdict against NWI that all thirteen patents were not invalid as indefinite, that NWI willfully infringed all thirteen patents, and awarding damages against NWI in the amount of \$493,057.00. (Appx8600-8613).

FGTL then moved for an exceptional case finding and attorney fees [350], which were awarded in the amount of \$2,108,672.50. [383]. Appellants moved for reconsideration of the summary judgment ruling on infringement (Appx10487-10497), which was denied when final judgment was entered April 9, 2019 in the total amount of \$2,718,451.10 against all Appellants, jointly and severally. [384]. Appellants filed post-trial motions for, *inter alia*, JMOL [355,356], new trial [358], and to alter or amend the judgment [386], all of which were denied. [383,407]. Appellants timely filed a notice of appeal. [411]. This appeal followed.

STATEMENT OF FACTS

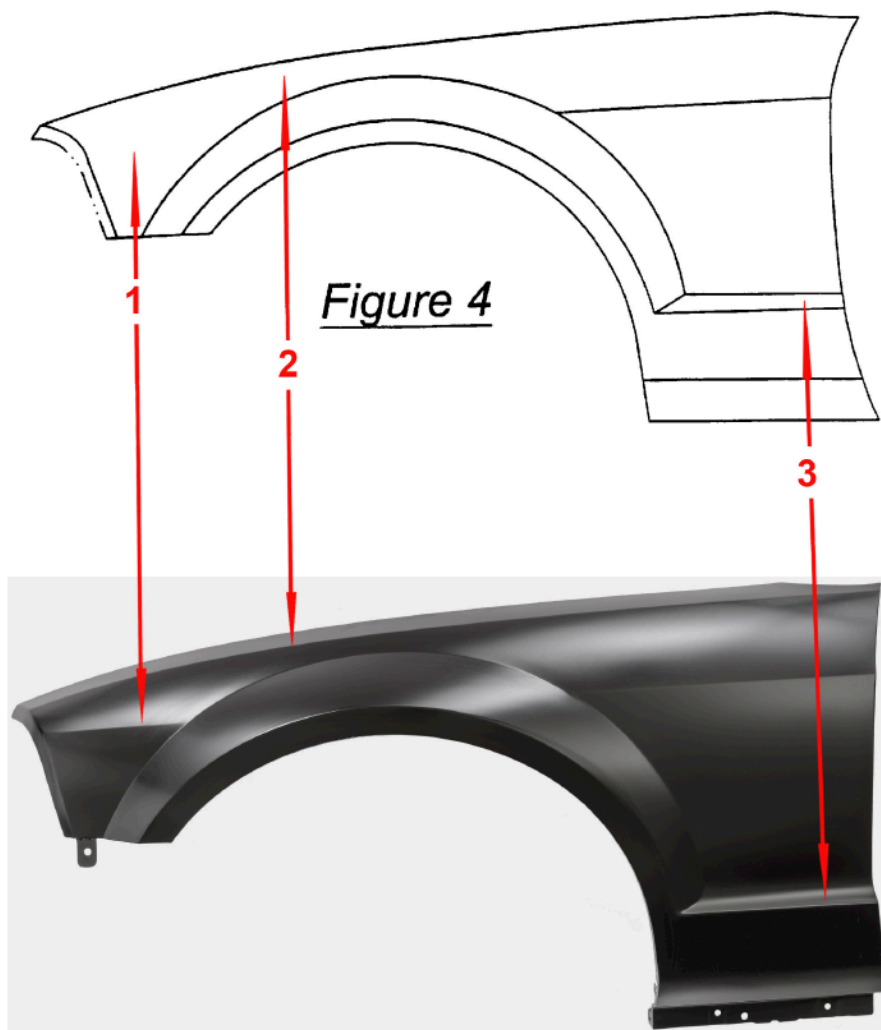
This case involves designs patents and automotive body repair parts. Three related cases have been before this Court a total of four times (15-156, 16-2097, 17-1956, 18-1613). Therefore, only a general statement of facts relevant to the issues on this appeal is set forth.

FGTL was involved in litigation before the International Trade Commission (ITC) as complainant involving design patents and both the F-150 and Mustang. (337-TA-557;337-TA-651). During that litigation, FGTL admitted that the ordinary observer was a purchaser of repair parts and therefore was “highly discerning” when observing the design of the parts during the act of purchase. (Appx6506-6507).

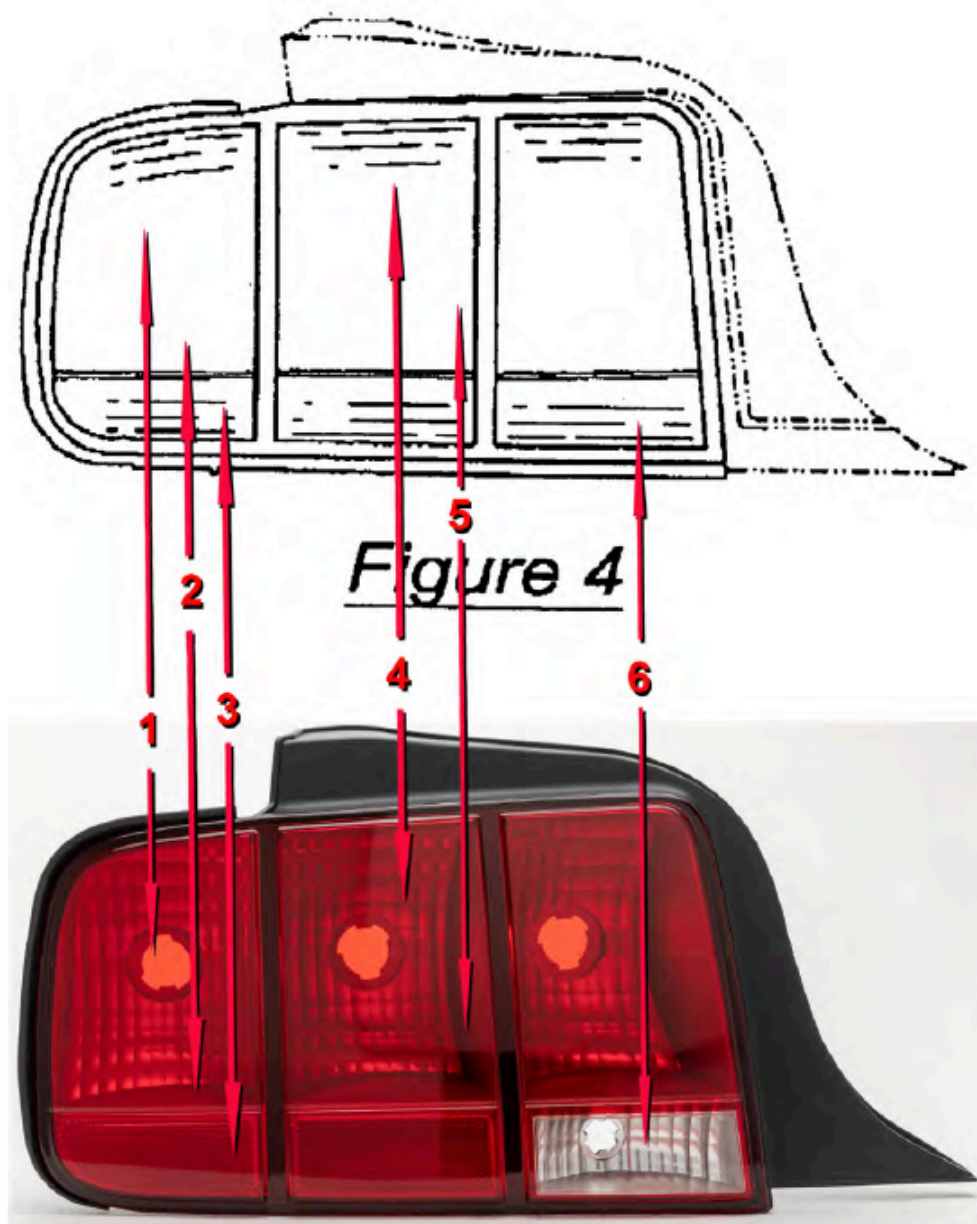
NWI and ALP sell repair parts for the F-150 and Mustang. (Appx1126-1127;Appx12821-12823). There is no record evidence that UCC does the same. The repair parts sold have the same appearance as the parts originally sold on the F-150 and Mustang. (Appx1126). The only purpose for the accused parts is to repair damaged F-150s and Mustangs. (Appx1127).

FGTL obtained design patents for vehicle repair parts and sued Appellants over thirteen design patents: D493,552 (Appx5745-5755); D496,890 (Appx5766-5774); D493,753 (Appx5756-5765); D496,615 (Appx5787-5795); D498,444 (Appx5775-5777); D501,162 (Appx5778-5780); D510,551 (Appx5781-5783);

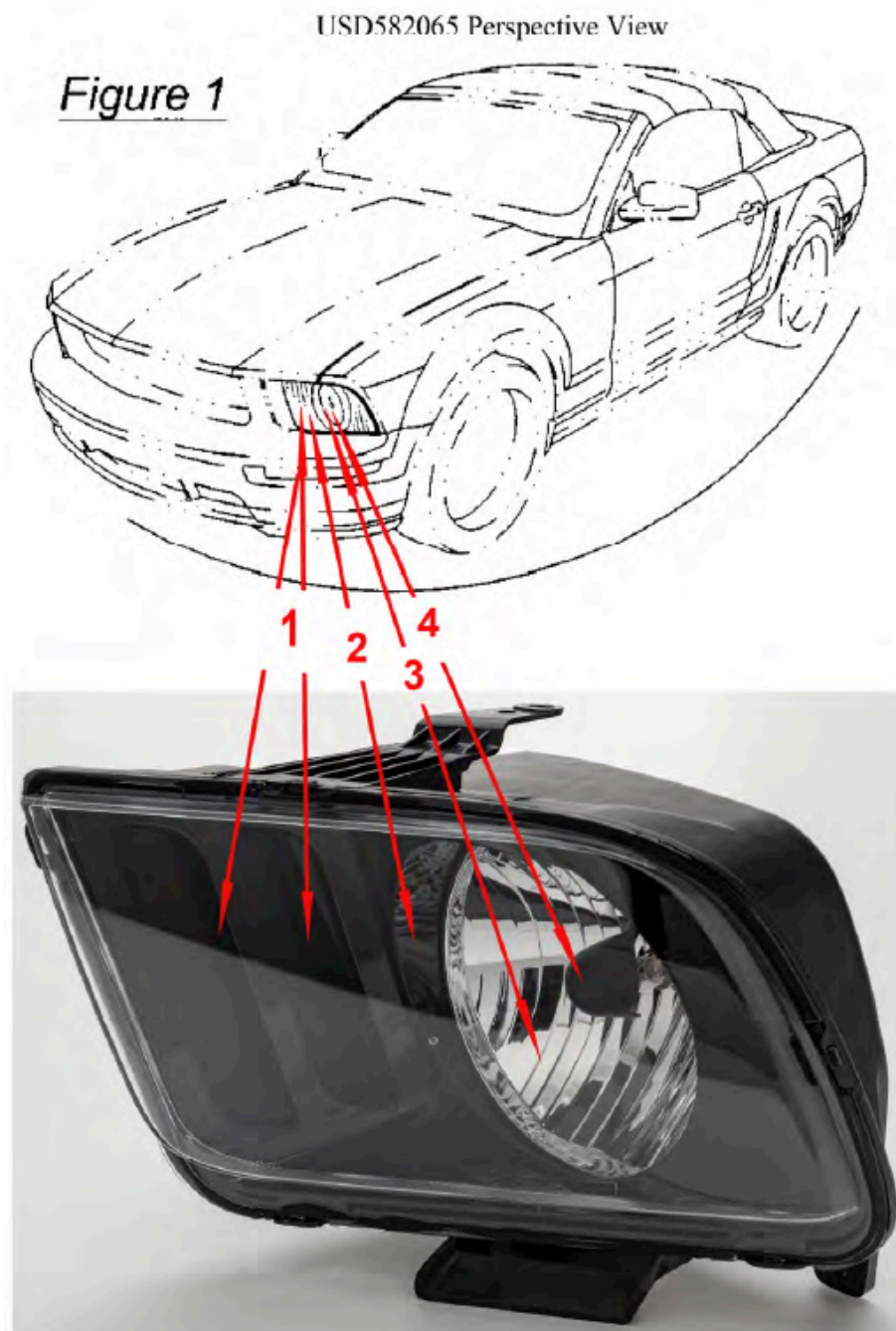
D539,448 (Appx5784-5786); D500,717 (Appx5796-5798); D508,223 (Appx5805-05807); D500,969 (Appx5799-5801); D500,970 (Appx5802-5804); and D582,065 (Appx5808-5811). The designs claimed in the patents-in-suit are not substantially the same as the designs embodied in the F-150 and Mustang as shown by the rebuttal report of Appellants' expert Keith Kaucher (Kaucher). (Appx5844-6056). Just three examples are: first, differences in the accused Mustang fender product and the design claimed in D508,223 (Appx5997-5998).



Second, differences in the accused Mustang taillamp and D539,448 (Appx6028-6029):



Third, differences in the accused Mustang headlamp and D582,065 (Appx6034-6035):



Although Kaucher by his own admission (and by law) is not an ordinary observer (Appx11511; p.345, 1.18-20), his report included the opinions that a properly identified ordinary observer familiar with the prior art and highly discerning because they were purchasing repair parts, would not consider the thirteen patented and accused designs to be substantially the same. (Appx5844-6056). When the district court granted summary judgment of infringement and denied Appellants' summary judgment of non-infringement, it did not identify the ordinary observer or consider the prior art. (Appx79-82).

All thirteen design patents contain substantial inconsistencies between the drawings, or between the drawings and written descriptions or title as shown by the intrinsic evidence alone. (Appx5745-5811). Kaucher produced a report showing these differences. (Appx6437-6505). Just three examples are D493,552 (Appx6447-6451), D510,551 (Appx6491-6494), and D582,065 (Appx6500-6504):

U.S. Patent

Jul. 27, 2004

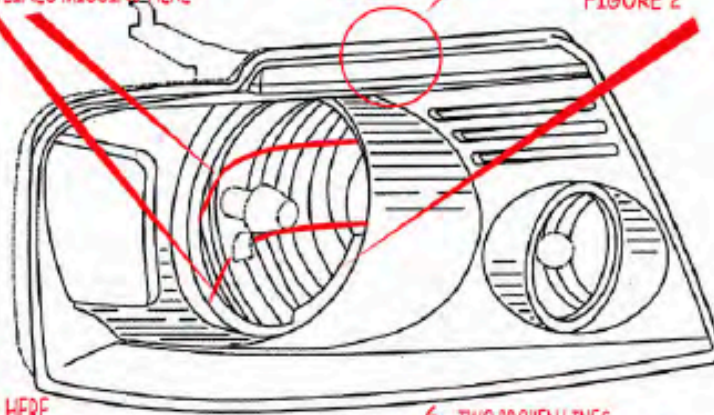
Sheet 1 of 3

US D493,552 S

5. HORIZONTAL LINES MISSING HERE

6. TWO BROKEN LINES
IN FIGURE 2 MISSING
HERE

9. STRUCTURE SHOWN HERE
IS INCONSISTENT WITH
FIGURE 2



5. HORIZONTAL LINES HERE

6. TWO BROKEN LINES
SHOWN HERE

8. SHADING MISSING HERE
INCONSISTENT WITH FIGURE 1

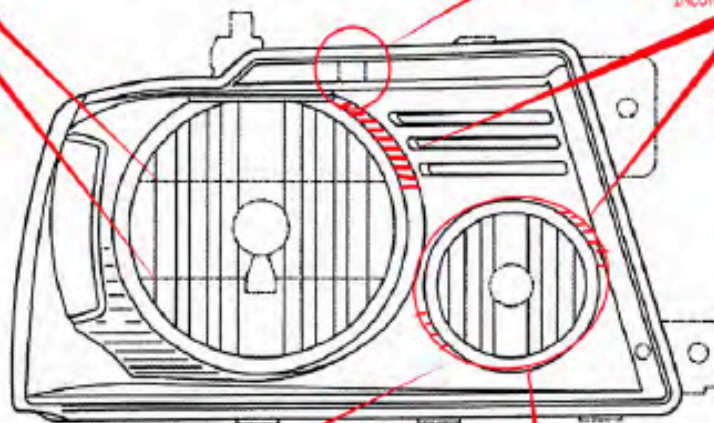


Figure 2

8. SHADING MISSING HERE

10. OVAL DEFINITION LINE MISSING
HERE INCONSISTENT WITH
FIGURES 1, 3 AND 6

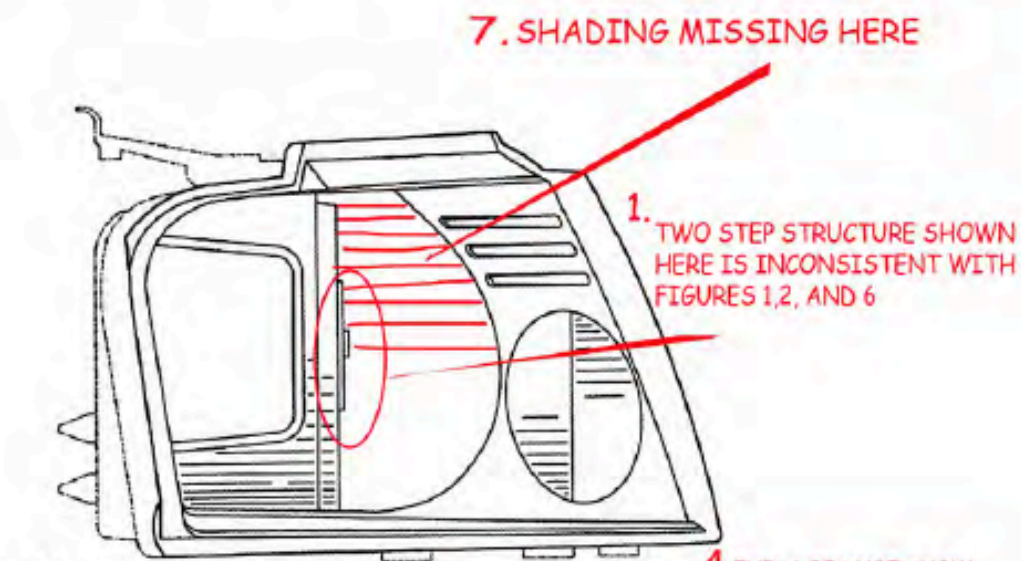


Figure 3

2. THIS VIEW IS LISTED AS A SIDE ELEVATION, SO AS A SIDE ELEVATION THESE PROTRUSIONS WOULD NOT BE VISIBLE THUS INCONSISTENT WITH FIGURES 1,2,3, SHOWN AS THE RIGHT HEADLAMP

