**2022-1954, -2295**

# United States Court of Appeals for the Federal Circuit

INLINE PLASTICS CORP.,

*Plaintiff-Appellant,*

– v. –

LACERTA GROUP, LLC,

*Defendant-Cross-Appellant.*

*On Appeals from the United States District Court for the District of Massachusetts in No. 4:18-cv-11631-TSH Honorable Timothy S. Hillman, District Judge*

## BRIEF FOR DEFENDANT-CROSS-APPELLANT

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## A PATENT CLAIM AT ISSUE

Claim 1 of U.S. Patent No. 7,118,003:

A tamper-resistant/evident container comprising:

a) a plastic, transparent cover portion including an outwardly extending peripheral flange;

b) a base portion including an upper peripheral edge forming at least in part an upwardly projecting bead extending substantially about the perimeter of the base portion and configured to render the outwardly extending flange of the cover portion relatively inaccessible when the container is closed; and

c) a tamper evident bridge connecting the cover portion to the base portion.

Appx94.

# CERTIFICATE OF INTEREST

Pursuant to Fed. Cir. R. 47.4, undersigned counsel for Defendants-Cross-Appellants states as follows:

1. The full names of the parties being represented are:

Lacerta Group, LLC

2. The name of the real party in interest if the party name in the caption is not the real party in interest:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are:

None.

4. The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this Court and who are not already listed on the docket for the current case:

**Hinckley, Allen & Snyder LLP**

Rebecca F. Briggs
Gina K. Kim

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:

None.

6. All information required by Fed. R. App. P. 26.1(b) and (c) that identifies organizational victims in criminal cases and debtors and trustees in bankruptcy cases:

None.

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## STATEMENT OF RELATED CASES

No appeal in or from this proceeding was previously before this or any other appellate court. Defendant-Cross-Appellant does not believe that any cases pending in this or any other court or agency will directly affect or be directly affected by this Court's decision in the pending appeal.

## STATEMENT OF JURISDICTION

Lacerta Group, LLC ("Lacerta") incorporates by reference Inline Plastics Corp.'s ("Inline") Jurisdictional Statement and adds that Lacerta timely filed its cross-appeal on September 27, 2022. Appx10877-10878.

## STATEMENT OF THE ISSUES

### I. Inline's Appeal

1. Whether the district court erred in denying Inline's motion for judgment as a matter of law ("JMOL") as to invalidity.

2. Whether the district court abused its discretion in denying Inline's motion for a new trial on invalidity.

3. Whether the district court's claim constructions were erroneous.

4. Whether the district court abused its discretion in denying Inline's motion for a new trial on non-infringement.

### II. Lacerta's Cross-Appeal

1. Whether the district court erred in dismissing the claims Inline dropped at the end of trial *without* prejudice.

2. Whether the district court abused its discretion in denying Lacerta's motion for an exceptional case determination.

## STATEMENT OF THE CASE

### I. Factual Background

Thermoformed plastic containers are not novel. Appx448, Appx465-466, Appx557. Hinged, thermoformed clamshell containers made from one sheet of plastic have been ubiquitous in the marketplace for over 60 years. Appx545. By 2002, supermarkets sold food in thermoformed plastic containers in various configurations—with and without locks, tamper-evident/tamper-resistant ("TE/TR"), vented and non-vented, and leak-proof. Appx547-550, Appx1050, Appx5644.

Lacerta is a custom plastic packaging manufacturer. Appx1390. Since 1998, Lacerta has manufactured thermoformed plastic products, when it produced thermoformed clamshell containers for Polaroid instant cameras. Appx1384-1386.[1] Over the next ten years, Lacerta expanded its thermoforming operations into multiple industries including food packaging. Appx1387-1388.

In 2009, Lacerta designed a version of TE/TR containers. Appx1390. It did not commercialize those designs, focusing instead on other packaging initiatives. Appx1391-1393. In 2014, Lacerta revisited the idea of producing TE/TR

[1] Ali and Mory Lotfi formed Lacerta in 1993 to provide recycling and waste management services for BASF and, later, DuPont. Appx1374-1377, Appx1382-1383. Lacerta's work for DuPont, which produced millions of pounds of plastic flake, led Lacerta to explore plastic thermoforming. Appx1383-1384.

containers, as customer trends shifted toward fresh, local products, and Lacerta saw an unmet demand for TE/TR containers that showcased the food and not the packaging. Appx1393, Appx1397, Appx1400-1403.

Lacerta designed a TE/TR container that was easier to open and close than its competitors, aesthetically pleasing by avoiding ribs that masked the food, and eliminated sharp edges. Appx1394-1395, Appx1400-1403. Lacerta's tamper-resistant feature incorporates a truncated cover flange that makes it more difficult to grasp and open the cover. Appx1407-1408, Appx1469-1470. As of trial, Lacerta's Fresh N' Sealed line contained approximately 100 products of different shapes and sizes that shared the same design features, such as the truncated flange. Appx1624, Appx1471-1472. Inline alleged infringement as to 18 of the 100 Fresh N' Sealed containers. Appx2173.

## II. The District Court Litigation

### A. Inline's Infringement Allegations

Inline's complaint alleged that certain Fresh N' Sealed products infringe U.S. Patent Nos. 7,118,003 (the "'003 patent"), 7,703,680 (the "'680 patent"), and 9,630,756 (the "'756 patent"). Appx182-192. Inline's amended complaint added allegations of infringement of U.S. Patent Nos. 8,795,580 (the "'580 patent") and 9,527,640 (the "'640 patent") (collectively, the "patents"). Appx231-245. Lacerta

asserted counterclaims that the patents are invalid. Appx280-305.[2]

The patents share substantially similar specifications. Appx81-181. In the "Summary of the Disclosure" of the '003 Patent,[3] Inline identified two features that render the claimed invention TE/TR and "improv[e] upon and solv[e] problems associated with previous containers." Appx91. First, "an upwardly projecting bead extending substantially about the perimeter of the base portion," which is "configured and dimensioned to render the outwardly extending flange of the cover portion relatively inaccessible when the container is closed." *Id.* Second, "a hinge joining the outwardly extending flange of the cover portion with the base portion" that "preferably includes a frangible section"[4] that must be severed in order to access the container's contents. *Id.*

Each asserted claim of the '003, '680, and '756 patents contains the limitation of an upwardly projecting bead or an upper peripheral rim "extending substantially about the perimeter of the container and configured to substantially surround the outwardly extending peripheral flange of the cover portion to render the outwardly extending peripheral flange of the cover portion relatively

[2] Lacerta also asserted an inequitable conduct defense as to each of the patents, which remains pending. Appx290-295, Appx29-30.
[3] All citations to the Specification are made to the '003 patent, unless otherwise noted.
[4] "Frangible section" is replaced with "frangible portion" in the '580, '640, and '756 patents. Appx131, Appx153, Appx176.

inaccessible when the cover is closed." Appx94-95, Appx112-113, Appx136. Similarly, the asserted claims of the '580 patent and claim 5 of the '640 patent include the limitation of an upwardly projecting bead or upper peripheral rim "extending substantially about the perimeter of the container and configured to substantially surround the outwardly extending peripheral flange of the cover portion to hinder access to the container when the container is closed." Appx157-158, Appx181.

B. The District Court's Claim Construction

Inline proposed "[Upwardly projecting] bead" to mean "[a]n [upwardly projecting] raised molding formed on the upper peripheral edge of the base portion." Appx2217, Appx2259.[5] The court largely adopted Lacerta's proposed construction: "raised portion of the upper peripheral edge that substantially surrounds the outer edge of the outwardly extending peripheral flange." Appx10, Appx2217.

The court explained that the patent specifications all "refer to the upwardly projecting bead as 'extend[ing] substantially about the perimeter of peripheral rim 22 and . . . positioned to surround the outer edge of flange 24 of cover portion 12 when container 10 is closed.'" Appx8. "Each specification also explains that this position 'hinders,' 'physically impedes,' or 'physically blocks' 'access . . . from

[5] Inline argued that "upwardly projecting" did not require construction, but proposed the aforementioned construction of "bead." Appx2259.

fingers or any other object that might normally be used for leverage to pry cover portion 12 from base portion 14.'" *Id.*[6] "In other words, consistent with Lacerta's proposed construction, only by surrounding the outwardly extending peripheral edge of the cover with the raised portion of the upper peripheral edge of the base does the container achieve what both parties agree is the functional purpose of the upwardly projecting bead." *Id.*

Inline advanced plain and ordinary meaning for the term "relatively inaccessible," or, in the alternative, "[m]ore difficult to access than in conventional containers." Appx2218. Lacerta argued indefiniteness, and alternatively proposed the construction "physically impedes access from fingers or any other object to separate the cover portion from the base portion." *Id.* Lacerta offered that same proposed construction for "hinder access," as to which Inline proposed plain and ordinary meaning or, alternatively, "[m]akes more difficult to access than in conventional containers." *Id.*

The court determined that "relatively inaccessible" is not indefinite because the specification explains that the upwardly projecting bead renders relatively inaccessible the outwardly extending peripheral flange of the cover portion by

[6] *See, e.g.*, Appx93 at col. 6, lns. 5-13, col.6, lns. 55-57 ("The presence of bead 34 prevents unauthorized access to the contents of container 10 by making it difficult to pull cover portion 12 from base portion 14."), Appx110 at col. 6, lns. 37-44, Appx111 at col.7, lns. 18-20, Appx178 at col. 5, lns. 42-49.

surrounding and physically blocking access to it. Appx4. The court rejected in a footnote that "physically blocking access to something makes it 100% inaccessible" and noted that physically blocking access to the outwardly extending peripheral flange "does not mean that access is impossible." *Id.*, n. 5. The court adopted Lacerta's proposed construction based on the specifications' teaching as to how the upwardly projecting bead renders the cover flange relatively inaccessible. Appx11.

The court construed "configured to substantially surround [the/an edge of the] outwardly extending peripheral flange of the cover portion" to mean "configured to physically impede access to [the/an edge of the] outwardly extending flange of the cover portion when the container is closed." Appx17. The specifications describe the purpose of surrounding the outwardly extending peripheral flange as physically impeding or physically blocking access from fingers or any other object that might normally be used to pry the cover from the base. Appx15-16.

C. Inline Disclosed Only a Literal Infringement Theory

In its four sets of infringement contentions, Inline disclosed only literal infringement theories. *E.g.*, Appx8661-8968. Inline's expert, Dr. David Kazmer, offered a doctrine of equivalents ("DOE") theory as to the upwardly projecting bead limitation in his infringement report. *E.g.*, Appx7792-7793. Given Inline's

untimely disclosure of this DOE theory, the court granted Lacerta's motion to strike Dr. Kazmer's DOE opinions. Appx2669-2678.

Lacerta moved *in limine* to preclude Inline from offering testimony or argument relating to a DOE theory of liability at trial. Appx2998-3005. Inline opposed, contending that "[t]estimony relevant to literal infringement might also be relevant to infringement under DOE" because "Inline's literal and equivalent infringement theories rely on the same structure, the angled surface on the bottom portion of the accused products." Appx3006. The court reserved ruling on the motion. Appx3192.

D. Non-Infringement and Invalidity

Lacerta timely served its Preliminary Non-Infringement and Invalidity Contentions. Appx8969-9038. Lacerta contended that the terms "height substantially equal to the height of the downwardly depending skirt" and "vertical height of the hinge correlates with the height of the skirt that depends downwardly from the base portion" are indefinite under 35 U.S.C. § 112. Appx9010, Appx9035. Lacerta's technical expert, Dr. Steven MacLean, opined in his invalidity report that the hinge height limitations are indefinite under § 112. Appx8256-8261. Dr. MacLean also opined that all asserted claims of the patents are obvious over several prior art combinations. Appx8261-8275.

