No. 2023-2308

United States Court of Appeals for the Federal Circuit

BALL METAL BEVERAGE CONTAINER CORPORATION,
Plaintiff-Counterclaim Defendant-Appellee,

v.

CROWN PACKAGING TECHNOLOGY, INC.,
CROWN CORK & SEAL USA, INC.,
Defendants-Counterclaim Plaintiffs-Appellants,

v.

REXAM BEVERAGE CAN CO.,
Counterclaim Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio in Case No. 3:12-cv-00033-WHR, United States District Judge Walter H. Rice

REPLY BRIEF OF APPELLANTS CROWN PACKAGING TECHNOLOGY, INC. AND CROWN CORK & SEAL USA, INC.

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February 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 23-2308

Short Case Caption Ball Metal Beverage Container Corporation v. Crown Packaging Technology, Inc.

Filing Party/Entity Crown Packaging Technology, Inc. and Crown Cork & Seal USA, Inc.

Instructions:

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Date: 09/05/2023

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Name: Daniel J. Goettle

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
Crown Packaging Technology, Inc.	Crown Packaging Technology, Inc.	Crown Holdings Incorporated
Crown Cork & Seal USA, Inc.	Crown Cork & Seal USA, Inc.	Crown Holdings Incorporated

☐ Additional pages attached

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

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5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

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Term	Meaning
Crown	Appellants, Defendants/Counterclaim Plaintiffs Crown Packaging Technology, Inc., and Crown Cork & Seal, USA, Inc.
Ball	Appellees, Plaintiff/Counterclaim Defendant Ball Metal Beverage Container Corporation and its subsidiary Counterclaim Defendant Rexam Beverage Can Co.
’875 patent	Crown’s asserted U.S. Patent No. 6,848,875 (Appx17-33)
’826 patent	Crown’s asserted U.S. Patent No. 6,935,826 (Appx34-46) (which shares a common specification with the ‘875 patent)
’634 patent	Crown’s unasserted U.S. Patent No. 6,065,634 (which shares a common specification with the ‘826 and ‘875 patents)
Asserted Claims	Claims 50, 52, 54, 56, 58 and 59 of the ’875 patent and claim 14 of the ’826 patent
Broad Claims	All Asserted Claims other than claim 54
Second Point	Refers not only to the term “second point” as used in claim 14 of the ’826 patent but also to the term “transition” in the ’875 patent claims
CDL+ Drawing	A product specification sheet having an undisputedly unscaled and dimensionally-inaccurate drawing of a can end that Ball says corresponds to the accused New CDL+ can end and supposedly is relevant ***only*** to claim 54
LOF+ Can End	A dimensionally-accurate photograph of a cross section of an operational LOF+ Can End (the “LOF+” can end) made by Anheuser-Busch that Ball says is relevant ***only*** to claim 54
Patent Drawings	Five unscaled and dimensionally-inaccurate Patent Drawings from four patent documents that Ball says are relevant to the Broad Claims ***but not*** claim 54

’789 patent	U.S. Patent No. 7,100,789 containing two of the five Patent Drawings (figures 4B and 7A)
JP ’371	Published JP Application No. 2018-016371A containing one of the five Patent Drawings (figure 2)
’280 patent	U.S. Patent No. 6,761,280 containing one of the five Patent Drawings (figure 4)
’843 patent	U.S. Patent No. 4,217,843 containing one of the five Patent Drawings (figure 3)

INTRODUCTION

The district court construed the term "second point" not once, but twice. That construction is not at issue on this appeal. Rather, the issue now involves (or should have involved) how to apply that construction to operational products. That is a fact-laden question for a jury. *Markman v. Westview Instru., Inc.*, 52 F.3d 967, 984 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996). Ball never even bothered to address *Markman* in its brief. Further, it admits, or at least does not deny, that the district court engaged in factfinding in granting summary judgment. That alone is sufficient to reverse the district court under Rule 56. Ball claims that this Court's precedent (*Exxon*) allowed the district court to make fact findings on summary judgment. But *Exxon*, which was cited to (but not by) the district court, is no longer controlling, having been limited by the Supreme Court's decision in *Teva*. If the district court wished to make fact findings, it was required to comply with Rule 52. But it ignored that rule entirely, never holding an evidentiary hearing or making fact findings and separate legal conclusions. So confronted with a choice of either Rule 56 or Rule 52, the district court violated the first and ignored the second. In either case, this Court should reverse and remand for a jury trial on indefiniteness, liability, and damages.

I. The proper standard of review is *de novo* and not "clear error."

Ball's brief reads as if the district court's ruling contained conclusions of law based on fact findings after a bench trial or evidentiary hearing. Ball Br. at, e.g., 32-

36; 39-44. For example, Ball states, "[t]he district court had ample evidence to conclude that the differences between the competing methods of locating the 'second point' are material" and that Ball had provided "multiple specific examples of can ends to illustrate" materiality of the methods. *Id.* at 32 (emphasis omitted). But the question on summary judgment was not whether Ball could marshal evidence to sufficiently support its position at trial. The question instead was whether Ball showed that no genuine dispute as to any material fact existed such that it was entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The answer is that Ball failed to make the required showing, which the district court erroneously failed to recognize in granting summary judgment. This Court should review the entirety of the district court's summary judgment ruling *de novo*, reverse, and remand for trial.