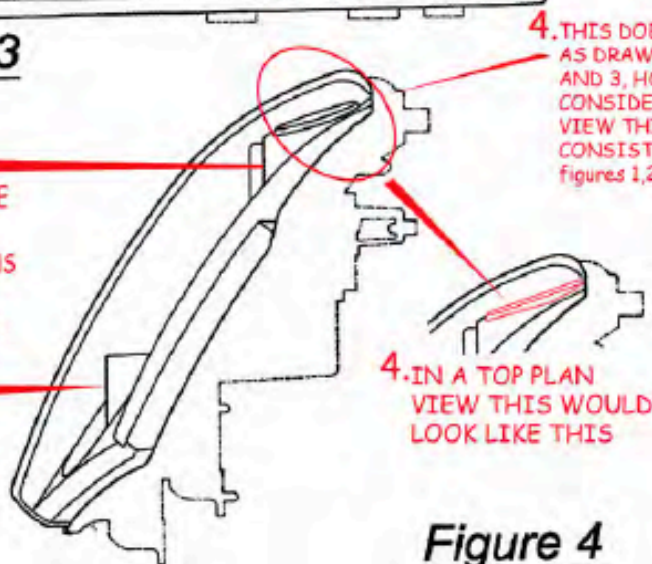


Figure 4



Figure 5

3. THIS FIGURE IS A TOP VIEW AND IS INCONSISTENT WITH FIGURE 1. IN A CORRECT TOP VIEW OF FIGURE 1 THE SIDE MARKER AND LARGE LIGHT WOULD NOT BE IN THIS POSITION

5. HORIZONTAL LINES MISSING HERE SHOWN IN FIGURE 2

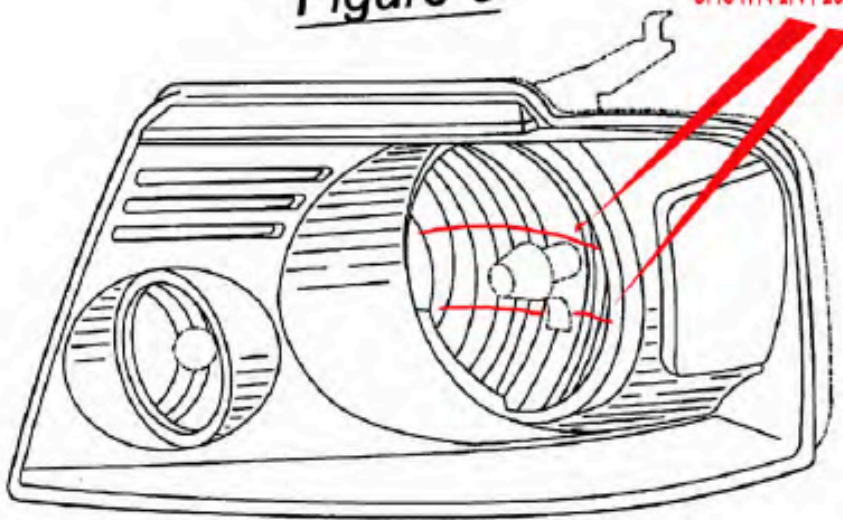


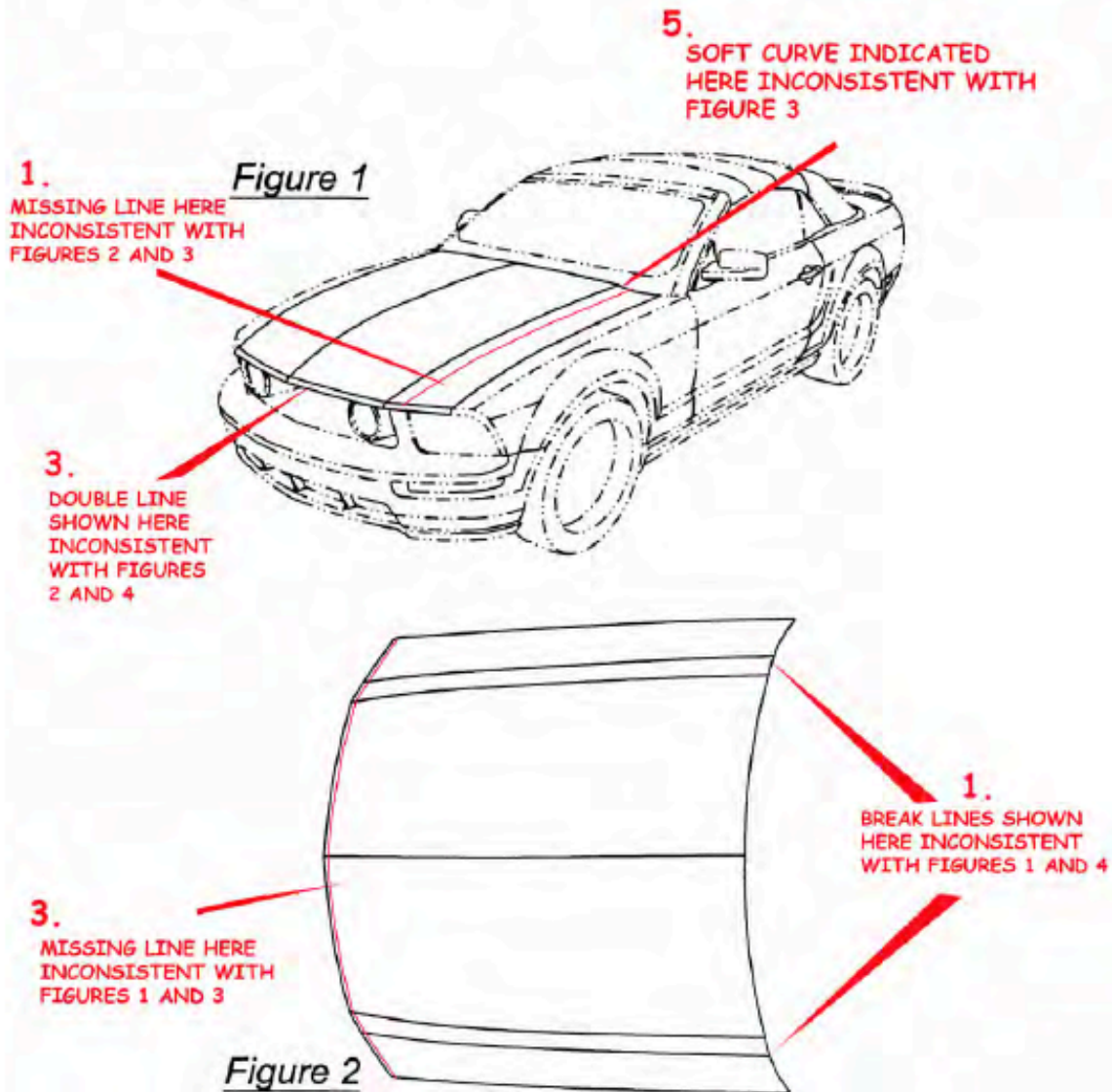
Figure 6

U.S. Patent

Oct. 11, 2005

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US D510,551 S

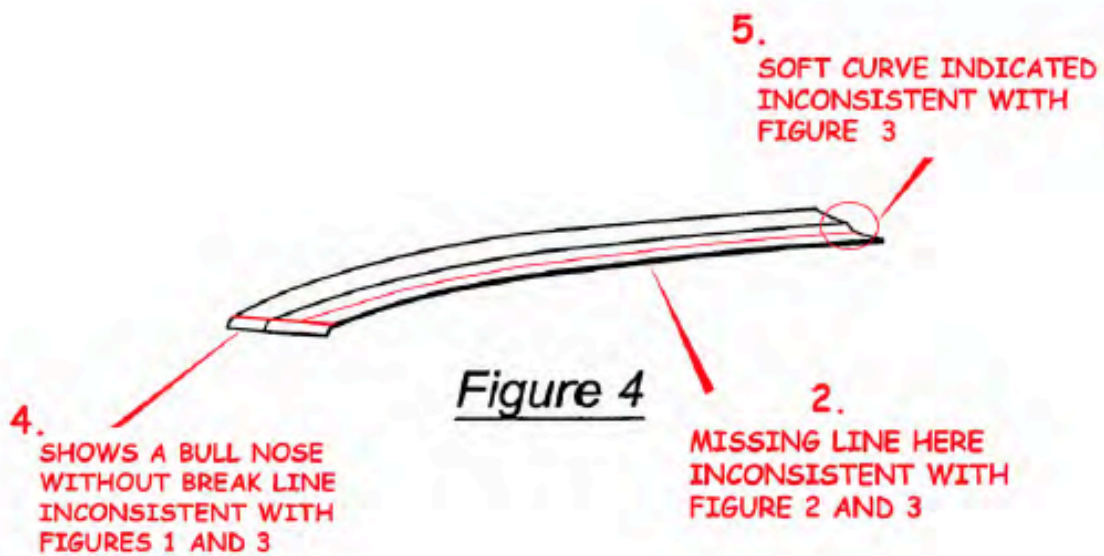
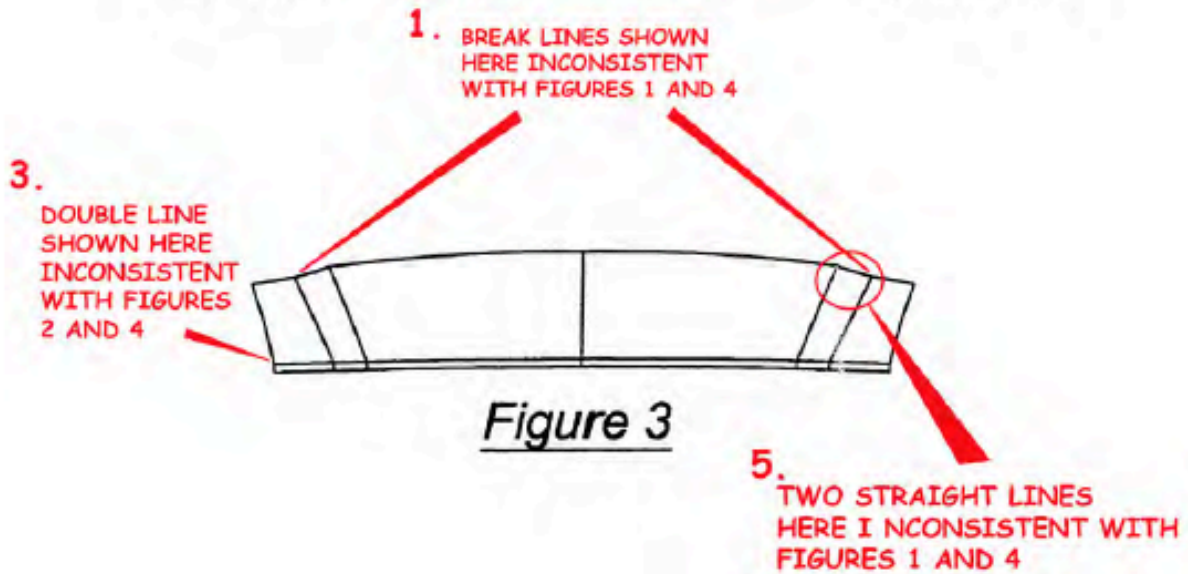


U.S. Patent

Oct. 11, 2005

Sheet 2 of 2

US D510,551 S



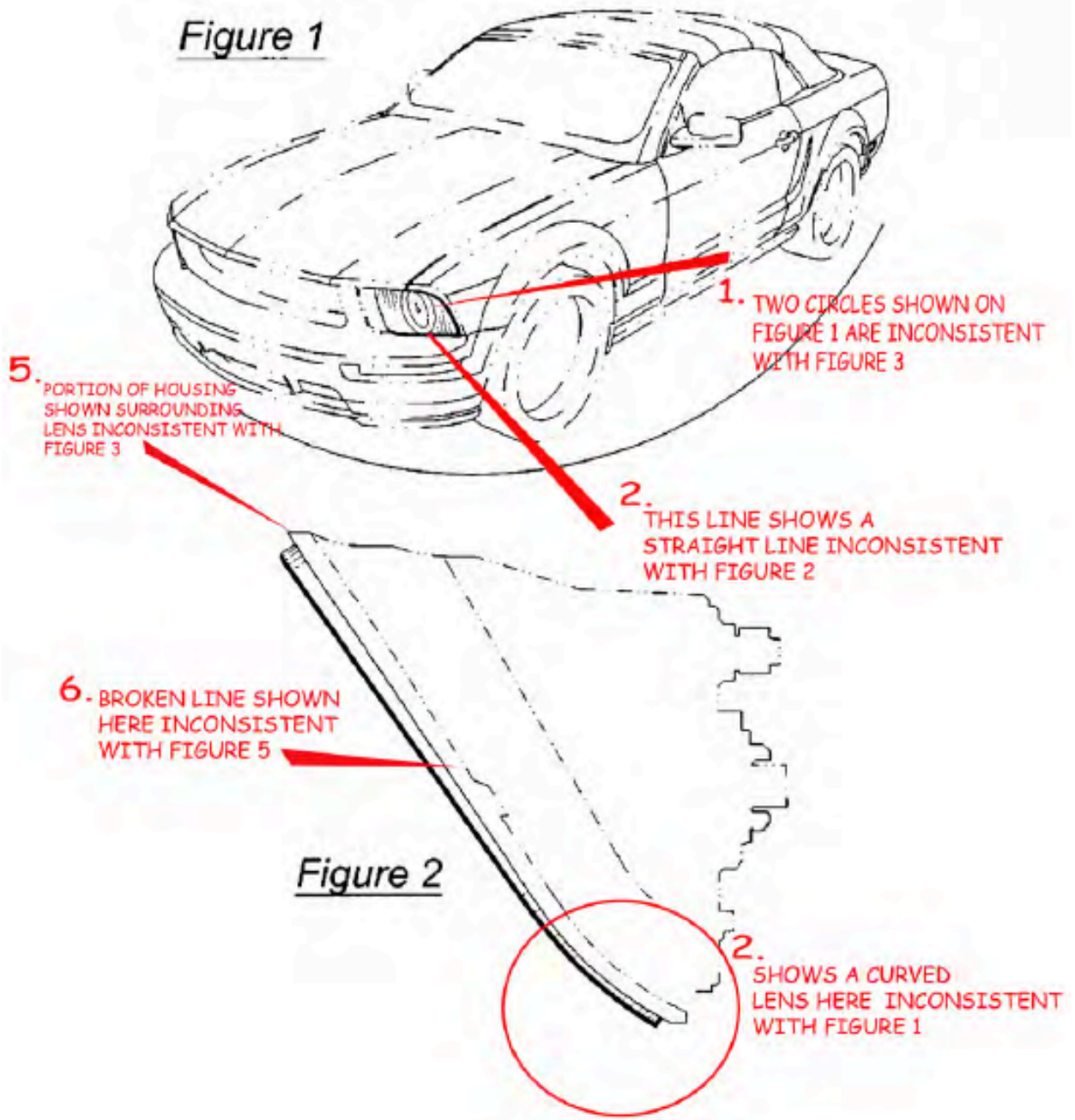
U.S. Patent

Dec. 2, 2008

Sheet 1 of 3

US D582,065 S

Figure 1



U.S. Patent

Dec. 2, 2008

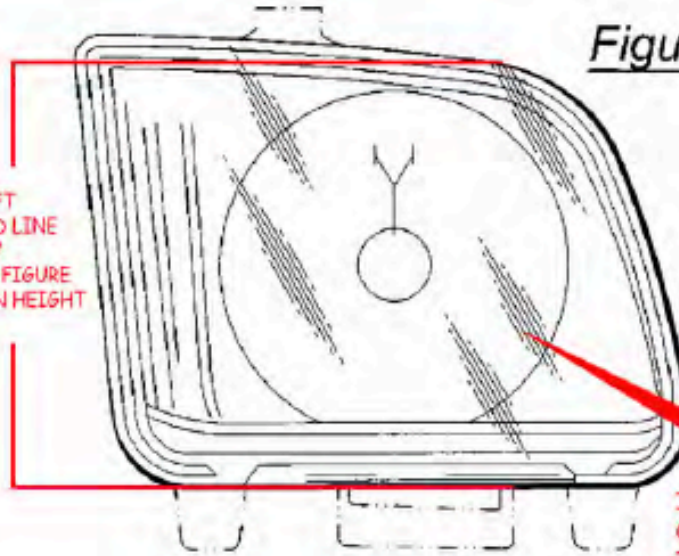
Sheet 2 of 3

US D582,065 S

Figure 3

3.

RIGHT SIDE OF LEFT
HEAD LIGHT BROAD LINE
SHOWS BOUNDARY
OF LENS IN THIS FIGURE
INCONSISTENT IN HEIGHT
WITH FIGURE 4



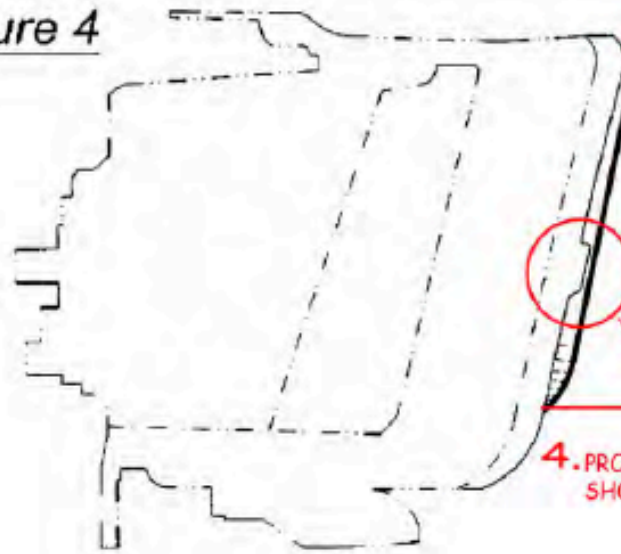
1.

INNER CIRCLE SHOWN
ON FIGURE 1
IS MISSING HERE

Figure 4

3.

RIGHT SIDE OF LEFT
HEAD LIGHT BROAD LINE
SHOWS BOUNDARY
OF LENS IN THIS FIGURE
INCONSISTENT IN HEIGHT
WITH FIGURE 3



4.