E. The Summary Judgment Order

The court denied Lacerta's motion for summary judgment of non-infringement and denied in part Inline's motion for summary judgment of infringement. Appx2980-2997. The court found a genuine dispute of material fact requiring jury resolution as to whether the angle of the peripheral rim of the accused products' base physically impedes access from fingers or any other object to separate the cover from the base, which precluded summary judgment on all asserted claims except Claims 1, 2, 3, 4, and 6 of the '640 patent. Appx2992. The court noted the absence of the upwardly projecting bead, hinder access, and relatively inaccessible limitations in those claims and found that the accused products contain an outwardly extending peripheral cover flange that abuts the upper peripheral rim of the base. Appx2994. The order is silent as to the hinge height limitation of the asserted claims. Appx2980-2997.[7]

F. Inline Sought to Limit Dr. MacLean's Opinions at Trial

Inline moved *in limine* to preclude Dr. MacLean from opining at trial as to secondary considerations of nonobviousness and the "ultimate question" of obviousness. Appx3011-3020. The court granted Inline's motion to the extent of barring any undisclosed opinion from Dr. MacLean on secondary considerations.

[7] The jury's invalidity verdict as to these claims deprives Lacerta of any basis to cross-appeal the summary judgment order. *Aventis Pharma S.A. v. Hospira, Inc.*, 637 F.3d 1341, 1343-43 (Fed. Cir. 2011).

Appx3193. The court denied the motion as to the "ultimate question" of obviousness because Dr. MacLean considered secondary considerations of nonobviousness in forming his opinions. *Id.*

Inline also moved *in limine* to preclude Dr. MacLean's opinion that the hinge height limitations are indefinite. Appx3053-3054. Inline admitted that Lacerta disclosed this indefiniteness theory in its Preliminary Non-Infringement Contentions. Appx3053. The court denied Inline's motion. Appx3192.

G. Lacerta Prevailed on Non-Infringement and Invalidity as to Every Claim Asserted at Trial

At trial, Inline's witnesses admitted that most elements of the claimed invention existed in the market long prior to Inline's patents. Appx465-466 (clear thermoformed clamshell containers), Appx544-545 (hinged thermoformed containers made from a single sheet of plastic), Appx547-548 (leak-proof plastic containers), Appx549-550 (locks), Appx1049-1050 (tear strips).[8] Although Inline's counsel repeatedly argued to the jury that Inline "essentially created the category of tamper evident-tamper resistant containers," Inline's witnesses conceded that TE/TR plastic food containers existed in the marketplace prior to 2002. Appx424, Appx549-550, Appx557-558, Appx682, Appx1039-1040,

[8] Lacerta's witnesses testified similarly. Appx1384-1385 (thermoformed clamshells made from one sheet of plastic), Appx1411-1417 (negative draft angle that improves leak resistance and keeps containers from locking together), Appx1431-1432 (tabs), Appx1467-1468 (skirts), Appx1468-1469 (locks).

Appx1048-1049, Appx5646-5647 (identifying existing tamper-evident plastic food package in an internal Inline memorandum dated May 21, 2002).

Dr. MacLean testified that every asserted claim of the patents would have been obvious to a person of skill in the art ("POSA") as of 2002.[9] Appx1765-1766, Appx1786-1799, Appx1823-1831, Appx1833-1841. He testified that the asserted claims of the '003 patent were obvious over U.S. Patent No. 5,897,011 to Brilliant ("Brilliant"),[10] U.K. Patent Appl. No. 2,306,160 to Thompson ("Thompson"),[11] and Japan Patent Appl. No. 7-67275 ("Masuno").[12] Appx1783-1791. Dr. MacLean explained that a POSA would be motivated to combine Brilliant with Thompson because Thompson teaches tamper-resistance, and would add Masuno to improve the resulting tamper-resistant feature. Appx1788-1789.

Dr. MacLean testified that the asserted claims of the '680 patent were obvious over E.P.O. Patent No. EP0752374 A1 to Guillin ("Guillin EP"),[13] U.S.

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[9] Inline identified "late 2002" as the alleged conception date. Appx1765, Appx8519.

[10] Appx7326-7332. Brilliant discloses a one-piece plastic food container with a frangible hinge. Appx1773.

[11] Appx7333-7347. Thompson discloses a TE/TR plastic food container with an upwardly projecting bead, buried flange, and tear strips. Appx1767-1768, Appx1770-1771, Appx1898-1899, Appx2037, Appx2059, Appx2062. The PTO did not consider Thompson during prosecution of the patents. Appx2034.

[12] Appx7387-7397. Masuno teaches a plastic food container with a frangible hinge down its length. Appx1774-1775.

[13] Appx7361-7381. Guillin EP discloses a tamper-resistant plastic food container with a bead structure and buried flange. Appx1769. In June 2002, prior to the alleged invention date and at the outset of the project that led to the patents, Inline

Patent No. 4,753,351 to Guillin ("Guillin US"),[14] and Brilliant. Appx1792-1797. Dr. MacLean testified that a POSA would be motivated to combine Guillin EP with Guillin US to achieve a secondary locking mechanism. Appx1795-1796.

Dr. MacLean testified that the asserted claims of the '640 patent were obvious over Thompson and Brilliant and/or over Guillin EP combined with German Patent No. 7,816,353 to Menshen ("Menshen")[15] and POSA knowledge. Appx1797-1799, Appx1823-1833. Dr. MacLean explained that in an obviousness analysis, "when I'm taking two pieces of prior art and I'm trying to make a combination, there has to be some rationale or basis that allows you to make that combination," *i.e.*, a "motivation to combine." Appx1824. He testified that a POSA would be motivated to combine a plastic container made of two pieces, like Guillin EP, with a one-piece plastic container, like Menshen, because "they're both plastic containers used in the same type of food packaging arena" and to go from a one-piece to two-piece container, "you're just making a cut between the two." Appx1827. Dr. MacLean opined that the asserted claims of the '580 and '756 patents were obvious over Thompson and Masuno. Appx1834-1841.

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identified the applicant for Guillin EP, the Guillin Groupe, as a potential partner for that initiative. Appx549-550, Appx5644, Appx7362.

[14] Appx7382-7386. Guillin US discloses a one-piece container thermoformed from a single piece of plastic. Appx1833. The PTO did not consider Guillin US during prosecution of the patents. Appx2035.

[15] Appx7424-7442. Menshen discloses a one-piece tamper-evident plastic container with a tear strip and frangible hinge. Appx1771, Appx1774.

Dr. MacLean also opined that the hinge height limitations are indefinite because the patents and specifications do not teach a POSA how to define the height of the hinge. Appx1841-1845.

Dr. Kazmer testified as to secondary considerations of nonobviousness, including Safe-T-Fresh product sales, declarations Inline submitted to the PTO from its then-Vice President of Sales and a member of its Board of Directors, and a customer letter. Appx2023-2032. As Dr. Kazmer noted, Inline submitted those documents to the PTO in order to overcome an obviousness rejection to the application that matured to the '003 patent, which was based on Menshen, U.S. Patent No. 5,507,406 to Urciouli, and U.S. Patent No. 4,535,889 to Terauds. Appx2031-2032, Appx4106-4109, Appx4124-4154. In response to that rejection, and anticipation and obviousness rejections of the application that matured to the '680 patent, Inline falsely claimed that Menshen "describes a container with a lid made from aluminum" and could not be combined with a reference disclosing a plastic container. Appx4132-4133, Appx4340-4341, Appx4376.

Contrary to his expert report[16] and Inline's submission to the PTO, Dr. Kazmer conceded for the first time at trial that Menshen teaches a *plastic* container as an improvement over aluminum. Appx2050-2051, Appx7431.[17] During cross-

[16] Appx8149 at ¶ 510, Appx8151 at ¶ 515.

[17] Dr. Kazmer testified that Menshen disclosed an injection molded plastic container, Appx2051, but admitted on cross-examination that he did not know

examination, the jury heard not only Dr. Kazmer's change of position as to Menshen, but also that the PTO combined many of the references Dr. Kazmer testified could not be combined, the bias of Inline's commercial success declarants, and Dr. Kazmer's application of the wrong legal standard to the burden of proof required to prove invalidity. Appx2055-2059.

As to non-infringement, Dr. MacLean testified that, applying the claim constructions, the accused products do not have an upwardly projecting bead, an upper peripheral edge configured to substantially surround the outwardly extending peripheral flange of the cover portion, or an outwardly extending peripheral flange of the cover portion rendered relatively inaccessible when the container is closed. Appx1734, Appx1746.

With respect to the upwardly projecting bead, Dr. MacLean explained that a CT scan of the accused products confirmed that they do not have a raised portion of the upper peripheral edge of the base. Appx1737-1738, Appx1745 (the cover flange and base are parallel relative to one another). As to the hinder access/relatively inaccessible limitations, Dr. MacLean explained that if he drags a finger across the peripheral edge of the base of the accused products from its

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whether Menshen expressly discloses injection molding, Appx2056. Dr. MacLean testified that the container disclosed in Menshen can be thermoformed. Appx1830. Inline's counsel did not cross-examine Dr. MacLean on this issue. Appx1887-1888.

outermost edge, the peripheral flange of the cover is accessible. Appx1741-1742. As to the "configured to substantially surround" limitation, Dr. MacLean testified that nothing on the accused products impedes access to the outwardly extending flange of the cover. Appx1742-1746.

In contrast, Dr. Kazmer strayed from the court's constructions requiring the upwardly projecting bead or upper peripheral rim to physically impede access to the cover flange and advanced DOE opinions and limitations not claimed in the patents. *E.g.*, Appx1107 ("the bead . . . conceals that outer flange"), Appx1108 (the outwardly extending flange "both visually and tactically it is hard to get to" and because of the interference fit – not the alleged bead – "you actually need a fair amount of force to pull up and remove the cover portion from the base portion"), Appx1138 (the outer cover flange is "relatively inaccessible visually and tactily [sic]" and because "there is a force that is retaining it to make the seal within the product that must be overcome to remove it"), Appx1188 (the patents require visual blocking relative to accessing the cover flange). Fatal to his credibility, during his direct examination, the jury witnessed Dr. Kazmer casually lift the cover from the base of one of the accused products with his fingers without removing the tear strip. Appx1189-1190.

After 11 trial days, Inline withdrew 21 asserted claims (the "Dropped Claims") after Lacerta had moved for JMOL. Appx3272-3273, Appx1805-1806.

The jury returned a verdict that each remaining claim Inline asserted at trial was not infringed and invalid. Appx21-26.

H. Post-Trial Motions and Judgment

Inline proposed a form of judgment that omitted the Dropped Claims. Appx3401. Lacerta opposed Inline's proposed judgment to the extent it omitted the Dropped Claims and requested that the judgment reflect the dismissal with prejudice of those claims. Appx3402-3407. The court entered judgment dismissing the Dropped Claims without prejudice. Appx29-30.

Lacerta moved for an exceptional case determination and fees under the Patent Act. Appx3419-3449. Inline moved for JMOL or a new trial on infringement and validity. Appx3475-3528. The court denied Lacerta's fee motion and Inline's motions for JMOL or a new trial. Appx31-33.

## SUMMARY OF THE ARGUMENT

The jury rejected Inline's conceit, repeated throughout trial yet undermined by its own witnesses, that it invented thermoformed TE/TR food containers, and that its patents are inventive and infringed. Inline seeks to set aside the jury's verdict by urging this Court to reweigh evidence, make credibility determinations, and address issues Inline raises for the first time on appeal. Inline ignores or mischaracterizes record evidence, the applicable standards of review, and the deference this Court affords a jury's factual findings.

The district court properly denied Inline's motion for JMOL on invalidity. The fact that Lacerta's and Inline's experts disagreed as to factual components of the obviousness analysis does not justify vacating the jury's verdict. The jury was not required to credit Inline's expert over Lacerta's or to find that the evidence of secondary considerations outweighed the evidence that the asserted claims were obvious, particularly where the record reflects that factors other than the claimed invention drove commercial success.

The court did not abuse its discretion in denying Inline a new trial on invalidity. The use of a general verdict form – which Inline proposed as to infringement – does not amount to error, and Inline's contention that the court should not have instructed the jury on written description and indefiniteness is meritless. Inline waived its argument as to the court's instruction on objective indicia of nonobviousness by failing to raise it in Inline's motion for a new trial, request a curative instruction, or take any other action below to remedy the alleged error. The court also did not abuse its discretion in allowing Dr. MacLean to testify on the ultimate issue of obviousness because he considered secondary considerations of nonobviousness in forming his opinions and found them unpersuasive.

