

No. 19-1746

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

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FORD GLOBAL TECHNOLOGIES, LLC,

*Plaintiff-Appellee,*

v.

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

*Defendants-Appellants.*

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Appeals from the U.S. District Court for the Northern District of Texas  
The Honorable David C. Godbey  
Case No. No. 3:17-cv-03201-N

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**RESPONSE BRIEF OF FORD GLOBAL TECHNOLOGIES, LLC**

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## CERTIFICATE OF INTEREST

Counsel for Appellee certifies the following:

1. Full name of party represented by me:

Ford Global Technologies, LLC

2. Name of real party in interest represented by me:

N/A

3. Parent corporations and publicly held companies that own 10% or more of stock in the party:

Ford Global Technologies, LLC is a wholly-owned subsidiary of Ford Motor Company. Ford Motor Company has no parent company and no publicly held corporation holds 10% or more of its stock.

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:

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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:

N/A.

Dated: December 16, 2019

/s/ Jessica L. Ellsworth

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## STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, Appellee states: (a) there have been no previous appeals in this case, and (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 is: *Automotive Body Parts Ass'n v. Ford Global Technologies, LLC*, 930 F.3d 1314 (Fed. Cir. 2019) (No. 2018-1613) (petition for certiorari anticipated).

## INTRODUCTION

Ford Global Technologies, LLC (Ford) owns and manages the design patents for Ford Motor Company's iconic vehicles, including the F-150 and the Mustang. It derives great value from those innovative, patented designs. In contrast, New World International, Inc., Auto Lighthouse Plus, LLC, and United Commerce Centers, Inc. (collectively, New World) have a different business model. New World's business model is to purchase Ford-manufactured parts for Ford vehicles, make computer-generated copies of those parts, and then sell the copied parts on the resale market.

All this made an infringement lawsuit an inevitability. But New World made the process as painful as possible. It filed multiple meritless declaratory judgment actions to avoid this suit, each of which this Court rejected. And once Ford sued, New World filed a series of baseless and often frivolous motions.

That strategy failed. In a series of thoughtful orders, the District Court methodically rejected New World's legal arguments. And, when the time came, the jury found for Ford on every issue.

True to form, New World attempts to relitigate nearly every issue it raised below—and many it did not—on appeal. In the end, this kitchen-sink approach reveals no basis to set aside the jury's verdict holding New World accountable for its brazen infringement of Ford's design patents. This Court should affirm.

## STATEMENT OF THE ISSUES FOR REVIEW

New World purports to raise fifteen issues. Br. at 3–4. This brief reorders the issues—and consolidates some—to aid the Court’s resolution of this appeal, addressing validity first, followed by infringement, and then remedies.

1. Whether the District Court properly denied New World’s motion for judgment as a matter of law or for a new trial on the issues of indefiniteness and enablement. (New World Issue Nos. 3 and 12)

2. Whether the District Court properly granted Ford summary judgment on the issue of functionality. (New World Issue No. 6)

3. Whether the District Court properly granted Ford summary judgment on the issue of infringement. (New World Issue Nos. 1, 2, and 5)

4. Whether substantial evidence supports the jury’s finding that New World had notice of Ford’s patent rights and that New World willfully infringed. (New World Issue Nos. 4 and 8)

5. Whether the District Court acted within its discretion in granting a permanent injunction, awarding damages, and awarding attorneys’ fees. (New World Issue Nos. 7, 9, 10, 13, and 14)

6. Whether the District Court properly denied New World’s motion to alter or amend the judgment. (New World Issue No. 15)

7. Whether the District Court acted within its discretion when issuing various case management orders. (New World Issue No. 11)<sup>1</sup>

### **FACTUAL STATEMENT**

This case stems from the deliberate acts of New World to copy—quite literally—parts of vehicles covered by Ford’s design patents and sell those copies as replacement parts.

#### **A. Ford sues New World for design patent infringement.**

Ford Motor Company designs and manufactures vehicles, and the parts that make up those vehicles. Its subsidiary Ford Global Technologies, LLC (referred to as Ford here) owns and licenses the intellectual property rights that protect those vehicles and parts. Appx75–76. This case involves thirteen design patents, covering vehicle parts such as headlamps, front grilles, bumpers, and hoods.

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<sup>1</sup> New World (at 3) states that it is also appealing in Issues Nos. 1, 3, 5, and 6 the District Court’s denial of New World’s motion for summary judgment on these issues. But New World makes no attempt to show that the denial of summary judgment to New World as to those issues is appealable. *See, e.g., United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999) (stating that a denial of summary judgment may be appealed in the narrow circumstances where “the motion involved a purely legal question and the factual disputes resolved at trial do not affect the resolution of that legal question”). In any event, this Court should affirm for the reasons given in this brief.

Appx78–79.<sup>2</sup> Ford granted a license to LKQ Corporation to sell parts covered by these patents. Appx11389.

New World is in the business of unlicensed copying and manufacturing of vehicle parts covered by Ford design patents. It “admits that its aftermarket parts are created by computer scanning original equipment manufacturer (‘OEM’) Ford parts to create identical replicas for sale.” Appx79; *see also* Appx5535 (testimony of New World executive that New World “reverse-engineer[s] the part”). Because it copies Ford’s designs, New World, a trade association to which it belongs, and other association members have tried several times to have Ford’s design patents invalidated. None of these attempts has worked. *See In re Certain Automotive Parts* at 2, Inv. No. 337-TA-557, USITC Pub. 4012 (June 2008) (Final), *available at* <https://tinyurl.com/forditc> (rejecting New World’s defense that design patents on Ford parts were anticipated, obvious, or unenforceable); H.R. 5638, 110th Cong.

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<sup>2</sup> The patents are: (1) U.S. Patent No. D493,552 (‘552 patent) (2004 F-150 Headlamp); (2) U.S. Patent No. D496,890 (‘890 patent) (2004 F-150 Grille); (3) U.S. Patent No. D493,753 (‘753 patent) (2004 F-150 Hood); (4) U.S. Patent No. D496,615 (‘615 patent) (2004 F-150 Side Mirror); (5) U.S. Patent No. D498,444 (‘444 patent) (2005 Mustang Front Fascia); (6) U.S. Patent No. D501,162 (‘162 patent) (2005 Mustang GT Front Fascia); (7) U.S. Patent No. D510,551 (‘551 patent) (2005 Mustang Hood); (8) U.S. Patent No. D508,223 (‘223 patent) (2005 Mustang Front Fender); (9) U.S. Patent No. D500,717 (‘717 patent) (2005 Mustang Side Mirror); (10) U.S. Patent No. D539,448 (‘448 patent) (2005 Mustang Taillamp); (11) U.S. Patent No. D582,065 (‘065 patent) (2005 Mustang Headlamp); (12) U.S. Patent No. D500,969 (‘969 patent) (2005 Mustang Rear Fascia); and (13) U.S. Patent No. D500,970 (‘970 patent) (2005 Mustang GT Rear Fascia). Appx78–79.

(2008) (unenacted bill that would have excluded automotive parts from design patent protection); S. 780, 113th Cong. (2013) (similar); *Auto. Body Parts Ass'n v. Ford Glob. Techs., LLC* (“ABPA”), 930 F.3d 1314, 1319 (Fed. Cir. 2019) (rejecting arguments that Ford design patents were invalid or unenforceable), *reh’g denied*, No. 2018-1613 (Sept. 13, 2019).