PROTRUDING FEATURE NOT
SHOWN IN ANY OTHER VIEW

U.S. Patent

Dec. 2, 2008

Sheet 3 of 3

US D582,065 S

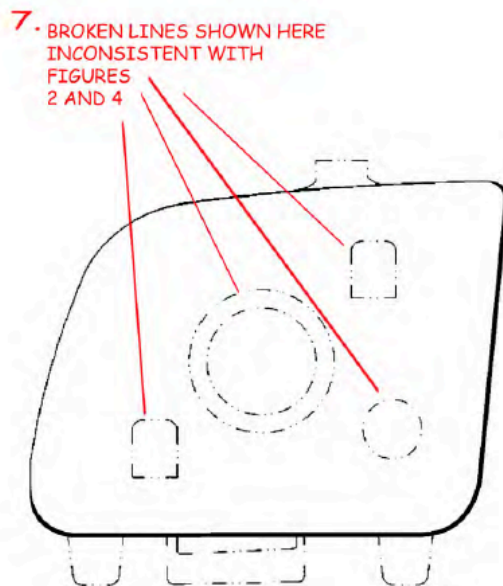


Figure 5

During trial, Kaucher testified that when the proper legal test for indefiniteness is applied, each of the design patents is invalid for indefiniteness. (Appx10197-10198). None of FGTL's cross-examination questions to Kaucher were phrased in terms of the proper legal test. (Appx10198-10209).

More than four years before this litigation commenced, FGTL sent a cease and desist letter to NWI that did not make a specific charge of infringement of an identified patent by a specific part, but rather made reference to a table including hundreds of design patents and that was based on an assumption that was false. (Appx5715-5734).

Additional relevant facts are set forth below and in the Joint Appendix.

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment of infringement and denying summary judgment of non-infringement because the court (1) failed to properly identify the ordinary observer, (2) failed to properly construe the patents, (3) failed to consider the relevant prior art, (4) failed to consider the differences between the patented and accused designs, and (5) failed to consider whether genuine issues of fact exist as to whether a properly identified ordinary observer, familiar with the relevant prior art, would consider the patented and accused designs to be substantially the same when considering the designs as a whole. The court improperly used irrelevant and later corrected deposition testimony of Kaucher, an expert and non-ordinary observer.

The district court erred in construing the claims because every patent in suit is claimed “as shown and described,” and the court construed all the claims only “as shown in the accompanying drawing(s).”

The district court erred in denying Appellants’ motion for summary judgment and motion for judgment as a matter of law and new trial on the issues of indefiniteness and lack of enablement because when the *Nautilus* indefiniteness test is properly applied to the patents-in-suit, the inconsistencies shown by both the intrinsic and extrinsic evidence indicate all the patents in suit are invalid as indefinite and not enabled.

The district court erred in denying Appellants' motion for judgment as a matter of law and new trial on the issue of actual notice because the letter relied upon by FGTL was not an affirmative communication of a specific charge of infringement by a specific accused product or device. The letter referred to a table with hundreds of patents, relied on a false assumption, and therefore could not constitute actual notice.

The district court erred in granting summary judgment on the issue of right of repair because this Court's new claiming test is improper and unworkable and the appropriate test to be used is either an embodiment test or a multifactor test similar to that used in determining article under 35 U.S.C. § 289. Under the appropriate test, at a minimum a question of fact exists concerning right of repair.

The district court erred in granting summary judgment on the issue of functionality because the patents in suit are all invalid under the doctrine of complementary functionality. Alternatively, the patents in suit are invalid due to functionality because, based on allegations of infringement by FGTL, they constitute the best design for a repair part and are essential to the purpose of the article or affect the cost of the article.

Since the judgment of infringement must be reversed and vacated, the award of damages and interest, judgment of willful infringement, award of attorney fees and costs, and permanent injunction must be reversed and/or vacated.

The district court abused its discretion in failing to clarify the scheduling order, failing to grant requested additional discovery, and failing to allow use of a legal opinion because the scheduling order needed clarification and the failure to clarify it denied Appellants substantive legal rights including necessary discovery and use of the legal opinion.

The district court abused its discretion in denying the motion for continuance and additional discovery because *In re Maatita* changed the law on design patent indefiniteness and Appellants had the right to conduct additional discovery and prepare for trial under the new standard.

The district court abused its discretion in not allowing Appellants' damages expert to rely on certain evidence and to offer an opinion on damages because the failure to timely produce documentation was unintentional and was based in large part on the actions and omissions of FGTL.

The district court erred in allowing the jury instruction on spoliation because it was not supported by the evidence and required, rather than permitted, the jury to infer certain facts.

The district court abused its discretion in failing to alter or amend the final judgment because it made all three Appellants jointly and severally liable despite no finding of damages or willful infringement against ALP or UCC.

STANDARDS OF REVIEW

1. Summary Judgment – Fifth Circuit law applies, *see Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 469 F.3d 1005, 1013 (Fed. Cir. 2006), which is *de novo*. *See Ford v. Cimarron Ins. Co.*, 230 F.3d 828, 830 (5th Cir. 2000). Denial of a motion for reconsideration of summary judgment on the merits under Rule 59(e) is reviewed *de novo*. *See Fletcher v. Apfel*, 210 F.3d 510, 512 (5th Cir., 2000). Denial of a motion for summary judgment is reviewed for abuse of discretion. *See Cross Medical Products, Inc. v. Medtronic Sofamor Danek*, 424 F.3d 1293, 1302 (Fed. Cir., 2005).
2. Claim Construction – Review is *de novo*. *See Ethicon Endo–Surgery, Inc. v. Covidien, Inc.*, 796 F.3d 1312, 1333 (Fed. Cir. 2015). Any underlying factual findings based on extrinsic evidence are reviewed for clear error. *See Wi-Lan, Inc. v. Apple Inc.*, 811 F.3d 455 (Fed. Cir. 2016).
3. JMOL and Motion for New Trial - Fifth Circuit law applies, *see Seachange Int'l, Inc. v. C–COR, Inc.*, 413 F.3d 1361, 1367–68 (Fed. Cir. 2005), which is *de novo*. *See Ford, supra*, at 830. JMOL is appropriate when ““there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue.”” *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 804 (5th Cir. 1997) (quoting FED. R. CIV. P. 50(a)). New trial is reviewed for abuse of discretion." *Hollybrook Cottonseed Processing, L.L.C. v. Am. Guarantee & Liab.*

Ins. Co., 772 F.3d 1031, 1034 (5th Cir.2014). "The standard for the district court to grant a new trial is whether the verdict is against the great weight of the evidence."

Whitehead v. Food Max of Miss., Inc., 163 F.3d 265, 270 (5th Cir.1998).

4. Discovery Rulings –Fifth Circuit law applies, *see Solarex Corp. v. Arco Solar, Inc.*, 870 F.2d 642, 643 (Fed. Cir., 1989), which is abuse of discretion. *See Pustejovsky v. Pliva, Inc.*, 623 F.3d 271, 278 (5th Cir. 2010).

5. Scheduling Order – This Court reviews rules and deadlines and rulings related to a patent scheduling order for abuse of discretion. *See O2 Micro International Ltd. v. Monolithic Power Systems, Inc.*, 467 F.3d 1355, 1364 (Fed. Cir. 2006); *SanDisk Corp. v. Memorex Products, Inc.*, 415 F.3d 1278, 1292 (Fed. Cir. 2005).

6. Jury Instruction - The standard of review for jury instructions is prejudicial legal error. *See Tex. Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1201 (Fed. Cir. 2002).

7. Motion for Continuance – Fifth Circuit law applies, *see Cf. Serdarevic v. Advanced Medical Optics, Inc.*, 532 F.3d 1352 (Fed. Cir., 2008) (Continuance under Rule 56(f)), which is abuse of discretion.

8. Permanent Injunction – Review is abuse of discretion which requires plenary review of the correctness of rulings on matters of law. *See Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1379 (Fed. Cir. 2000).

9. Alter or Amend Judgment – Reviewed for abuse of discretion, although to the extent that it involves a reconsideration of a question of law, the standard of review is *de novo*. See *Lake Eugenie Land & Dev., Inc. v. BP Exploration & Prod., Inc. (In re Horizon)*, 824 F.3d 571 (5th Cir., 2016).

10. Attorney Fees – Abuse of discretion, see *Lumen View Tech. LLC v. Findthebest.com, Inc.*, 811 F.3d 479, 482 (Fed. Cir. 2016), including the "exceptional case determination," *SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344, 1347 (Fed. Cir. 2015).

ARGUMENT

1. The district court erred in granting FGTL summary judgment of infringement and in denying the motions for reconsideration and abused its discretion in denying Appellants' summary judgment of non-infringement.

A. Introduction

The district court failed to use the ordinary observer test to determine whether infringement existed. The district court (1) failed to properly identify the ordinary observer, (2) failed to properly construe the patents, (3) failed to consider the relevant prior art, (4) failed to consider the differences between the patented and accused designs, and (5) failed to consider whether genuine issues of fact exist as to whether a properly identified ordinary observer, familiar with the relevant prior art, would consider the patented and accused designs to be substantially the same when considering the designs as a whole.

Instead, the district court (1) improperly made no mention of an ordinary observer in its analysis, (2) improperly construed the claims, (3) observed that the accused parts looked the same as Ford's commercial parts, (4) improperly used putative deposition testimony of Kaucher to conclude that the patented designs looked substantially the same as Ford's parts, (5) concluded without any supporting analysis that "[a] simple side-by-side comparison of New World's products and Ford's claimed designs confirms that New World's products are substantially the same as FGTL's claimed designs," (Appx80) (6) improperly used putative deposition

testimony of Kaucher to conclude that the patented designs looked substantially the same as Ford's parts, (7) found that the "accused parts include the visually dominant aspects of the claimed design as described by the experts and also include the aspects of the claimed design that differ from the prior art," (Appx81) and (8) concluded as a matter of law that infringement existed. The district court's analysis and conclusion are reversible error as explained below.

B. Basic Framework for Determining Design Patent Infringement

The basic framework for determining design patent infringement is well established. The district court failed to follow it. The infringement test requires proper identification of the ordinary observer, correct construction of the patent claims, then comparison of the correctly construed patent claims against the accused designs in light of the prior art through the eyes of the properly identified ordinary observer. *See Arminak and Associates v. Saint-Gobain Calmar*, 501 F.3d 1314, 1321 (Fed. Cir. 2007); *Elmer v. ICC Fabricating, Inc.*, 67 F.3d 1571, 1577 (Fed. Cir. 1995); *Gorham Manufacturing Co. v. White*, 81 U.S. 511, 528 (1872). The patent owner must establish that "an ordinary observer, familiar with the prior art designs, would be deceived into believing the accused products are the same as the patented design." *Crocs, Inc. v. Int'l Trade Comm'n*, 598 F.3d 1294, 1306 (Fed. Cir. 2010).

C. Summary Judgment Evidence

The summary judgment evidence includes without limitation the design patents-in-suit (Appx5745-5811), their prosecution histories, the accused designs (Appx5844-6056), and the prior art. (Appx5844-6056). The summary judgment evidence also includes the rebuttal expert report of Keith Kaucher that properly identifies the ordinary observer, illustrates and describes the differences between the patented and accused designs, illustrates and describes the relevant prior art, and provides opinions that a properly defined ordinary observer familiar with the prior art would not consider the patented and accused designs to be substantially the same. (Appx5844-6056).²

D. The District Court erred in failing to properly identify the Ordinary Observer

The district court never identifies the “ordinary observer.” This is reversible error. “A question that is central to ... every design patent case, is the identity of the ‘ordinary observer’ of the design at issue.” *Arminak, supra*, at 1321. “The focus is on the actual product that is presented for purchase, and the ordinary purchaser of that product.” *Goodyear Tire & Rubber Co. v. Hercules Tire & Rubber Co., Inc.*, 162 F.3d 1113, 1117 (Fed. Cir., 1998).

² The expert report of Kaucher is summary judgment evidence because Kaucher affirmed in his deposition that his opinions were true and correct. (Appx11523-11524). In any event, the report properly illustrates and describes the differences in the patented and accused designs, the prior art, and properly identifies the ordinary observer. (Appx5844-6056).

Identification of the ordinary observer and purchaser of the accused product is of critical importance because it substantially influences the comparison. Indeed, the *Gorham* ordinary observer test begins “if, in the eye of an ordinary observer, *giving such attention as a purchaser usually gives...*” 81 U.S. at 528 (emphasis added). For example, in *Arminak, supra*, at 1324, the ordinary observer was a sophisticated industrial buyer rather a retail consumer and therefore did not consider the patented and accused trigger shroud designs to be substantially the same. In *Goodyear, supra*, at 1117, the ordinary observer was the ordinary trucker or fleet operator who purchases truck tires rather than a purchaser of tires in general and therefore would not have been confused due to the differences in the tire tread designs. In *KeyStone Retaining Wall Systems, Inc. v. Westrock, Inc.*, 997 F.2d 1444, 1451 (Fed. Cir. 1993), the ordinary observer was a purchaser of the patented block and not of the unpatented wall and therefore would not have been confused due to differences in the patented and accused block designs.

Similarly, in the instant case, it makes an important difference that the accused parts all are repair/replacement parts that are being purchased by people who by definition are trying to match the original part being replaced. (Appx1127; Appx1030). Indeed, Ford agreed in the ITC Action that in such a circumstance the ordinary observer is “highly discerning.” (Appx6506-6507). And as explained in Kaucher’s report, such an ordinary observer will notice differences between the

claimed designs and the accused designs. (e.g., Appx5850-5851; Appx5870). That is, if an ordinary observer in the circumstances of this case is attempting to purchase an automotive body repair part that looks like the original part (of which the accused part is a copy) and the ordinary observer views a part with the differences in the patented design,³ such differences will be readily apparent when considering the designs as a whole. Therefore, summary judgment of non-infringement is appropriate on all thirteen patents. At a minimum, issues of fact exist concerning whether design patent infringement exists.

An example of this in the repair/replacement context is *Dorman Prods., Inc. v. Paccar, Inc.*, 201 F. Supp. 3d 663 (E.D. Pa., 2016). In *Dorman*, the court held summary judgment of infringement inappropriate because Dorman identified differences between the *replacement* headlights and the patented designs. Specifically, the replacement headlights all were styled and included ornamental lens lines not included in the patented designs and the replacement headlights included ridged, or ribbed, surrounding borders, whereas the patents depicted solid borders. *Id.* at 684. The same type differences exist between some of the patented and accused designs in the instant case. The D493552 patented design does not contain ribs on the reflector

³ The rebuttal expert report of Kaucher illustrates and explains the differences in each patented and accused design when considering and comparing the designs as a whole. (Appx5844-6056). The differences include differences between a design claimed for only one side of a vehicle when the accused part is for the other side. Appellants moved for summary judgment on that issue. (Appx5709-5710).

Just as in *Dorman*, these differences, as well as the many other differences listed in the Kaucher report, at a minimum create a question of fact as to infringement.

Appellants submit that a highly discerning ordinary observer would not consider the patented and accused designs to be substantially the same as a matter of law, but at a minimum, questions of fact exist in that regard.

E. The district court's claim constructions are incorrect

Although every patent-in-suit is claimed "as shown *and described*," (emphasis added) (Appx), the district court construed all the claims "as shown in the accompanying drawing(s)" and omitted the phrase "and described." (Appx71).

The district court's claim constructions are erroneous. 37 CFR 1.153 states in relevant part "[t]he claim shall be in formal terms to the ornamental design for the article (specifying name) as shown, or as shown and described." MPEP states:

When the specification includes a proper descriptive statement of the design (see MPEP § 1503.01, subsection II), or a proper showing of modified forms of the design or other descriptive matter has been included in the specification, the words "and described" must be added to the claim following the term "shown"; i.e., the claim must read "The ornamental design for (the article which embodies the design or to which it is applied) as shown and described."

MPEP § 1503.01, subsection III. This Court recently stated "[t]his regulation tells us ... the scope of the design claim can be defined either by the figures ("as shown") or by a combination of the figures and the language of the design patent

(“as shown and described”). *Curver Luxembourg v. Home Expressions Inc.*, 2018-2214, *9 (Fed. Cir. September 12, 2019).

Since all thirteen patents-in-suit are claimed in the form “as shown and described,” the claim scope is defined by both the drawings and the descriptions. Each patent contains descriptive matter beyond the drawings, including broken line statements regarding environment and boundaries, intent to attach to a vehicle or a certain side of the vehicle, and/or disclaimers, e.g., “[t]he bottom and the rear of the headlamp are not part of the claimed design.” (Appx5745-5811).

The district court’s claim constructions improperly change the scope of the claimed designs by omitting the descriptions. The descriptions help define the scope of the claim by describing (1) intention of attachment to a vehicle including a particular side, (2) the meaning of the broken lines (environment and/or boundaries), and/or (3) express limitations. The meaning of the broken lines and express limitations are important for, *inter alia*, determining the scope of the claim for infringement analysis, indefiniteness analysis, for determining the appropriate article under the four-factor test developed for 35 U.S.C. § 289, and potentially for determining article for right to repair (see discussion below). Since the district court’s claim constructions improperly change the scope of the claimed designs, they must be rejected. *See Sport Dimension, Inc. v. Coleman Co.*, 820 F.3d 1316,

1321 (Fed. Cir., 2016) (claim construction rejected that eliminated structural elements from the claimed design).

The claim construction issue is preserved for appeal because Appellants argued for proper claim construction in a timely manner [140,144,145,148,149]. *See O2 Micro, supra*, at 1358–59; *Sandisk, supra*, at 1355.

F. The district court did not properly use the ordinary observer test to determine whether infringement exists as a matter of law.

1. It is not relevant whether the accused parts match Ford's Parts.

The district court first states that New World admits its parts look the same as Ford's commercial embodiments. (Appx79). That is true, but not relevant. The only time comparison of the accused designs with the commercial embodiments is proper is when there is no dispute that the commercial embodiments and the patented designs are substantially the same. *See Dorman Products, supra*, at 684 (citing *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1125–26 (Fed. Cir. 1993)). Here, a dispute exists.

2. Kaucher's Putative Deposition Testimony Does not Establish Infringement as a Matter of Law

Kaucher provided a 213 page report that compared each patent figure with the corresponding view of the accused products. (Appx5844-6056). Each difference was illustrated and explained. Kaucher's report also properly identified the ordinary observer, identified the relevant prior art, and discussed the ordinary observer test.

(Appx5848-5851). Kaucher's report then offered opinions that a properly identified ordinary observer, familiar with the prior art, would not consider the accused designs to be substantially the same as the patented designs when each was considered as a whole. (Appx5870, Appx5889, Appx5909, Appx5921, Appx5933, Appx5947, Appx5959, Appx5971, Appx5983, Appx 5999, Appx6014, Appx6030, Appx6042). Kaucher affirmed during his deposition that these opinions were his opinions and were true and correct. (Appx11523-11524).