Despite Ball's suggestion, Crown is not appealing district-court fact findings or legal conclusions rendered under Rule 52 that might trigger clear error review. Ball Br. at 4, 40-44. That rule expressly requires "[i]n an action tried on the facts without a jury . . . the court ***must*** find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1) (emphasis added). The district court's opinion nowhere references Rule 52 and contains no explicit findings of fact or conclusions of law as Rule 52 requires. *Id.*; Appx11-16; *Tris Pharma, Inc. v. Actavis Labys FL, Inc.*, 755 F. App'x 983, 988 (Fed. Cir. 2019) (Rule 52 "***require***[s] findings on 'as many of the subsidiary facts as are necessary to disclose to the appellate court

the steps by which the trial court determined factual issues and reached its ultimate conclusions.'") (emphasis added) (quoting *Atlantic Thermoplastics Co. v. Faytex Corp.*, 5 F.3d 1477, 1479 (Fed. Cir. 1993)). The district court's single-paragraph analysis falls well short of enunciating fact findings or separate legal conclusions required by Rule 52.[1] Indeed, the district court never held any "action tried on the facts" or otherwise heard "evidence," let alone admitted any such evidence into the record. Fed. R. Civ. P. 52(a)(1) & (c). Because the district court never "heard" the parties on indefiniteness and never held a trial or evidentiary hearing, Rule 52 and the clearly erroneous standard of review are irrelevant.

Instead, Crown appeals the district court's ruling on summary judgment rendered under Rule 56. And Ball can hardly dispute this. The district court's scheduling order invited Ball to file its "renewed" motion for "summary judgment." Appx2742. Ball accepted that invitation and moved for summary judgment, titling its motion, "Renewed Motion . . . For ***Summary Judgment*** On Indefiniteness." Appx2887 (emphasis added). Ball clearly understood its motion was governed by Rule 56, stating in the very first sentence that its motion was filed "[p]ursuant to ***Fed. R. Civ. P. 56*** . . ." *Id.* (emphasis added).

Furthermore, the district court recognized that Ball's motion was for summary

[1] If this Court somehow decides that Rule 52 applies here, it should reverse and remand at least because of this error.

judgment and that Rule 56 governed. For example, the title of the district court's opinion stated that it was "Sustaining [Ball's] Renewed ***Motion for Summary Judgment*** on Indefiniteness . . . ." Appx2 (emphasis added). And the opinion cited not only Rule 56 but also bedrock Supreme Court summary-judgment cases like *Celotex* and *Anderson v. Liberty Lobby*. Appx11-12. The opinion also espoused the Rule 56 standard in granting Ball's motion. Appx16. Notably, the opinion nowhere mentioned Rule 52, either explicitly or implicitly.

Despite a clear record that Ball moved under Rule 56, that the district court held no evidentiary hearing on indefiniteness after this Court's remand, and that Crown appeals from a Rule 56 summary judgment ruling, Ball would now have this Court ignore Rule 56 as wholly inapposite. Ball Br. at 39-40 ("[Crown] assumes that the district court could not make factual findings in answering the materiality question."); Ball Br. at 42 ("The Court does ***not*** review the trial court's fact findings under the FED. R. CIV. P. 56 summary judgment standard, by asking whether a reasonable jury could have found for the non-movant.") (emphasis in original). Ball goes so far as to state (incorrectly) that "nothing in this Court's precedent requires factual disputes underlying indefiniteness to be resolved at trial. . . ." Ball Br. at 41. But on all counts here, Ball is wrong.

To support its notion that district-court factfinding here was somehow appropriate, Ball relies on this Court's decision in *Exxon*. Ball Br. at 41 (citing *Exxon*

Research & Eng'g Co. v. United States, 265 F.3d 1371, 1376 (Fed. Cir. 2001)). Ball contends that *Exxon* "rejected the patentee's argument that, because the indefiniteness issue turned on a question of fact, it could not be adjudicated without a trial." *Id*. Ball, however, ignores that the *Exxon* panel's rationale for the statement is now defunct. The *Exxon* panel concluded that the issue of indefiniteness turning on extrinsic evidence consisting of competing expert opinions could be resolved on summary judgment because "'the [district] court is not crediting certain evidence over other evidence or making factual evidentiary findings. Rather, the court is looking to the extrinsic evidence to assist in its ***construction*** of the written document.'" *Exxon*, 265 F.3d at 1376 (quoting *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998) (*en banc*)) (emphasis added).

Further, Ball's assertion that indefiniteness may be adjudicated without a trial even though it turns on conflicting extrinsic evidence, may be consistent with what the *Exxon* opinion stated, but it ignores the crucial fact that the *Exxon* panel's rationale is now defunct. The Supreme Court squarely rejected this *Exxon* rationale in *Teva*. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 330 (2015). Citing Rule 52, the Supreme Court concluded that resolving competing expert testimony underlying indefiniteness ***does, in fact,*** constitute factfinding. *Id.* (rejecting dissent's argument that claim construction does not involve factfinding, stating "this case provides a perfect example of the factfinding that sometimes underlies claim

construction: The parties here presented the District Court with competing fact-related claims by different experts, and the District Court resolved the issues of fact that divided those experts.").