In September 2011, Ford notified New World in a letter that New World was selling components for Ford vehicles that “may infringe” design patents for Ford parts. Appx11389. The letter attached a chart that listed patent numbers, part descriptions, and “Aftermarket Part Numbers to assist” New World “in identifying the infringing products” that it was selling. *Id.*; Appx11392-11407. “Aftermarket Part numbers,” also called “Partslink numbers,” are an industry-standard way to identify parts. Appx10834. New World uses Partslink numbers to label its parts, and subscribes to a database that allows it to cross-reference Partslink numbers with Ford OEM numbers. Appx10914; Appx10926; Appx10932. The chart thus allowed New World to locate its own part and then identify the corresponding Ford part that was being copied and the patent that was being infringed. The attachment listed each patent-in-suit. Appx11392–11407; Appx10931.

In response, New World said that it intended to respect Ford’s patent rights—but then New World did the opposite. Appx11409 (declaring its “intention at this time to comply” and stating that it had “removed any non-complying

parts”). It continued to sell unlicensed parts and tried to conceal those sales. For example, in February 2012, its then-Vice President James Ma sent a “reminder” to the company about “dealing with Ford Special Parts,” instructing that “ALL packag[ing]” should be “removed . . . from the product before selling” and that “those items” should be sold at prices “slightly cheaper than” those of “LKQ,” Ford’s licensee. Appx11410. Another former employee, Patricia Zimmerman, testified that New World deleted sales records, altered other records, and made “back door” cash sales. Appx10734–10744.

In January 2015, Ford sued New World to enforce its rights. Appx135–167. The case was transferred to the Northern District of Texas after *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017). Appx3773; Appx3791–3792. After the transfer, the District Court disposed of a pending claim construction motion, Appx71, and granted partial summary judgment to Ford on the issues of functionality and patent exhaustion, Appx72 (adopting the analysis in *Automotive Body Parts Ass’n v. Ford Global Technologies, LLC*, 293 F. Supp. 3d 690 (E.D. Mich. 2018), *aff’d*, 930 F.3d 1314).

New World initiated a series of attempts to delay the proceedings. It filed four motions to clarify the scheduling order entered prior to the transfer. Appx3793–3813; Appx3814–3817; Appx3823–3828; Appx3853–3863. The District Court vacated that scheduling order, issued its own, and denied the

motions as moot. Appx3900–3901. New World filed another motion to clarify, which in reality sought to reopen discovery and relitigate claim construction issues. Appx3905–3915. The District Court denied that motion too. Appx90.

**B. The District Court grants summary judgment on infringement.**

The parties then filed cross-motions for summary judgment. Ford moved for partial summary judgment on infringement. Appx76. New World moved on the issues of invalidity, unenforceability, infringement, and damages. *Id.*

Just after these briefs were filed, New World filed yet another motion. In this one, New World asked for leave to file additional unspecified motions, to file a supplemental expert report, to reopen discovery, to file a supplemental summary judgment motion, and for a continuance. Appx6604–6610. It pointed to *In re Maatita*, 900 F.3d 1369, 1377 (Fed. Cir. 2018), claiming that it was a “fundamental change in the test” for whether a design patent is indefinite. Appx6605. But it nowhere explained *how* this supposed change affected its theory of indefiniteness. *Maatita* said it was “not dealing with inconsistencies in the drawings, or inconsistencies between the drawings and the verbal description,” which was the only theory of indefiniteness that New World had raised. 900 F.3d at 1376. The District Court denied this motion as well, keeping the proceedings on track. Appx73–74.

The District Court then granted summary judgment to Ford on infringement, subject to a jury's verdict on New World's invalidity defenses. First, it was "undisputed that New World's accused parts are copies of Ford's OEM parts." Appx79. Second, New World's expert, Keith Kaucher, "admitted that Ford's commercial products are substantially the same as" the patented designs. *Id.* (internal quotation marks omitted). Though New World tried to walk back that admission with a post-deposition declaration and an errata sheet that it filed after the summary judgment order, the District Court declined to allow New World to create a genuine dispute of material fact this way. Appx80; Appx88. And third, it was undisputed that New World's accused products are substantially the same as Ford's design patents because "[a] simple side-by-side comparison of New World's products and Ford's claimed designs confirms that." Appx80. Here too, New World's expert Kaucher agreed, stating that "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." Appx80–81.

**C. The jury rejects New World's invalidity defense and finds willful infringement.**

The District Court sent three issues to the jury: whether the patents were invalid as indefinite, whether New World's infringement was willful, and the amount of damages based on when Ford gave notice of the infringement. Appx82–86. The jury found for Ford on all three issues. It found each patent

valid. Appx8600–8601. It found New World’s infringement of each patent willful. Appx8603–8604. And it assessed damages as Ford’s expert had proposed, which had been calculated using the date of the notice letter, September 2011, as the date on which the infringement began. Appx8608 (awarding \$493,057).

New World then filed post-trial motions, seeking judgment as a matter of law and a new trial on a whole host of issues. The District Court denied these motions. Appx69. It granted Ford’s motion for its attorneys’ fees, declaring this an exceptional case based on New World’s willful infringement, the testimony “that New World altered sales records to conceal its infringement,” the production of “inaccurate sales records during . . . discovery,” New World’s “misrepresent[at]ions . . . that it would stop selling the copied parts,” and its “multiple excessive motions,” Appx63. It also granted a permanent injunction and pre- and post-judgment interest. Appx66–69.

After the District Court entered judgment, Appx59–60, New World moved to alter or amend that judgment. Appx12754–12758. This motion raised a new argument—that the three defendants should not be held jointly and severally liable—that conflicted with how New World had litigated the case. As a result, the District Court denied the motion. Appx96–97.

## SUMMARY OF THE ARGUMENT

I. Ford's design patents are valid. The jury heard ample evidence that the alleged "inconsistencies" New World identified in the patents did not exist or were minor and immaterial. It was thus entitled to find that the patents were definite. To the extent New World argues that the District Court applied the wrong legal standard, that argument is forfeited and irrelevant because it has never identified any prejudice based on the different standard. New World's enablement argument is also forfeited because New World did not raise it at trial. And New World's functionality argument is foreclosed by this Court's decision in *ABPA*.

II. New World infringed Ford's design patents. Summary judgment was appropriate on infringement because New World's own expert repeatedly conceded the critical issue of substantial similarity. The District Court properly rejected New World's efforts to claw back those concessions. New World failed to adequately present its challenge to the jury's willfulness finding, but the verdict was well supported.

III. Ford's design patents were enforceable, and Ford notified New World of its infringement. The jury's verdict on actual notice was amply supported given that Ford provided New World with a detailed letter accurately identifying the patents-in-suit and the accused parts. New World's invocation of the repair

doctrine is nothing more than an effort to relitigate an earlier loss on this issue and should be rejected.

IV. The District Court's remedial orders were proper. New World has largely forfeited or failed to adequately present these issues for appeal, and sometimes both. In any event, the standard injunction was proper, the jury's damages award was amply supported, and the award of fees and costs was well justified.

V. The District Court correctly denied New World's much-belated motion to amend the judgment to eliminate joint and several liability.

## **ARGUMENT**

### **I. Ford's Design Patents Are Valid.**

#### **A. The District Court correctly denied New World's motion for judgment as a matter of law or a new trial on validity.**

This Court reviews the denial of a motion for judgment as a matter of law de novo, and the denial of a motion for a new trial for abuse of discretion. *See Elbit Sys. Land & C4I Ltd. v. Hughes Network Sys., LLC*, 927 F.3d 1292, 1296, 1299 (Fed. Cir. 2019). On both fronts, it applies the regional circuit's law. *See id.* The Fifth Circuit reviews the denial of judgment as a matter of law de novo, asking whether "the facts and inferences point[ed] so strongly and overwhelmingly in favor of one party that . . . reasonable jurors could not arrive at a contrary verdict." *Raytheon Co. v. Indigo Sys. Corp.*, 895 F.3d 1333, 1338 (Fed. Cir. 2018) (internal

quotation marks omitted) (stating that a jury’s verdict will be upheld “when there was substantial evidence to support the jury’s verdict”). It reviews the denial of a new trial for abuse of discretion, asking whether “the appellant ma[de] a clear showing of an absolute absence of evidence to support the jury’s verdict.” *Id.* at 1338–39 (internal quotation marks omitted).