Since the accused designs look the same as FGLT's commercial embodiments, Kaucher's opinions also must be that the FGTL commercial designs and the patented designs are not substantially the same under the same ordinary observer parameters. The district court held the second question below ("Question") and answer to establish just the contrary as a matter of law for all thirteen design patents in suit:

Q. You agree with me, sir, that the -- that Ford's products -- actually, let me back up first. You agree with me, sir, that the accused -- actually, let me back up. Are these photographs of Fords products or the accused products in your report?

A. I don't know for sure.

Q. Would you agree with me, sir, that Ford's products and the claim designs are substantially the same?

A. Yes.

Mr. Oake: Object to the form on the last question.

(Appx79).

The district court's holding is incorrect for several reasons. First, the Question and answer were not asked in terms of what a properly identified ordinary observer, familiar with the prior art, would think. Kaucher is an expert and not an ordinary observer. (Appx11511; p.345, l.18-20). *Gorham, supra*, at 528 specifically states that an ordinary observer is not an expert.

Second, the Question is ambiguous because it does not specify what "Ford's products" are or what the "claim designs" are. Although counsel for FGTL had been focusing Kaucher's attention on Figure 7 the '717 patent (alleged Mustang Side Mirror) and the image that Kaucher provided on page 96 of his report (Appx11493-11494), the term "Ford's products" is plural and the term "claim designs" refers to a single claim. It is possible that "Ford's products" refers to multiple Mustang mirrors and "claim designs" refers to the '717 Patent claim with its multiple figures, but that is not clear enough to support summary judgment of infringement of the '717 Patent and certainly not clear enough to support summary judgment on all the other patents in suit. Appellants stand on and reassert their objection to the form of the Question.

Third, the Question not only is ambiguous, it had to be changed by the district court with an improper post-deposition addition of "[ed] " (Appx79), which converts the singular noun "claim" to the adjective "claimed," thereby changing the meaning of

the Question.⁴ "Claim designs" refers to a single claim containing multiple designs. "Claimed designs" refers to multiple claims of multiple designs, which is a completely different question.

Fourth, Kaucher reviewed and corrected his deposition transcript (Appx8083-8088; Appx8566-8579) within the thirty-day time period allowed by Rule 30(e)(1)(B), which allows changes "in form or substance." *See Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 480 (5th Cir. 2012); *Glob. Mach. Tech. v. Thomas C. Wilson, Inc.*, No. H-02-0452, 2003 U.S.Dist.LEXIS 27593, at *15 (S.D.Tex. Sep. 17, 2003). The corrections made by Kaucher change the testimony relied upon by the district court, which at a minimum raises issue of fact regarding infringement.

The district court rejected Kaucher's corrections, reasoning that since "FGTL's questions are clear and straightforward," "New World's argument that Mr. Kaucher was 'confused' is unpersuasive." (Appx80). This was error. First, as explained above, FGTL's questions were anything but "clear and straightforward." Rather, they were ambiguous and confusing, omitted proper legal standards, and failed to specifically identify what patented claims or accused products were being referred to.

Second, neither of the two cases relied upon by the district court, *Powell v Dallas Morning News*, 776 F.Supp.2d 240 (N.D. Tex. 2011) or *S.W.S. Erectors v*

⁴ If questions can be changed after the deposition is over, the deposition process becomes meaningless.

Infax, Inc., 72 F3d 489 (5th Cir. 1996), involved or addressed deposition errata under Rule 30(e).

Third, even if the sham affidavit analysis is considered under *S.W.S. Erectors*, the Kaucher declaration clearly is not a sham. In one of cases cited by *S.W.S. Erectors*, *Kennett-Murray Corp. v. Bone*, 622 F.2d 887 (5th Cir. 1980), the court explained “[i]n considering a motion for summary judgment, a district court must consider all the evidence before it and cannot disregard a party's affidavit merely because it conflicts to some degree with an earlier deposition [citations omitted] and “[t]hus, a genuine issue can exist by virtue of a party's affidavit even if it conflicts with earlier testimony in the party's deposition.” *Id.* at 893.

In *Kenneth-Murray*, the Fifth Circuit determined the affidavit was not a sham and the reasons given are similar to those present in the instant case. First, the court stated that the conflict created by the affidavit was already present in the deposition. In the instant case, immediately after the Question was answered, the following two questions were asked and answered:

Q. And in your analysis, did you consider all of the ornamental features demonstrated in the design patents?

A. Yes, I did.

Q. And you found a great number of them to be substantially, similar, right?

A. Similar, not substantially, but similar.

(Appx11494). The declaration and errata sheet indicate Kaucher would have answered “no” to the Question if he had understood it. (Appx8566-8579). The above two answers create the same conflict as they indicate Kaucher not only does not believe the accused parts (or Ford’s parts) are *substantially the same* as the ornamental features demonstrated in the design patents, but that they also are not even *substantially similar*. Further, the same conflict is established when Kaucher reaffirms the opinions in his report as his own and as true and correct in the deposition.

Second, the Fifth Circuit stated that the deponent’s explanation that he was confused and thought that the questioning concerned one matter when it actually referred to another was “at least plausible” because of “frequent shifts” in the questioning between the two matters. Here we have the same thing. The confused question before the Question concerned whether the photographs in the expert report were Ford’s products or were the accused products:

Q. You agree with me, sir, that the – that Ford's products -- actually, let me back up first. You agree with me, sir, that the accused -- actually, let me back up. Are these photographs of Fords products or the accused products in your report?

A. I don't know for sure.

Then the Question and objection occurred:

Q. Would you agree with me, sir, that Ford's products and the claim designs are substantially the same?

A. Yes.

(Appx11494). Given the pattern of the questioning and the confused nature of the question before the Question, Kaucher's explanation certainly is plausible that he believed the Question related to a comparison between the Ford's products and the accused products.

Third, the Fifth Circuit explained that the statement in the affidavit was not at odds with the general theory of defense presented in the deposition. In the instant case, prior to the deposition Kaucher set forth his opinion in a report that Kaucher reaffirmed during the deposition. (Appx5844-6056). The only plausible explanation is that Kaucher was confused by the questions - as he stated in his declaration.

Finally, case law indicates that the questions and answers must not be ambiguous. Here, as explained above, the questions relied upon by the district court are not only ambiguous, they are so deeply flawed that they cannot possibly form the basis for summary judgment.

The district court also refers to Kaucher's testimony regarding "substantial similarity" and "virtually identical," but as explained by Kaucher in his declaration, the questions and answers referred to suffer from the same type problems as the Question. (Appx8566-8579). Further, Kaucher provided a detailed and plausible explanation for these answers. *Id.* The primary source of confusion is that

Kaucher only used these general terms in his expert report regarding comparisons with the prior art. (e.g., Appx5851-5852). He never used them in his report when comparing the patented designs with the accused designs. (e.g., Appx5870). However, during questioning, Ford began to use the terms when comparing the patented designs with the accused products – which as explained by Kaucher, created substantial confusion. Even if Kaucher’s explanations are not accepted, the answers still do not support summary judgment. First, the questions are flawed for much the same reasons that the Question is flawed (ambiguous, ordinary observer standard not used, improper claim construction). In addition, neither substantial similarity nor virtually identical are the tests for design patent infringement. Substantially *similar* is not the same standard as substantially the *same*.⁵ And it was clear from the deposition that the concept of “virtually identical” was anything but clear. For example, see the perplexing questions and answers at Appx11484, p.237, 1.2 to p.238, 1.20. (Appx12842). The confusion could have been avoided if FGTL’s counsel had asked questions that used the proper legal standards for the ordinary observer test. But FGTL did not do that, and the consequent confusion should not be held against Appellants.

⁵ Note that other than answering the Question, Kaucher never answered in terms of the accused designs being substantially the *same* as the patented designs. The questions either included the term *substantial similarity*, or in the one case where the question included substantially the *same*, Kaucher conditioned his answer on only the term “*substantial*,” and referred back to an earlier answer that had been answered in terms of substantial *similarity*. (Appx8083-8088).

The district court next states “[a] simple side-by-side comparison of New World’s products and Ford’s claimed designs confirms that New World’s products are substantially the same as FGTL’s claimed designs.” (Appx80). No analysis accompanies this conclusory statement. The district court fails to consider the differences between the patented and accused designs, fails to consider the prior art, fails to consider the nature of the accused product, fails to consider the identity of the hypothetical ordinary observer and its highly discerning nature in the repair/replacement context, and fails to consider whether a properly identified ordinary observer conversant with the prior art would consider the patented designs, each considered as a whole, to be substantially the same as the accused designs, each considered as a whole. In short, the district court fails to properly apply the ordinary observer test and improperly ignores the many genuine issues of fact that exist. Since there are many differences between all the claimed and accused designs as shown by comparing the patented designs with the accused products and as illustrated by the Kaucher rebuttal report (Appx5844-6056) that at a minimum raise an issue of fact, summary judgment of infringement was error.

- G. The district court improperly used non-dispositive guidelines to establish infringement as a matter of law

The district court granted summary judgment because the court found “no genuine issue of material fact that New World’s accused parts include the visually dominant aspects of the claimed design as described by the experts and also include

the aspects of the claimed design that differ from the prior art.” (Appx81). This was error and the district court did not provide any authority for its statements. The sole test for design patent infringement is whether an ordinary observer familiar with the prior art would consider the patented and accused designs to be substantially the same. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir., 2008) (en banc). In *Egyptian Goddess*, this Court stated there may be a number of factors to consider, but none are outcome determinative. *Id.* at 676-679. In this case, these factors, even if true, are offset by the fact that since the accused parts are repair parts, the properly identified ordinary observer is *highly discerning* and will be able to discern the differences that exist between the patented designs and the accused products. At a minimum, genuine issues of fact exist in that regard for each of the accused parts.

H. The Jury Note Supports Reversal of the Summary Judgment

Despite not being allowed to decide the issue of infringement or being charged on the “highly discerning” nature of the ordinary observer in this case, the jury sent a note stating it believed the Mustang headlamp was inconsistent with the design patent. (Appx8615). The jury note supports the conclusion that non-infringement exists as a matter of law, or at a minimum, issues of fact exist.

2. The district court erred in construing the design patent claims

See argument under section 1.E. above (presented as a separate point of error because it is relevant to more than the summary judgment of infringement).

3. The district court erred in failing to grant summary judgment and JMOL and a New trial on Design Patent Indefiniteness and Lack of Enablement

A. Introduction

In *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 910 (2014), the Supreme Court changed the standard for indefiniteness. This Court applied the new *Nautilus* standard to a design patent with only one drawing in *In re Maatita*, *supra*. The district court held *In re Maatita* did not apply because all patents in suit have multiple drawings. (Appx73-74;[306]). Therefore, this case is one of first impression on how *Nautilus* should be applied to design patents with multiple drawings.

B. Legal Standard for Design Patent Indefiniteness

35 U.S.C. 112 ¶2 (pre-AIA) requires that “a patent’s claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus, supra*, at 910. *Nautilus* changed the old standard, under which patent claims only were indefinite if they were “insolubly ambiguous” or “not amenable to construction.” *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347 (Fed. Cir. 2005). This Court has applied the new *Nautilus* standard in only one design patent case, *In re Maatita*. In *Maatita*, this Court required those skilled in the art to view the design as would an ordinary observer. The district court held *Maatita* only applies to

design patents with a single drawing.⁶ The question remains how *Nautilus* should be applied to design patents with inconsistencies between multiple drawing figures. *Maatita* cites and discusses various cases, but these cases do not apply the *Nautilus* rational in any meaningful manner and the discussion of these cases in *Maatita* is dictum.⁷

One district court applied the *Nautilus* standard to an inconsistency between the drawings and the title of the design patent. In *Eclectic Prods., Inc. v. Painters Prods., Inc.*, No. 6:13-CV-02181-AA (D. Or. Mar. 2, 2015), the design patent was for an applicator cap on a tube dispenser used for spackling paste, D482,962. The

⁶ New World filed a Motion for Leave to Modify the Scheduling Order (Appx6604-6610;[257]) arguing that *In re Maatita* changed indefiniteness law by requiring those skilled in the art to view the design as would an ordinary observer. (Appx6605). The district court denied the motion, holding that since *In re Maatita* involved only a single figure, it was not applicable to design patents with alleged inconsistencies between multiple drawings or between drawings and written descriptions. (Appx73-74;[306]).

⁷ District courts have attempted to apply the *Nautilus* standard to design patents, at least in part, but these courts improperly modify the standard by using pre-*Nautilus* case law and references to language in the MPEP. For example, in *Deckers Outdoor Corp. v. Romeo & Juliette, Inc.*, 2016 WL 7017219, at *4 (C.D. Cal. Dec. 1, 2016), the court stated “a design patent is invalid for indefiniteness if the errors and inconsistencies in the patent drawings are of such magnitude that the drawings, taken as a whole, fail to inform, with reasonable certainty, those skilled in the art about the overall appearance of the design.” In *Weber-Stephen Products, supra*, at *52, the court stated “for a design patent to be invalidated for indefiniteness, ‘errors and inconsistencies in the patent drawings must be material and of such magnitude that the overall appearance of the design is unclear.’” (citing and quoting *Times Three Clothier, LLC v. Spanx, Inc.*, 2014 WL 1688130, at *7 (S.D.N.Y. Apr. 29, 2014) (quoting *HR U.S. LLC v. Mizco Int’l, Inc.*, 2009 WL 890550, at *6 (E.D.N.Y. Mar. 31, 2009), and MPEP §§ 1503.02, 1504.04)).

court held “intrinsic evidence establishes the ‘962 Patent as fatally indefinite.” *Id.* at *9. The court explained “[t]he words of the patent lay claim to ‘an applicator cap, as shown,’ but the drawings depict an entire tube dispenser with a threaded neck and a sponge tip but, notably, no cap that fits over the tube.” *Id.* The court concluded “[t]his conflict between the patent's verbal and visual descriptions creates uncertainty about the claim's meaning” and “[t]he patent, on its face, fails to provide notice of what is claimed.” *Id.*

The Supreme Court in *Nautilus*, following its announcement of the new standard, stated “[t]he definiteness requirement, so understood, mandates clarity, while recognizing that absolute precision is unattainable” and “[t]he standard we adopt accords with opinions of this Court stating that the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter.” *Id.* at 910.

Proper application of *Nautilus* therefore requires asking what degree of certainty is reasonable in light of the subject matter of the patent. In the case of utility patents, *Nautilus* states “the definiteness requirement must take into account the inherent limitations of language,” that “some modicum of uncertainty ... is the price of ensuring the appropriate incentives for innovation,” and that “patents are not addressed to lawyers, or even to the public generally, but rather to those skilled in the relevant art.” *Id.* at 909.

In a design patent, the claims include the drawings. *See Hupp v. Siroflex of America, Inc.*, 122 F.3d 1456, 1464 (Fed. Cir. 1997) ("A design patent contains no written description; the drawings are the claims to the patented subject matter. Therefore, when *Nautilus* is applied to design patents, ¶2 requires that "a patent's [drawings], viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty." The question becomes what is reasonable and appropriate in the context of the drawings that constitute the claims.

When assessing whether a patent is indefinite, "a court considers first and foremost intrinsic evidence, which includes the claim language, the specifications, and any prosecution history of the patent in evidence." *Eclectic Prods., supra*, at *8, 9 (citing *Young v. Lumenis*, 492 F.3d 1336, 1346 (Fed. Cir. 2007)). Courts also may consider extrinsic evidence, which is "evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises," but it has less evidentiary value. *Philips v. AWH Corp.*, 415 F.3d 1303, 1313, 1315 (Fed. Cir. 2005) (en banc).

In general, indefiniteness is a question of law that is reviewed *de novo*, subject to a determination of underlying facts. *See Akzo Nobel Coatings, Inc. v. Dow Chem. Co.*, 811 F.3d 1334, 1343 (Fed. Cir. 2016). Evaluation of the intrinsic evidence is a legal issue reviewed *de novo*, whereas evaluation of extrinsic

evidence (such as expert testimony) is a factual issue reviewed under the clearly erroneous standard (court), *see UltimatePointer, LLC v. Nintendo Co.*, 816 F.3d 816, 826 (Fed. Cir. 2016), or under the substantial evidence rule (jury). *See BJ Services Co. v. Halliburton Energy Services*, 338 F.3d 1368, 1371, 1372. In a design patent case, “a finding of indefiniteness would equal a finding of lack of enablement.” *Weber- Stephen Products LLC v. Sears Holding Corporation*, No. 13 C 01686, *52 (N.D. Ill., December 22, 2015).

Although the test for indefiniteness requires the Court to evaluate definiteness from the perspective of someone skilled in the relevant art, sometimes what is understood by a person of skill in the art "may be readily apparent even to lay judges", *Phillips v. Awh Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005), which obviates the need for expert testimony. *See Times Three Clothier, LLC v. Spanx, Inc.*, 2014 WL 1688130, at *7 (S.D.N.Y. Apr. 29, 2014) (Court ruled design patents indefinite without need for experts); *Eclectic Prods.*, *supra*. (Court ruled design patent fatally indefinite based on intrinsic evidence only).

C. Argument and Authorities

1. JMOL is Appropriate based on the Intrinsic Evidence Alone

Indefiniteness can and should be decided in this case based on the intrinsic evidence alone as a matter of law. There is no legally sufficient evidentiary basis for a reasonable jury to find for FGTL on this issue. The intrinsic evidence

consists of the thirteen design patents-in-suit (Appx5745-5811) and their patent prosecution histories (DX68-80). The drawings in the design patents consist of orthographic line drawings in various views including perspective, front, back, side, top, and bottom. The drawings are simple and straightforward, and as shown at trial and in the expert report of Kaucher (Appx6437-6505), they contain major inconsistencies.

This clearly is one of those cases where what is understood by a person of skill in the art is readily apparent to lay judges, *Phillips, supra*, at 1314, which obviates the need for expert testimony. *See Times Three Clothier, supra*, at *7); *Eclectic Prods., supra*. Indeed, FGTL's representative Craig Metros agreed with the statement that a degree in automotive design and experience in automotive design was not necessary to understand the drawings and all that was needed was "learning about the basic process of descriptive drawings." (Appx8711).

The district court erred in not granting summary judgment and JMOL based on the intrinsic evidence for several reasons. First, the inconsistencies between the drawings render the design patents indefinite under the *Nautilus* "reasonable certainty" standard. *Nautilus* requires reasonable certainty in light of the subject matter. Since the subject matter consists of drawings that are simple and straightforward, there is no reasonable excuse for the drawings not to be consistent with one another. An analysis of the intrinsic evidence alone reveals that the

inconsistencies create such uncertainty that the scope of the claims cannot be known to a reasonable certainty. This argument applies to all thirteen design patents-in-suit. If this Court does not hold these design patents indefinite, this Court will be encouraging the type of ambiguity that *Nautilus* prohibits. Design patentees will be encouraged to include drawings with inconsistencies to broaden their claims.