The court's claim constructions, amply supported by the uniform and repeated teachings of the specifications, were not erroneous. Inline abandons on

appeal constructions it sought below, often contradicting the arguments it made to the district court. Inline also raises for the first time on appeal that the court erred in not construing the hinge height limitation—another long-waived argument.

The court also did not abuse its discretion by denying Inline's motion for a new trial based solely on the admission of evidence of Lacerta's patent, which was relevant to willfulness and reasonable royalty and properly responded to Inline's own arguments and evidence.

The court did err in dismissing without prejudice the Dropped Claims, which Inline only dropped after 11 days of trial and after Lacerta moved for JMOL. The court also abused its discretion in denying Lacerta's motion for an exceptional case determination in light of Inline's lack of a good faith literal infringement theory, as demonstrated by its expert's improper shift at trial to DOE testimony highlighting concepts of visual occlusion, concealment, and force – none of which the asserted claims or claim constructions require. Inline's vexatious litigation tactics are also exemplified by Dr. Kazmer's last-minute change in position as to a key invalidating reference. The court abused its discretion in finding that Inline's shifting theories and meritless positions did not render this case exceptional.

## ARGUMENT

### I. The District Court Did Not Err in Denying Inline's Motion for JMOL as to Invalidity.

The Court reviews a district court's denial of a motion for JMOL *de novo*, but such review "is weighted towards preservation of the jury verdict because a verdict should be set aside only if the jury failed to reach the *only* result permitted by the evidence." *Analysis Grp., Inc. v. Cent. Fla. Invs., Inc.*, 629 F.3d 18, 22 (1st Cir. 2010) (quotation omitted).[18] The Court does not evaluate the credibility of the witnesses or weigh the evidence, and will only set aside a jury verdict "if the facts and inferences point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have [returned the verdict]." *Cortes-Reyes v. Salas-Quintana*, 608 F.3d 41, 47 (1st Cir. 2010) (quotations omitted).

Because obviousness under 35 U.S.C. § 103 is a mixed question of law and fact, on appeal from a jury verdict, the Court "first presume[s] that the jury resolved the underlying factual disputes in favor of the verdict[] and leave[s] those presumed findings undisturbed if they are supported by substantial evidence." *ABT Sys., LLC v. Emerson Elec. Co.*, 797 F.3d 1350, 1357 (Fed. Cir. 2015) (quotation omitted). The Court then "examine[s] the [ultimate] legal conclusion [of nonobviousness] *de novo* to see whether it is correct in light of the presumed

[18] This Court reviews denials of motions for JMOL under the law of the regional circuit. *Raytheon Co. v. Indigo Sys. Corp.*, 895 F.3d 1333, 1338 (Fed. Cir. 2018).

jury fact findings." *Id.* (quotation omitted). "In recreating the facts as they may have been found by the jury, and in applying the *Graham* factors, [the Court] assess[es] the record evidence in the light most favorable to the verdict winner." *Id.* (quotation omitted).

A. Lacerta Presented Legally Sufficient Evidence of Obviousness.

A patent claim is invalid as obvious "if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains." 35 U.S.C. § 103. The factual inquiries underlying an obviousness determination are: "(1) the scope and content of the prior art; (2) the level of ordinary skill in the prior art; (3) the differences between the claimed invention and the prior art; and (4) objective evidence of nonobviousness." *Beckson Marine, Inc. v. NFM, Inc.*, 292 F.3d 718, 725-26 (Fed. Cir. 2002) (quotation omitted).

Inline argues that Lacerta's prior art references and expert testimony as to obviousness were "deficient" because the references each "differed from the claimed technology in critical ways." Brief for Plaintiff/Appellant ("Br.") at 45-46. It is axiomatic, however, that "[o]bviousness can be proven by combining existing prior art references." *Cohesive Techs., Inc. v. Waters Corp.*, 543 F.3d 1351, 1364 (Fed. Cir. 2008). Inline does not dispute that the asserted combinations

– as opposed to each prior art reference standing alone – disclose all limitations of the asserted claims. Rather, Inline contends that it was "simply not feasible" to combine the references, pointing solely to Dr. Kazmer's testimony. Br. at 46. Yet Dr. MacLean testified to the contrary,[19] and "[w]hat the prior art teaches (including whether it teaches away from the claimed invention), whether a skilled artisan would have been motivated to combine the prior art references, and the existence of and weight assigned to any objective indicia of nonobviousness are underlying factual questions." *Adapt Pharma Ops. Ltd. v. Teva Pharms. USA, Inc.*, 25 F.4th 1354, 1364 (Fed. Cir. 2022).

Inline also suggests that the prior art was deficient because the PTO considered four of the six references during prosecution of the patents. Br. at 45-46. However, where – as here – the PTO did not have all references before it, "the challenger's burden to persuade the jury of its invalidity defense by clear and convincing evidence may be easier to sustain." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 111 (2011). Although Inline minimizes that Thompson and Guillin US were not before the PTO by pointing to Dr. Kazmer's testimony that they were "cumulative to" or "taught away" from the prior art the PTO did consider, that

[19] *E.g.*, Appx1790-1791 (explaining how to combine Masuno with Brilliant and Thompson), Appx1791 (combining Brilliant and Thompson would take "just a simple modification"), Appx1827 (combining one-piece with two-piece container would require "just making a cut between the two" during production), Appx1830 (confirming that a POSA could combine Guillin EP and Mensheng).

argument again ignores that the scope of the prior art and teaching away are factual inquiries within the purview of the jury. *Adapt Pharma Ops.*, 25 F.4th at 1364.[20]

The jury credited Dr. MacLean's testimony over Dr. Kazmer's testimony, and Inline's argument that Dr. Kazmer's testimony somehow rendered Lacerta's obviousness evidence deficient is wrong. *See Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1362 (Fed. Cir. 2012) (the jury is free to "make credibility determinations and believe the witness it considers more trustworthy" where there is conflicting expert testimony) (quotations omitted); *XY, LLC v. Trans Ova Genetics*, 890 F.3d 1282, 1295 (Fed. Cir. 2018) ("[T]he jury holds the exclusive function of appraising credibility . . . [and] determining the weight to be given to the testimony.") (quotations omitted); *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1224-25 (Fed. Cir. 2014) (declining to disturb the jury's verdict on anticipation because the jury was entitled to credit the appellee's expert testimony over the appellant's expert).

### B. Lacerta Presented Legally Sufficient Evidence of Motivation to Combine.

Inline contends that no reasonable jury could have found the patents obvious

[20] Additionally, although Menshen was before the PTO, Inline overcame anticipation and obviousness rejections based in part on Menshen with the erroneous statement that Menshen teaches an aluminum container; in actuality it teaches a plastic container as an improvement over aluminum. Appx2051, Appx4132-4133, Appx4376, Appx7431. Inline's expert first conceded as much at trial, and the jury assessed these facts.

because Dr. MacLean's testimony allegedly "lacked any meaningful support" regarding motivation to combine the prior art references. Br. at 47. Inline's argument is both factually and legally flawed.

Prior to *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007), this Court required an alleged infringer to show "that a person of ordinary skill in the art would have had motivation to combine the prior art references and would have had a reasonable expectation of success in doing so," by identifying such motivation in the prior art itself, POSA knowledge that certain references were of special interest or importance in the field, or from the nature of the problem to be solved. *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1238 (Fed. Cir. 2010) (citations omitted). In *KSR*, however, the Supreme Court "instruct[ed] courts to take a more 'expansive and flexible approach' in determining whether a patented invention was obvious at the time it was made" and "emphasized the role of 'common sense'" in that determination. *Id.* (quoting *KSR*, 550 U.S. at 415, 421). The Supreme Court "also made clear that expert testimony concerning motivation to combine may be unnecessary." *Id.* at 1239 (citing *KSR*, 550 U.S. at 427). Rather, the "legal determination of obviousness may include recourse to logic, judgment, and common sense, in lieu of expert testimony." *Id.*

Further, "an implicit motivation to combine exists not only when a suggestion may be gleaned from the prior art as a whole, but when the

'improvement' is technology-independent and the combination of references results in a product or process that is more desirable, for example because it is stronger, cheaper, cleaner, faster, lighter, smaller, more durable, or more efficient." *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006). "One of the ways in which a patent's subject matter can be proved obvious is by noting that there existed at the time of invention a known problem for which there was an obvious solution encompassed by the patent's claims." *KSR Int'l*, 550 U.S. at 419-20.

Inline argues that Dr. MacLean did not "identify[] any support for combining elements taken from the prior art from any source," but rather "used these claim limitations as a roadmap to construct his prior art combinations." Br. at 47. However, Dr. MacLean used an inventory of claim elements merely as a framework for presenting his invalidity opinions to the jury. Appx1766-1767 ("I'm going to show you in kind of a step-by-step manner."). Contrary to Inline's contention, Dr. MacLean did testify as to why a POSA would be motivated to combine the prior art references in order to solve a known industry problem—*i.e.*, in the words of Inline's CEO, the need for a "simple, more effective" TE/TR solution for plastic food packaging. Appx485, Appx485-486 (discussing known drawbacks of then-existing TE/TR food packaging). This known problem, combined with the fact that the prior art taught TE/TR solutions for plastic food

packaging—such as Thompson's upwardly projecting bead and buried flange, Brilliant and Masuno's frangible hinge, and Guillin EP's bead and buried flange—is sufficient to demonstrate a motivation to combine. *See Intercontinental Great Brands v. Kellogg N. Am.*, 869 F.3d 1336, 1348 (Fed. Cir. 2017);[21] *Wyers*, 616 F.3d at 1241-42; *Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc.*, 555 F.3d 984, 993 (Fed. Cir. 2009). "[T]his form of motivation to combine evidence is particularly relevant with simpler mechanical technologies." *ABT Sys.*, 797 F.3d at 1360 (quotations omitted).

Similarly, multiple Inline witnesses testified as to the cost-saving and efficiency advantages of a one-piece plastic container. Appx492, Appx882-883, Appx1079. Thus, the record also consists of motivations to combine the prior art references to achieve a one-piece TE/TR container. *See Dystar Textilfarben*, 464 F.3d at 1366; *see also id.* at 1367-68 (motivation to combine may be found "even absent any hint of suggestion in the references themselves," where the combination would yield a cheaper, faster, more convenient, more durable, or more efficient

[21] As the Court held in *Intercontinental*, "some cases involve technologies and prior art that are simple enough that no expert testimony is needed" as to motivation to combine. *Id.*; *see also Adapt Pharma Ops.*, 25 F.4th at 1369 ("As to the specific factual considerations of motivation to combine, the fact finder . . . is not constrained to an expert's say-so; other documentary evidence, such as the teachings of the prior art or problems known in the field of endeavor at the time of the invention, can provide the requisite support for the court's motivation finding.").

product or process); *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1472 (Fed. Cir. 1997) ("cost and simplicity" considerations can supply motivation to combine).

Dr. MacLean testified that a POSA would be motivated "to look at the prior art to see if there is some teachings of tamper resistance," such as those found in Thompson, that he could add to a non-tamper-resistant container, like Brilliant, then would look to Masuno's frangible hinge to make the tamper-resistant feature easier to handle. Appx1789-1790. He also testified that a POSA would be motivated to combine a one-piece plastic container (like Menshen) with a two-piece plastic container (like Guillin EP) because both references are "plastic containers used in the same type of food packaging arena" and doing so would involve a simple cut during manufacturing. Appx1827. This testimony is legally sufficient to establish a motivation to combine. *See Pregis Corp. v. Kappos*, 700 F.3d 1348, 1354-55 (Fed. Cir. 2012) (affirming denial of JMOL on obviousness and finding sufficient evidence of motivation to combine where the alleged infringer's expert testified as to how the prior art disclosed every element of the asserted claims and would require only a small alteration to perform the function of the patents-in-suit).

Inline's contention that Dr. MacLean's testimony was conclusory, and therefore inadequate, is unsupported by the authority Inline cites. In *ActiveVideo*

*Networks, Inc. v. Verizon Commc'ns, Inc.*, this Court affirmed the district court's pre-verdict grant of JMOL to the patentee where the alleged infringer's expert "failed to explain how specific references could be combined, which combination(s) of elements in specific references would yield a predictable result, or how any specific combination would operate or read on the asserted claims." 694 F.3d 1312, 1327 (Fed. Cir. 2012). The expert's motivation to combine testimony was also generic, identifying only a general motivation to "build something better," and not linked to any specific combination of prior art elements. *Id.* at 1328. In contrast, Dr. MacLean testified as to where every element of each asserted claim was found in his prior art combinations, as well as how the references could be combined into those specific combinations. Appx1765-1766, Appx1786-1799, Appx1823-1831, Appx1833-1841.