1. *The jury reasonably rejected the indefiniteness defense.*

A patent is presumed valid, and an invalidity defense such as indefiniteness must be “proved by clear and convincing evidence.” *Microsoft Corp. v. I4I Ltd. P’ship*, 564 U.S. 91, 95 (2011). The jury was instructed on that presumption and that “[d]esign patent drawings, when read along with the rest of the description of the drawings must inform, with reasonable certainty, those skilled in the art about the scope of the invention.” Appx8601–8602. It was also instructed that a design patent claim is not indefinite “[s]imply because the drawings may not be precise.” *Id.* New World did not object to these instructions—which paralleled the definition of definiteness in *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014)—at the final charge conference. Appx11265–11266.

On appeal, New World presents only evidence it sees as favorable, declining to discuss the full record. On that basis alone, it has not shown that it was entitled to judgment as a matter of law. *See Eaton Corp. v. Rockwell Int’l Corp.*, 323 F.3d 1332, 1345 (Fed. Cir. 2003) (That a party has “some evidence” in its favor is not a

basis for awarding judgment as matter of law.). New World points to inconsistencies (a) “between the drawings,” Br. at 52–53, or (b) “between the drawings and the written descriptions,” *id.* at 53. The jury could reasonably have concluded that these inconsistencies either did not exist or, if they did, did not render the patents indefinite.

As to inconsistencies between the drawings in a patent (that is, between the multiple drawings in a single patent), New World has also forfeited the argument by failing to develop it on appeal. Its entire argument is two sentences long: “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.” *Id.* at 52–53. New World offers *no* citations to support its argument that would allow Ford to understand and rebut this argument. It does not even describe the *kind* of inconsistencies it thinks exists in a way that might allow Ford to hunt through the record and then respond. By not offering any “developed argument” on this point, New World forfeited it. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (“A skeletal argument, really nothing more than an

assertion, does not preserve a claim” especially where, as here “the brief presents a passel of other arguments” (internal quotation marks omitted)).<sup>3</sup>

In any event, New World never grapples with two important realities. The jury was instructed, properly, that a patent is presumed to be valid and must be proven invalid by clear and convincing evidence. Appx8601–8602. And the jury was instructed, again properly, that mere imprecision does not make a claim indefinite. Appx8601; *Maatita*, 900 F.3d at 1375–76 (stating that mere “[e]rrors and inconsistencies” will not render a design patent indefinite so long as “the drawing as a whole” can be understood (internal quotation marks omitted)). Given this, the jury reasonably could have concluded that New World’s alleged inconsistencies were minor and that the claims as a whole could be understood.

As to inconsistencies between the written descriptions and drawings in any given patent, all of the same arguments apply. Here at least, New World offers (at 53) four citations to pages of the patents that it alleges contain inconsistencies. But again, it does not say *what* those inconsistencies are, leaving both Ford and this Court to guess at the nature of the supposed inconsistencies. Such a “skeletal

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<sup>3</sup> To the extent that New World relies on the drawings in its factual statement (at 15–22), even though its argument *does not refer to them*, the drawings compare different angles of the same design and identify alleged differences that result from that change in perspective. These kinds of alleged inconsistencies do not amount to indefiniteness. See *Maatita*, 900 F.3d at 1375–76.

argument” is not enough to raise a claim on appeal. *SmithKline Beecham*, 439 F.3d at 1320 (internal quotation marks omitted).

Even if New World has adequately presented this issue, the drawings and descriptions are not inconsistent. New World appears to be arguing that what is labeled a “side” view should have been labeled a “top,” “bottom,” or “front” view. *See* Appx5745, Appx5753 (top view labeled as “side” view); Appx5796, Appx5798 (front view labeled as “side” view); Appx5784, Appx5785 (top view labeled as “side” view); Appx5784, Appx5786 (bottom view labeled as “side” view). But, when discussing a three-dimensional object like a headlamp, it is accurate to refer to the “top,” “front,” or “bottom” of an object as one of its “sides.” Even if these labels amount to an inconsistency, the jury reasonably could have concluded that they did not render the patents indefinite because they did “not preclude the overall understanding of the drawing as a whole.” *Maatita*, 900 F.3d at 1376 (quoting *Ex Parte Asano*, 201 U.S.P.Q. 315, 317 (B.P.A.I. 1978)).

New World also notes (at 54–57) that its expert, Kaucher, testified at trial that the patents contained inconsistencies and that he, as a person of ordinary skill in the art, did not know what they claimed. The jury could review the patents for itself and could reasonably have looked at the patents, considered the alleged errors

and inconsistencies, and found them nonexistent or immaterial. *See* Appx11581–11660.<sup>4</sup>

The jury could reasonably have declined to credit Kaucher’s testimony. It was instructed that it could consider his “credibility,” including his relationship to the opposing party and whether he has been “discredited by contradictory evidence.” Appx8596–8598. On cross-examination, Kaucher admitted that, as a “reasonable designer,” he “could understand the designs that were presented in each of the [Ford] design patents.” Appx11194. He acknowledged that “the same feature may be illustrated differently depending on the view” and that “a reasonable designer will look to drawings that provide the more clear view of a particular feature” when assessing a claim. Appx11189. Pressed on several of the specific alleged inconsistencies he had mentioned on direct examination, he conceded that many could be explained by variations in perspective. Appx11210–11218; Appx11240–11250. He also admitted that he had “no experience drawing patent drawings,” Appx11250, and was specifically trying “to find differences”

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<sup>4</sup> New World claims that any conclusion based on an examination of the patents would be “intrinsic” evidence that is reviewed *de novo*. Br. at 50–51. But it cites a case discussing claim construction for that proposition. Ford has not located a Federal Circuit case that departs from the normal judgment-as-a-matter-of-law and new-trial standards of review in the context of an indefiniteness claim tried to a jury. *See, e.g., BJ Servs. Co. v. Halliburton Energy Servs., Inc.*, 338 F.3d 1368, 1372–73 (Fed. Cir. 2003) (not using New World’s standard of review); *see also Koninklijke Philips N.V. v. Zoll Med. Corp.*, 656 F. App’x 504, 526 (Fed. Cir. 2016) (same).

rather than “using [his] skills as an ordinary designer to understand the design that was claimed,” Appx11201. The jury could reasonably have concluded that Kaucher’s testimony was not credible.

New World offers (at 55) a table of Kaucher’s testimony about alleged inconsistencies in the patents-in-suit. But because of the evidence just reviewed, the jury could reasonably have declined to credit Kaucher’s testimony. In addition, Ford specifically rebutted these alleged inconsistencies at trial. *See, e.g.*, Appx11203–11205 (’890, ’753 patents); Appx11214 (’615 patent); Appx11217–11220 (’615, ’552 patents); Appx11220–11125 (’444 patent); Appx11228 (’162 patent); Appx11230–11236 (’551, ’223, ’717 patents); Appx11242–11243 (’448 patent); Appx11244–11249 (’065, ’969, ’970 patents); *see also* Appx11185–11186 (addressing discrepancies based on whether a part is on the left or right hand side of a vehicle); Appx11193–11194 (designer would look to multiple views).