Because, here, resolution of competing expert declarations on indefiniteness clearly involved factfinding, this Court's rationale in *Exxon* stands rejected and thus so does *Exxon*'s conclusion that such facts can be adjudicated and resolved on summary judgment without trial. And this Court has already acknowledged as much. For example, in *ImmunoGen*, it reversed a summary judgment ruling on indefiniteness, noting that "the district court resolved numerous factual disputes," which was "an error that is fatal to its ultimate [indefiniteness] ruling." *ImmunoGen, Inc. v. Hirshfeld*, No. 2021-1939, 2022 WL 885774, at *1 (Fed. Cir. March 25, 2022); *Bombardier Recreational Prod. Inc. v. Arctic Cat Inc.*, 785 F. App'x 858, 867 (Fed. Cir. 2019) ("The evidence presented . . . was almost exclusively extrinsic, in large part encompassing warring expert testimony. ***The question of definiteness thus required the resolution of critical factual issues***. . . ."") (emphasis added).[2]

[2] *See also Smarte Carte Inc. v. Innovative Vending Sols., LLC*, No. 1:19-cv-08681-NLH-AMD, 2023 WL 2263511, at *21 (D.N.J. Feb. 28, 2023) ("Indefiniteness, while a question of law, can only be determined at the summary judgment stage if there is no genuine factual dispute underlying the legal question.") (citing *Bombardier*, 785 F. App'x at 867); *Geospatial Tech. Assocs., LLC v. United States*, 164 Fed. Cl. 267, 276 (2023) (denying cross-motions for summary judgment because "[t]he parties rely on conflicting expert reports, creating a disputed material fact"); *Viva Healthcare Packaging USA Inc. v. CTL Packaging USA Inc.*, 197 F. Supp. 3d

Ball's assertion that *ImmunoGen* is "plainly incorrect" as supposedly inconsistent with *Exxon* is itself plainly incorrect – *Teva* has undone *Exxon*. Ball Br. at 44 n.12.

Crown appeals a summary-judgment ruling, not a ruling following a bench trial or evidentiary hearing that triggered Rule 52, and therefore, as this Court has explained, the clear error standard of review is irrelevant:

> In patent infringement suits involving the grant of a motion for summary judgment, the law enunciated in *Anderson v. Liberty Lobby* governs. This court reviews those determinations without deference. ***An appellate court does not review a district court's "findings" of fact underlying summary judgment under the clearly erroneous standard of Rule 52.*** To overturn a summary judgment, the non-movant need only show that one or more of the facts on which the district court relied was "genuinely in dispute," as that phrase is interpreted in *Anderson*, and was material to the judgment.

Amini Innovation Corp. v. Anthony Cal., Inc., 439 F.3d 1365, 1368 (Fed. Cir. 2006) (emphasis added and citations omitted).[3]

837, 858 (W.D.N.C. 2016) ("[W]here, as here, expert evidence addressing what one skilled in the art would have understood by looking at [the] patent is in conflict, summary judgment is inappropriate.") (quotation marks omitted; collecting cases).

[3] *See also Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307, 1312 (Fed. Cir. 2016) ("We review the grant or denial of summary judgment *de novo* . For the district court's entry of judgment under Rule 52(c), we review the district court's factual findings for clear error and its legal conclusions *de novo*.") (citations omitted); *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 592 (6th Cir. 2009) ("In considering a motion for summary judgment, '[t]he judge's function . . . is limited to determining whether sufficient evidence has been presented to make the issue a proper jury question, and ***not to judge the evidence and make findings of fact***.'") (citation omitted and emphasis added).

For its part, Ball nowhere mentions Rule 52, instead harkening to the clearly-erroneous standard with no explanation of why the standard would apply to the summary judgment motion here, where the issues in dispute relate to claim application rather than claim construction, and where the district court held no bench trial or evidentiary hearing, admitted no evidence, presumably relied on hearsay expert declarations on summary judgment, and failed to "find the facts specially" or "state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). None of the cases Ball cites support its contention that the clearly-erroneous standard applies in this case. Ball Br. at 41-43.[4] In all but one of them, *EON*, the district court made fact findings after a bench trial or in the context of claim construction at a *Markman* hearing thus triggering Rule 52 and its requirements, or properly granted summary judgment under Rule 56 because there were no disputed factual issues. *EON*, as discussed below, is distinguishable on other grounds.

The principal case on which Ball relies, *Saso Golf*, was not an appeal from a summary judgment ruling. *Saso Golf, Inc. v. Nike, Inc.*, 843 F. App'x 291 (Fed. Cir. 2021); Ball Br. at 41. Instead, the matter was an appeal from an invalidity judgment following a bench trial. Indeed, the *Saso Golf* panel nowhere mentions summary

[4] Indeed, Ball ignores that this Court's 2020 decision vacating and remanding the district court's summary judgment of indefiniteness ruling nowhere mentioned "clear error" or Rule 52. Appx1899-1908. Rather, this Court specifically stated that it was reviewing the district court's decision "de novo." Appx1904.

judgment or Rule 56, instead referencing the Rule 52 clear error review standard. *Saso Golf*, 843 F.App'x at 294. Furthermore, even if *Saso Golf* had involved a summary judgment ruling – and there is nothing in this Court's opinion hinting that it did – this Court would still have been positioned to affirm under a *de novo* standard because there was no genuine dispute of material fact as to "where an artisan would take the required measurements." *Id.* at 298. In *Saso Golf*, the defendant presented expert testimony contending that a skilled artisan would not be reasonably certain. *Id*. at 293. But crucially, the patentee's expert did not disagree, instead simply contending that such location need not be found in the first place. *Id.* at 293-94, 296.