Second, when the patent claims are properly construed, the inconsistencies between the drawings and the written descriptions render the design patents indefinite under the *Nautilus* “reasonable certainty” standard. In *Eclectic Products, supra*, the court held that a conflict between the patent's verbal and visual descriptions created uncertainty about the claim's meaning. Based on this reasoning and an application of the *Nautilus standard*, at a minimum the following design patents are indefinite: ‘552 (Figure 4 description conflicts with drawing) (Appx5745-5753); ‘717 (Figure 4 description conflicts with drawing) (Appx5796-5798); ‘448 (Figure 2 description conflicts with drawing (Appx5784-5785); Figure 3 description conflicts with drawing) (Appx5784-5786).

Third, in the event a properly applied *Nautilus* standard requires that the designs must be considered as a whole, the inconsistencies are such that the test is satisfied. This argument is applicable to all thirteen design patents-in-suit.

Fourth, in the event the *Maatita* test is applied to a design patent with multiple drawings, the degree of inconsistency is satisfied. That is because, as explained above, the ordinary observer purchaser of the repair parts is highly discerning and the inconsistencies would make a difference in the infringement analysis. In the event this Court believes the *Maatita* test should be applied and does not grant JMOL or summary judgment on that issue, this Court should reverse and remand for additional discovery and retrial applying the correct standard.

2. JMOL is Appropriate based on the Extrinsic Evidence

Analysis of the extrinsic evidence also indicates that all patents-in-suit are indefinite and that there is no legally sufficient evidentiary basis for a reasonable jury to find for FGTL on this issue. Kaucher was qualified as a person of ordinary skill in the art (Appx11063-11073) (24:25-34:1) and he testified that he considered himself to be one skilled in the art. (Appx11077) (38:2-4). When Kaucher was read verbatim the indefiniteness test from *Nautilus*, Kaucher testified he understood the test and would apply it. (Appx11076-11077) (37:4-38:7). FGTL failed to present its own expert on indefiniteness.

Kaucher's testimony first addressed the issue of subject matter in the *Nautilus* test. Kaucher described orthographic drawing techniques (Appx11074-11075) (35:13-36:24), he described what apparent inconsistencies could be explained by perspective (Appx11079) (40:4-22), what inconsistencies could be

considered minor drawing errors (Appx11079-11080) (40:23-41:14), and he explained how easy the inconsistencies would be to correct. (Appx11080-11081) (41:24-42:7). Although Kaucher is not a patent attorney (Appx11076) (37:2-3), Kaucher testified he understood that “solid line means claimed and broken line means unclaimed.” (Appx11078) (39:1-7). Kaucher testified that when he applied the *Nautilus* “reasonable certainty” test to the design patents-in-suit, all the design patents were indefinite due to the inconsistencies,⁸ as follows: (All referenced page numbers regarding inconsistencies can be found on the top right of the appendix pages within the appendix page ranges Appx11080-11126).

Pat.	Description	Exh.	Testimony Inconsistent	Opinion Indefiniteness
‘065	M Headlamp	DX21	41:15-44:5	44:6-19 (Appx11083)*
‘223	M Fender	DX18	44:20-46:20	46:21-47:17 (Appx11085-11086)*
‘551	M Hood	DX19	47:20-49:12	49:13-20 (Appx11088)*
‘552	F Headlamp	DX9	49:21-51:23	61:19-62:3 (Appx11100-11101)*
‘448	M Taillamp	DX20	53:11-55:2	55:3-12 (Appx11094)*
‘753	F Hood	DX10	55:13-57:10	57:11-17 (Appx11096)*
‘615	F Mirror	DX11	57:18-61:5	61:6-62:3 (Appx11100-11101)*
‘890	F Grill	DX12	64:22-67:15	Inferred (Appx11103-11106)*
‘717	M Mirror	DX14	67:16-71:16	71:17-23 (Appx11110)*
‘969	M Rear Bu	DX15	71:24-77:17	77:18-78:6 (Appx11116-11117)*
‘970	M Rear Bu	DX16	78:7-80:6	Inferred (Appx11117-11119)*
‘162	M Front Bu	DX17	80:7-82:25	83:1-83:10 (Appx11122)*
‘444	M Front Bu	DX13	83:13-87:17	87:18-88:3 (Appx11126)*

⁸ Kaucher testified that he formed his opinions by reviewing and analyzing all the design patent drawings, the written descriptions, the patent prosecution histories, and applying the legal test from *Nautilus*. (Appx11127-11128) (88:4-89:6).

*Kaucher testified that the opinions he gave were consistent with the opinions in his report (Appx11128; 89:7-9), which for reference and demonstrative can be found at Appx6437-6505.

On cross-examination, Kaucher's testimony and opinions under the proper *Nautilus* test were not addressed or rebutted. Indeed, not a single cross-examination question included or referred to the reasonable certainty standard from *Nautilus*. Rather, FGTL's counsel asked generally "[a]nd in this case when you followed your process as a reasonable designer, you could understand the designs that were presented in each of the four design patents. Right?" to which Kaucher responded "That's correct." (Appx11194) (155:7-10). The phrase "understand the designs" in the question was not specifically defined or referred to by counsel as being equivalent to the objective *Nautilus* test of informing those skilled in the art "about the scope of the invention with reasonable certainty."⁹ Indeed, during cross examination, it was clear that Kaucher understood the phrase "understand the design" and "understand the claimed design" to mean to understand the design in the broadest possible way, i.e., that a particular patent was directed toward a grill, a fender, etc. For example, the cross-examination question was asked "[i]f the examiner at the Patent Office *didn't understand what the claim design was* ... how could they compare it to the prior art to determine whether it was patentable?" to

⁹ There were two problems with this question. First, the standard was not properly defined. Second, the question was asked subjectively and not objectively.

which Kaucher answered “I guess they couldn’t. If they didn’t know it was a grille, they wouldn’t know what to compare it to.” (Appx11197) (158:19-25) (emphasis added).

Finally, Kaucher testified that as he went through his testimony on direct examination, he considered all the drawings and pointed out major inconsistencies in all the drawings. (Appx11251-11252) (212:24-213:5). Kaucher testified that on all of those, as a designer of ordinary skill in the art, if he had received those drawings, he would not be able to make any of the parts without more clarification. (Appx11252) (213:6-11). Kaucher testified that he would send the drawings back to the person who did it to say, you’ve got to clear this up, there’s an inconsistency here. (Appx11252) (213:12-15). This testimony indicates that the design patents are not enabled under 35 U.S.C. 112 ¶1. FGTL did not cross examine Kaucher on this issue, did not rebut this testimony of lack of enablement, and did not offer any testimony that the patents were enabled. The design patents therefore are invalid as not being enabled as a matter of law and this testimony supports a finding of indefiniteness as well. *See In re Maatita, supra* at 1375.

3. Alternatively, a New Trial should be Granted

Alternatively, a New trial should be granted on the issue of indefiniteness and lack of enablement because the verdict is against the great weight of the evidence as discussed above. In deciding to grant a new trial, the Court “need not

take the view of the evidence most favorable to the verdict winner . . . but may weigh the evidence.” *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 270 (5th Cir. 1984).

4. The district court erred in not granting JMOL that the Sept. 28, 2011 Letter did not provide Actual Notice

Unless products are properly marked with a patent number, a patentee may not recover damages “except on proof that the infringer was notified of the infringement.” 35 U.S.C. § 287(a). There was no proof during trial that FGTL marked its products. Actual notice under section 287(a) requires “the affirmative communication of a specific charge of infringement by a specific accused product or device.” *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994) “Under this standard, general letters referring to the patent and including an admonishment not to infringe do not constitute actual notice.” *Minks v. Polaris Indus., Inc.*, 546 F.3d 1364, 1376 (Fed. Cir. 2008) (emphasis added); *see also Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 926 F.Supp.2d 1100, 1113–1114 (N.D. Cal. 2013) (actual notice requires identification of specific patents and the infringement of them by a specific product). “It is irrelevant ... whether the defendant knew of the patent or knew of his own infringement.” *Amsted, supra*, at 187. “The correct approach to determining notice under section 287 must focus on the action of the patentee, not the knowledge or understanding of the infringer.” *Id.*

The patentee has the burden of proving compliance with Section 287(a). *See Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1111 (Fed. Cir. 1996).

When a notice letter is based on a false assumption, there is lack of actual notice as a matter of law. *Fujitsu Limited v. Netgear, Inc.*, 07cv710 (W.D. Wis. Sept. 18, 2009), *aff'd in part, rev'd in part on other grounds*, 620 F.3d 1321 (Fed. Cir. 2010). Further, there is no actual notice as a matter of law when a large number of patents are involved in the notice and plaintiffs failed to identify which patents were relevant. *Toshiba Corp. v. Imation Corp.*, 990 F. Supp. 2d 882, 901 (W.D. Wis., 2013)

The September 28, 2011 letter does not provide actual notice because it does not make a specific charge of infringement of an identified patent by a specific part. The letter states “[o]ur investigations have uncovered that your company is selling components for Ford vehicles that may infringe one or more of Ford's US patents.” (Appx5715). The letter then states “[a]ttachment A of this letter are receipts of articles purchased from your company,” which does identify specific parts, but the next sentence states “[t]hese items are protected by Ford patents,” which does not identify specific patents. *Id.* The letter then states “[a]ttachment B of this letter is a list of patented parts” and “I have included both the Ford and Aftermarket Part Numbers to assist you in indentifying (sic) the infringing products.” *Id.*

Contrary to the statement in the letter, the table in Attachment B does not contain Ford part numbers. Further, neither the letter nor the table expressly states or indicates that a part identified by a part number on a row is to be considered an infringement of the patent number on the same row. That is an assumption that must be made, and that is a false assumption. (Appx5682-5689). For example, the first two rows of the table list the vehicle as Grand Marquis Mercury. (Appx5718). The patent number is D494114 and the application title is Vehicle Front Bumper. However, the LKQ Part Numbers are different in the two rows. It is FO1000455 in row one and FO1000518 in row two. (Appx5718). The documentary evidence and testimony established that part number FO1000455 and the drawings in design patent D494114 are clearly different in appearance. (Appx5683, Appx7813-7814). The evidence also showed this to be true for other part numbers and patents located on the same row in Exhibit B, including the accused Mustang Fender and F-150 Hood. (Appx5684-5688). Therefore, it is not reasonable to infer, assume, or conclude that the association of the patent numbers with the part numbers in each row means that FGTL is affirmatively communicating a specific charge of infringement of an identified patent by a specific accused product. Indeed, review of the evidence indicates that is a false assumption. Since it is a false assumption, the letter and accompanying table does not provide actual notice as a matter of law and JMOL is appropriate on this issue. The falsity of the assumption can be

demonstrated definitely through mathematical principles. (Appx12858-12859). Finally, although there was testimony at trial concerning the understanding of Appellants with regard to Partslink numbers, that is not relevant to whether the September 28, 2011 letter provide actual notice because “[t]he correct approach to determining notice under section 287 must focus on the action of the patentee, not the knowledge or understanding of the infringer.” *Amsted, supra*, at 187.

Alternatively, a New trial should be granted on the issue of actual notice because the verdict is against the great weight of the evidence as discussed above.

5. The district court erred in granting summary judgment on the issue of right of repair and abused its discretion in denying Appellant’s motion for summary judgment on right of repair as moot.

The district court erred in granting summary judgment concerning right to repair. When the proper test is applied, at a minimum a fact issue exists. In *ABPA v. FGTL*, 2018-1613, *17 (Fed. Cir. July 11, 2019) this Court addressed doctrine of repair for design patents, rejected an embodiment test, and purported to use a claiming test.¹⁰ The claiming test is unworkable and suffers from the same type defects as the point of novelty test abandoned by this Court in *Egyptian Goddess*.

¹⁰ In *ABPA*, the patent title was not considered when determining article of manufacture for repair analysis. This is proper because (1) a title does not define the scope of a design patent claim as it can be broader than the claim and (2) the title of a design patent is not dispositive when determining what the article of manufacture is for purposes of section 289. When *Apple v. Samsung* was before the Supreme Court, in the United States’ amicus brief that advocated use of the four-part test now being used for determining article of manufacture under Section

When deciding between permissible repair or impermissible replacement, it is necessary to determine the article of manufacture being repaired/replaced. In *ABPA, supra*, this Court stated without supporting authority that “to determine what repair rights apply, we look to what Ford actually claimed.” *Id.* at *17. But that test quickly becomes unworkable in design patent cases involving portion claims that do not match up precisely with components or subcomponents. For example, in a design patent that claims a portion of a hood, headlamp, and fender, what is the article of manufacture for doctrine of repair? And if just the hood or headlamp or fender is replaced, is it repair or replacement?

Given that portion claims are allowed for design patents, *see In re Zahn*, 617 F.2d 261, 267 (CCPA 1980), there are potentially unlimited ways that multi-component articles can be claimed. In the vehicle example, claims can include portions of a vehicle, portions of components, portions of sub-components, and combinations of portions of the vehicle, components, and sub-components. The act of repair/reconstruction can include repair/replacing any one or more of the

289, the United States stated “the factfinder should not treat the patent's designation of the article as conclusive” out of a concern that the patentee could manipulate the result through its characterization of the article in the title.” 2016 U.S. S. Ct. Briefs LEXIS 2322, *46 (June 8, 2016). The title likewise should not be deemed conclusive here when considering the article of manufacture for doctrine of repair purposes due to the ease with which the result could be manipulated.

component(s) or sub-component(s) of which portions or combinations of portions were claimed.¹¹

In *Egyptian Goddess*, this Court stated that the point of novelty test was easy to apply in simple cases but more difficult to apply “where the claimed design has numerous features that can be considered points of novelty, or where multiple prior art references are in issue and the claimed design consists of a combination of features, each of which could be found in one or more of the prior art designs.” *Id.* at 671. After twenty-five years, the test was abandoned. Unless this Court likewise abandons its new claiming test, Appellants respectfully submit this Court will need to say the same thing about the claiming test after additional cases demonstrate its flaws – easy to apply in simple cases, but difficult and unpredictable in complex cases.¹²

An alternative approach is the embodiment approach. Under this approach, if the article sold embodies the claimed design, then it is the article that is used for

¹¹ An additional problem is that determining the article of manufacture likely will require consideration of how the article is manufactured and whether the article can be replaced without also replacing another component. These factors are independent of claiming, further indicating a claiming approach is unworkable.

¹² This problem does not exist in utility patent law because under statute, the claim is of an article of manufacture, not for an article of manufacture. Therefore, there is no ambiguity as to what the article of manufacture is. For example, in *Aiken v. Manchester Print Works*, 1 F. Cas. 245 (C.C.D.N.H. 1865), it was the actual needle that was claimed and so there was no question but that the article of manufacture was the needle. That is not the case in design patent law, and that is why *Aiken* is not relevant to this case.

the repair analysis. Since the F-150 is the article sold and the claimed designs are embodied in the F-150, the repair doctrine applies. The embodiment approach has advantages in that it is simple, predictable, consistent with the approach used for method patents, *see Quanta Computer Inc. v. LG Electronics, Inc.*, 553 U.S. 617 (2008),¹³ and is consistent with the principles of implied license, which underlie the doctrine of repair (see discussion below).

Another approach is a multi-factor test similar to that being used for determining the article in the section 289 context. *See Apple, Inc. v. Samsung Electronics Co. Ltd.*, 11-cv-01846 (N.D.Cal., October 22, 2017). The advantage of a multi-factor test is that it is flexible and can take into account all the factors that determine whether an implied license exists, which is the underlying basis of the right of repair. The scope of an implied license “must be based on what the parties reasonably intended as to the scope of the implied license based on the circumstances of the sale.” *See Carborundum Co. v. Molten Metal Equip. Innovs.*, 72 F.3d 872, 878 (Fed. Cir. 1995). Relevant factors should include, for example, the article sold, the reasonable expectations of the parties, whether the article sold is marked with patent numbers, what is claimed, and how the article and its component parts are manufactured and sold.

¹³ In *Quanta, supra*, the Supreme Court stated “[i]t is true that a patented method may not be sold in the same way as an article or device, but methods nonetheless may be ‘embodied’ in a product, the sale of which exhausts patent rights.” *Id.* at S.Ct. 2117.

The F-150 and Mustang are sold as complete vehicles and there is no record evidence that Ford places any restrictions on the implied license granted. There is no evidence that Ford marks the F-150 and Mustang component parts with patent numbers. Therefore, when a customer purchases an F-150 or Mustang, they have no notice, actual or constructive, that the hood and headlamp are separately patented. Based on this evidence, the reasonable expectation is that a purchaser of the F-150 or Mustang receives an implied license to repair the F-150 or Mustang free from any patents claiming portions of the designs. At a minimum, there is a question of fact in that regard.

Finally, when the right to repair is involved, it necessarily includes the right to purchase repair parts from others. *See Kendall Co. v. Progressive Medical Technology, Inc.*, 85 F.3d 1570, 1573 (Fed. Cir. 1996).

6. The district court erred in granting summary judgment on the issue of functionality and abused its discretion in denying Appellant's motion for summary judgment on functionality as moot.

At a minimum, a question of fact exists as to whether the patents in suit are invalid as functional.¹⁴ First, in *ABPA* at *6 this Court made clear that the “alternative designs” factor no longer is case dispositive and that other factors can be considered. One such factor is whether the design is the “best design,” which is

¹⁴ To be clear, all comparisons between the claimed designs and accused parts should be understood as being based on FGTL's allegations that the accused parts infringe the claimed designs and not upon a concession by Appellants that infringement is occurring.

one of the five factors set forth in *Berry Sterling Corp. v. Pescor Plastics, Inc.*, 122 F.3d 1452, 1456 (Fed. Cir. 1997). There is no requirement that all the *Berry Sterling* factors be considered and a single factor may be dispositive. See *Dorman, supra*, at 693. All patents-in-suit claim designs for separate parts or portions of separate parts, the only purpose for which is to be used as repair/replacement parts to return a damaged vehicle back to its original condition and appearance. (Appx1127; Appx1014-1016). A fact issue exists as to whether the patented designs are the “best designs” to use for such repair as further discussed below.

Another alternative test is whether the design “is essential to the use or purpose of the article or if it affects the cost or quality of the article.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850 n. 10 (1982). Here, the purpose of the design is to serve as a repair/replacement design. (Appx1127; Appx1014-1016). Further, parts with the claimed designs (1) can be ordered by number, which increases efficiency, reduces purchasing time spent by the purchaser and supplier, and reduces costs, ex., (Appx1033), (2) since they are standard repair parts can be ordered and provided in bulk, which decreases costs and increases the probability of discounts, (3) in the case where multiple parts are needed for repair of a damaged vehicle (i.e., headlamp, fender, hood, bumper, mirror), all the parts with the claimed designs can be obtained from a sole source, which decreases costs and increases the probability of discounts, (Appx1015-1018; Appx10216-10219)

(4) and will necessarily be paid for by an insurance policy that requires the vehicle to be returned to its original condition, (Appx1016).