New World ends by arguing (at 56) that Ford failed to phrase its cross-examination of Kaucher in terms of the proper legal test. But it asked Kaucher whether he, as one skilled in the art, would understand the designs. Appx11189–11190; Appx11194. These questions mirrored the jury instruction, which New World did not challenge at the final charge conference. Appx11265–11266. Where, as here, “there was sufficient evidence to support the verdict in light of the entire record, and upon correct or unobjected instructions of law, the jury’s verdict

must stand.” *Brooktree Corp. v. Adv. Micro Devices, Inc.*, 977 F.2d 1555, 1569 (Fed. Cir. 1992) (describing “the process, whereby the jury is instructed on the law, and applies the law to the facts and inferences reasonably drawn therefrom, based on the evidence adduced at trial”).

New World also summarily requests a new trial. Br. at 57. For the same reasons, the District Court did not abuse its discretion in denying that request. *See Industrias Magromer Cueros y Pieles S.A. v. La. Bayou Furs Inc.*, 293 F.3d 912, 924 (5th Cir. 2002) (“[T]here is no such abuse of discretion unless there is a complete absence of evidence to support the verdict.” (internal quotation marks, alterations, and citation omitted)).

2. *New World’s arguments based on Maatita are forfeited and have no bearing on the judgment, in any event.*

New World states that “in the event the *Maatita* test is applied,” the patents-in-suit are indefinite. Br. at 54. It is not clear what New World’s argument is on this front. New World does not actually ask this Court to apply *Maatita*, and it elsewhere acknowledges that this case involves “how *Nautilus* should be applied.” *Id.* at 47. All agree that *Nautilus* set out the definiteness requirement as follows: “[A] patent’s claims, viewed in light of the specification and prosecution history, [must] inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus*, 572 U.S. at 910 (discussing a utility patent). New World suggests that this Court added a gloss on that standard in *Maatita*, when it

stated that “a design patent is indefinite . . . if one skilled in the art, viewing the design as would an ordinary observer, would not understand the scope of the design with reasonable certainty based on the claim and visual disclosure.” 900 F.3d at 1369, 1377. *Even assuming* this standard is different from that of *Nautilus*, that would not affect this case.

First, New World forfeited any argument that *Maatita* changed the *Nautilus* standard in a way that affected its case. In its Rule 50(a) motion for judgment as a matter of law at the close of the evidence, New World argued only that it was entitled to judgment because “under the new *Nautilus* test” it “should prevail on . . . indefiniteness.” Appx11261. It did not mention *Maatita*, it did not argue that the two cases contained different standards, it did not object to the District Court’s instruction at the charge conference, *see* Appx11265–11266, and it did not argue that it was entitled to judgment as a matter of law under *Maatita*’s standard. A party must raise an argument in a 50(a) motion to preserve the argument for a later 50(b) motion and for an appeal. *See Shockley v. Arcan, Inc.*, 248 F.3d 1349, 1361 (Fed. Cir. 2001).

Second, even if New World preserved the argument, it has never—not below and not on appeal—explained *why* the *Maatita* standard matters to the outcome here. The opening brief offers just one sentence on this point. Br. at 54 (“[T]he ordinary observer purchaser of the repair parts is highly discerning and the

inconsistencies would make a difference in the infringement analysis.”). New World must offer more than a single sentence to raise an issue on appeal and require this Court to address it. *See SmithKline Beecham*, 439 F.3d at 1320 (requiring a party to do more than merely make “a passing reference to an issue” to present it for appeal (internal quotation marks omitted)).

That one sentence shows the gap in New World’s analysis. The definiteness requirement exists “to ensure that the disclosure is clear enough to give potential competitors (who are skilled in the art) notice of what design is claimed—and therefore what would infringe.” *Maatita*, 900 F.3d at 1376. But New World has never explained how any difference between the *Maatita* and *Nautilus* standards would make a difference to that analysis in this case. New World’s indefiniteness argument has always been based on alleged inconsistencies between (a) the drawings in the patents-in-suit or (b) the written description and drawings in the patents-in-suit. *See supra* at 12–17. New World never explains why those inconsistencies could leave “one skilled in the art, viewing the design as would an ordinary observer” unclear on the scope of the claimed designs even as they leave “those skilled in the art” clear on the scope of the claimed designs.<sup>5</sup> Indeed, any

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<sup>5</sup> As a result, New World’s suggestion (at 48 n.6, 71) that the District Court should have reconsidered its scheduling order and granted a new round of discovery and briefing after *Maatita* is wrong. In any event, the District Court

satisfactory answer would require New World to show that *Maatita*'s phrasing of the standard—"one skilled in the art, viewing the design as would an ordinary observer"—involves more stringent scrutiny of a patented design than *Nautlius*'s—"one skilled in the art." But the Supreme Court long ago foreclosed the notion that the "ordinary observer" is more discerning than an expert. *Gorham Co. v. White*, 81 U.S. (14 Wall.) 511, 527–28 (1871).

3. *New World's enablement argument is forfeited and incorrect.*

New World argues that Ford's patents are invalid because they do not meet the enablement requirement. This argument is forfeited and wrong.

Though enablement and definiteness can involve overlapping inquiries in the design-patent context, they are separate requirements and thus must be separately raised. See *BJ Servs.*, 338 F.3d at 1371–72; *Maatita*, 900 F.3d at 1375. New World did not separately present an enablement challenge at trial. It did not request a jury instruction on enablement. It did not raise enablement in its Rule 50(a) motion. Appx11260–11261.<sup>6</sup> The District Court thus properly denied New World's motion for judgment as a matter of law, or a new trial, on the issue of

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certainly did not abuse its discretion in finding that *Maatita* announced no change to the legal standard for indefiniteness relevant to this litigation. Appx74.

<sup>6</sup> New World also did not separately raise enablement on summary judgment. Appx5702–5707.

enablement. *See Shockley*, 248 F.3d at 1361 (“[A] party may make a Rule 50(b) renewed motion . . . only if the party made a motion . . . under Rule 50(a).”).

On the merits, New World cites (at 57) to snippets of Kaucher’s testimony, claiming he said that he would not have been able to construct the repair parts based on the patents. Appx11252. The jury would have had ample grounds to doubt Kaucher’s credibility, had New World pressed an enablement defense. *See supra* at 16–17. There is thus no basis to conclude that no “reasonable jurors” could have rejected an enablement defense, or that the District Court abused its discretion in denying a new trial on enablement in light of “a clear showing of an absolute absence of evidence” that supported rejecting that defense. *Raytheon*, 895 F.3d at 1338–39 (internal quotation marks omitted).

**B. The District Court correctly granted Ford summary judgment on the issue of functionality.**

New World’s functionality argument reprises an argument that its counsel made—and lost—in another recent case in this Court trying to invalidate Ford design patents. That case was brought by a trade association that New World is a member of—the ABPA. *See* Appx10864–10865. The upshot of New World’s reprisal of ABPA’s argument is this: The patented designs are for automotive parts, consumers often prefer replacement automotive parts that visually match the original parts on the vehicle onto which they will be installed, and that makes the designs functional rather than ornamental. This Court has already rejected this

view of functionality. *ABPA*, 930 F.3d at 1316. As this Court straightforwardly put it, aesthetic preference does not equate to functionality. *Id.* at 1319 (even assuming there exists “a consumer preference for a particular design to match other parts of a whole, the aesthetic appeal of a design to consumers is inadequate to render that design functional”).