In *TQ Delta, LLC v. CISCO Systems, Inc.*, the Court found that the PTAB erred in finding claims obvious where it relied on the appellee's expert declaration that a POSA would have recognized a phase scrambling technique disclosed in one reference as a solution to reduce the peak-to-average power ratio ("PAR") disclosed in a second reference. 942 F.3d 1352, 1361 (Fed. Cir. 2019). The Court found the declaration impermissibly conclusory because neither reference discussed PAR, and the expert failed to identify any evidence that a POSA would have applied the technique disclosed in the first reference to reduce the PAR of the

second reference other than the disclosures of the patents-in-suit. *See id.* at 1361-62. Here, in contrast, the prior art references Dr. MacLean combined expressly teach solutions for producing a TE/TR container. *E.g.*, Appx7333 (disclosing a "tamper-evident container"), Appx7362 (teaching a "Tamper proof and airtight container"), Appx7430 (disclosing a "One-Piece Tamper-Proof Container").

*Insite Vision Inc. v. Sandoz, Inc.*, 783 F.3d 853 (Fed. Cir. 2015), is even farther afield; it concerns whether the district court, acting as factfinder, erred in framing the obviousness question for purposes of ascertaining the scope of the prior art. *See* 783 F.3d at 859-60. In that context, the Court noted that "[d]efining the problem in terms of its solution reveals improper hindsight in the selection of the prior art relevant to obviousness." *Id.* at 859.

Further, none of the above cases applied the deferential standard of review applicable to a jury's factual finding of motivation to combine. *Compare Kinetic Concepts*, 688 F.3d at 1367 (the Court "must defer" to the jury's factual finding as to motivation to combine where supported) *with TQ Delta*, 942 F.3d at 1357 (reviewing PTAB factual determinations under substantial evidence standard involving "examination of the record as a whole, taking into account evidence that both justifies and detracts from an agency's decision"); *Insite Vision*, 783 F.3d at 858 (reviewing district court's factual finding as to motivation to combine in bench trial for clear error); *ActiveVideo Networks*, 694 F.3d at 1319 (reviewing grant of

pre-verdict JMOL *de novo*). Rather, Inline identifies one case from this Court overturning a jury's verdict of obviousness, *InTouch Techs., Inc. v. VGO Commc'ns, Inc.*, 751 F.3d 1327 (Fed. Cir. 2014). The Court held there that the alleged infringer's expert testimony failed to establish motivation to combine because the expert testified primarily that a POSA could combine the references, not why a POSA would combine those references. *InTouch Techs.*, 751 F.3d at 1351-52. The expert also "succumbed to hindsight bias in her obviousness analysis" and "failed to address why [a POSA] *at the time of the invention* . . . would be motivated to combine these three references." *Id.* at 1352. Instead, she "simply opined what a skilled artisan could accomplish" at the time of trial, which "is not the relevant inquiry." *Id.*[22]

Dr. MacLean's testimony did not suffer from this same hindsight bias. Unlike the expert in *InTouch*, who did "[n]ot once . . . analyze what one of skill in the art would have understood as of [the time of the invention]," *id.*, Dr. MacLean testified that the starting point of his analysis was the priority date of the patents, and analyzed obviousness from the perspective of a POSA's knowledge as of that date. Appx1765-1766, Appx1770-1773, Appx1779, Appx1786, Appx1778, Appx1824.

[22] In *InTouch*, the alleged infringer pointed solely to its expert's testimony as evidence of motivation to combine. *Id.* at 1351.

Further, Inline does not identify any evidence that the elements of the patents – all known in the prior art – do not function in their ordinary and expected way within the patents. Therefore, even were Dr. MacLean's motivation to combine testimony deficient in some respect, which it was not, the trial record demonstrates a motivation to combine known elements to yield a predictable result. *See KSR*, 550 U.S. at 416 ("The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results."); *Wyers*, 616 F.3d at 1243-44 (evidence of motivation to combine sufficient to establish obviousness as a matter of law where the invention at issue represented "no more than the predictable use of prior art elements according to their established functions") (quotations omitted).

C. The Jury Rejected Inline's Evidence of Secondary Considerations.

Inline's final attack on the jury's invalidity verdict is that Lacerta allegedly failed to refute Inline's evidence of secondary considerations. Br. at 49-50. Inline argues, in essence, that no reasonable jury could have found the patents obvious because Inline presented evidence of secondary considerations. However, "the existence of and weight assigned to any objective indicia of nonobviousness" are factual questions within the province of the jury. *Adapt Pharma Ops.*, 25 F.4th at 1364. Therefore, the Court "presumes the jury resolved all factual disputes in favor of the verdict." *Pregis Corp.*, 700 F.3d at 1354; *see also Motorola*, 121 F.3d

at 1472 (finding no error where the district court refused to second-guess the jury's apparent rejection of the patentee's arguments and evidence on secondary considerations). Indeed, "secondary considerations of nonobviousness . . . simply cannot overcome a strong prima facie case of obviousness." *Wyers*, 616 F.3d at 1246.

Inline again points solely to *InTouch* as an example of this Court overturning a jury's verdict of obviousness based on insufficient evidence rebutting secondary considerations.[23] There, the alleged infringer's expert testified that she had not heard of the concept of objective indicia of nonobviousness and did not realize she needed to consider this factor. *InTouch Techs.*, 751 F.3d at 1352. The Court noted that a defendant is not required to proffer expert testimony on objective indicia of nonobviousness before the jury may reject such evidence. *Id.* at n. 8. Rather, the Court found insufficient evidence to support the jury's verdict given the "many weaknesses" in the expert's testimony[24] and the appellee's failure to rebut persuasively the patentee's evidence of nonobviousness through its expert or

[23] In the other case Inline cites, *Pro-Mold & Tool Co., Inc. v. Great Lakes Plastic, Inc.*, 75 F.3d 1568 (Fed. Cir. 1996), the Court reversed the district court's grant of summary judgment of obviousness because the patentee's evidence of commercial success created genuine issues of material fact. That holding has no application following a jury verdict.

[24] As discussed above, the expert also evaluated obviousness from the perspective of a POSA as of the time of trial, not the priority date; testified as to what a POSA could do, not any motivation to combine; and misinterpreted one of the primary prior art references underlying her opinion. *See id.* at 1350-54.

otherwise. *Id.* at 1352.

*InTouch* demonstrates the high burden Inline faces in overturning the jury's invalidity verdict. There, the alleged infringer's proof failed in nearly every respect of the obviousness analysis, while the patentee presented substantial evidence of secondary considerations, including nexus, that the alleged infringer did not rebut through any evidence. *Id.* at 1352-53. Here, Inline has not disputed that the prior art references disclose every limitation of the asserted claims; the record contains ample evidence of motivation to combine, as discussed above; and Lacerta's expert considered but found non-persuasive evidence of secondary considerations. Appx3193.

Moreover, contrary to Inline's contention that Lacerta did not contest the nexus between Inline and Lacerta's commercial success and the asserted claims, Br. at 50, the jury heard extensive evidence that numerous factors other than the combination of elements claimed in the patents determine commercial success in the food packaging industry. *See, e.g.*, Appx629-630 (responsiveness and aesthetics), Appx1397 (ability to respond quickly to customer needs), Appx1402-1403 (aesthetics), Appx1420 (customization), Appx1571-1572 (design, application-specific packaging, right-size packaging, speed to market, responsiveness, use of post-consumer recycled material), Appx3757 (breadth of product line), Appx7308 (boutique service approach), Appx7310 (differentiation),

Appx7562 (speed to market), Appx7568-7569 (responsiveness, speed, variety of product line, aesthetics, cost), Appx7581 (aesthetics and right-sizing), *cf.* Appx7571 (tear strip is a disadvantage). The jury also assessed the bias of the commercial success declarations Inline submitted to the PTO. Appx2058.

Thus, viewing the record in the light most favorable to the jury's verdict as the Court must at this juncture, the jury had ample evidence from which it could find Inline's evidence of objective indicia of nonobviousness insufficient to find validity. *See Pregis Corp.*, 700 F.3d at 1355-56;[25] *Intercontinental Great Brands*, 869 F.3d at 1342, 1347 (affirming district court's finding that "strong evidence" of commercial success, industry praise, and copying was insufficient to overcome the prima facie showing of obviousness); *DyStar Textilfarben*, 464 F.3d at 1371 (evidence of secondary considerations was insufficient to overcome JMOL of obviousness).

D. Lacerta Presented Legally Sufficient Evidence of Indefiniteness.

Finally, "[a] general jury verdict of invalidity should be upheld if there was sufficient evidence to support any of the alternative theories of invalidity."

[25] Inline's nexus evidence was particularly weak as to Claims 1-3 and 6 of the '640 patent, which – as Inline successfully argued at summary judgment – do not require an upwardly projecting bead or hindered access to the cover flange. Appx2631, Appx2994-2995. The nexus evidence that Inline cites linked Inline's commercial success to "tamper-evident/tamper-resistant features" that are absent from the '640 patent claims (other than Claim 5). Appx2029, Appx2024-2025.

*Cordance Corp. v. Amazon.com, Inc.*, 658 F.3d 1330, 1339 (Fed. Cir. 2011). Inline does not contend that Lacerta failed to present legally sufficient evidence of indefiniteness—only obviousness. Br. at 44-50. Inline also failed to argue that no reasonable jury could have found the asserted claims indefinite in its motion for JMOL below. Appx3477-3501.[26] Accordingly, Inline waived any such argument. *Carrozza v. CVS Pharmacy, Inc.*, 992 F.3d 44, 59 (1st Cir. 2021); *Sparkle Hill, Inc. v. Interstate Mat Corp.*, 788 F.3d 25, 29 (1st Cir. 2015) (arguments for reversing a district court's decision first raised in a reply brief are waived).[27] The Court should affirm the district court's denial of JMOL on this basis alone. *Cordance Corp.*, 658 F.3d at 1338-39 (reversing JMOL on claim as to which the alleged infringer asserted two invalidity theories and the district court only found insufficient evidence as to one theory).

## II. The District Court Did Not Abuse Its Discretion in Denying Inline's Motion for a New Trial on Validity.

Inline contends that the jury verdict finding all asserted claims invalid is "tainted" by: (1) the court charging the jury on written description; (2) the court's submission of Lacerta's indefiniteness defense to the jury; (3) the substance of the jury instruction on objective indicia of nonobviousness; and (4) the use of a general

[26] Inline argued only – as it does here – that the court should have barred Lacerta's indefiniteness theory as untimely. Appx3495-3496.

[27] *See also Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 915 F.3d 743, 756 (Fed. Cir. 2019) (regional circuit law applies to waiver).

verdict form on invalidity. No ground warrants a new trial.

A. Standards of Review

Denials of motions for a new trial are reviewed under regional circuit law, *TEK Global, S.R.L. v. Sealant Sys., Int'l*, 920 F.3d 777, 783 (Fed. Cir. 2019), which is abuse of discretion review, *Aponte-Rivera v. DHL Sols. (USA), Inc.*, 650 F.3d 803, 812 (1st Cir. 2011).

Federal Circuit law governs the sufficiency of patent law jury instructions. *Bettcher Indus. v. Bunzl USA, Inc.*, 661 F.3d 629, 638 (Fed. Cir. 2011). Although *de novo* review applies to preserved claims of errors in jury instructions, a new trial is appropriate only "when errors in the instructions as a whole *clearly* misled the jury." *Id.* (emphasis added). In reviewing jury instructions, the Court examines the full trial record and the instructions in their entirety "because instructions take on meaning from the context of what happened at trial, including how the parties tried the case and their arguments to the jury." *Therasense, Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1325, 1331 (Fed. Cir. 2010). To preserve such an argument, the party seeking relief "must establish . . . it requested alternative instructions that would have remedied the error." *Bettcher Indus.*, 661 F.3d at 638 (quotation omitted). A party seeking a new trial based on erroneous jury instructions or an evidentiary error must additionally demonstrate that those errors had prejudicial effect. *Id.* at 638-39; *Nieves-Vallanueva v. Soto-Rivera*, 133 F.3d

92, 102 (1st Cir. 1997).