Similarly, neither *Berkheimer*, *IBSA*, nor *HZNP* in relevant part involved summary judgment, Rule 56, or claim application of the type at issue in this case. Ball Br. at 42. Rather, all three involved rulings after factfinding made in connection with claim construction at *Markman* hearings. In *Berkheimer* and *IBSA* (as in *Saso Golf*), there were no disputed factual issues. In *Berkheimer*, the patentee failed to provide expert testimony. *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1364 (Fed. Cir. 2018) ("Mr. Berkheimer did not provide the court with expert testimony of his own."). In *IBSA*, the patentee's expert corroborated that the term at issue was "not a well-known term in the art" and therefore did not have a definite meaning. *IBSA Institut Biochimique, S.A. v. Teva Pharms. USA, Inc.*, 966 F.3d 1374, 1381 (Fed. Cir. 2020). In *HZNP*, there was competing expert testimony but also, unlike the present

case, a hearing was held at which that testimony was received before holding the claims indefinite after multiple *Markman* hearings. *HZNP Medicines LLC v. Actavis Lab'ys UT, Inc.*, 940 F.3d 680, 685 (Fed. Cir. 2019).

The cases Ball cites involving summary judgment are distinguishable. Ball Br. at 42-43. In *Synchronoss*, for example, this Court affirmed two holdings of indefiniteness under two different standards of review. The ruling as to one patent invalidated on summary judgment was affirmed after *de novo* review where there were no disputed factual issues because the district court's ruling was based entirely on the patentee's expert and admission. *Synchronoss Techs., Inc. v. Dropbox, Inc.*, 987 F.3d 1358, 1365-67 (Fed. Cir. 2021). Conversely, the ruling as to a second patent was reviewed for clear error because indefiniteness was decided in the context of claim construction after a *Markman* hearing triggering Rule 52 review. *Id.* at 1365, 1367-68.

In *EON*, summary judgment of indefiniteness was affirmed. *EON Corp. IP Holdings LLC v. AT&T Mobility LLC*, 785 F.3d 616, 624 (Fed. Cir. 2015). Before granting the motion, however, the district court held three hearings in short succession, a claim construction hearing, a summary judgment hearing, and a "hearing to receive expert testimony" after which it "made numerous detailed findings of fact." *Id.* at 619-20. Even though the case involved summary judgment, this Court expressly stated it was reviewing the subsidiary factual determinations for

clear error "[b]ecause the indefiniteness inquiry here is intertwined with claim construction." *Id.* at 620. In the present case, the indefiniteness inquiry does not involve claim construction at all, but rather claim application, and thus *EON* does not apply.

Ball cites no case supporting its proposition that this Court reviews a district court's summary-judgment ruling under a clear error standard when the district court held no trial or evidentiary hearing implicating Rule 52, admitted no evidence, made no findings of fact specially, or separately stated conclusions of law. Fed. R. Civ. P. 52(a)(1). Instead, in this case, the district court considered only lawyer argument made in summary-judgment briefs and inadmissible evidence, largely in the form of expert declarations purporting to lay out what the experts could say at trial if ever called to testify. Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a [summary-judgment] motion must be made on personal knowledge, set out facts ***that would be admissible in evidence***, and show that the affiant or declarant is competent to testify on the matters stated.) (emphasis added).

Because the district court ruled on summary judgment, this Court's review is *de novo*. *Ball Metal Beverage Container Corp. v. Crown Packaging Tech., Inc.*, 838 F. App'x 538, 541 (Fed. Cir. 2020) (citing *Savage v. Gee*, 665 F.3d 732, 737 (6th Cir. 2012)). Furthermore, because the district court could not resolve genuine disputes of material fact on summary judgment, its rulings were as to only "questions

of law . . . and are not shielded by the 'clear error' standard of review." Fed. R. Civ. P. 52 Adv. Comm. Notes (1991 Amend.). Finally, because the district court was supposed to, but did not, rule only "on the basis of facts established ***on account of the absence of contrary evidence*** or presumptions," this Court must reverse. *Id*. (emphasis added).

II. The summary-judgment record contained genuine disputes of material fact as to each of Ball's "examples" and all asserted claims.

Ball contends that, even if this Court reviews the district court's ruling *de novo* under the summary judgment standard, this Court should still affirm. Ball Br. at 44-49. According to Ball, it supposedly demonstrated to the district court that there was no disputed issue of material fact as to any "example" and as to all asserted claims. *Id*. But Ball's contention is based on two fundamentally-flawed foundations. First, Ball impermissibly shifts the burden to Crown on the indefiniteness issue, contending that Crown did not prove that the second-point location method could never be material in an infringement analysis. *Id*. Second, all of Ball's arguments boil down to disagreement with Crown's expert and fail to view the prospective evidence in a light most favorable to Crown, as black-letter law requires. *See, e.g., Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). Instead, Ball does the opposite of what summary-judgment law requires and asks this Court to find facts never found by the district court below after viewing them in a light most favorable

to Ball, the summary-judgment movant. *Id*.