New World points out (at 65) that the Court in *ABPA* stated considerations relevant to the functionality inquiry before rejecting *ABPA*’s argument. *See ABPA*, 930 F.3d at 1319 (listing, among other factors, whether a design “represents the best design” or “there are any elements in the design or an overall appearance clearly not dictated by function” (internal quotation marks omitted)). As New World sees it, that gives New World a license to re-argue (at 66) what *ABPA* lost—namely that Ford’s design patents are functional because the “best design” for a replacement part is one that matches the original vehicle. New World is wrong. That *ABPA* first recited the functionality factors before holding that a customer’s preference for matching parts does not—full stop—render a design functional does not leave any open question on the issue. *See ABPA*, 930 F.3d at 1319. New World argues that Ford’s parts “can be ordered and provided in bulk” and “can be obtained from a sole source.” Br. at 66. But it never claims (nor could

it) that these facts stem from anything about the patented *designs* themselves, or explains why these facts could render the designs functional.<sup>7</sup>

New World next re-raises another point this Court rejected in *ABPA*. It argues (at 67–68) that just as the shape of a key blade is functional because only one shape fits in the corresponding lock, a replacement automotive part is functional because only one shape can recreate the look of the original vehicle. As the Court previously explained, this argument “misunderstands” the precedent on which it is based. *ABPA*, 930 F.3d at 1320–21 (discussing *Best Lock Corp. v. Ilco Unican Corp.*, 94 F.3d 1563 (Fed. Cir. 1996)). The shape of the key blade in *Best Lock* was functional because “no alternatively designed blade would mechanically operate the lock”—not because “the blade and lock were aesthetically compatible.” *Id.* And here, as in *ABPA*, the evidence showed the automotive parts market is full of other replacement parts with alternative designs that fit on Ford vehicles and perform the same function mechanically as the original part did. Appx2897; *see ABPA*, 930 F.3d at 1321 (“Ford introduced abundant evidence of alternative . . . designs that physically fit its trucks.”).

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<sup>7</sup> Just as *ABPA* did, New World claims that insurers require vehicles to be returned to their original appearance. But just as in *ABPA*, New World “cites no evidentiary support” for this statement. 930 F.3d at 1321 n.2.

## **II. New World Infringed Ford’s Design Patents.**

Infringement “is properly decided upon summary judgment when no genuine issue of material fact exists.” *Bai v. L & L Wings, Inc.*, 160 F.3d 1350, 1353 (Fed. Cir. 1998). That was the case below. Infringement of a design patent exists “if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same.” *Gorham*, 81 U.S. at 528; *accord Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 677–678 (Fed. Cir. 2008) (en banc). The summary judgment record included a concession by New World’s expert that the accused products were substantially the same as Ford’s patented designs.

### **A. No genuine issue of material fact existed as to infringement.**

This case presented only a narrow question on infringement. New World admitted “that its aftermarket parts are created by computer scanning original . . . Ford parts to create identical replicas for sale.” Appx79. As a result, the only issue was whether Ford’s “claimed design patents are substantially the same as Ford’s [original] parts and thus New World’s aftermarket parts.” *Id.* To avoid summary judgment, New World thus had to raise a genuine dispute of material fact that Ford Motor Company—after employing highly acclaimed artists, with educational backgrounds in vehicle design to create the designs in the patents-in-suit, at a cost of millions of dollars, Appx5538; Appx5540—manufactured vehicles

that so substantially deviated from the patented designs that the parts are not in fact patent-protected. As long as the parts were “substantially the same” as Ford’s patented designs, they are covered by those designs. *Gorham*, 81 U.S. at 528. As this Court has noted, absolute perfection is not required: “mere difference of lines in the drawing or sketch . . . or slight variances in configuration . . . will not destroy the substantial identity.” *Egyptian Goddess*, 543 F.3d at 670 (internal quotation marks omitted).

New World attempted to show Ford’s parts were not substantially the same as its patented designs by relying on the testimony of its expert Kaucher. But Kaucher “admitted” during his deposition that the “commercial products” Ford produced—which New World copied—“are ‘substantially the same’ as [Ford’s] asserted design patents.” Appx79. In fact, he did so twice:

- Kaucher was asked whether “in this report” it was his “opinion that the design patents are substantially the same as the accused products.” Appx11481–11482. Kaucher requested a break, but after he was told he had to answer first, he responded: “Okay. And the question is do I think they’re substantial, I believe, I answered that. I said yes.” Appx11482.
- Later he was asked “Would you agree with me, sir, that Ford’s products and the claim designs are substantially the same,” and Kaucher answered unequivocally: “Yes.” Appx11494.

That is not all. Kaucher was also questioned about the detailed descriptions of the patented designs included in Ford’s expert’s report, and he agreed that the accused designs contained each of those elements. Appx11491 (“Q: And [Baker’s] descriptions that he’s provided they are found in not only the design patents but

also the accused products, right? A: That’s correct, yes.”). Given these concessions, the District Court properly relied on Kaucher’s testimony to conclude that there was no genuine issue of material fact as to whether the claimed designs and accused products were “substantially the same.” *Gorham*, 81 U.S. at 528.

New World offers this Court a grab-bag of theories for why it should have been able to claw back Kaucher’s concessions. None of them show that the District Court erred in concluding that New World had failed to show a *genuine* dispute of material fact and that Ford was entitled to summary judgment on infringement. First, New World claims (at 39) that Kaucher did not realize he had been asked about the ordinary observer test. The record shows otherwise. Appx11482 (clarifying, after a break to consult with New World’s counsel, that Kaucher was talking about “the ordinary observer test”); Appx5594–5595 (Kaucher’s report, applying the “ordinary observer test”). Next, New World suggests (at 39) that Kaucher understood the question as asking about only one patent, not all thirteen at issue. The record again shows otherwise. The questions asked whether the “products”—plural—were the same as the “patents” or “designs”—plural. Appx11482; Appx11494. And Kaucher responded to the first question by referring to multiple patents. Appx11482.<sup>8</sup> Finally, New World

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<sup>8</sup> New World accuses the District Court of altering Kaucher’s deposition transcript as it relates to the similarity issue. But the alteration—from “claim

argues that the relevant questions and answers to Kaucher were about substantial similarity, not *Gorham*'s "substantially the same" test. This argument is new on appeal and thus forfeited. See *Rentrop v. Spectranetics Corp.*, 550 F.3d 1112, 1117 (Fed. Cir. 2008). It also does not raise a genuine dispute of material fact: New World offers no reason why its *expert* would have understood "substantially similar" and "substantially the same" to refer to different concepts.

That leaves New World's two after-the-facts attempts (at 40–44) to undermine Kaucher's concession.

The first was a post-deposition declaration from Kaucher offering a bare-bones assertion that he was "confused," and understood the questions differently than everyone else reading the transcript would. Appx8083–8084. The District Court properly rejected this attempt to walk back his testimony. Kaucher had twice repeated his concessions on the critical issue in an unequivocal fashion. Appx11482; Appx11494. Those concessions accorded with numerous other portions of his deposition testimony, where he confirmed that various individual Ford products and accused products were highly similar to the designs in the patents. Appx11481 (discussing the '552 patent); Appx11492–11493 (discussing

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designs" in the deposition transcript, Appx11494, to "claim[ed] designs" in the summary judgment opinion, Appx79—changed nothing of substance. The references to "designs"—plural—and "products"—also plural—were unchanged. Appx11494.

the '717 patent); *see also* Appx11493 (agreeing that one “accused product” has “all of the ornamental design features of the design patents”). In the same vein, Kaucher identified and explained visually dominant features of Ford’s claimed designs that appeared in the accused products which are not in the prior art. Appx81; Appx11496–11497; Appx11459 (’552 patent); Appx11454–11455 (’890, ’753, ’615, ’444 and ’162 patents); Appx11452–11453 (’223 patent); Appx11456–11458 (’969, ’970, ’065, ’551, ’448 and ’717 patents); Appx11489 (’444 patent and ’890 patent contrasted with prior art); Appx11488 (’162 patent); Appx11487 (’551 patent); Appx11486 (’065 patent).