The Court has applied Federal Circuit law to the propriety of a general verdict form. *InTouch Techs., Inc.*, 751 F.3d at 1352; *SSL Servs., LLC v. Citrix Sys.*, 769 F.3d 1073, 1084 (Fed. Cir. 2014).[28] This Court applies abuse of discretion review to the use of a general verdict form. *R.R. Dynamics v. A. Stucki Co.*, 727 F.2d 1506, 1515 (Fed. Cir. 1984); *see also McGinley v. Franklin Sports, Inc.*, 262 F.3d 1339, 1356 (Fed. Cir. 2001) ("Our law does not compel the use of special verdicts in these cases").

B. The District Court's Jury Instructions Do Not Warrant a New Trial on Validity.

1. *Written Description*

Inline complains that the district court should not have charged the jury on

[28] Inline cites to *XY, LLC*, 890 F.3d at 1290, for its assertion that regional circuit law governs jury instructions and verdict forms. That case is inapposite because the choice-of-law analysis as to verdict forms applied to a state law breach of contract claim. It appears that the Court has applied regional circuit law to patent general verdicts in some cases where not contested by the litigants. *Cordance Corp.*, 658 F.3d at 1339; *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 849 (Fed. Cir. 2010); *Northpoint Tech., Ltd. v. MDS Am., Inc.*, 413 F.3d 1301, 1311-13 (Fed. Cir. 2005). However, where it is unclear whether an issue should be characterized as a "patent" issue or not, it "is nonetheless governed by Federal Circuit law if the issue 'pertains to patent law,' …, 'bears an essential relationship to matters committed to our exclusive control by statute,' …, or … 'clearly implicates the jurisprudential responsibilities of this court in a field within its exclusive jurisdiction.'" *Midwest Indus. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1359 (Fed. Cir. 1999). Whether a general verdict of invalidity may stand "pertains to patent law" – at least as much as the jury instructions themselves. *See id.* at 1359.

written description. Inline asserts that it was "[g]iven no notice" of Lacerta's lack of written description defense, and contends that Lacerta did not present sufficient evidence at trial to support such a theory. Br. at 36. Neither contention is correct.

In 2018, Lacerta's counterclaim placed Inline on notice of its written description defense. Appx219-221.[29] Further, Lacerta presented sufficient evidence to support that theory.[30] "Written description is a question of fact, judged from the perspective of one of ordinary skill in the art as of the relevant filing date." *BASF Plant Sci., LP v. Commonwealth Sci. & Indus. Research Org.*, 28 F.4th 1247, 1264 (Fed. Cir. 2022) (quotation omitted). The written description must describe an invention understandable to a POSA and show that the inventor actually invented the invention claimed. *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010). Dr. MacLean testified as to ways in which the written description of the patents does not describe certain elements of the claimed invention, specifically the hinge height limitation present in some asserted claims, in a manner understandable to a POSA. Appx1841-1854.[31] The court

[29] Lacerta raised substantially the same allegations in its first and second amended counterclaims on May 31, 2019 and September 30, 2020. Appx261-267, Appx297-303.

[30] Inline also attempted to defend against the written description challenge. Appx1090 (Dr. Kazmer testified that the '680 patent "has a written description that basically discloses the best mode, and that is claimed as well in the claims").

[31] Although this evidence came in during a discussion of indefiniteness, such testimony is also probative to the written description challenge. *See Sonix Tech.*

properly submitted the challenge to the jury. *See Ariad Pharms., Inc.*, 598 F.3d at 1351.

In addition, Inline does not meet its burden to establish prejudicial effect. Instead, it faults Lacerta for requesting an instruction on the written description defense because Inline contested the sufficiency of evidence to support the theory. Such unsubstantiated assertions are insufficient to establish prejudice. *See Nieves-Vallanueva*, 133 F.3d at 102.

Moreover, any error in giving the written description instruction is mooted by the use of a general verdict form for invalidity. Appx21-26. "A general jury verdict of invalidity should be upheld if there was sufficient evidence to support *any* of the alternative theories of invalidity." *InTouch Techs.*, 751 F.3d at 1336 (emphasis added) (quotation omitted). The Court "presume[s] that the jury resolved the underlying factual disputes in favor of the verdict." *Id.* at 1338-39. Thus, courts do "not set aside a general verdict simply because the jury might have decided on a ground that was supported by insufficient evidence."[32] *i4i Ltd.*

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*Co., Ltd. v. Pubs. Int'l, Ltd.*, 844 F.3d 1370, 1378 (Fed. Cir. 2017) ("the written description is key to determining whether a term of degree is indefinite.").

[32] Even if First Circuit law applied, it applies harmless error "generously," "[r]ecognizing that a jury is likely to prefer a better supported theory to one less supported." *Baron v. Suffolk County Sheriff's Dep't*, 402 F.3d 225, 244 (1st Cir. 2005); *see also Raiche v. Peitroski*, 623 F.3d 30, 35 (1st Cir. 2010) ("[W]here the jury has issued a general verdict . . . we view the facts in the light most favorable to the verdict.") (citation omitted).

*P'ship*, 598 F.3d at 849 (quotation omitted).

Inline's claim of error as to the written description instruction is a sufficiency-of-evidence argument. Br. at 36 ("Lacerta never even raised a written description theory at trial"). Inline does not challenge the court's statement of the law. *See id.* at 36-37. Importantly, Inline does not challenge the district court's decision to instruct the jury on Lacerta's obviousness defense. Thus, even if Inline is correct that the district court should not have submitted written description to the jury based on insufficient evidence, the Court should presume the jury reached its verdict on the factually supportable theory, and leave it in place. *See Cordance Corp.*, 658 F.3d at 1339; *Northpoint Tech., Ltd.*, 413 F.3d at 1311-12.

2. *The District Court Properly Instructed the Jury on Indefiniteness of the Claim Term "Hinge" Height.*

Inline is wrong that indefiniteness can *never* be submitted to the jury. Br. at 40. Inline waived this argument by failing to object prior to deliberations and by failing to raise the issue in its post-trial briefing. Appx2199-2201, Appx3477-3503; *Abdallah v. Bain Capital LLC*, 752 F.3d 114, 120-21 (1st Cir. 2014). Further, indefiniteness is "amenable to resolution by a jury where the issues are factual in nature." *Bombardier Rec. Prods. Inc. v. Arctic Cat Inc.*, 785 Fed. App'x 858, 867 (Fed. Cir. 2019). The cases Inline relies on do not support its contrary approach.

In *Encyclopaedia Britannica, Inc. v. Alpine Elecs., Inc.*, 355 F. App'x 389,

392 (Fed. Cir. 2009), the Court affirmed the district court's entry of summary judgment that the patent-in-suit's independent claim was indefinite as a matter of law. It did not create a rule that such claims cannot be submitted to the jury where attendant factual issues require resolution. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014), which sets out the standard for an indefiniteness defense, does not speak to whether the determination can be submitted to the jury.[33]

Inline does not cite to *Bombardier Rec. Prods. Inc.*, where the Court rejected that indefiniteness should have been before the court rather than the jury. There, the Court noted that the primary dispute was, as here, whether a POSA would have understood how to design the claimed invention based on the specification. 785 Fed. App'x at 867. Concluding such factual issues called for jury resolution, the Court affirmed the denial of the appellant's motion for new trial, explaining that "[t]he evidence presented on these topics was almost exclusively extrinsic, in large part encompassing warring expert testimony." *Id.*

The same is true here. Dr. MacLean testified at length as to whether a

[33] In *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1337 (Fed. Cir. 2009), the defendant sought to introduce evidence that the plaintiff had admitted during prosecution that certain products did not meet one definition of a claim term. The Court found the defendant's attempt, in effect, to argue claim construction to the jury improper. That ruling does not establish that indefiniteness cannot be submitted to the jury for adjudication of attendant facts.

POSA would understand how to design Inline's claimed inventions based on the patents' disclosures.[34] Appx1841-1846. Dr. Kazmer testified at length in an effort to rebut the same. Appx2020-2023. The court made no error in submitting indefiniteness to the jury. Inline's undeveloped argument, raised for the first time on appeal,[35] that the court's grant of summary judgment on claim 1 of the '640 patent "demonstrate[s]" that hinge height is reasonably certain is both waived, *Abdallah*, 752 F.3d at 120-21, and ignores that the court's order did not address the hinge height limitation, Appx2980-2997.

Inline next parrots a twice-failed argument from below that Lacerta "waived" the argument that the "hinge" height limitations were indefinite. Br. at 38. It mischaracterizes the relevant history to portray itself as having been blindsided by the defense at trial. As acknowledged in Inline's motion *in limine* briefing, Lacerta "did raise this issue in its Preliminary Noninfringement Contentions served March 12, 2019." Appx3053. Lacerta maintained this defense throughout its amendments to its noninfringement contentions and in Dr. MacLean's timely served Invalidity Report. Appx9168, Appx9180, Appx9183. There was no waiver or surprise at trial.

Inline alternatively argues that Lacerta waived the defense because Lacerta

[34] This Court has endorsed expert testimony on indefiniteness. *See Bombardier Rec. Prods.*, 785 Fed. App'x at 867.
[35] Appx3477-3528, Appx3599-3631.

did not argue the "hinge" height term is indefinite at claim construction. Br. at 39. Inline relies on *Cent. Admixture Pharm. Servs. v. Adv. Cardiac Sols., P.C.*, 482 F.3d 1347, 1356 (Fed. Cir. 2007), where the defendant-appellant complained for the first time on appeal that the district court failed to construe a claim term. The Court found waiver because the defendant did not raise the argument during claim construction. This decision, however, has no bearing on whether a party must raise *indefiniteness* at claim construction to preserve the defense. And Inline cites no such case.

To the contrary, "courts generally will not find a waiver of an indefiniteness challenge simply because an accused infringer did not raise the challenge as part of its claim construction arguments." *See Sci. Applications Int'l Corp. v. United States*, 2022 U.S. Claims LEXIS 2613, at *50 (Fed. Ct. Cl. Nov. 29, 2022) (quoting 4 Robert A. Matthews, Jr., Annotated Patent Digest § 23:25.120 (2022)). Indeed, this Court routinely affirms the resolution of indefiniteness on summary judgment – well after claim construction. *See, e.g.*, *EON Corp. IP Holdings LLC v. AT&T Mobility LLC*, 785 F.3d 616, 619 (Fed. Cir. 2015); *H–W Tech. L.C., v. Overstock.com, Inc.*, 758 F.3d 1329, 1330 (Fed. Cir. 2014). Lacerta timely served and maintained its indefiniteness defense.

Moreover, Inline has not attempted to make a showing of prejudice. Its own expert vigorously refuted Lacerta's proffered indefiniteness testimony. Appx2020-

2023. So on both counts – law and fact – Inline has failed to demonstrate any prejudicial error.

3. *The District Court's Instruction on Objective Indicia of Obviousness Does Not Warrant a New Trial.*

Inline asserts that the court gave insufficient instructions relating to secondary considerations of nonobviousness by instructing the jury only on commercial success and long-felt need. Br. at 41-42. Inline did not preserve this issue in its motion for a new trial on validity and elected not to ask for a curative instruction despite several occasions to do so. Appx3477-3500. Its argument is waived.

Fed. R. Civ. P. 51 governs preservation of claims of error as to jury instructions. A party may only assign error to "(A) an error in instruction actually given, if that party properly objected; or (B) a failure to give an instruction, if that party properly requested it and – unless the court rejected the request in a definitive ruling on the record – also properly objected." Fed. R. Civ. P. 51(d). The First Circuit's application of Rule 51 is "quite strict." *Ting Ji v. Bose Corp.*, 626 F.3d 116, 125 (1st Cir. 2010).

> There is good reason for this strictness. We enforce our object-or-forfeit rules to compel litigants to afford the trial court an opportunity to cure a defective instruction and to prevent the litigants from ensuring a new trial in the event of an adverse verdict or diminutive damages award by covertly relying on the error.