Turning to Ball's burden-shifting, despite Ball's burden to prove indefiniteness by clear-and-convincing evidence, Ball flips the rulebook and contends that Crown's expert, Mr. Biondich, supposedly did not opine "that the different methods would ***always*** produce consistent infringement results for operational ends" because Mr. Biondich supposedly "did ***not*** even try to answer this question, even though this Court had expressly posed it in *Ball* III." Ball Br. at 45 (emphases in original); *see also id.* at 32 ("Crown's new expert, Mr. Biondich, did not purport to opine that the choice of method could ***never*** be material.") (emphasis in original). But of course, this Court posed no such question in the first place. Instead, it stated that the "relevant inquiry" is "whether the differing methodologies lead to materially different results" while cautioning that "'mere possibility of different results'" does not render a claim indefinite. Appx1905 (quoting *Takeda Pharms. Co. Ltd. v. Zydus Pharms. USA Inc.*, 746 F.3d 1359, 1366-67 (Fed. Cir. 2014)). And in any event, neither Crown nor Mr. Biondich carries any burden to prove that the claims are definite. The claims are presumed valid, the burden rests with Ball, and Crown has no obligation to come forward with definiteness-proving evidence. 35 U.S.C. § 282(a) ("A patent shall be presumed valid. . . . The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity."). To defeat summary judgment, Crown was merely

required to cite "particular parts of materials in the record, including . . . declarations" in support of all assertions that a fact "is genuinely disputed . . . ." Fed.R.Civ.P. 56(c)(1)(A). And as amply demonstrated throughout its opening brief, Crown did just that, including summary charts showing the genuine disputes of material fact as to each example Ball raised on summary judgment. Crown Br. at 28-51 & 37.[5] Ball is wrong in its implied assertion that the law required Crown to prove definiteness to defeat summary judgment.

In addition to burden-shifting, Ball also performs factfinding, or at least advocates for this Court to do so, ignoring that it is Ball that needs to demonstrate that the record lacks genuine disputes of material fact. It is not for Ball or the district court, on summary judgment, to decide whether Crown's Mr. Biondich "only attempted to nitpick" Ball's expert or "conveniently, managed to slide each pair of

[5] While Ball did not discuss certain of its "examples" on summary judgment because of district-court page limits, on appeal, Ball attempts to resurrect these "examples." Ball Br. at 25 n. 9. But Ball waived these "examples." The entirety of what Ball said on summary judgment about these examples was contained in a footnote, quoted here in its entirety except as to internal citations: "For space reasons, not all of the examples analyzed by Mr. Gillest have been specifically discussed in this motion. In addition to Examples 2-7 above, Mr. Gillest evaluated four other examples: (1) JP 2015-42411A, (2) JP 4388726B2, (3) Figure 6 from U.S. Patent No. 8,490,825, and (4) Figure 10 from the same patent. All four of these additional examples are relevant to claim 52 of the '875 Patent, and the first two are also relevant to claim 14 of the '826 Patent." Appx2906 (citations omitted). But if this Court allows resurrection of these "examples," all fail anyway because Crown's opposition brief and Mr. Biondich's declaration demonstrated multiple genuine disputes of material fact as to each one. *See* Appx3226-3250 at 7 & n. 8, 11 & n. 11, 12-13; 15 & n. 13; 17 & n. 15; Appx3274-3358 at 41-43, 57-61, 73-79.

angle measurements either inside or outside the applicable range" or "manufacture[d]" disagreement with Ball's expert or "contort[ed] his angle measurements to fit either inside or outside a particular claimed range." Ball Br. at 45-48. Ball's brief in this regard reads more like a closing jury argument than a brief in support of summary judgment. But in any event, Ball forgets that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255. This is all the more so here, given that the district court never mentioned the supposed nefarious behavior Ball attributes to Crown's expert and that Ball's burden is not merely preponderance of the evidence but is instead clear-and-convincing evidence. *Id*. ("holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions")

Ball further asserts a supposedly "undisputed point" that "as a 'simple case of geometry,' the choice between the methods would be expected to produce materially different angle results for at least some ends that skilled artisans could potentially design." Ball Br. at 46 (citing Appx2964) (emphasis omitted). But this point is hardly undisputed – instead, this is ***the*** disputed issue and it is, of course, material. Crown's Mr. Biondich reviewed all of the supposed can end examples that Ball raised and flatly disagrees that any demonstrate indefiniteness. Crown Br. at 37; Appx3264-3265; Appx3307-3309; Appx3326-3332; Appx3340-3341; Appx3349-3351. No

matter how convinced Ball is that indefiniteness here is a matter of such "simple geometry," the law requires clear-and-convincing proof, not lawyer-generated, unsubstantiated, spurious arguments denigrating the integrity of an independent expert, the lawyers who retained him, or the party in interest.