Second, since the claimed designs are embodied in parts being used for repair/replacement, the complementary functionality doctrine from *Best Lock Corp. v. Ilco Unican Corp.*, 94 F.3d 1563 (Fed. Cir. 1996) applies. Under this doctrine, the time to analyze whether a design is ornamental is *after* the designs are created, i.e., when the purchaser is buying a repair/replacement part and not when the vehicle is originally purchased, and when the sole issue is whether the subject design is the only design that can fulfill the complementary function. If there is only one design that can do so, then the design is not ornamental because there are no conscious design choices to be made either by the inventor or by the consumer.

Under complementary functionality, it does not matter whether the complementary function is due to aesthetics, shape, or mechanics, because the ultimate issue when determining ornamentality is whether the design is consciously created for the purposes of ornamenting. *See* MPEP 1504.01(c) (“It is clear that the ornamentality of the article must be the result of a conscious act by the inventor....”) (emphasis added); *see also In re Carletti*, 328 F.2d 1020, 1022 (CCPA 1964). A design created for the purpose of fulfilling a complementary function is not created for the purpose or ornamenting. Although the *original* design may have been created for the purposes of ornamenting and may be patent

eligible if properly claimed, when the design is not claimed as a combination but rather as a complement, it may be invalid under complementary functionality as explained by this Court in the *Best Lock* case.

When *Best Lock* is understood in terms of complementary functionality, it is consistent with the policies underlying design patent law. If there is not a conscious design choice made, then the underlying purposes of design patent are not served, which are “To Promote the Progress of Science and the useful Arts.” U.S. Constitution, Article 1, Section 8, Clause 8. There are no conscious design choices made by the inventor when producing a replacement part with a complementary design because all design choices were made when the complementary designs originally were created. And a purchaser is not making the same type of purchasing design choice they made when they originally purchased the F-150 or the Mustang. The purchaser simply is keeping the original design. When the holding of the *Best Lock* case is applied to this case, the subject designs are invalid as non-ornamental.

7. The judgment of damages must be reversed and vacated.

In addition to being speculative, excessive, and based on erroneous rulings (Appx10519-10520) and an erroneous jury instruction (Appx10507-10510), since the summary judgment of infringement must be reversed, the judgment of damages must be vacated. See *On Demand Machine v. Ingram Industries*, 442 F.3d 1331,

1345 (Fed. Cir., 2006). Further, since the damages question was not apportioned by patent (Appx8608), reversal as to only one or more patent(s) on infringement will require vacation of the entire damages award.

8. The judgment regarding willful infringement must be reversed

In addition to not being supported by the evidence under the proper legal standard (Appx10212-10214), since the summary judgment of infringement must be reversed, the judgment of willful infringement also must be reversed. *See Cook Biotech Inc. v. Acell, Inc.*, 460 F.3d 1365, 1382 (Fed. Cir., 2006); *Integrated Tech. Corp. v. Rudolph Techs., Inc.*, 734 F.3d 1352, 1355 (Fed. Cir., 2013). Further, even if summary judgment is not reversed as to all patents-in-suit, the willful infringement finding must be reversed as to all because Appellants never had an opportunity to present its non-infringement arguments at trial, which potentially could influence the jury's verdict on willful infringement as to all the patents.

9. The Attorney Fee and Cost award must be vacated

In addition to the exceptional case finding and attorney award being an abuse of discretion based on the evidence and Appellants' strong litigation positions (Appx13349-13373), since the judgment of willful infringement must be reversed or vacated, the award of attorney fees and costs based in part on such holding must be reversed as well. *See S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 201 (Fed. Cir., 1986); *Integrated Tech.*, *supra*, at 1361.

And although the award was based in part on putative litigation misconduct, if attorney fees are awarded based on litigation misconduct alone, the amount of the award should be related to the extent of the misconduct. *See Read Corp. v. Portec, Inc.*, 970 F.2d 816, 831 (Fed. Cir. 1992). Unless the litigation misconduct is pervasive enough to infect the entire litigation, then a full award of fees is not justified. *See In re Rembrandt Techs. LP Patent Litig.*, No. 17-1784, 2018 WL 3862644 (Fed. Cir. Aug. 15, 2018) at *18-19. Even if litigation misconduct occurred, which is respectfully denied, it was not pervasive enough to infect the entire litigation.

10. The Permanent Injunction must be vacated

In addition to the reason that FGTL will not be irreparably harmed, money damages are adequate to compensate FGTL, and it is not in the public interest (13327-13341), since the summary judgment of infringement must be reversed, the permanent injunction (Appx59-60) must be vacated. *See International Rectifier Corp. v. Ixys Corp.*, 361 F.3d 1363, 1378 (Fed. Cir., 2004).

11. The District Court abused its discretion in failing to clarify the scheduling order, failing to grant additional discovery, and failing to allow a legal opinion

The scheduling order [207] required clarification and prevented Appellants from asserting substantive defensive positions, from conducting needed discovery, and from timely disclosing a legal non-infringement and invalidity opinion. ([208,

211]; Appx13803-13836). The district court abused its discretion in failing to resolve the conflicts in a timely manner, in failing to allow Appellants needed discovery, and in failing to allow use of the legal opinion. In the event of remand, these clarifications should be provided and the requested discovery and legal opinion allowed.

12. The District Court abused its discretion in denying the motion for continuance and additional discovery based on *In re Maatita*

In re Maatita, supra, changed the law regarding indefiniteness and created a need for additional discovery on the issue of the ordinary observer test. Appellants moved for a continuance and additional discovery (Appx6604-6624;[257]; Appx8408-8419[292]), which the district court denied. Appx73-74;[306]). If this Court agrees that the holding in *In re Maatita* applies in this case and this case is remanded, the additional discovery requested should be allowed.

13. The district court abused its discretion in not allowing the damage expert to rely on certain evidence and offer an opinion on damages

The district court prevented Appellants' damages expert from relying on certain evidence and prevented the damages expert from offering an opinion on damages. This was an abuse of discretion because the failure to timely produce the evidence was unintentional and was caused by confusion in search techniques, the two different NWI data bases not properly linking with each other, and confusion caused by Ford Global identifying the steel and aluminum hoods with different

Partslink numbers, identifying the two different Partslink numbers, and then dropping one of the hood patents from the case. (Appx7809-7814; Appx10519-10520). The evidence also showed that when NWI discovered the confusion, it performed searches using different search techniques and produced the requested documentation. *Id.* The evidence also showed that NWI timely supplemented its production with information that could not have been produced before the Court ordered deadline because the sales had not occurred before the deadline. *Id.* If this case is remanded, Appellants' expert should be entitled to rely upon the excluded evidence and to offer an opinion on damages at trial.

14. The district court erred in allowing the jury instruction on spoliation

The jury instruction on spoliation (Appx8606) was not supported by the evidence for the reasons stated in the previous section and because there was no evidence that NWI destroyed evidence to hide sales of the accused parts. Further, the jury instruction was error because it required ("should be"), rather than permitted (may), the jury to infer certain facts. *See Eaton Corp. v. Appliance Valves Corp.*, 790 F.2d 874, 878 (Fed. Cir. 1986). The instruction was particularly harmful because it was included in the section on damages that included not only instructions on calculating damages, but also instructions on how to determine actual notice and article of manufacture. (Appx8606-8607). The jury could, and likely did, follow the instruction for all three issues.

15. The district court abused its discretion in failing to alter or amend the judgment.

The final judgment is against all Appellants, jointly and severally. (Appx59). Since the jury did not award damages against ALP or UCC (Appx8608), these two defendants should not be jointly and severally liable for damages or interest. Further, since willful infringement was not found against ALP or UCC (Appx8603-8604) and willful infringement was integral to the district court's rationale for a finding of exceptional case and attorney fees, ALP and UCC should not be held liable or jointly and severally liable for attorney fees.

CONCLUSION AND RELIEF SOUGHT

Based on the arguments and authorities set forth above, Appellants request this Court to grant the relief requested above by reversing and rendering, reversing and remanding, and/or vacating the judgments, orders, and permanent injunction appealed from, and to grant such other and further relief to which Appellants may show themselves justly entitled.

Respectfully submitted October 30, 2019.

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ADDENDUM

Note: Three Protective Orders are at Appx1-58.

1.	Final Judgment	Appx59-60
2.	Opinion and Order	Appx61-70
3.	Order Claim Construction	Appx71
4.	Order Functionality and Patent Exhaustion	Appx72
5.	Order Continuance	Appx73-74
6.	Order Summary Judgment	Appx75-87
7.	Order Reconsideration	Appx88
8.	Order Clarification.....	Appx90
9.	Judgment	Appx91-95
10.	Order Alter or Amend	Appx96-97

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FORD GLOBAL TECHNOLOGIES, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:17-CV-3201-N
	§	
NEW WORLD INTERNATIONAL, INC.,	§	
<i>et al.</i> ,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

By separate Order of this same date, the Court granted and denied in part Ford Global Technologies, LLC's ("Ford") motions for attorneys' fees and costs and for injunctive relief, and denied Defendants, New World International, Inc., Auto Lighthouse Plus, LLC, and United Commerce Centers, Inc.'s motions for judgment as a matter of law and for new trial.

It is ordered that Ford have judgment against Defendants, jointly and severally, for (1) \$493,057.00; (2) \$75,000.00 in stipulated prejudgment interest; (3) \$41,721.60 in additional recovery; (4) \$2,108,672.50 for Ford's reasonable attorneys' fees; and (5) postjudgment interest at the rate of 2.41%, compounded annually from the date of this final judgment until paid.

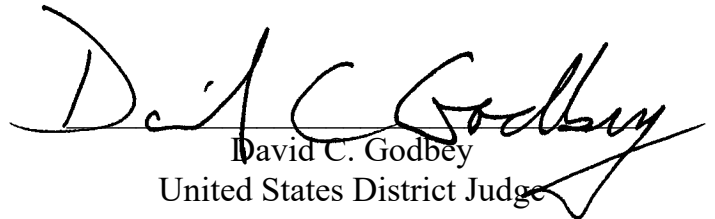
The Court also enjoins New World International, Inc. and any subsidiaries, parent corporations, and affiliates, together with their officers, agents, and employees, and all those acting in active concert with them who have knowledge of this judgment, from continuing to infringe the following Ford design patents for the remaining life of each patent: (1)

D510,551 (Mustang Hood); (2) D508,223 (Mustang Fender); (3) D582,065 (Mustang Headlamp); and (4) D539,448 (Mustang Taillamp).

Court costs are taxed against Defendants. All relief not expressly granted is denied.

This is a final judgment.

Signed April 9, 2019.


David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FORD GLOBAL TECHNOLOGIES, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:17-CV-3201-N
	§	
NEW WORLD INTERNATIONAL, INC.,	§	
<i>et al.</i> ,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

This Order addresses Ford Global Technologies, LLC's ("Ford") motions for attorneys' fees and costs, and for injunctive relief[350], [352], as well as Defendants' ("New World") motions for judgment as a matter of law and for new trial. The Court grants and denies the motions in part, as set forth below.

I. ORIGINS OF THE DISPUTE

This case involves New World's copying of thirteen of Ford's design patents. The Court previously granted Ford's motion for summary judgment, finding infringement as a matter of law. The case was subsequently tried to a jury, who found willful infringement and awarded damages in the amount of \$493,057.00 to Ford.

II. THE COURT GRANTS IN PART FORD'S MOTION FOR ATTORNEYS' FEES

The Court grants Ford's motion for attorneys' fees and costs, but denies Ford's motion with respect to expert fees and any upward adjustment of the lodestar amount.

A. Legal Standard

In exceptional cases, a district court may award reasonable attorneys' fees to the prevailing party. 35 U.S.C. § 285. Reasonable attorneys' fees include those expenses incurred in the preparation for and performances of legal services related to the case and nontaxable costs. *Maxwell v. Angel-Etts of Cal., Inc.*, 53 F. App'x 561, 569 (Fed. Cir. 2002). In addition, a district court has wide discretion whether to award costs under Federal Rule of Civil Procedure 54(d). *Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471 (5th Cir. 2006). But if a district court does not award costs, it must state its reasons. *Id.*

An exceptional case "stands out from others with respect to the substantive strength of a party's litigation 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). A case brought in subjective bad faith or that makes especially meritless claims is exceptional and warrants a fee award. *Id.* District courts determine whether a given case is exceptional on a case-by-case basis and in light of the totality of the circumstances. *Id.* Factors to be considered include frivolousness, motivation, and objective unreasonableness of a case's factual or legal components. *Id.* at 554 n.6. Litigants seeking fees must show the case is exceptional by a preponderance of the evidence. *Id.* at 557.

Section 285, however, does not authorize an award of expert fees. *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 23 F.3d 374, 376 (Fed. Cir. 1994). Instead, a district court has inherent authority to impose sanctions in the form of reasonable expert fees in excess of what

is made available by statute. *MarcTec, LLC v. Johnson & Johnson*, 664 F.3d 907, 921 (Fed. Cir. 2012). Only where a court finds fraud or bad faith, whereby the “very temple of justice has been defiled,” may the court use its inherent authority to impose sanctions. *Id.* (quoting *Amsted*, 23 F.3d at 378). Thus, not every case that qualifies as exceptional under Section 285 also warrants sanctions. *Id.*

B. The Court Holds that This Case Is Exceptional

The Court holds that this case is exceptional and awards reasonable attorneys’ fees to Ford. The jury found that New World willfully infringed all thirteen of Ford’s design patents by digitally copying Ford’s original equipment manufacturer (“OEM”) parts and selling them. Further, the testimony of James Ma and Patricia Zimmerman, two former vice presidents at New World, showed that New World altered sales records to conceal its infringement. Ford’s App. in Support of Mot. for Attys’ Fees (“APX”), APX 137–38, 141–42 [354]. New World additionally produced inaccurate sales records during the course of discovery and misrepresented to Ford on multiple occasions that it would stop selling the copied parts. Finally, New World filed multiple excessive motions, including motions to dismiss, for clarification, and for reconsideration that unnecessarily prolonged litigation. Accordingly, the Court holds that this case is exceptional and grants Ford’s motion with respect to attorneys’ fees and costs.

C. The Court Denies Ford's Motion with Respect to Expert Fees

New World's conduct does not, however, amount to fraud or abuse of the judicial process. The inherent power to sanction is typically reserved for egregious rather than simply inappropriate conduct. *Amsted*, 23 F.3d at 379. The Court does not find New World's conduct so egregious to warrant expert fees.

D. The Court Awards \$2,108,672.50 in Attorneys' Fees to Ford

Ford seeks a total of \$2,108,672.50 in attorneys' fees incurred during the four-year period it spent litigating this case. Ford additionally requests that the Court increase the lodestar amount by \$489,915.94 pursuant to the *Johnson* factors. After reviewing Ford's evidence, including invoices and billing records, as well as New World's objections, the Court awards Ford \$2,108,672.50 in attorneys' fees, but denies Ford's request for an upward adjustment of the lodestar.

To determine a reasonable fee award, courts calculate a "lodestar" amount by multiplying a reasonable billing rate by the number of hours reasonably spent litigating the successful claim. *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 284 (5th Cir. 2008); *see also Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551–52 (2010). This calculation, however, excludes hours spent on "excessive, redundant, or otherwise unnecessary work" and on nonprevailing claims unrelated to successful claims. *Hensley v. Eckerhart*, 461 U.S. 424, 434–35 (1983). The Court may then increase or decrease the lodestar amount

based on the factors enumerated in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974).¹

Ford presented sufficient evidence that its counsel, Brooks Kushman P.C. and Forrest, Burg, & Smith, LLC (local counsel), spent a reasonable number of hours (5987) litigating this case over the past four years. APX 271–89 (Declaration of M Lorelli), APX 318–705 (billing invoices). Ford’s billing rates are likewise reasonable because they are below the average prevailing hourly rates and are also all within the American Intellectual Property Law Association (“AIPLA”) average rates. *In re Dahlgren Int’l, Inc.*, 811 F. Supp. 1182, 1185 (N.D. Tex. Oct. 29, 1992) (citing *Mathis v. Spears*, 857 F.2d 794, 755–56 (Fed. Cir. 1988)) (recognizing the AIPLA “as a valid source in assessing customary fee in patent cases”). New World complains only generally about Ford’s calculation of attorneys’ fees and does not point to any specific flaws in Ford’s calculation or reference any specific time entries or invoices showing excessive or duplicative work. Ford additionally discounted almost 600 hours for time spent on clerical duties and for motions and submissions that were either not filed or for which Ford did not prevail. APX 284.

¹ The *Johnson* factors are: (1) the time and labor required to litigate the case; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal services properly; (4) whether taking the case precluded the attorney from other employment; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the attorney-client relationship; and (12) awards made in similar cases.

Ford also requests an upward adjustment of the lodestar to account for two separate declaratory judgment actions New World filed. The Court, however, does not find that the *Johnson* factors warrant an upward adjustment on this basis. Accordingly, the Court determines the lodestar to be \$2,108,672.50.

III. THE COURT GRANTS FORD’S MOTION FOR INJUNCTION

Ford seeks a permanent injunction against New World enjoining New World and related entities from continuing to willfully infringe eight (8) of Ford’s design patents that are not expired and still effective. New World notes, however, that as of February 2019, only four of the patents in suit are still unexpired.² Ford additionally seeks New World’s profits for sales related to the eight non-expired patents made between June 22, 2018 (the date of the expert reports) and the date of the permanent injunction. Additionally, Ford seeks New World’s profits for sales related to the five remaining Ford design patents made between June 22, 2018 and the respective expiration date for each patent. Finally, Ford seeks pre and postjudgment interest. The Court grants Ford’s motion, but modifies the permanent injunction to only include the four remaining unexpired patents.

A. Legal Standard

The Patent Act permits the Court to “grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. § 283. “According to well-established principles

² The four patents are: (1) D510,551 (Mustang Hood); (2) D508,223 (Mustang Fender); (3) D582,065 (Mustang Headlamp); and (4) D539,448 (Mustang Taillamp).

of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Moreover, “the decision to grant or deny injunctive relief is an act of equitable discretion” by the district court. *Id.*

B. The Court Grants Ford’s Motion for Permanent Injunction

1. Ford Has Demonstrated Irreparable Injury — Ford and New World are direct competitors. *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 702 F.3d 1351, 1363 (Fed. Cir. 2012) (“Direct competition in the same market is certainly one factor suggesting strongly the potential for irreparable harm without enforcement of the right to exclude.”); *Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1171 (Fed. Cir. 2014) (“[The parties] are direct competitors selling competing products in this market. Thus, the record shows a probability for irreparable harm.”). New World’s parts are digital copies of Ford’s OEM parts, but are sold at a far lower price, which allows New World to undercut Ford’s pricing by trading off Ford’s work. Moreover, Ford had demonstrated that New World’s aftermarket products are of inferior quality and that Ford’s reputation is harmed when customers attribute the low quality of New World’s products to Ford. New World’s willful infringement has forced Ford to compete against its own innovative designs and against

products of lesser quality and price. The Court holds that Ford has demonstrated irreparable injury.