A party cannot “defeat a motion for summary judgment” by producing “an affidavit that impeaches, without explanation, sworn testimony.” *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996); *accord Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 386 (5th Cir. 2000) (explaining that the function of summary judgment would be defeated “[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony” (internal quotation marks omitted)). The District Court rightly understood the law to not permit New World to defeat summary judgment in this way. The District Court also correctly concluded that Kaucher’s statement that he was simply baffled by the questions was flatly contradicted by the record. Appx80. It was not required to accept his

unsupported post-hoc assertion. *See Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 136 n.23 (5th Cir. 1992) (finding an “explanation . . . for . . . contradictory statements” to be “insufficient to create genuine issues of material fact required to defeat summary judgment” where it stated only “that [defense] counsel outwitted him and made him utter words he did not intend”).

Contrary to New World’s argument (at 41), *Kennett-Murray Corp. v. Bone*, 622 F.2d 887 (5th Cir. 1980), does not say otherwise. There, the deposition testimony alone had created a dispute of fact sufficient to preclude summary judgment. *See id.* at 894. The Court found that a post-deposition affidavit *bolstered* that factual dispute because the “affidavit did not purport to raise a new matter, but rather to explain certain aspects of his deposition testimony.” *Id.* That is, in *Bone*, unlike in this case, “the affidavit [wa]s in accord with” the deposition testimony and was not “a reformulation of” that testimony, as here. *Id.* at 895. Moreover, this case did not involve, as *Bone* did, “frequent shifts in the questioning” that could make an assertion that Kaucher “was confused” even “plausible.” *Id.* at 894. The questioning here was clear: It transitioned from a discussion of one patent to questions regarding “all of these design patents” covering “the particular parts of the F150 and the Mustang.” Appx11481. And Kaucher’s second concession came in a line of questions about his approach to all of the “design patents.” Appx11494.

New World made its second attempt *one day after* the District Court granted summary judgment on infringement, when it filed a motion to reconsider, which the District Court denied. Appx10487–10497; Appx88. New World’s motion relied on an “errata sheet” it sought to introduce under Fed. R. Civ. P. 30(e). Appx8568–8572. But New World had not relied on that errata sheet in opposing summary judgment. As a result, the District Court was not obligated to find a “manifest error of law”<sup>9</sup> in granting summary judgment based on an errata sheet that New World had not presented to the court, nor did it ask the court to withhold any decision on the summary judgment briefs until the time to submit an errata sheet expired. *See* Appx10491 (reconsideration motion, not citing any controlling precedent).

**B. New World’s other challenges to the District Court’s grant of summary judgment on infringement lack merit.**

New World offers four additional arguments, none of which undermine the District Court’s grant of summary judgment to Ford on infringement.

First, New World takes issue (at 45) with the District Court’s side-by-side comparison of Ford’s designs and New World’s products. Appx80 (analyzing images at Appx5487–5516). Where, as here, all sides agree that the photographs are accurate, this kind of comparison is proper. *See Crocs, Inc. v. Int’l Trade*

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<sup>9</sup> This is the standard that New World argued applied to its motion for reconsideration. Appx10490–10496.

*Comm'n*, 598 F.3d 1294, 1304–06 (Fed. Cir. 2010) (engaging in “a side-by-side view of the drawings” and reversing a finding of noninfringement); Appx80 (noting that “New World did not dispute the accuracy of [Ford’s] side-by-side comparisons”). This portion of the District Court’s summary judgment opinion, in any event, only “confirm[ed]” what it had already concluded in light of Kaucher’s concession. Appx80.

New World’s opening brief declines to develop any explanation for *why* the District Court’s conclusion after the side-by-side comparison was wrong. It offers only a one-sentence reference to 200-plus pages of Kaucher’s report. Br. at 45. The argument is thus both undeveloped and an improper attempt to evade the word limits for appellate briefs. *See SmithKline*, 439 F.3d at 1320; *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1335 (Fed. Cir. 2006) (“[A]rgument by incorporation, such as by referring to a summary judgment memoranda for legal analysis, is a violation of Fed. R. App. P. 28(a)(6).”).

Any attempt by New World on reply to point to the drawings reproduced earlier in its opening brief and argue those drawings show differences between the designs and New World’s products would be equally improper. *See Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1321 n.3 (Fed. Cir. 2005) (argument must be raised in “opening brief to warrant relief from this [C]ourt”). It would also be wrong. Take, for example, the headlamp from the ’065

patent.<sup>10</sup> The arrows on New World’s reproduction (Br. at 8) appear to correspond with matching elements of the patented design and the photographed product. The only conceivable difference the arrows could be referring to comes at the top of the reflector. The very top edge is slightly cropped in the product, and appears rounded in the design in a single view. This slight difference results from a slightly different angle of perspective between the two pictures, which do not purport to be views of the exact same angle. And in any event, this would be a textbook example of the “[m]inor differences” that, as a matter of law, “cannot, and shall not, prevent a finding of infringement.” *Crocs, Inc.*, 598 F.3d at 1303 (internal quotation marks omitted).<sup>11</sup> Kaucher agreed that this headlamp embodied the detailed description provided by Ford’s expert, Appx11491, and was quite different from prior art, Appx11486. The remaining diagrams reproduced in New World’s brief (at 11–13, 34) offer only more of the same. Indeed, Ford could have submitted these diagrams itself and said that the arrows show elements of substantial similarity between Ford’s designs and New World’s products.

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<sup>10</sup> This is the patent that was the subject of the jury’s note. Appx8615.

<sup>11</sup> *Columbia Sportswear North America, Inc. v. Seirus Innovative Accessories, Inc.*, 942 F.3d 1119 (Fed. Cir. 2019), is in accord. There, the alleged differences between the design and products were considerably more substantial. *Id.* at 1131 (noting that the accused design featured the defendant’s logo and a variable “wave thickness” compared to the patented design’s “uniform line thickness”).

Second, New World argues (at 31–35) that the District Court failed to expressly identify the ordinary observer and claims that the ordinary observer is a purchaser who will “notice differences between the claimed designs and the accused designs.” New World does not explain how *expressly* identifying the ordinary observer would have changed anything in the analysis.<sup>12</sup> None of the cases that New World cites support its counterintuitive notion that not expressly identifying the ordinary observer automatically amounts to reversible error, even in the absence of prejudice. *See* Br. at 31 (quoting *Arminak & Assocs., Inc. v. Saint-Gobain Calmar, Inc.*, 501 F.3d 1314, 1321 (Fed. Cir. 2007)); *Arminak*, 501 F.3d at 1323 (affirming the district court’s identity of the ordinary observer); *Goodyear Tire & Rubber Co. v. Hercules Tire & Rubber Co.*, 162 F.3d 1113, 1117 (Fed. Cir. 1998) (same)). Indeed, in *KeyStone Retaining Wall Systems, Inc. v. Westrock, Inc.*, 997 F.2d 1444, 1450–51 (Fed. Cir. 1993) (cited at Br. at 32), this Court affirmed a summary judgment ruling without even noting whether the district court had identified the ordinary observer. And in *Dorman Products, Inc. v. PACCAR, Inc.*,

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<sup>12</sup> To the extent New World is suggesting that an ordinary observer would be even more discerning than its own expert, *Gorham* forecloses that argument. 81 U.S. at 527–528 (dismissing the idea that an “ordinary observer” shares the level of discernment of an “expert”).

201 F. Supp. 3d 663, 683–684 (E.D. Pa. 2016) (cited at Br. at 33), nothing turned on the identity of the ordinary observer.<sup>13</sup>

Third, New World faults the District Court for having construed the claims “as shown in the accompanying drawing(s),” and omitting any reference to the written descriptions accompanying those drawings. Br. at 35 (quoting Appx71). But New World consistently referred to the written descriptions of the patents *and* the drawings below. This explains why it offers no argument that a reference to the written drawings in the claim construction order would have changed anything. Its failure to identify “prejudice” means it has not identified any “reversible” error. *Egyptian Goddess*, 543 F.3d at 679; *accord* Fed. R. Civ. P. 61.