Ball moreover contends that Crown's Mr. Biondich did not challenge the accuracy of Ball's expert's second-point location determinations, did not "explain why Mr. Gillest's application of the change-in-geometry method . . . was unreliable," and did not "rebut Ball's explanation" of how Mr. Gillest applied the methods for locating the second point. Ball Br. at 46-48. Ball is wrong on all counts. First, Mr. Biondich did challenge Ball's expert, and Crown relied on Mr. Biondich's work to amply demonstrate a genuine dispute of material fact as to all Ball "examples" in the form of Mr. Biondich's disagreement with Ball's proffered angle measurements and other material assertions. Crown Br. at 35-38, 47-51 (citing, e.g., Appx3241-3242; Appx3307-3309; Appx3314-3316; Appx3327-3332; Appx3337-3338; Appx3340-3341; Appx3349-3351; Appx3357). Second, Crown is under no obligation to proffer Mr. Biondich to explain ***why*** Mr. Gillest's measurements are wrong to defeat summary judgment. At trial, Crown will be free to cross examine Mr. Gillest in this regard. But on summary judgment, Crown need only cite Mr. Biondich's declaration containing facts that will be admissible in evidence and that are genuinely disputed. Fed. R. Civ. P. 56(c)(1)(B) & (c)(4). This Crown has done.

Lastly, Ball contends that Crown's Mr. Biondich applied a different method for locating the second point using the so-called change-in-geometry method than Crown's former expert, Mr. Higham, used. Ball Br. at 47. Ball is wrong. This Court defined the change-in-geometry method of finding the second point as locating "a point along the chuck wall where the radius of the lower arcuate portion of the chuck wall deviates from the chuck wall to become the annular reinforcing bead." Appx1904 (quotation marks omitted). Mr. Higham and Mr. Biondich both used that method of locating the second point.

Mr. Higham used paper and a physical protractor to measure the inclination angle in *Anheuser-Busch v. Crown*. Appx3406. In this case, Mr. Higham used Microsoft PowerPoint and a computer-generated protractor for that purpose. Appx3263; Appx2898. And in this case, Mr. Biondich followed Mr. Higham's lead and used Microsoft PowerPoint and a computer-generated protractor to measure inclination angle. Appx3264-3265; Appx3307-3309; Appx3326-3332; Appx3340-3341; Appx3349-3351. In any event, locating the second point is one thing and measuring inclination angle is another. Switching from a plastic to a computer-generated protractor does not introduce a new "methodology" of locating the second point or measuring inclination angles, just as using a calculator to add numbers implements that same arithmetic as adding numbers using pad and pencil.

In summary, this Court should reject Ball's assertion that Crown failed to raise genuine disputes of material fact as to all Ball "examples" and reverse the district court's summary judgment ruling.

III. As to the LOF+ Can End and claim 54, the district court ignored genuine disputes of material fact.

Turning specifically to the LOF+ Can End and claim 54, Crown hardly "tacit[ly] acknowledged" indefiniteness of claim 54 or spent "little time" discussing the claim in its opening brief. Ball Br. at 36-37. Instead, Crown demonstrated that its prior expert's analysis 20 years ago in another case was flawed, and Crown demonstrated this through its current expert who used the same methodology that the former expert used in 2018 in this case – Microsoft PowerPoint and a computer-generated protractor. Crown Br. at 48-50. Crown's current expert determined that the prior expert, who used a blurry paper image of an LOF+ Can End, located the second point in the wrong spot, probably because the blurry image made it difficult to see where the relevant geometry changed. *Id.* Crown's new expert disagreed with Crown's prior expert (the only evidence Ball proffered on summary judgment here as to the LOF+ Can End), creating summary-judgment-defeating genuine disputes of material fact.

Ball suggests that the district court did not find facts with regard to claim 54 because Crown was conclusively bound by its former expert's opinion in the prior case against Anheuser Busch. Ball Br. at 57-58. To the extent the district court

applied judicial estoppel principles or the like, the district court nowhere explicitly said so. *Id*. And had it said so, it would have been wrong. "Under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding, ***and succeeds in maintaining that position,*** he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (emphasis added and citation omitted). But no position Crown took in the prior case regarding the wall angle of the LOF+ Can End succeeded. At the district court, Crown lost on Anheuser-Busch's motion for summary judgment based on claim construction, prevailed on appeal in obtaining reversal of that construction, and then settled the case with no decision on the claim application merits. Thus, Crown did not "succeed" in maintaining any position regarding the inclination angle in the LOF+ Can End, judicial estoppel is inapplicable, and neither the district court nor Ball asserted otherwise. Thus, to the extent the district court granted summary judgment based on the unstated conclusion that Crown was conclusively bound by its former expert, it would have been wrong. Alternatively, if the district court rejected Crown's current expert in favor of its former expert it would necessarily have made a credibility determination. On summary judgment, the district court was not permitted to do so.