*Id.* (quotations omitted); *see also Puckett v. United States*, 556 U.S. 129, 134

(2009); *Bogan v. Stroud*, 958 F.2d 180, 183 (7th Cir. 1992) (requiring objection to be "sufficiently detailed to draw the court's attention to the defect"); *Melton v. Wash. Metro. Area Transit Auth.*, 1987 U.S. App. LEXIS 9449, at *3-4 (D.C. Cir. May 12, 1987) ("the grounds of the objection must be called to the attention of the trial court in such a manner as to clearly advise it of the question of law involved").

"The purpose of Rule 51 is to give the district court an opportunity to correct errors in the jury instructions and to lessen the burden on the appellate courts." *Lee v. Metro. Gov't of Nashville & Davidson Cty.*, 432 Fed Appx. 435, 451 (6th Cir. 2011). Critically, a party claiming error as to a jury instruction on appeal must affirmatively raise that error in its post-trial briefing. *See United States v. Wasserson*, 418 F.3d 225, 239-40 (3d Cir. 2005).

The court did differ – perhaps inadvertently – from the instructions proposed by either party and its own draft instructions. Appx3123, Appx3153-3154, Appx10808, Appx10853, Appx2185, Appx3298, Appx3327. But Inline had *multiple* opportunities to bring the issue prominently to the court's attention and remedy any perceived error before the jury began deliberations. Instead, it sat back and took no action to provide the court the opportunity to cure the issue.

First, after the court charged the jury, but before the jury began deliberations, Inline stated that it would make "some further objections to preserve the record" for appeal. Appx2199. It did not request a curative instruction, or

otherwise put the court on notice of immediate action required in advance of jury deliberations. Instead, Inline indicated that it merely needed to check the boxes of preserving objections the court had already considered and overruled.

At that point, Inline delivered a cascade of objections to various instructions. Appx2199-2201. Buried as the seventh of eight objections, Inline hurriedly stated:

> And we further object to the Court's elimination of several of the secondary considerations of nonobviousness from the instructions that was -- I don't believe that instruction -- or elimination of those.
>
> . . . .
>
> . . . .we object to the Court's elimination of several of the secondary considerations of nonobviousness from the instructions which was not proposed by either party.

Appx2201. Inline rested on that perfunctory objection.

Yet, it had another logical opportunity to raise the issue before the jury reached a verdict. The jury submitted a question as to whether it should complete the verdict questions on validity if the jurors found non-infringement. Appx2206-2207. The court heard from both parties on the issue. Appx2206-2209. Inline did not take the occasion to request a curative instruction on secondary considerations. *Id.* Instead, it let the deliberations play out, keeping its instruction objection as an arrow in the quiver for appeal.

In *Reilly v. United States*, 863 F.2d 149, 159-61 (1st Cir. 1998), the First Circuit found waiver where the government complained in a motion for new trial

and on appeal that the court had failed to give the parties advanced notice of a technical advisor's identity and intended use pursuant to Fed. R. Evid. 706. *Id.* at 159. The First Circuit deemed that argument waived:

> [W]hen a trial judge announces a proposed course of action which litigants believe to be erroneous, the parties detrimentally affected ***must act expeditiously to call the error to the judge's attention or to cure the defect***, not lurk in the bushes waiting to ask for another trial when their litigatory milk curdles.

*Id.* at 160 (emphasis added). Aside from a perfunctory reference to the jury instruction – buried in its litany of other preserve-for-the-record objections– Inline did just that, "wait[ing] to see which way the wind blew." *See id* at 160.

Further, Inline did not preserve in its briefing on its post-trial motion for JMOL or a new trial on validity the issue of court error as to the jury instructions on secondary considerations. Appx3477-3501, Appx3599-3611; *Abdallah*, 752 F.3d at 120-21.[36]

Because Inline waived rather than forfeited this argument, the Court need not consider it under plain error review. *See Almonte v. National Union Fire Ins.*

[36] Waiver refers to the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quotation and citation omitted). "By contrast, forfeiture refers not to affirmative conduct but rather to a 'failure to make the timely assertion of a right.'" *United States v. Gaffney-Kessell*, 772 F.3d 97, 100 (1st Cir. 2014) (quoting *Olano*, 507 U.S. at 733). Inline's failure to raise these arguments both at trial and in post-trial briefing falls outside the realm of forfeiture and should be construed as a waiver. *See id.*; *Geoffroy v. Town of Winchendon*, 959 F.3d 1, 9 (1st Cir. 2020).

*Co.*, 787 F.2d 763, 769 (1st Cir. 1986). But even if forfeiture applied, Inline cannot satisfy this exacting standard. To prevail on plain error review, Inline must show that "(1) an error occurred (2) which was clear or obvious and which not only (3) affected the [appellant's] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of the judicial proceedings." *Sparkle Hill*, 788 F.3d at 30 (quotation omitted). "Plain error review is 'extremely demanding,' and "it is rare indeed for a panel to find plain error in a civil case." *Id.* (quoting *Chestnut v. City of Lowell*, 305 F.3d 18, 20 (1st Cir. 2002) (en banc)).

Inline cites no case where a court found error – much less plain error – based on an omission of certain factors of the secondary considerations analysis.[37] *Id.* The court did not refuse to give an instruction on secondary considerations. Rather, the court gave the instruction and listed several of the factors to the jury. Appx2185. Inline has failed to demonstrate prejudice, or that it meets the "extremely demanding" bar set by plain error review. *See Sparkle Hill*, 788 F.3d at 30.

[37] *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 9-10 (1st Cir. 1998) is a negligence case, where the district court refused to provide *any* instruction on the defendants' affirmative defenses of comparative negligence and primary duty. *Power-One, Inc. v. Artesyn Techs., Inc.*, 2008 WL 1746634, at *8 (E.D. Tex. Apr. 11, 2008) does not address the adequacy of jury instructions.

C. The District Court's Use of a General Verdict Form Does Not Warrant a New Trial.

Fed. R. Civ. P. 49 empowers the district court to "submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." *Correia v. Fitzgerald*, 354 F.3d 47, 56 n.4 (1st Cir. 2003) (quoting Fed. R. Civ. P. 49(b)) (affirming denial of motion for new trial). "The burden of establishing that an error . . . could have changed the verdict" "is on the party challenging the verdict." *SSL Servs., LLC*, 769 F.3d at 1085; *see Davis v. Rennie*, 264 F.3d 86, 105 (1st Cir. 2001). Inline, *which proposed a general verdict form as to infringement*, Appx3250-3252, leaves undeveloped that the use of the general verdict form could have changed the verdict. Br. at 44; *FTC v. Direct Mktg. Concepts Inc.*, 624 F.3d 1, 8 (1st Cir. 2010) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

The jury found *all* claims to be invalid. Since Lacerta only raised § 112 as to a subset of claims that include the hinge height or "substantially leak resistant" limitation,[38] Inline cannot meet its burden that the use of a general verdict form amounts to error.

[38] Appx1841-1846; *see also* Appx94-95 (hinge height limitation only found in claim 22 of the '003 patent).

D. The Court Did Not Abuse Its Discretion By Allowing Dr. MacLean To Testify on the Ultimate Issue of Obviousness.

A district court's admission or exclusion of expert testimony is reviewable for abuse of discretion, "giving broad deference to the determination made by the district court." *Granfield v. CSX Transp., Inc.*, 597 F.3d 474, 485 (1st Cir. 2010). If the Court finds error, it must determine whether the error resulted in substantial prejudice. *Play Time, Inc. v. LDDS Metromedia Commcn's, Inc.*, 123 F.3d 23, 30 n. 8 (1st Cir. 1997).

Inline does not identify any authority barring an expert from testifying as to the ultimate question of obviousness where the expert considered secondary considerations. In *InTouch*, the expert "did not realize she needed to consider this factor as part of her obviousness analysis" and "had not even heard of the concept of objective evidence of nonobviousness." 751 F.3d at 1352. Moreover, this Court did not hold that the expert's testimony was inadmissible, but rather that the alleged infringer had failed to prove obviousness because of numerous flaws, the expert's failure to *consider* secondary considerations being just one. *See id.* at 1349-1352.[39] Nor does Inline contest that Dr. MacLean considered Inline's evidence of secondary considerations and found it unpersuasive. Appx3013-3014. Further, the court's order was not internally inconsistent in barring testimony as to

[39] The other cases Inline cites do not address the admissibility of expert testimony. Br. at 61.

any undisclosed opinions on secondary considerations, which Lacerta did not offer at trial, and permitting Dr. MacLean to testify as to his timely disclosed opinions on obviousness.

Even assuming that Inline could establish error, it has not established substantial prejudice. It does not explain how Dr. MacLean's testimony creates purported uncertainty as to whether the jury considered Inline's evidence of objective indicia of nonobviousness. *Ruiz v. A.B. Chance Co.*, 234 F.3d 654 (Fed. Cir. 2000), in which this Court remanded a district court's obviousness judgment following a bench trial to make specific factual findings as to the probative value of the patentee's evidence of secondary considerations, does not support a finding that substantial prejudice resulted from the admission of Dr. MacLean's testimony, and Inline cites no authority finding substantial prejudice resulting from an expert's testimony as to the ultimate issue of obviousness.

## III. The District Court's Claim Constructions Were Not Erroneous.

The Court reviews a district court's claim construction and the intrinsic-evidence aspects of a claim-construction analysis *de novo*. *A.O. Smith Corp. v. Bradford White Corp.*, No. 2021-2222, 2022 WL 3053891, at *3 (Fed. Cir. Aug. 3, 2022). The Court reviews any subsidiary factual determinations based on extrinsic evidence for clear error. *Id.*

A. "Upwardly Projecting Bead"

Inline complains that the court erred in not giving the term "upwardly projecting bead" its plain and ordinary meaning. Br. at 52-54. But Inline did not advance a plain and ordinary meaning of this term. Rather, Inline urged the court to construe "bead" to mean "[a]n [upwardly projecting] raised molding formed on the upper peripheral edge of the base portion." Appx2217.

"[A] party may not introduce new claim construction arguments on appeal or alter the scope of the claim construction positions it took below." *Conoco, Inc. v. Energy & Envmt'l Int'l, L.C.*, 460 F.3d 1349, 1358-59 (Fed. Cir. 2006). This Court declines to review claim construction arguments presented for the first time on appeal. *See, e.g.*, *Digital-Vending Servs. Int'l, LLC v. Univ. of Phoenix, Inc.*, 672 F.3d 1270, 1274 (Fed. Cir. 2012); *Microsoft Corp. v. Enfish, LLC*, 662 F. App'x 981, 984 (Fed. Cir. 2016).

Even if the Court were to consider Inline's argument, it fails. Inline contends that the court improperly limited the upwardly projecting bead to a "specific location in a preferred embodiment." Br. at 52-54. This argument misapprehends both the court's claim construction order and the patents' specifications. The court did not look to a single preferred embodiment depicted in Figure 10 in construing "bead." Rather, the court explained that the specifications all "refer to the upwardly projecting bead as 'extend[ing] substantially about the

perimeter of peripheral rim 22 and . . . positioned to surround the outer edge of flange 24 of cover portion 12 when container 10 is closed.'" Appx8 (quotation omitted). The court rejected Inline's argument that Lacerta's proposed construction would improperly limit the bead to a single configuration, adding that "every drawing in the specification . . . shows the upwardly projecting bead surrounding the edge of the outwardly extending peripheral flange of the cover portion." Appx9 (emphasis added). Critically, "only by surrounding the outwardly extending peripheral edge of the cover with the raised portion of the upper peripheral edge of the base does the container achieve what both parties agree is the functional purpose of the upwardly projecting bead." *Id.* (emphasis added).

Indeed, Inline's claim construction briefing observed that in each instance in which the specifications refer to the upwardly projecting bead, "the function of the bead is to render the outwardly extending flange of the cover portion relatively inaccessible or hinder the removal of the cover from the container when the container is closed, thus resisting tampering." Appx2260, Appx2261 ("The bead is simply an upwardly projecting raised molding formed on the upper peripheral edge of the base portion that is configured to hinder access to the container.") (emphasis added). The specifications teach a single way in which the bead is configured to perform that function: by substantially surrounding the outer edge of the outwardly

extending peripheral flange of the cover. Appx8.