Fourth, New World argues (at 46) that the District Court should have reconsidered its summary judgment infringement ruling after a jury note asked a question about one patented design and product. The District Court did not abuse its discretion in denying reconsideration. *See Fletcher v. Apfel*, 210 F.3d 510, 512 (5th Cir. 2000) (standard of review). First, the jury had not been instructed on the relevant standard for infringement, so its question about the relationship between the design and the product did not undermine the District Court’s earlier legal conclusion. Second, the note was not part of the summary judgment record, and

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<sup>13</sup> New World also accuses (at 45–46) the District Court of having improperly treated its consideration of the prior art as “outcome determinative” in violation of *Egyptian Goddess*, but it did no such thing, Appx79–81.

therefore could not have created a genuine dispute of material fact at that time. Finally, the verdict the jury ultimately issued—that New World willfully infringed the patent in question, Appx8604—was fully consistent with the court’s finding of infringement.

**C. APBA forecloses New World’s right-of-repair argument.**

New World argues “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.” Br. at 65. This Court already squarely rejected that “unpersuasive” argument when New World’s counsel made it on behalf of ABPA’s efforts to circumvent Ford’s design patents: “[T]hough a sale of the [vehicle] permits the purchaser to repair the designs as applied to the specific hood and headlamps sold on the truck, the purchaser may not create new hoods and headlamps using Ford’s designs.” *ABPA*, 930 F.3d at 1323–24. New World implicitly acknowledges as much, as its discussion of this issue (at 61–65) involves primarily a criticism of this Court’s *ABPA* decision.

**III. Substantial Evidence Supports The Jury’s Findings On Notice And Willfulness.**

New World resists two of the jury’s findings: that it was on notice of Ford’s patent rights and that it willfully infringed those patent rights. Appx8603–8604 (verdict on willfulness); Appx8608 (damages award reflecting a finding of notice). To be entitled to judgment as a matter of law, New World had to show that “the

facts and inferences point so strongly and overwhelmingly in” its “favor. . . that reasonable jurors could not arrive at a contrary verdict.” *Raytheon*, 895 F.3d at 1338 (internal quotation marks omitted); *see id.* (stating the standard for a new trial as “an absolute absence of evidence to support the jury’s verdict” (internal quotation marks omitted)). It did not below, and it has not on appeal.

**A. The trial evidence showed that New World had notice of Ford’s patent rights.**

The jury was instructed—without objection from New World—that Ford could “give notice of its patents by notifying New World with a specific claim that the allegedly infringing product infringed an identified patent.” Appx8608.

Ford did just that. It sent New World a letter stating that New World was “selling components for Ford vehicles that may infringe one or more of Ford’s US patents.” Appx11389. The letter included two attachments: receipts of articles purchased from New World and a spreadsheet with columns for the type of vehicle, the patent number, the type of part, and the Partslink number. Appx11390–11407. The jury heard testimony that “a Partslink number is an industry-wide number that acts as a SKU [(a barcode)] for a particular aftermarket part.” Appx10834. And the jury heard testimony—from New World’s Vice President—that New World subscribed to a service that allowed it to look up the Partslink number that corresponded to the “original equipment manufacture[r]” or “OEM” number of Ford’s products. Appx10926; Appx10932. That same Vice

President testified that all thirteen patents-in-suit matched up to the Partslink numbers that Ford provided. Appx10931; Appx11422–11423. From all of this evidence, the jury could reasonably have concluded that letter and attachments—which told New World the patent numbers, the vehicle types, the part types, and *New World's* own part numbers—contains specific claims that the listed New World parts infringed Ford's listed patents. *See Minks v. Polaris Indus., Inc.*, 546 F.3d 1364, 1376 (Fed. Cir. 2008) (holding that while “general letters referring to the patent and including an admonishment not to infringe do not constitute actual notice,” those “that specifically identify a product” and the patent in question do).

New World does not engage with any of this evidence. Instead, it states (at 60) that *some* Partslinks numbers corresponded to a part that did not match the part covered by a patent the chart identified as being infringed.<sup>14</sup> None of the patents New World mentions are at issue in this suit. *Compare* Br. at 60, *with supra* at 4 n.2 (listing the patents-in-suit). New World also argues that the chart was unintelligible, but the jury plainly (and reasonably) rejected the argument that New World was somehow unable to process a simple chart. Appx10931 (testimony

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<sup>14</sup> New World claims that some mismatches did involve “the accused Mustang Fender and F-150 Hood.” Br. at 60. But it cites only to its own briefing below, not trial evidence. Appx5684–5688. And that briefing does not support its claim on appeal: It demonstrates only that Ford identified multiple similar-looking New World parts as potentially infringing products, not that there was any mismatch between the patent number in the chart and the type of part to which the Partslink number corresponded. *Id.*

from New World’s Vice President that the chart was confusing because it did not include OEM numbers); Appx11352–11353 (New World’s closing argument).

To the extent New World is arguing (at 59) that this letter did not provide notice because it identified *more* potential infringement than Ford ended up raising in this suit, that argument is wrong. It also borders on the absurd: If a plaintiff gives notice of two acts of infringement, the parties settle their differences as to one act, and the plaintiff sues for the other, New World’s theory would somehow mean the defendant did not have notice. It is no surprise then, that the case New World cites does not support it. *See Toshiba Corp. v. Imation Corp.*, 990 F. Supp. 2d 882, 900–901 (W.D. Wis. 2013) (finding that a “scattershot” letter that did not come from the patentee and failed to identify “which of [defendant’s] products [were] accused of infringing which patents” did not establish notice).

Put simply, there was more than sufficient substantial evidence to uphold the jury’s verdict in Ford’s favor on the issue of notice.

**B. The trial evidence showed that New World willfully infringed Ford’s patent rights.**

The jury’s finding of willful infringement was similarly supported by substantial evidence. On this issue, New World makes only a 14-word argument—not even a complete sentence—that attempts to incorporate its briefing below by reference. Br. at 69. That is not enough to raise an issue on appeal. *See SmithKline*, 439 F.3d at 1320; *Monsanto*, 459 F.3d at 1335. In any event, the jury

heard substantial evidence of willful infringement. It heard evidence that after receiving Ford's letter, New World assured Ford that "that it will not offer the listed parts for sale" and yet continued to make infringing sales. Appx9629; Appx11409; Appx11417. And it heard evidence that these continued sales were no mere accident. Appx11410; Appx11415 (emails directing employees to conceal evidence of infringement); Appx10784 (testimony that New World had "hidden or concealed some of the sales that were made"). A reasonable jury could have concluded based on this evidence that New World's infringement was willful.

#### **IV. The District Court Acted Within Its Discretion When Setting Remedies.**

##### **A. The District Court's permanent injunction was not an abuse of discretion.**

The District Court permanently enjoined New World from continuing to infringe the four Ford patents at issue that had not yet expired. Appx66. New World's one-sentence challenge (at 70) is insufficient to raise an issue on appeal. *See SmithKline*, 439 F.3d at 1320. Worse, New World attempts to incorporate its briefing below by reference, presumably due to word-count issues that come with a 15-issue appeal brief. *See Monsanto*, 459 F.3d at 1335 ("[A]rgument by incorporation, such as by referring to a summary judgment memoranda for legal analysis, is a violation of Fed. R. App. P. 28(a)(6)."). This argument, regardless, lacks merit because the District Court acted within its discretion. *See Nichia Corp. v. Everlight Americas, Inc.*, 855 F.3d 1328, 1340 (Fed. Cir. 2017) ("We review a

district court's grant or denial of a permanent injunction for an abuse of discretion.”). The District Court thoroughly addressed the permanent injunction factors and granted injunctive relief in light of New World's willful infringement, its production of inferior products that harmed Ford's reputation, and a continued threat of infringement. Appx67–68.