Ball further implies that the district court's decision was crystal clear and that there's no doubt that the court considered not only the LOF+ Can End but also the Patent Drawings. Ball Br. at 37-39. This Court can evaluate the clarity of the district court's ruling for itself, particularly given that the analysis is a mere six sentences in a single paragraph. Appx15-16. Certainly, however, Ball's contention that the district court "cited approvingly . . . the ten additional Examples analyzed by Mr. Gillest" is at least a stretch if not plain false. Ball Br. at 27; *see also id*. at 33 ("The district court cited all of Ball's Examples . . ."). Yes, the district court generally referred to the opinions of Ball's expert, Mr. Gillest, who (in turn) had opined about all patent-drawing "examples" but not the LOF+ Can End. Appx15-16. But the district court nowhere mentioned any Ball example except for the LOF+ Can End. *Id.* It appears to Crown just as likely that the district court thought that Ball was contending that the LOF+ Can End "example" rendered all asserted claims indefinite. Indeed, Ball nowhere addresses Crown's contention that, while the district court's opinion noted that Crown's Mr. Biondich arrived at measurements different from its former expert, the LOF+ Can End was the ***only*** example as to which ***both*** Mr. Higham and Mr. Biondich made relevant measurements, and thus the only example as to which their measurements could differ from one another. Crown Br. at 34-35 (citing Appx2898; Appx3371-3372; Appx3406). But at least there is one crystal-clear fact on which the parties appear to agree – to the extent the

district did rely on only the LOF+ Can End as the sole basis for invalidating any claim other than claim 54, such reliance would have been erroneous.

IV. As to the patent drawing "examples," Ball ignored this Court's remand requiring analysis of operational can ends that might realistically be practicing the other claim limitations.

As to this Court's instructions that proof of indefiniteness here is limited to analysis of can ends that are not only "operational" but that "might realistically be practicing the other claim limitations," Ball wholly ignores the genuine disputes of material fact underlying the patent drawing "examples." Instead, Ball improperly argues facts in a light most favorable to Ball or ignores the disputed material facts altogether. Ball Br. at 53.

As to the requirement for "operational" can ends, Ball misleadingly asserts that Crown's Mr. Biondich had no opinion on the matter, implying that Mr. Gillest's opinion stands unrebutted. But this implication is false. Mr. Biondich stated that Ball and its expert presented no evidence demonstrating that the patent "examples" depicted can ends that could be made operational. Appx3179, 140:1-25 ("I don't know if they could be manufactured or seamed . . . I have no reason to believe any of these could be made or double seamed . . . ."). Indeed, the admissions of ***Ball's*** expert cast grave doubt on such a proposition given that he failed to consider whether any of the Patent Drawings were even scaled, as Crown explained in its opening brief. Crown Br. at 43. Furthermore, as to the instruction to consider can ends that

may be "realistically practicing the other claim limitations," Ball wholly ignores Crown's opening brief explaining that Ball's expert's opinions were conclusory, inadmissible *ipse dixit* because they contained no analysis as to the remaining claim limitations despite Ball's evidentiary hurdle. Crown Br. at 44-45; Ball Br. at 53-57.

Instead of demonstrating that the record contained no genuine dispute of material fact that the Patent Drawings depicted "operational" can ends that practiced the other claim limitations, Ball instead spends pages telling this Court what this Court meant when it wrote that can ends used to demonstrate indefiniteness must be not only operational but also be realistically practicing the other claim limitations. Ball Br. at 49-57. This Court knows what it meant better than the parties. But the guiding principle that this Court laid out is that indefiniteness here requires clear-and-convincing proof that the choice of method for locating the second point is material, such that under one method, an operational can end is within the claimed range and under another, outside the claimed range. Appx1906-1908. And this Court's guidance makes sense. If a can end would not infringe the claim regardless of location method used, for example, the choice of method is *per se* immaterial to determining claim scope. This is why this Court instructed that "'mere possibility of different results'" does not render a claim indefinite. Appx1905 (quoting *Takeda*, 743 F.3d at 1366-67). Instead, this Court referred to "operational" can ends and further instructed that "differences in measurement must matter for determination of

whether or not a claim limitation is met by those who might realistically be practicing the other claim limitations." Appx1906-08.

Despite Ball's attempt to equate the Patent Drawings with real products, the unscaled Patent Drawings suggest, at most, the "mere possibility" of a product. But even if the Patent Drawings could be used the way Ball misuses them, Ball's proof of materiality still remains both woeful and disputed. Ball's only evidence is its expert's conclusory, unsupported, and inadmissible opinion that falls well short of showing that the drawings could not only be brought to life but also work for their intended purpose. Crown Br. at 40-45. And even if the expert's opinions were admissible, Crown amply demonstrated genuinely disputed material facts as to these opinions based on the expert's failure to perform even a cursory evaluation of the other claim limitations and conclusory unsupported assertions that the Patent Drawings "could" be made operational. *Id.* at 45-47.

V. Even if this Court reviews the district court's ruling under the clearly erroneous standard, this Court should still reverse as to all claims and all Ball "examples."