2. *Money Damages are Inadequate* — While money damages may be adequate for New World's past infringement, it is no so for future infringement. *Visto Corp. v. Seven Networks, Inc.*, 2006 WL 3741891, at *4 (E.D. Tex. Dec. 19, 2006). The record supports a continued threat of infringement by New World, as well as a willingness to alter sales records. Under the facts of this case, an injunction against continued use of Ford's products is the only proper remedy to prevent future infringement .

3. *The Balance of Hardships Favors Ford* — The Court agrees with Ford that if an injunction is not entered Ford will suffer loss of sales, reputational harm, and the loss of the right to exclude. Conversely, the injunction would only require New World to cease infringing sales for a limited time period, as required by law.

4. *The Public Interest Is Best Served by Issuing Injunctive Relief* — The Court agrees that the public interest will be served by issuing an injunction. Patent laws promote progress by incentivizing inventors through the right of exclusion. And enjoining the sale of the infringing products would not pose any threat to the public safety.

***C. The Court Grants Ford's Request for Recovery of Profits
and Pre and Postjudgment Interest***

Ford seeks an additional \$41,721.60 in profits New World made on infringing sales after June 22, 2018 through entry of the permanent injunction. This amount is consistent with the jury's adoption of Ryan Lamotta's forecast of infringing sales, and New World does

not specifically challenge this sum. Accordingly, the Court awards Ford an additional \$41,721.60.

The Court additionally grants Ford's request for pre and postjudgment interest. New World argues that prejudgment interest is unavailable. The Court disagrees. Ford requests prejudgment interest pursuant to 35 U.S.C. § 284, which permits the Court to award the claimant damages, together with "interest and costs as fixed by the court." New World does not specifically challenge Ford's request for postjudgment interest, other than to generally assert that New World believes Ford is not entitled to judgment at all. The Court therefore grants Ford's motion for pre and postjudgment interest.

IV. THE COURT DENIES NEW WORLD'S MOTIONS FOR JUDGMENT AS A MATTER OF LAW AND FOR NEW TRIAL

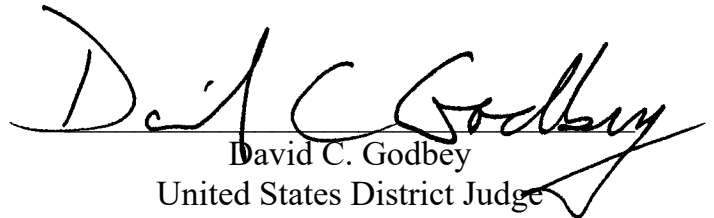
The Court denies New World's motions for judgment as a matter of law and for new trial. The Court rejects New World's arguments and holds that there is sufficient evidence to support the jury verdict.

CONCLUSION

The Court grants Ford's motion for attorneys' fees in the amount of \$2,108,672.50, but denies its request for expert fees and an upward judgment of the lodestar. The Court grants Ford's motion for injunction, but only with respect to the four remaining unexpired patents. The Court likewise grants Ford's requests for additional recovery of profits and pre and postjudgment interest. The Court also notes that the parties stipulated to an agreed

prejudgment interest amount of \$75,000.00. Finally, the Court denies New World's motions for judgment as a matter of law and for new trial.

Signed April 9, 2019.


David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FORD GLOBAL TECHNOLOGIES, LLC, §

Plaintiff, §

v. §

NEW WORLD INT'L, INC., *et al.*, §

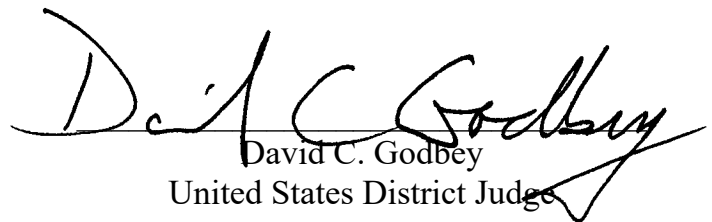
Defendants. §

Civil Action No. 3:17-CV-3201-N

ORDER

This Order addresses the parties' claim construction briefing. [144, 145, 148, 149]. Mindful of *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F3d 665, 679-80 (Fed. Cir. 2008) (en banc), in each instance the Court construes the claims of the design patents in suit as: the design as shown in the accompanying drawing(s). The Court will address the other issues raised by the briefs at such time as they come before the Court.

Signed December 12, 2017.


David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FORD GLOBAL TECHNOLOGIES, LLC, §

Plaintiff, §

v. §

NEW WORLD INTERNATIONAL, INC., §

et al., §

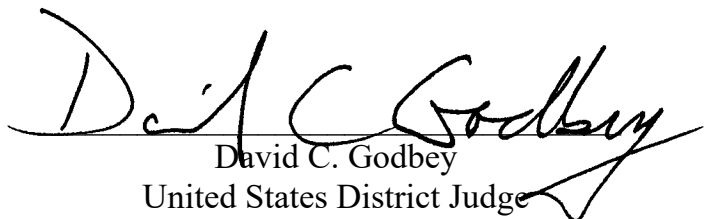
Defendants. §

Civil Action No. 17-CV-03201-N

ORDER

This Order addresses Plaintiff Ford Global Technologies, LLC's motion for summary judgment regarding functionality and patent exhaustion [99]. For the reasons set forth in *Automotive Body Parts Association v. Ford Global Technologies, LLC*, No. 2:15-CV-10137, 2018 WL 949869, at *4–12 (E.D. Mich. Feb. 20, 2018), the Court grants the motion. In light of this ruling, the Court denies as moot Defendants New World International, Inc.; Auto Lighthouse Plus, LLC; and United Commerce Centers, Inc.'s motion for leave to refile motion for partial summary judgment on the issues of functionality and patent exhaustion [168].

Signed March 12, 2018.


David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FORD GLOBAL TECHNOLOGIES, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:17-CV-3201-N
	§	
NEW WORLD INTERNATIONAL, INC.,	§	
<i>et al.</i> ,	§	
	§	
Defendants.	§	

ORDER

This Order addresses Defendants New World International, Inc., Auto Lighthouse Plus, LLC, and United Commerce Centers, Inc.’s (collectively, “New World”) Motion for Leave [257]. For the reasons set forth below, the Court denies the motion.

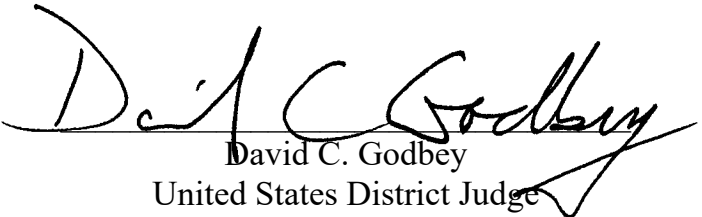
To modify a scheduling order, a party must demonstrate good cause and obtain the judge’s consent. Fed. R. Civ. P. 16. The movant must also establish good cause for a continuance. *Squyres v. Heico Cos., L.L.C.*, 782 F.3d 224, 237 (5th Cir. 2015). District judges have “discretion not to grant a continuance” and “power to control their dockets by refusing to give ineffective litigants a second chance to develop their case.” *S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 537 (5th Cir. 2003) (citations omitted).

New World fails to show good cause. In its motion, New World argues that the Federal Circuit fundamentally changed the test for design patent indefiniteness in *In re Maatita*, 2018 U.S. App. LEXIS 23188 (Fed. Cir. August 20, 2018). Mot. for Leave at 1. New World argues that in the design patent context, the *Maatita* case changed the law by

requiring those skilled in the art to view the design as would an ordinary observer. *Id.* at 2. New World alleges that this fundamental change constitutes good cause and that the Court should therefore grant a continuance from the current November 13, 2018 trial setting. New World also argues that this fundamental change requires a supplemental motion for summary judgment, a supplemental expert report, and additional discovery. *Id.* The Court disagrees.

The *Maatita* case involved a single patent figure that was alleged to be of uncertain scope. The Federal Circuit expressly distinguished the single figure issue it addressed from the inconsistencies in the drawings issue that New World has raised here. *In re Maatita*, 2018 U.S. App. LEXIS 23188, at *8 (“Here, we are not dealing with inconsistencies in the drawings, or inconsistencies between the drawings and the verbal description, but rather with a single representation of a design that is alleged to be of uncertain scope.”). New World does not demonstrate good cause for modifying the scheduling order. The Court therefore denies New World’s motion for leave in its entirety.

Signed October 24, 2018.


David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FORD GLOBAL TECHNOLOGIES, LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:17-CV-3201-N
	§	
NEW WORLD INTERNATIONAL, INC.,	§	
<i>et al.</i> ,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

This Order addresses Plaintiff Ford Global Technologies, LLC’s (“FGTL”) Motion for Partial Summary Judgment [227] and Defendants New World International, Inc., Auto Lighthouse Plus, LLC, and United Commerce Centers, Inc.’s (collectively, “New World”) Motion for Summary Judgment [215]. For the reasons set forth below, the Court grants FGTL’s motion and denies New World’s motion.

I. ORIGINS OF THE DISPUTE

FGTL filed this action alleging that New World infringes a total of thirteen (13) design patents. The Complaints were originally filed on January 29, 2015 in the Eastern District of Michigan. But the case was transferred to this Court in light of the Supreme Court ruling in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017). FGTL alleges that New World has infringed and is infringing each of the thirteen design patents in violation of 35 U.S.C. § 271. FGTL is a subsidiary of Ford Motor Company

(“Ford”); and FGTL owns and manages the intellectual property of Ford. New World is a distributor and marketer of aftermarket automotive parts and accessories. FGTL brought suit against New World for selling and offering for sale aftermarket parts copied from Ford’s original equipment designs, which FGTL alleges are covered by the thirteen design patents.

FGTL filed a motion for partial summary judgment on the issue of infringement alleging that there is no genuine issue of material fact that New World’s products: (1) are identical to Ford’s patented parts; (2) are substantially the same as the claimed design; (3) include the visually dominant aspects of the claimed designs as described by the experts; and (4) include the aspects of the claimed design that differ from the prior art. New World also filed a motion for summary for judgment on the issues of damages, patent invalidity, unenforceability, and noninfringement.

II. LEGAL STANDARDS

A. Summary Judgment Standard

Courts “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In making this determination, courts must view all evidence and draw all reasonable inferences in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The moving party bears the initial burden of informing the court of the basis for its belief that there is no genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When a party bears the burden of proof on an issue, she “must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in [her] favor.” *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). When the nonmovant bears the burden of proof, the movant may demonstrate entitlement to summary judgment either by (1) submitting evidence that negates the existence of an essential element of the nonmovant’s claim or affirmative defense, or (2) arguing that there is no evidence to support an essential element of the nonmovant’s claim or affirmative defense. *Celotex*, 477 U.S. at 322–25. Once the movant has made this showing, the burden shifts to the nonmovant to establish that there is a genuine issue of material fact so that a reasonable jury might return a verdict in her favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). Moreover, “[c]onclusory allegations, speculation, and unsubstantiated assertions” will not suffice to satisfy the nonmovant’s burden. *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). Indeed, factual controversies are resolved in favor of the nonmoving party “only when an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts.” *Olabisiomotosho v. City of Hous.*, 185 F.3d 521, 525 (5th Cir. 1999) (quoting *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995)).

B. Design Patent Infringement Standard

A design patent is infringed if an ordinary observer, when comparing the two designs in context of the prior art, would think that the accused design is substantially the same as the patented design. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 678 (Fed. Cir.

2008) (*en banc*). The test considers “both the perspective of the ordinary observer and the particular novelty in the claimed design.” *Id.* at 671. In *Egyptian Goddess*, the Federal Circuit discussed novelty, explaining that “when the differences between the claimed and accused design are viewed in light of the prior art, the attention of the hypothetical ordinary observer will be drawn to those aspects of the claimed design that differ from the prior art.” *Id.* But even so, “minor differences between a patented design and an accused article’s design cannot, and shall not, prevent a finding of infringement.” *Crocs, Inc. v. Int’l Trade Comm’n*, 598 F.3d 1294, 1303 (Fed. Cir. 2010) (quoting *Payless Shoesource, Inc. v. Reebok Int’l Ltd.*, 998 F.2d 985, 991 (Fed. Cir. 1993)).

III. THE COURT GRANTS FGTL’S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF INFRINGEMENT

A. FGTL’s Asserted Patents

In its motion, FGTL alleges that New World’s aftermarket parts are substantially the same as, and therefore infringe, the following thirteen design patents: (1) U.S. Patent No. D493,552 (Ford’s 2004 F-150 Headlamp); (2) U.S. Patent No. D496,890 (Ford’s 2004 F-150 Grille); (3) U.S. Patent No. D493,753 (Ford’s 2004 F-150 Hood); (4) U.S. Patent No. D496,615 (Ford’s 2004 F-150 Side Mirror); (5) U.S. Patent No. D498,444 (Ford’s 2005 Mustang Front Fascia); (6) U.S. Patent No. D501,162 (Ford’s 2005 Mustang GT Front Fascia); (7) U.S. Patent No. D510,551 (Ford’s 2005 Mustang Hood); (8) U.S. Patent No. D508,223 (Ford’s 2005 Mustang Front Fender); (9) U.S. Patent No. D500,717 (Ford’s 2005 Mustang Side Mirror); (10) U.S. Patent No. D539,448 (Ford’s 2005 Mustang Taillamp); (11)

U.S. Patent No. D582,065 (Ford's 2005 Mustang Headlamp); (12) U.S. Patent No. D500,969 (Ford's 2005 Mustang Rear Fascia); and (13) U.S. Patent No. D500,970 (Ford's 2005 Mustang GT Rear Fascia).

B. New World's Accused Parts Are Identical to Ford's Parts

New World admits that its aftermarket parts are created by computer scanning original equipment manufacturer ("OEM") Ford parts to create identical replicas for sale. New World's Resp. at 2 [270]; Kaucher Tr. at 210:4–211:3 [236-1]; Pl.'s App. 3, 4: J. Tsai Dep. at 48:18–49:3 [228-1]; Pl.'s App. 7, 8: J. Tsai Dep. at 27:15–20, 61:8–62:3, 63:8–15 [229-3]. It is therefore undisputed that New World's accused parts are copies of Ford's OEM parts. The parties, however, dispute whether FGTL's claimed design patents are substantially the same as Ford's OEM parts and thus New World's aftermarket parts.

C. FGTL's Design Patents Are Substantially the Same Design as Ford's Parts

FGTL alleges that there is no genuine issue of material fact that FGTL's design patents are substantially the same as Ford's parts. The Court agrees. New World's expert Keith Kaucher admitted that Ford's commercial products are "substantially the same" as FGTL's asserted design patents. During his deposition, FGTL's counsel asked if Mr. Kaucher agreed "that Ford's products and the claim[ed] designs are substantially the same?" Kaucher Tr. at 279:13–18 [236-1]. Kaucher responded, "yes." *Id.*

New World attempts to raise a genuine issue by declaration, alleging that Mr. Kaucher was confused when answering multiple questions involving "substantial similarity." New World's Resp. at 3, 4, 5. For example, when Mr. Kaucher was asked another question

regarding whether FGTL’s design patents are “substantially the same” as the accused products – which are admittedly identical to Ford’s parts – Mr. Kaucher also answered yes. Kaucher Tr. at 228:18–229:21 [236-1]. And again, when FGTL’s counsel asked Mr. Kaucher whether the accused products are “virtually identical” to the design patents, Mr. Kaucher responded, “I said they could be, yes.” *Id.* New World’s argument that Mr. Kaucher was “confused” is unpersuasive; FGTL’s questions are clear and straightforward. The Court therefore rejects New World’s attempt to raise a fact issue by filing a declaration that fundamentally changes Mr. Kaucher’s explicit deposition testimony. *See, e.g., Powell v. Dallas Morning News L.P.*, 776 F. Supp. 2d 240, 247 (N.D. Tex. 2011), *aff’d*, 486 F. App’x 469 (5th Cir. 2012); *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996).

Accordingly, the Court finds that there is no genuine issue of material fact that FGTL’s design patents are substantially the same as Ford’s parts.

D. FGTL’s Design Patents Are Substantially the Same Design as the Accused Parts

FGTL’s design patents are also substantially the same as New World’s accused products. A simple side-by-side comparison of New World’s products and Ford’s claimed designs confirms that New World’s products are substantially the same as FGTL’s claimed designs. *See* Pl.’s Mot. at 5–34. And New World did not dispute the accuracy of FGTL’s side-by-side comparisons. Moreover, when asked whether the design of the accused products is substantially the same as FGTL’s claimed designs, Mr. Kaucher answered yes. Kaucher Tr. at 228:18–229:21 [236-1]. And when asked whether Mr. Kaucher believes that

the accused products are “virtually identical” to the design patents in suit, Mr. Kaucher responded “I said they could be, yes.” *Id.* Finally, Mr. Kaucher agreed that the design features, outlined by FGTL’s expert Brian Baker, appear in both the design patents and the accused products. *Id.* at 267:17–20. Accordingly, the Court finds that there is no genuine issue of material fact that New World’s accused parts are substantially the same as FGTL’s claimed design.

New World’s accused parts also include the visually dominant aspects of the claimed design and include the aspects of the claimed design that differ from the prior art. Mr. Kaucher admitted that the inventors created designs for the 2004 F-150 and 2005 Mustang with “new and fantastic” designs that are “ornamentally different” from the prior art. *Id.* at 286:16–287:8. Mr. Kaucher further admits that even though the prior art is crowded, the key visual impact items of FGTL’s design patents are not in the prior art. *Id.* at 285:1–5, 286:16–287:8. And when discussing whether New World’s accused products include the ornamental design features of FGTL’s design patents, Mr. Kaucher agreed that the accused products do include the ornamental design features of FGTL’s design patents. *Id.* at 276:4–11, 292:5–10. The Court therefore finds that there is no genuine issue of material fact that New World’s accused parts include the visually dominant aspects of the claimed design as described by the experts and also include the aspects of the claimed design that differ from the prior art. Accordingly, the Court grants FGTL’s motion for partial summary judgment on infringement.