**B. New World fails to show that the District Court was required to disturb the jury's damages award.**

New World describes the damages award as “speculative, excessive, and based on erroneous rulings.” Br. at 68. But its one-sentence argument does not say *why*, and this Court is not required to dig through the referenced briefing below to develop its argument. *See SmithKline*, 439 F.3d at 1320; *Monsanto*, 459 F.3d at 1335. The jury awarded \$493,057 in damages. Appx61; Appx8608. Substantial evidence supports the jury's damages award. Ford's damages expert had proposed this figure, based on six years' worth of sales that infringed thirteen patents. Appx10816. The jury heard evidence of New World's sales forecasts from New World's *own* former Vice President and based its award on the analysis from Ford's damages expert, who described his calculations as a *conservative* estimate

because New World's sales were increasing over time. Appx10716–10717; Appx10814; Appx10816.<sup>15</sup>

New World also disagrees (at 71–72) with the District Court's evidentiary ruling granting Ford's motion in limine related to damages. New World cursory disagreement in its opening brief does not even describe *what* evidence was excluded, much less explain *how* the exclusion prejudiced it. That forfeits the argument. *See SmithKline*, 439 F.3d at 1320; *Monsanto*, 459 F.3d at 1335. In any event, Ford's motion sought to prevent New World from relying at trial on new sales reports produced nearly a year *after* the close of discovery. Appx3954.<sup>16</sup> The District Court was within its discretion to exclude from trial evidence that long post-dated the close of discovery. *See SSL Servs., LLC v. Citrix Sys., Inc.*, 769 F.3d 1073, 1082 (Fed. Cir. 2014) (“The Fifth Circuit also reviews evidentiary

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<sup>15</sup> New World states in passing (at 69) that the damages award is suspect because the jury did not apportion damages on a patent-by-patent basis. It expressly makes this argument contingent on its securing a reversal on some other ground and, in any event, it did not object to the jury instruction or verdict form on this basis and thus forfeited this argument. Appx11265–11266.

<sup>16</sup> By that point, Ford had learned of New World's deceptive actions to keep Ford from learning the extent of its infringing sales: Two former New World employees testified about how New World altered, concealed, or destroyed sales records. Appx10736–10739; Appx10950; *see also* Appx11410 (email following Ford's letter giving notice of its patent rights that directed New World employees to “remove ALL package [sic] from [Ford Special Parts] before selling” and avoid “underselling those items”).

rulings for an abuse of discretion.”); Fed. R. Civ. P. 37(c)(1) (permitting a court to exclude evidence not produced as required by a discovery order).

Relatedly, New World argues that the District Court’s spoliation instruction was improper. But the premise of its argument—that “there was no evidence that” New World “destroyed evidence to hide sales of the accused parts”—is wrong. Br. at 72. The “main person” at New World who had been “in charge of . . . compiling the sales records that were produced” testified that just the opposite was true. Appx10718; Appx10736 (“Q. You’ll never know how many records had been deleted? A. Correct.”); Appx10738 (“Q. And whose plan was it to hide these sales records? A. Peter’s.”); *see also supra* at 42 n.16. And though New World objected to the spoliation instruction in general at the charge conference, it did not raise the arguments it now makes on appeal—that the instruction should have been permissive, rather than mandatory, and that the placement of the instruction in the damages section could affect the jury’s verdict on other issues. Appx9275–9276. It has forfeited this argument. *See Koito Mfg. Co. v. Turn-Key-Tech, LLC*, 381 F.3d 1142, 1150 (Fed. Cir. 2004); Fed. R. Civ. P. 51(d).

Those arguments also lack merit. As to the first, the District Court had discretion to issue a mandatory, rather than permissive, spoliation instruction. *See Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) (“[A] motion for sanctions for spoliation of evidence during discovery is reviewed for abuse of discretion.”);

*Bryant v. Wal-Mart Louisiana, L.L.C.*, 729 F. App'x 369, 370 (5th Cir. 2018) (per curiam) (stating that a “decision regarding sanctions for spoliation” is committed to the trial court’s “discretion”). As to the second, the jury was specifically instructed that willfulness and damages were separate inquiries. Appx8605 (stating that the jury was not “allow[ed]” to permit its willfulness determination “to affect the amount of any damages award”).<sup>17</sup>

**C. New World’s challenge to the District Court’s award of attorneys’ fees and costs is forfeited and meritless.**

Continuing a pattern, New World’s challenge (at 69) to the fee award attempts to incorporate two-dozen pages of briefing below by reference. It has thus forfeited the issue. *See SmithKline*, 439 F.3d at 1320; *Monsanto*, 459 F.3d at 1335. But here too, the District Court was well within its discretion. *See Energy Heating, LLC v. Heat On-The-Fly, LLC*, 889 F.3d 1291, 1306 (Fed. Cir. 2018) (applying “abuse of discretion” review, “which is a highly deferential standard of review”). The District Court marched through New World’s conduct that made this case exceptional: its willful infringement, its alteration of records, and its

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<sup>17</sup> Nor is there any merit to New World’s argument (at 72) that the instruction to hold any confusion “due to New World’s failure to keep proper records” or “caused by New World’s records,” against New World, rather than to hold it against Ford, affected the jury’s findings on notice or article of manufacture because the parties’ dispute over those issues did not concern New World’s records at all. Appx8606 (instruction); Appx9325–9330 (arguing in closing that Ford’s letter giving notice of its patent rights was clear); Appx9336 (arguing in closing that the relevant article of manufacture was the whole part).

excessive litigation of this case. Appx63. As this Court has said over and over, this is exactly the kind of conduct that supports an attorneys' fees award. *See Modine Mfg. Co. v. Allen Grp., Inc.*, 917 F.2d 538, 543 (Fed. Cir. 1990).

**V. The District Court Correctly Denied New World's Motion To Alter Or Amend The Judgment.**

New World argues (at 73) that the three defendants should not be jointly and severally liable, and that the District Court thus should have granted its motion to alter or amend the judgment. But “[i]n 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.” Appx96 (denying New World's motion). A Rule 59(e) motion “serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.” *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (internal quotation marks omitted); *see also Flexuspine, Inc. v. Globus Med., Inc.*, 879 F.3d 1369, 1373 (Fed. Cir. 2018) (applying Fifth Circuit law and reviewing for abuse of discretion). It does not authorize defendants to sit back and wait to see how trial shakes out and then to challenge joint and several liability. The District Court properly denied New World's motion to alter or amend the judgment.

## **VI. The District Court’s Case Management Order Was Proper.**

New World complains (at 70–71) about the District Court’s denial of its motion to clarify a pretrial scheduling order. These kinds of docket-management orders are reviewed for abuse of discretion. *See Massachusetts Inst. of Tech. v. Abacus Software*, 462 F.3d 1344, 1358 n.9 (Fed. Cir. 2006) (applying Fifth Circuit law). New World does not explain why the scheduling order confused it or how any confusion prejudiced it. New World has thus forfeited the argument and failed to show any abuse of discretion, in any event. *See Ajinomoto Co. v. Int’l Trade Comm’n*, 597 F.3d 1267, 1278 (Fed. Cir. 2010) (“Such a conclusory assertion unaccompanied by developed argumentation does not preserve the issue for appeal.”); Appx90 (denying the motion because it “focuse[d] heavily on interpretation of the Court’s claim construction order,” which “clearly applies to all thirteen patents in suit”).

## CONCLUSION

For these reasons, the District Court's judgment should be affirmed.

December 16, 2019

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## CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019, I caused a copy of the foregoing to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

December 16, 2019

/s/ Jessica L. Ellsworth

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 11,103 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(b).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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