Even if this Court reviews the district court's ruling for clear error, this Court should still reverse. First, as to the Patent Drawings, for the reasons explained in section IV above, it was clearly erroneous for the district court to find that the Patent Drawings depicted "operational" can ends that "realistically practiced" the other claim limitations. Crown Br. at 40-45. A factual finding is "clearly erroneous" when

the appellate court is "left with the definite and firm conviction that a mistake has been committed." *Lindemann Maschinenfabrik GMBH v. Am. Hoist & Derrick Co*., 730 F.2d 1452, 1458 (Fed. Cir. 1984) (quotation marks and citations omitted). As explained above, the district court had no evidence on which to find that the Patent Drawings corresponded to operational can ends that realistically practiced the other claim limitations. At best, all the district court had was the inadmissible *ipse dixit* of Ball's expert. And aside from this, it was also clear error for the district court to accept the reliance of Ball's expert on the Patent Drawings and on the CDL+ Drawing to locate first and second points and determine the angle between them without any evidence that – indeed, without Ball's expert even considering whether – the drawings were scaled. Crown Br. at 23-24, 40-45. "This Court has repeatedly cautioned against overreliance on [patent] drawings that are neither expressly to scale nor linked to quantitative values in the [patent] specification." *Krippelz v. Ford Motor Co.*, 667 F.3d 1261, 1268 (Fed. Cir. 2012) (citations omitted). "[I]t is well established that Patent Drawings do not define the precise proportions . . . and may not be relied on to show particular sizes if the specification is completely silent on the issue." *Hockerson-Halberstadt, Inc. v. Avia Group Int'l, Inc*., 222 F.3d 951, 956 (Fed. Cir. 2000) (citations omitted).

The district court's supposed fact findings for claim 54 were also clearly erroneous. The district court's acceptance of Mr. Higham's inclination angle

measurements and rejection of Mr. Biondich's competing measurements as to the LOF+ Can End was clear error. Appx15. Mr. Biondich used the same method of locating the second point as Mr. Higham, but did so in a more accurate way. Crown Br. at 26, 48-50. It was therefore clear error for the district court to reject Mr. Biondich's measurements over Mr. Higham's.

Furthermore, Rule 52 requires that, for the clear-error review standard to apply, the district court "must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). But the district court's six-sentence paragraph does neither. *See OSRAM Sylvania, Inc. v. Am. Induction Techs., Inc.*, 701 F.3d 698, 707 (Fed. Cir. 2012) ("Whether dealing with an issue of law . . . or an issue of fact . . . , this court must be furnished 'sufficient findings and reasoning to permit meaningful appellate scrutiny.'").

VI. Because of the length of this case, Ball's intention to press for summary judgment on additional grounds upon this Court's remand, and the undisputed prejudice to Crown from more delay, this Court should order reassignment.

Turning to Crown's request for reassignment, the length of this case is hardly of Crown's making. Ball Br. at 59-61. Ball implies that Crown controls the district court's docket and not the district court, an assertion requiring no response.

The record is clear. Crown sued Ball as soon as the now-expired patents issued. But Ball hoodwinked Crown, causing years of needless discovery, motion practice, and an appeal over a product that Ball secretly stopped making years earlier.

Had Ball been forthcoming, Crown could have focused in 2006 when Ball first started secretly making the accused product, rather than in 2012, when Crown discovered the secret.

And Crown was forced into a Hobson's choice regarding Rexam's infringement. Had it sued Rexam immediately it would have been confronted with either a two-front war, or a likely motion to transfer and consolidate with the present glacially-paced case against Ball. And then when Ball bought Rexam, it faced another Hobson's choice – bring this new Ball entity into the case immediately and suffer more delay in this case or file another lawsuit at the conclusion of this one, inviting another decade of litigation over expired patents.

Furthermore, if this Court does not reassign this case, Ball clearly intends to draw it out for years to come, noting that the district court has yet to rule on various other Ball summary judgment motions. Ball Br. at 6 n.2. In so signaling this intention, Ball fails even to acknowledge, let alone dispute, the prejudice to Crown from the delay to date. Crown Br. at 51-55. And given the district court's past practice, it appears that the district court would entertain more motion practice and continue to eschew trial.

For all of the reasons set forth in Crown's opening brief, Crown respectfully requests reassignment to preserve the appearance of justice.

VII. Addressing Ball's gratuitous comments

Ball makes gratuitous comments irrelevant to the issues before this Court that should not stand unrebutted.

Ball contends that Crown's patented can end, SuperEnd, suffered from "major design flaw[s]" and was "performing poorly." Ball Br. at 7, 13. Ball fails to mention that Crown sold billions of these SuperEnd can ends and continues selling them today.

Ball suggests that Crown "dismissed" its prior case against Rexam to avoid a trial loss on infringement. *Id.* at 14. Ball ignores that Crown and Rexam settled the lawsuit because the accused can end failed in the market, forcing Rexam to shift to the currently-accused can end.

The first sentence of Ball's brief appears to suggest that Crown has been unfairly litigious. *Id.* at 1. But Anheuser-Busch first sued Crown, not vice versa. Furthermore, Ball fails to explain that it (together with Rexam and others) saw SuperEnd as a major business threat and copied the idea though using a serpentine wall. Further, Ball also fails to mention that Crown has always made its patents available for license on fair terms, as licensee Anheuser-Busch well knows.

Similarly, Ball suggests that Crown improperly included claims in its continuation applications to cover serpentine-walled can ends not disclosed in the

example patent embodiments. *Id.* at 8-10, 14, 28. But Ball tellingly has never raised any written-description defense in this regard.

CONCLUSION

For the reasons stated above and in Crown's opening brief, Crown respectfully asks this Court to reverse the district court's grant of summary judgment and remand for a long-awaited jury trial, as justice demands. Furthermore, Crown respectfully submits that this Court should order reassignment.

February 20, 2024

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FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2023-2308

Short Case Caption: Ball Metal Beverage Container Corporation v. Crown Packaging Technology, Inc.

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