The court correctly construed "upwardly projecting bead" consistent with the repeated and uniform teaching from the specifications as to how the bead must be configured to achieve the TE/TR container the patents claim. *See ICU Med., Inc. v. Alaris Medical Sys., Inc.*, 558 F.3d 1368, 1374-75 (Fed. Cir. 2009).

Next, under the guise of challenging the district court's construction, Inline complains that Lacerta improperly influenced the jury by comparing figures of a "preferred embodiment" with the court's construction. Br. at 53. This is another undeveloped argument and therefore waived. *Rodríguez v. Municipality of San Juan*, 659 F.3d 168, 175 (1st Cir. 2011).[40]

Finally, Inline argues that the court's construction "created confusion" because Claim 5 of the '640 patent includes the language "configured to substantially surround an edge of the outwardly extending peripheral flange." Br. at 53-54. Although "[a] claim construction that gives meaning to all the terms of the claim is preferred over one that does not do so," *Merck & Co., Inc. v. Teva Pharms. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005), "this doctrine is not a rigid rule but rather is one of several claim construction tools," *ICU Med.*, 558 F.3d at 1376. In *ICU Med.*, the patentee argued that the court's construction of

[40] For example, Inline does not identify any authority under which the cited testimony would be inadmissible or the applicable standard of review.

"spike," which required a "pointed tip," was erroneous because it rendered the language of a dependent claim "said spike is pointed" superfluous. *Id.* The Court rejected this argument because the patent uniformly described the spike as pointed and the dependent claim was added to a patent years after the filing date of the original patents. *Id.* Similarly, here, the fact that the "substantially surrounds" language appears in a single dependent claim from an application filed nearly ten years after the application that matured to the '003 patent cannot overcome the overwhelming intrinsic evidence that the bead must be configured to perform its intended function by substantially surrounding the outer edge of the outwardly extending peripheral flange.

B. "Relatively Inaccessible" and "Hinder Access"

Inline also contends that "relatively inaccessible" and "hinder access" did not require construction. Br. at 54-57. As to "relatively inaccessible," in rejecting Lacerta's indefiniteness challenge to that term, the court explained that a POSA "would understand the metes and bounds of 'relatively inaccessible'" based on the specifications' teaching that the upwardly projecting bead "makes the outwardly extending peripheral flange of the cover portion relatively inaccessible by surrounding it and physically blocking access to it." Appx4. The court explained that "relatively inaccessible" is only used in the context of the upwardly projecting bead, which the specifications teach "'physically blocks access to the edge of the

peripheral flange 24 on cover portion 12 from fingers or any other object that might normally be used for leverage to pry cover portion 12 from base portion 14.'" Appx11. In light of the specifications' consistent teaching of the manner in which the upwardly projecting bead renders the cover flange relatively inaccessible, the court adopted Lacerta's proposed construction. Appx11-12. Similarly, as to hinder access, the court noted that the '580 and '640 patent specifications only use "hinder access" in connection with the upwardly projecting bead and teach that the bead "physically blocks access" to the cover flange "from fingers or any other object that might normally be used for leverage" to pry the cover from the base. Appx12.

Inline argues that the court erred in "[r]uling that the patentee had 'disclaimed' the ordinary meaning" of these terms. Br. at 56. However, "when the scope of the invention is clearly stated in the specification, and is described as the advantage and distinction of the invention, it is not necessary to disavow explicitly a different scope." *On Demand Mach. Corp. v. Ingram Indus., Inc.*, 442 F.3d 1331, 1340 (Fed. Cir. 2006); *accord A.O. Smith*, 2022 WL 3053891, at *3.

The specifications repeatedly and uniformly teach, as the advantage of the invention, an upwardly projecting bead that physically blocks access to the cover flange from fingers or any other object to separate the cover portion from the base portion. Appx11-12. Although Inline claims that the specification "describes its

invention in broader terms," it does not identify any other way in which the specifications teach that access to the flange is hindered or rendered relatively inaccessible. Br. at 56. Therefore, the court did not err in construing "relatively inaccessible" and "hinder access" consistent with the teachings of the specifications. *See On Demand*, 442 F.3d at 1340.[41]

Inline's argument that the court effectively "redrafted tamper-resistant" as "tamper-proof" by requiring physically impeding access is unsupported. Br. at 55. Inline does not explain why the court's use of "impede," which, as the court noted, is one dictionary definition for "hinder," Appx12, correlates to "tamper proof" or "exclud[ing] access." Further, the court noted that physically blocking access does not correlate to 100% inaccessible or impossible access, and instructed the jury as such. Appx4, Appx2176; *see also Morales-Vallellanes v. Potter*, 605 F.3d 27, 34-35 (1st Cir. 2010). In addition, Inline's argument that "hinder" in the context of the patent does not mean "prevent," Br. at 55, Appx2084, which is another ordinary meaning of hinder, *see* Appx12, underscores that the plain and ordinary meaning does not apply.

[41] The Court did not expressly "rule" that Inline disavowed the claim terms' plain and ordinary meaning. Appx11-12. Even if premised on a finding of disavowal, this Court may nonetheless affirm because "an appellate court is not wedded to the trial court's reasoning but, rather, may affirm a judgment on any independently sufficient ground made manifest in the record." *Ungar v. Arafat*, 634 F.3d 46, 51 n.4 (1st Cir. 2011).

C. "Configured To Substantially Surround"

As to the "configured to substantially surround…" limitations, Inline does not advance any particular construction. Br. at 57-58 (suggesting that the court's departure from plain and ordinary meaning was unjustified). Again, Inline did not propose plain and ordinary meaning below, and the Court should decline to consider this argument. Appx2265-2267 (advancing construction of "[a]rranged to extend beyond [the perimeter of/an edge of] the outwardly extending peripheral flange of the cover portion when the container is closed and hinder access thereto").

Apart from the waiver issue, Inline now argues that the "configured to surround…" limitations specify only location, not function. Br. at 57. Yet below, Inline's proposed construction included a function limitation: "[a]rranged . . . to hinder access" to the cover flange. Appx2265 (emphasis added). The court's construction is consistent with the specifications' uniform teachings. Inline also again complains that Lacerta purportedly argued 100% inaccessibility was required, but none of the cited testimony or argument supports that statement. *E.g.*, Appx1734-1736, Appx1741-1744, Appx1793-1794, Appx2131.

D. Hinge Height

Inline contends that the court should have construed the hinge height limitation, despite neither party having requested construction. Br. at 58-59.

Inline did not raise this argument below, and it is waived. Appx3475-3501; *Lazare Kaplan Int'l, Inc. v. Photoscribe Techs., Inc.*, 628 F.3d 1359, 1376 (Fed. Cir. 2010).[42] Inline also cites no authority requiring the court to construe every term one party alleges is indefinite and, as discussed above, indefiniteness properly may be sent to the jury. Inline's undeveloped complaints as to the substance of Dr. MacLean's testimony, again under the guise of "claim construction," are also waived. *Rodríguez*, 659 F.3d at 175; Appx1755-1757 (failing to object to indefiniteness testimony), Appx1843-1844 (same), Appx1856 (Inline eliciting and failing to object to or move to strike Dr. MacLean's testimony).

## IV. The District Court Did Not Abuse Its Discretion in Denying Inline's Motion for a New Trial on Infringement.

The court did not abuse its discretion by denying Inline's motion for a new trial on infringement based solely on the admission of evidence of Lacerta's patent.[43] The court gave "a clear limiting instruction" that the jury could only consider Lacerta's patent on the issue of reasonable royalty damages and willful infringement. Br. at 63; Appx1474-1476. Inline does not dispute that an alleged infringer's patent may be relevant to a reasonable royalty,[44] Br. at 62-64, and it is

[42] Federal Circuit law controls whether a claim construction argument has been waived. *Id.*
[43] Appx3972-3990.
[44] *See Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (identifying "significant features or improvements added by the infringer" as relevant to reasonable royalty).

also relevant to willfulness, *Ortho Pharm. Corp. v. Smith*, 959 F.2d 936, 944 (Fed. Cir. 1992) (citing with approval holding that "defendant's reasonable belief that its activities fell within its own patent claims … is a factor in determining intent with respect to willful infringement"). Inline's cited cases do not find an abuse of discretion where the court admitted an alleged infringer's patent, let alone substantial prejudice warranting a new trial. *Cf. Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc.*, 265 F.3d 1294, 1309 (Fed. Cir. 2001) (affirming denial of alleged infringer's motion for new trial); *Rolls-Royce Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1109-10 (Fed. Cir. 1986) (affirming judgment of no willful infringement); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1572-73 (Fed. Cir. 1986) (affirming alleged infringer's denial of motion for new trial).

Mr. Lotfi testified, in response to Inline's charge of willfulness, that Lacerta developed an improved TE/TR container and applied for a patent before it launched its products. Further, Inline's counsel elected to highlight Lacerta's patent in closing argument, suggesting that its claims were "suspiciously like the claims of the Inline patents." Appx2115-2116. Lacerta properly responded in the closing argument that followed. Appx2147-2148. Inline has shown no prejudice.

## V. The District Court Erred in Dismissing Inline's Dropped Claims Without Prejudice.

At trial, Inline failed to present any evidence as to infringement of claims 6, 7, 8, 17, 18, 19, 20 and 25 of the '003 patent; 4, 5, 7, 9, 18, 19, 21, and 23 of the

'680 patent; 5 and 8 of the '756 patent; and 2, 3, and 15 of the '580 patent (the "Dropped Claims"). Inline waited until the charge conference on trial day 12—held after the close of its case-in-chief and at the tail end of trial—to withdraw the Dropped Claims. Appx1805-1806. It offered no reason for doing so, strongly suggesting it sought to avoid an adverse JMOL on those claims. *See id.*

Lacerta sought a with-prejudice disposition of the Dropped Claims. The court dismissed them *without* prejudice. Appx30. Precedent dictates otherwise, particularly since Inline did not drop the claims until it faced certain defeat at the tail end of trial.[45] *Strub*, 1998 U.S. App. LEXIS 20249, at *27 (finding abuse of discretion where claims where withdrawn without prejudice); *Momenta Pharms., Inc. v. Teva Pharms. USA Inc.*, 2014 U.S. Dist. LEXIS 9649, at *9-*10 (D. Mass. Jan. 24, 2014).

## VI. This is an Exceptional Case.

### A. Standard of Review

This Court reviews a district court's denial of attorneys' fees under 35 U.S.C. § 285 for abuse of discretion. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 561 (2014). "A district court abuses its discretion when its ruling rests on an erroneous legal conclusion or on a clearly erroneous assessment

[45] First Circuit law applies, and the review is *de novo*. *See Strub v. Axon Corp.*, 1998 U.S. App. LEXIS 20249, at *27-28 (Fed. Cir. Aug. 17, 1998) (unpublished); *VS PR, LLC v. Orc Miramar Corp.*, 34 F.4th 67, 69 (1st Cir. 2022).

of the evidence." *AdjustaCam, LLC v. Newegg, Inc.*, 861 F.3d 1353, 1358 (Fed. Cir. 2017) (citations omitted). "The court also abuses its discretion when it makes a clear error of judgment in weighing relevant factors." *Id.* (quotation omitted). A factual finding is clearly erroneous if, "despite some supporting evidence, [the Court is] left with the definite and firm conviction that a mistake has been made." *Elec. Commc'n. Techs., LLC v. ShoppersChoice.com, LLC*, 963 F.3d 1371, 1376 (Fed. Cir. 2020).

An exceptional case under Section 285 "is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). A prevailing party seeking fee shifting need only show exceptionality by a preponderance of the evidence. *Oplus Techs., Ltd. v. Vizio, Inc.*, 782 F.3d 1371, 1374 (Fed. Cir. 2015). The deference owed to district courts in deciding fees motions "is not absolute." *AdjustaCam*, 861 F.3d at 1359 (citations omitted). When a district court misapplies the proper standard and bases its decision to deny Section 285 fees on a clearly erroneous view of the evidence, as happened here, the court abuses its discretion. *See id.* at 1359-62.