IV. THE COURT DENIES NEW WORLD'S MOTION FOR SUMMARY JUDGMENT

New World moves for summary judgment on damages, patent invalidity, unenforceability, and noninfringement. The Court denies New World's motion.

A. Fact Issues Exist Regarding When FGTL Provided Actual Notice

New World alleges that FGTL's damages, if any, are limited to after FGTL provided actual notice of infringement. The parties primarily dispute whether FGTL provided actual notice in its September 28, 2011 letter from Damian Porcari of FGTL to Peter Tsai of New World. New World alleges that the letter does not provide notice because it does not make a specific charge of infringement of an identified patent by a specific part. New World's Brief in Supp. at 4 [238].

Notice is a question of fact for the jury. *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1111 (Fed. Cir. 1996). In response, FGTL alleges that for each of the thirteen asserted patents, the September 2011 letter identified the patent, described the covered products in words, and identified an infringing aftermarket part number, with at least one specific product identified by Partslink number.¹ Pl.'s Resp. at 5 [265]. The Court finds that FGTL raises fact issues regarding whether it provided actual notice of infringement in its September 28, 2011 letter to New World.

¹ Partslink is a universal numbering system for identification of aftermarket collision replacement parts.

B. Underlying Fact Issues Exist Regarding Willful Infringement

New World alleges that FGTL cannot prove willful infringement because New World subjectively believed that FGTL's patents were invalid and unenforceable. New World further contends that its good faith subjective belief precludes a finding of willful infringement. In *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016), the Supreme Court abrogated the Federal Circuit's rigid, two-part test for enhanced damages under 35 U.S.C. § 284. The Supreme Court held that a threshold requirement of objective recklessness prevented district courts from punishing "many of the most culpable offenders" *Id.* The Court noted that "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct." *Id.* at 1933. And while *Halo* states that section 284 allows district courts to punish the full range of culpable behavior, the issue of willfulness still involves underlying factual components that should be resolved by the jury. *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1341 (Fed. Cir. 2016) ("We do not interpret *Halo* as changing the established law that the factual components of the willfulness question should be resolved by the jury.").

FGTL alleges that New World engaged in a company-wide effort to conceal evidence of infringement and was aware that the industry recognized and honored FGTL's design patents. Pl.'s Resp. at 13. FGTL further avers that New World falsely advised FGTL that it would honor FGTL's design patents and that New World continued to infringe even after receiving FGTL's September 2011 cease and desist letter. Here, FGTL has raised factual

issues regarding the culpability of New World's behavior. The Court therefore denies New World's motion for summary judgment on the issue of willfulness.

C. New World Fails to Show Indefiniteness by Clear and Convincing Evidence

New World next argues that summary judgment is appropriate on the issue of indefiniteness. A patent is invalid for indefiniteness if “its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 134 S. Ct. 2120, 2124 (2014). Because indefiniteness renders a claim invalid, it must be proved by clear and convincing evidence to overcome the presumption of validity. *See Halliburton Energy Services, Inc. v. M-I LLC*, 514 F.3d 1244, 1249 (Fed. Cir. 2008). The definiteness requirement ensures patent claims are clear enough to give notice to potential competitors.

New World does not present clear and convincing evidence to overcome the validity presumption. New World first argues that an opinion of a designer of ordinary skill is not needed due to the simplicity of the drawings, the clear inconsistencies between the drawing figures, and the clear inconsistencies between the drawing figures and the written specifications. Nevertheless, New World cites to the entirety of Mr. Kaucher's 70-page expert report on indefiniteness to support its invalidity defense.

FGTL's drawings are not indefinite. Mr. Kaucher, in his separate report on infringement, argues for noninfringement by comparing the asserted design patents to the accused products. New World's App. at 130–142 [240]. The Court finds that Mr. Kaucher's

ability to make comparisons based on the design patents undercuts New World's argument that the drawings are indefinite.² To show indefiniteness, Mr. Kaucher points out inconsistencies among the drawings in his expert report. But mere inconsistencies among patent drawings do not invalidate a design patent. *Ex Parte Asano*, 201 U.S.P.Q. 315, 317 (B.P.A.I. 1978) ("Mechanical drawing errors and inconsistencies between the figures of the drawing, which do not preclude the overall understanding of the drawing as a whole are an insufficient basis for holding the design both indefinite and insufficiently disclosed under 35 U.S.C. § 112."); *see also Antonious v. Spalding & Evenflo Cos.*, 1999 WL 777450, at *8 (Fed. Cir. 1999); *Deckers Outdoor Corp. v. Romeo & Juliette, Inc.*, 2016 WL 7017219, at *3–5 (C.D. Cal. Dec. 1, 2016). Any alleged inconsistencies do not preclude the overall understanding of the drawings. Accordingly, the Court finds New World's arguments unpersuasive and therefore denies New World's motion for summary judgment on the issue of indefiniteness.

Additionally, because the Court grants FGTL's motion for summary judgment on the issue of infringement, the Court denies New World's motion for summary judgment on the same issue. And in accordance with its prior Order [202], the Court denies New World's renewed motion for summary judgment on the issues of functionality and patent exhaustion.

New World, however, raises an additional reason for why it believes summary

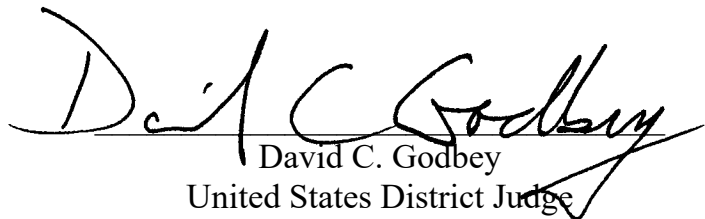
² Indeed, New World acknowledges that it is not possible to argue prior art invalidity of a design patent if the scope of the design is unclear. And while New World does not argue prior art invalidity, it does argue noninfringement, i.e., that the accused designs will not infringe under the ordinary observer test

judgment is appropriate on the issue of patent exhaustion. In a separate case, FGTL offered New World a covenant not to sue on two patents that are not at issue in this case. New World claims that because the other patents are “closely related” to D493,552 and D493,753 (asserted here), the patent exhaustion doctrine applies. The Court disagrees. The covenant FGTL offered expressly prohibits New World’s present argument, and the litigation New World refers to was not resolved based on that covenant, nor was any consideration exchanged for the covenant.

CONCLUSION

The Court therefore grants FGTL’s motion for partial summary judgment on the issue of infringement, establishing liability in FGTL’s favor. The Court denies New World’s motion for summary judgment on the issues of damages, patent invalidity, unenforceability, and noninfringement.

Signed November 5, 2018.


David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FORD GLOBAL TECHNOLOGIES, LLC, §

Plaintiff, §

v. §

NEW WORLD INTERNATIONAL, INC., §
et al., §

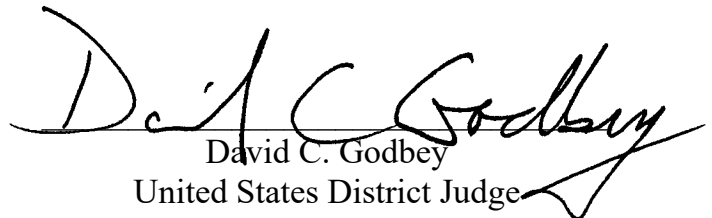
Defendants. §

Civil Action No. 3:17-CV-3201-N

ORDER

This Order addresses the Court's November 5, 2018 Order granting Ford Global Technologies, LLC's Motion for Partial Summary Judgment [320]. The Court clarifies that the November 5, 2018 Order grants partial summary judgment on the issue of infringement in favor of FGTL, subject to Defendants' remaining patent invalidity defense.

Signed November 7, 2018.


David C. Godbey
United States District Judge

From: ecf_txnd@txnd.uscourts.gov
Subject: Activity in Case 3:17-cv-03201-N Ford Global Technologies, LLC v. New World International Inc. et al Order on Motion for Reconsideration
Date: November 8, 2018 at 3:06 PM
To: Courtmail@txnd.uscourts.gov

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**U.S. District Court
Northern District of Texas**

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Case Name: Ford Global Technologies, LLC v. New World International Inc. et al

Case Number: [3:17-cv-03201-N](#)

Filer:

Document Number: 329(No document attached)

Docket Text:

ELECTRONIC ORDER denying [322] Motion for Reconsideration. (Ordered by Judge David C Godbey on 11/8/2018) (chmb)

3:17-cv-03201-N Notice has been electronically mailed to:

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3:17-cv-03201-N The CM/ECF system has NOT delivered notice electronically to the names listed below. The clerk's office will serve notice of court Orders and Judgments by mail as required by the federal rules. An attorney/pro se litigant is cautioned to carefully follow the federal rules (see FedRCivP 5) with regard to service of any document the attorney/pro se litigant has filed with the court. The clerk's office will not serve paper documents on behalf of an attorney/pro se litigant.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FORD GLOBAL TECHNOLOGIES, LLC, §

Plaintiff, §

v. §

NEW WORLD INTERNATIONAL, INC., §
et al., §

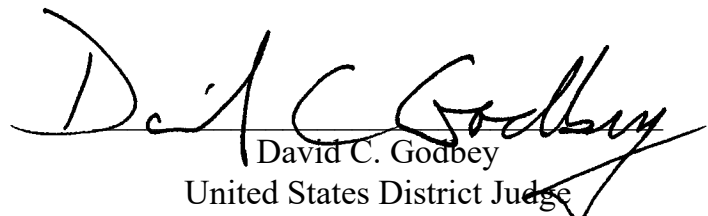
Defendants. §

Civil Action No. 3:17-CV-3201-N

ORDER

This Order addresses Defendants New World International, Inc., Auto Lighthouse Plus, LLC, and United Commerce Centers, Inc.’s (collectively, “New World”) Motion Requesting Clarification of the Scheduling Order [208]. New World’s request for clarification focuses heavily on interpretation of the Court’s claim construction order. The claim construction order, however, clearly applies to all thirteen patents in suit. The scheduling order does not require clarification. Accordingly, the Court denies New World’s motion.

Signed November 8, 2018.


David C. Godbey
United States District Judge

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

FORD GLOBAL TECHNOLOGIES, LLC,

Plaintiff,

v.

**NEW WORLD INTERNATIONAL, INC.,
AUTO LIGHTHOUSE PLUS, LLC and
UNITED COMMERCE CENTERS, INC.,**

Defendants.

Case No. 3:17-cv-03201-N

JUDGMENT

This action came before the Court for trial before a duly impaneled and sworn jury, and the Court presided over the jury trial from November 13-16, 2018. On November 16, 2018, the jury returned a verdict. The verdict was accepted by the Court and filed by the Clerk (DNs 345 and 346). Upon consideration of the Plaintiff's Motion for Entry of Judgment and Agreed Briefing Schedule and the verdict handed down by the Jury on November 16, 2018, it is hereby,

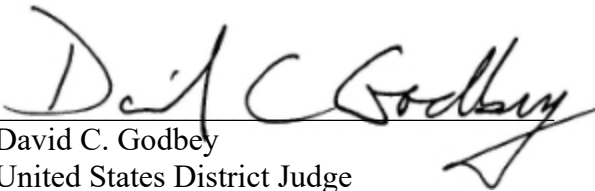
ORDERED, that judgment be entered in favor of the Plaintiff Ford Global Technologies, LLC (hereinafter "Ford") and against Defendant New World International, Inc. (hereinafter "New World") on Counts I-XIII of the Second Amended Complaint for infringement of U.S. Patent No. D493,552 titled "Vehicle Headlamp;" U.S. Patent No. D496,890 titled "Vehicle Grill;" U.S. Patent No. D493,753 "Exterior of Vehicle Hood;" U.S. Patent No. D496,615 titled "Vehicle Side View Mirror;" U.S. Patent No. D498,444 titled "Front Bumper Fascia;" U.S. Patent No. D501,162 titled "Front Bumper Fascia;" U.S. Patent No. D510,551 titled "Hood;" U.S. Patent No. D508,223 titled

“Fender;” U.S. Patent No. D500,717 titled “Sideview Mirror;” U.S. Patent No. D539,448 titled “Vehicle Taillamp;” U.S. Patent No. D582,065 titled “Headlamp;” U.S. Patent No. D582,969 titled “Rear Bumper Fascia;” and U.S. Patent No. D582,970 titled “Rear Bumper Fascia,” in the amount of \$493,057.00, and it is further,

ORDERED, that subject to New World’s right to challenge whether prejudgment interest is appropriate in this case and subject to New World’s other post-trial motions, prejudgment interest in the agreed amount of \$75,000.00 is awarded to Ford against New World, and it is further

ORDERED that judgment is entered in favor of Ford and against New World in the total amount of \$568,057.00.

SIGNED March 4, 2019.


David C. Godbey
United States District Judge

Agreed as to FORM ONLY:

<u>/s/ Stephanie Barnes</u> Clyde M. Siebman (Texas State Bar No. 18341600) Stephanie R. Barnes (Texas State Bar No. 24045696) SIEBMAN, FORREST, BURG & SMITH, LLP 4949 Hedgcoxe Road, Suite 230 Plano, TX 75024 Telephone: (214) 387-9100 Fax: (214) 387-9125 clydesiebman@siebman.com stephaniebarnes@siebman.com Marc Lorelli (P63156MI – Pro Hac Vice) Frank A. Angileri (P45611MI - Pro Hac Vice) BROOKS KUSHMAN P.C.	<u>/s/ Robert Oake, Jr.</u> Robert Oake, Jr. OAKE LAW OFFICE 700 S. Central Expressway, Suite 400 Allen, TX 75013 Tel: (214) 207-9066/Fax: (214) 383-0865 rgo@oake.com Robert Maris 3710 Rawlins Street, Suite 1550 Dallas, TX 75219 Tel: (214) 706-0920 RMaris@gpm-law.com George Tompkins TOMPKINS, P.C. 202 W. Main Street
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<p>1000 Town Center, 22nd Floor Southfield, MI 48075 Telephone: (248) 358-4400 Fax: (248) 358-3351 fangileri@brookskushman.com mlorelli@brookskushman.com</p> <p>Elvin E Smith, III Law Offices of Elvin E Smith III PLLC 7914 Bryn Mawr Dallas, TX 75225 Telephone: (214) 238-3345 Email: esmith@eeslaw.com</p> <p><i>Attorneys for Plaintiff</i></p>	<p>Suite 200, #12 Allen, TX 75013 (214) 843-1654/(469) 375-3969 Fax george@tomkinsiplaw.com</p> <p><i>Attorneys for Defendants</i></p>
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UNITED STATES DISTRICT COURT

for the
Northern District of Texas

Ford Global Technologies, LLC)
))
New World International, Inc., AutoLighthouse) Case No.: 3:17-cv-3201-N
Plus, LLC, United Commerce Centers, Inc.)
)

BILL OF COSTS

Judgment having been entered in the above entitled action on 04/09/2019 against Defendants,
Date
the Clerk is requested to tax the following as costs:

Fees of the Clerk	\$ 505.00
Fees for service of summons and subpoena	1,123.48
Fees for printed or electronically recorded transcripts necessarily obtained for use in the case	4,800.75
Fees and disbursements for printing	0.00
Fees for witnesses (<i>itemize on page two</i>)	0.00
Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.	0.00
Docket fees under 28 U.S.C. 1923	0.00
Costs as shown on Mandate of Court of Appeals	0.00
Compensation of court-appointed experts	0.00
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	0.00
TOTAL	\$ 6,429.23

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:

☒ Electronic service ☐ First class mail, postage prepaid

☐ Other: _____

s/ Attorney: Marc Lorelli

Name of Attorney: Marc Lorelli

For: Ford Global Technologies, LLC Date: 04/22/2019
Name of Claiming Party

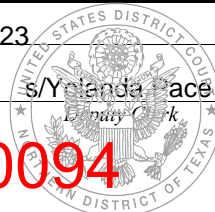
Taxation of Costs

Costs are taxed in the amount of \$6,429.23 and included in the judgment.

Karen Mitchell
Clerk of Court

By: s/Yolanda Pace 05/07/2019
Date

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Witness Fees (computation, cf. 28 U.S.C. 1821 for statutory fees)

NAME , CITY AND STATE OF RESIDENCE	ATTENDANCE		SUBSISTENCE		MILEAGE		Total Cost Each Witness
	Days	Total Cost	Days	Total Cost	Miles	Total Cost	
							\$0.00
							\$0.00
							\$0.00
							\$0.00
							\$0.00
							\$0.00
TOTAL					TOTAL		\$0.00

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:

“Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.”

“A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.”

RULE 54(d)(1)

Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 day's notice. On motion served within the next 7 days, the court may review the clerk's action.

(d) Additional Time After Certain Kinds of Service.

RULE 58(e)

Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FORD GLOBAL TECHNOLOGIES, LLC, §

Plaintiff, §

v. §

NEW WORLD INTERNATIONAL, INC., §
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Defendants. §

Civil Action No. 3:17-CV-3201-N

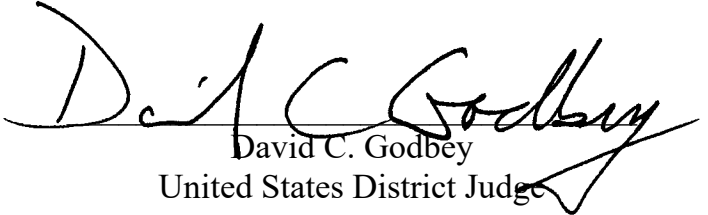
ORDER

This Order addresses Defendants, New World International, Inc., Auto Lighthouse Plus, LLC, and United Commerce Centers, Inc.’s motion to alter or amend final judgment [386]. For the reasons stated below, the Court denies the motion.

Defendants argue that the Final Judgment [384] incorrectly holds Auto Lighthouse and United Commerce Centers jointly and severally liable for damages. The Court disagrees. By prior Order [320], the Court granted Ford Global Technologies motion for partial summary judgment, finding infringement as a matter of law against Defendants. The jury was thus tasked with addressing Defendants’ invalidity defenses, damages, and willfulness. In the pretrial order and proposed verdict forms, Defendants treated New World, Auto Lighthouse, and United Commerce Centers as one collective entity, as they have done throughout the course of this litigation. The jury’s “no” invalidity verdict, as well as the Court’s prior finding of infringement, establishes liability against all three Defendants.

Accordingly, the Court declines to make any supplemental findings and denies Defendants' motion to amend.

Signed June 28, 2019.


David C. Godbey
United States District Judge

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B). This brief contains 13,995 words, excluding the parts of the brief exempted by the Federal Rules of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Robert G. Oake, Jr.

Robert G. Oake, Jr.

Attorney for Defendants-Appellants

October 30, 2019

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2019, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.

Counsel for Appellants