B. Lacerta is the Prevailing Party.

Lacerta is the "prevailing party" under 35 U.S.C. § 285. Appx31; *see*

*Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 76 F.3d 1178, 1183 (Fed. Cir. 1996).

C. Inline Had No Good Faith Infringement Theory.

Inline had no good-faith literal infringement theory. This Court has rejected the mechanical rule the district court applied that a good faith infringement theory exists if a party survives summary judgment but loses at trial. Appx31; *Eko Brands, LLC v. Adrian Rivera Maynez Enters., Inc.*, 946 F.3d 1367, 1375 (Fed. Cir. 2020) ("There is no precise rule or formula' for deciding whether a case is 'exceptional,'" and "[t]he district court must consider the 'totality of the circumstances' on a 'case-by-case' basis.") (quoting *Octane Fitness*, 572 U.S. at 554). Therefore, the district court's shorthand analysis is unavailing.

This is especially true where, as here, Inline advanced a new and improper infringement theory at trial, relying on undisclosed expert testimony that the cover flanges of the accused products are "visually occluded," shortened (and thus harder to access), and require a certain amount of force to open. Appx1079; *see infra* at pp. 65-66. This case is exceptional because Inline could not prove literal infringement of key claim limitations, and therefore belatedly and improperly attempted to pivot to a DOE theory of infringement notwithstanding the prohibition against doing so.

"[A] party cannot assert baseless infringement claims and must continually assess the soundness of pending infringement claims, especially after an adverse

claim construction." *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1326 (Fed. Cir. 2013). The court construed several of the disputed claim terms in such a way that should have made it plain to Inline heading into trial that it could not prevail on a literal infringement theory, as demonstrated by its pivot at trial.

First, with respect to upwardly projecting bead, as Dr. MacLean testified, the accused products do not meet this limitation as construed because, as both the naked eye and CT scans of the accused product show, there is no raised portion on the upper peripheral edge of the base flange that substantially surrounds the peripheral cover flange. Appx1738-1739, Appx1744. Rather, the cover and base flanges are relatively parallel to one another, and nothing surrounds the outer edge of the cover flange. Appx1745-1746.

Second, as to "relatively inaccessible" and "hinder access," as Dr. MacLean testified, the peripheral flange of the accused products is relatively accessible when the containers are closed, and nothing physically impedes access to the outwardly extending flange as required by the claim construction. Appx1741-1744. Dr. Kazmer demonstrated this point to the jury during his direct examination, however unintentionally, by casually separating the cover portion from the base portion of an accused container with his finger and without removing the tear strip. Appx1190 ("Q. [Lacerta's Counsel]: . . . Yesterday you were handed 119, which is one of the accused products in this case, and you opened it in front of the jury with

your fingers, didn't you? A. I did.").

Prior to trial, the court struck the DOE opinions in Dr. Kazmer's report and precluded Dr. Kazmer from testifying at trial as to any DOE opinions. Appx2669-2678. Nonetheless, at trial, Dr. Kazmer departed from the court's preclusion order and claim construction to testify that the accused products act to obscure visually the outer edge of the outwardly extending peripheral cover flange, which is not a claim limitation. For instance, Dr. Kazmer testified the base of the accused products "conceals that outer flange" of the cover. Appx1107; *see also* Appx1108 (the "outwardly extending peripheral flange . . . ***both visually*** and tactically it is hard to get to.") (emphasis added), Appx1138 (the outer flange of the cover of the accused products is "relatively inaccessible visually and tactily [sic]"). Doubling down on his improper DOE testimony, Dr. Kazmer even refused to acknowledge that visual blocking is not an element of any of the asserted claims, contrary to the language of the patents and the court's constructions, which require physical impediment, not visual occlusion. *See* Appx1188-1189.[46]

Dr. Kazmer further testified that, because of a "negative draft angle" providing an interference, "you actually need a fair amount of force to pull up and remove the cover portion from the base portion." Appx1108. But negative draft

[46] Dr. Kazmer also testified that the '580 patent requires "only that the cover portion is hidden," which the court struck. Appx1174-1176.

angles refer to a friction fit between a cover and base portion that is universal in containers and not what is claimed. Appx1411-1414. In addition, Dr. Kazmer testified that the cover flange "is generally inaccessible" because it sits below the upper edge of the base and "you need a force to overcome removal of that cover portion from the base." Appx1116. A cover that requires force to open is, again, not a claim limitation or how the patents teach TE/TR. Appx1-20. Dr. Kazmer also testified that "given the fact that the flange is relatively small and relatively protected, it's hard to remove." Appx1116. Small or truncated cover flanges are not claim limitations. Appx1-20.

None of Dr. Kazmer's testimony identified a raised portion of the upper peripheral rim on the accused products that "[p]hysically impedes access from fingers or other objects to separate the cover portion from the base portion," Br. at 20-21, as the district court's claim construction required, Appx19. Inline even tries to rehabilitate this flawed testimony and backfill that gap on appeal by modifying Dr. Kazmer's words to suggest he testified as to tactile impediment. Br. at 21 (altering "tactically" and "tactily" to "tacti[lely]").

In sum, despite Inline's insistence heading into trial and throughout its case-in-chief that it had not swerved from a literal infringement theory, Dr. Kazmer did exactly that with his "visual occlusion," shortened flange, and "force to open" testimony. The fact that Dr. Kazmer testified that he applied the claim

constructions does not make it so. Inline, through Dr. Kazmer, intentionally put on a new infringement theory notwithstanding extensive summary judgment briefing, four revised infringement contentions, an Order limiting it to a literal infringement theory and representations heading into trial that it would abide by that Order.

As of the December 2019 *Markman* decision, Inline knew that it could not prove literal infringement because the accused containers can be opened with "fingers or any other object." Yet Inline deployed Dr. Kazmer in a cynical, but failed, effort to confuse the jury by testifying about visual obfuscation, the use of force to open the accused products, and a shortened cover flange—none of which is an element of the asserted claims. These facts render this case exceptional, and the court abused its discretion in declining to review these facts in context simply because Inline survived summary judgment. *See Octane Fitness*, 572 U.S. at 546; *Eko Brands*, 946 F.3d at 1375.

D. Inline Litigated This Case Unreasonably.

This case is also exceptional because Inline engaged in obfuscation and vexatious litigation tactics that needlessly prolonged and multiplied these proceedings. "[M]any varieties of misconduct can support a district court's exceptional case finding, including lodging frivolous filings and engaging in vexatious or unjustified litigation." *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1324 (Fed. Cir. 2011). "Indeed, '[l]itigation misconduct and unprofessional

behavior may suffice, by themselves, to make a case exceptional under § 285.'" *Id.* (quotation omitted).

Inline's unreasonableness is highlighted by withdrawing asserted claims at the end of trial after diverting Lacerta's resources through years of litigation; altering its validity positions mid-trial; and various instances of vexatious litigation conduct that the district court characterized as "not to be condoned." Appx31-32.

Inline's decision to assert dozens of claims only to withdraw 21 of them at the charge conference on the twelfth day of trial weighs in favor of an extraordinary case determination. Contrary to the court's conclusion, without discussion, that "it is unclear how the litigation would have materially differed had Inline withdrawn the 21 claims sooner," Inline's assertion of those claims over three and a half years of litigation, four sets of infringement contentions, and eleven days of trial forced Lacerta and its technical expert to expend substantial resources litigating those claims and preparing a defense that included non-infringement and invalidity positions as to each element of those claims. Appx1806, Appx1810, Appx3389. This tactic burdened Lacerta with increased expert fees and preparation time, tracking the absence of evidence, and preparation of its motion for JMOL on these claims. Such unnecessary multiplication of a case, only to abandon claims on the eve of or during trial, calls for an exceptional case finding. *Nilssen v. Osram Sylvania, Inc.*, 528 F.3d 1352, 1369 (Fed. Cir.

2008).

As another example, Inline reneged on its pre-trial representation that one of the named inventors, Bruce Stein, was unavailable to testify at trial, after the parties designated his deposition testimony and the court ruled on objections. Immediately following the cross examination of Inline's CEO, Tom Orkisz, he called Mr. Stein and paid for him to appear live at trial, forcing Lacerta to pivot in the middle of trial to prepare for and cross-examine Mr. Stein. *See* Appx1033-1035.

Further, in prosecuting the '003 application, Inline misrepresented to the PTO that the Menshen patent teaches an aluminum container, and thus is not invalidating prior art because it teaches away from plastic containers. Appx4124, Appx4132. In Dr. Kazmer's expert report on validity, Dr. Kazmer rebutted Dr. MacLean's opinion as to invalidity of the '640 patent in part by adopting Inline's misstatements to the PTO: "A POSITA would understand that . . . **Menshen states that its container is aluminum**." Appx8149 (emphasis added). Menshen "states" no such thing, as Inline and Dr. Kazmer knew based on a plain reading of the Menshen patent. Appx7431.

At trial, Dr. Kazmer conceded that Menshen teaches a plastic, not aluminum, container. Appx2040. Inline strained to posture Kazmer's trial testimony as not deviating from his expert disclosure, but it plainly did. Appx3468-3469. This *post*

*hoc* attempt at rehabilitation lacks credibility as even Inline implicitly conceded: "It is undisputed that Menshen does not expressly disclose the material out of which its container is made." Appx3468. In fact, Dr. Kazmer testified that it would have been obvious to a POSA that Menshen is injection molded. Appx2055. Yet, Inline argued a contrary position—that Menshen is aluminum and teaches away from a plastic container—before the PTO. Appx4133, Appx4376. For Inline to contend that this 180-degree pivot by its expert at trial is a "reasonable" validity position lacks credibility. Rather, this sleight of hand is exactly the type of litigation conduct that warrants fee awards. *See, e.g.*, *Oplus Techs.*, 782 F.3d at 1373, 1375 (finding no basis to deny fees where the patentee strategically manipulated the facts and evidence provided to the court and presented "malleable expert testimony and infringement contentions" that "left [the defendant] in a frustrating game of Whac-A-Mole throughout the litigation").

Inline aggressively pursued an infirm case as demonstrated by its technical expert's trial testimony that backslid into improper DOE theories, often contradicted the court's claim constructions, and offered shifting positions on the prior art that contradicted Dr. Kazmer's own opinions expressed in his rebuttal validity report. Inline pursued its case unreasonably aggressively by, for example, securing the trial attendance of a named inventor mid-trial after previously representing the inventor as unavailable and only agreeing to withdraw certain

claims after forcing Lacerta to defend against them and move for JMOL. All of these shifting tactics and overreach created significant work for both Lacerta and the court and unnecessarily multiplied these proceedings, as did Inline's failure to concede that it had no good faith infringement or validity position following claim construction.

Given the totality of the circumstances—from patent prosecution to Inline's expert disclosures to Dr. Kazmer's disavowing of opinions at trial—this case stands out from the others. *See SRI Int'l, Inc. v. Cisco Sys., Inc.*, 254 F. Supp. 3d 680, 722-23 (D. Del. 2017); *SRI Int'l Inc.*, 14 F.4th 1323, 1332 (Fed. Cir. 2021). Accordingly, the district court abused its discretion in declining to find this case exceptional.

## CONCLUSION

For the foregoing reasons, Lacerta respectfully requests that the Court: (1) affirm the district court's orders denying Inline's motions for JMOL or a new trial on validity and infringement; (2) affirm the district court's claim constructions; (3) reverse the district court's dismissal without prejudice of the Dropped Claims and enter judgment for Lacerta and against Inline on the Dropped Claims; (4) reverse the district court's denial of Lacerta's motion for an exceptional case determination; and (5) remand this matter to the district court to determine the amount of fees owed to Lacerta.

*Defendant-Appellee/Cross-Appellant*
*LACERTA GROUP, LLC*

*By its Attorneys,*

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I certify that on the 18th day of January 2023, a true and correct copy of the foregoing document was filed with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to all CM/ECF participants resulting in service upon all counsel of record.

Date: January 18, 2023

/s/ *Laurel M. Rogowski*
Laurel M. Rogowski

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

# UNITED STATES COURT OF APPEALS
# FOR THE FEDERAL CIRCUIT

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**Case Number:** 2022-1954, 2022-2295

**Short Case Caption:** Inline Plastics Corp. v. Lacerta Group, LLC

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