

Nos. 18-1725, -1784

IN THE
United States Court of Appeals
FOR THE FEDERAL CIRCUIT

GREEN MOUNTAIN GLASS, LLC, CULCHROME, LLC,
Plaintiffs - Cross-Appellants,

v.

SAINT-GOBAIN CONTAINERS, INC., DBA VERALLIA NORTH AMERICA,
Defendant - Appellant.

On Appeal from the United States District Court
for the District of Delaware, in No. 1:14-cv-392-GMS

**CROSS-APPEAL REPLY BRIEF FOR
PLAINTIFFS - CROSS-APPELLANTS GREEN MOUNTAIN
GLASS, LLC AND CULCHROME, LLC**

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Green Mountain Glass, LLC, Culchrome, LLC v. Saint-Gobain Containers, Inc. dba Verallia North America

Case No. 18-1725, -1784

CERTIFICATE OF INTEREST

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(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Green Mountain Glass, LLC and CulChrome, LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

| 1. Full Name of Party Represented by me | 2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is: | 3. Parent corporations and publicly held companies that own 10% or more of stock in the party |
|---|---|---|
| Green Mountain Glass, LLC | None | G R Technology, Inc. (privately held; no publicly held companies) |
| CulChrome, LLC | None | GRT Holdings, Inc. (privately held; no publicly held companies) |
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4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Please see attached.

FORM 9. Certificate of Interest

Form 9
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None.

1/28/2019

Date

/s/ Jeffrey A. Lamken

Signature of counsel

Jeffrey A. Lamken

Printed name of counsel

Please Note: All questions must be answered

cc: All counsel by ECF

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CERTIFICATE OF INTEREST

Plaintiffs - Cross-Appellants Green Mountain Glass, LLC and CulChrome, LLC state that the following partners or associates have appeared on their behalf before the trial court or are expected to appear in this court:

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INTRODUCTION

The jury found that Ardagh engaged in “*the most egregious behavior*”—“wanton, malicious, consciously wrongful, or . . . bad faith” conduct “*especially worthy of punishment.*” Appx75 (emphasis added). Ardagh does not dispute that the jury found extreme culpability. It does not deny the jury did so under an enhanced willfulness instruction Ardagh itself requested. Nor does Ardagh suggest the district court disagreed with the jury’s finding of enhanced culpability. To the contrary, the district court did not merely find Ardagh infringed willfully. It found Ardagh *deliberately copied* Green Mountain’s patented invention; *hid its infringement* from Green Mountain; infringed willfully *for years*; and did so *without any good-faith belief in non-infringement or invalidity.* Appx31-35. Under this Court’s and Supreme Court precedent, the “egregiousness” of that conduct is the “paramount determination” on whether to enhance damages. *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826 (Fed. Cir. 1992); see *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016) (“egregious[ness]” and “culpable behavior”).

But the decision below skirts that paramount consideration. It nowhere explains how “*the most egregious behavior*” could be *insufficiently egregious* to warrant enhancement—or why infringement “especially worthy of punishment” should yield no punishment. The decision identifies nothing that mitigated Ardagh’s infringement to render it less culpable or worthy of punishment. Even

where there is an ordinary “finding of willful infringement, a trial court should provide reasons for not increasing a damages award.” *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1572 (Fed. Cir. 1996). That goes double where, as here, the willfulness is found to be “the most egregious.”

The decision below reflects multiple errors of law—errors that Ardagh ignores or weakly defends. The trial court’s “discretion” is “the discretion to decide whether the case is sufficiently egregious to warrant enhancing damages and,” if so, “to decide the amount of enhancement.” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1342 (Fed. Cir. 2016). The decision below acknowledges the “egregiousness” standard but never applies it. Its enhancement discussion never even mentions the jury’s finding that Ardagh committed “the most egregious” infringement. Where the jury finds such especially egregious infringement—and the court itself finds deliberate copying, concealment, and no remedial efforts, all without any good-faith belief in non-infringement or invalidity—the court must explain how mitigating factors overwhelm that egregious conduct to render punishment unwarranted. The decision below never does that.

Instead, it replaces the paramount focus on egregiousness with a mathematical comparison of *Read* factors, tabulating factors for and against enhancement. Appx35; Green Mountain Br. 70-71. Ardagh insists “there is *no indication* that the district court merely tallied factors,” invoking the district court’s statement

that it “assessed and weigh[ed] each of the *Read* Factors” to “conclude[] that an award of enhanced damages is not warranted.” Ardagh Response 45 (quotation marks omitted; emphasis added). But Ardagh overlooks the court’s explanation of that result, which appears in the immediately succeeding sentences: “Only three factors favor[] enhancement Most of the other factors . . . disfavor enhancement” or “are essentially neutral.” Appx35. That is counting, not the exercise of discretion. It is divorced from the paramount consideration of egregiousness. Ardagh deliberately copied, hid its infringement, and infringed for years without any “‘good faith belief’ that the ’737 Patent was invalid or not infringed.” Appx32; Appx35. The decision below does not explain what mitigates that extreme behavior.

Nor can Ardagh explain away the district court’s misunderstanding of, and clear factual error in, various *Read* factors. Ardagh declines to respond to three different errors. Ardagh neither disputes nor defends the district court’s inversion of the motivation-to-harm analysis. *Green Mountain Br.* 76. It ignores the departure from precedent on duration of misconduct. *Id.* at 75. And Ardagh ignores the district court’s clear error on remedial efforts. The district court found Ardagh had “fail[ed] to take remedial action” and “continued post-suit infringement.” Appx19. But the court then contradicted its own finding by declaring that factor to “disfavor” enhancement. Appx35; *see Green Mountain Br.* 76. And the court’s treat-

ment of litigation misconduct—misconduct Ardagh nowhere denies—was deficient or missing entirely.

Ardagh’s defenses have repeatedly shifted, because it had no defense at all. When accused of infringement, it initially denied using mixed-color cullet (presenting a false affidavit so insisting). At trial, its defense was the opposite—that it had been using the patented method for mixed-color cullet all along, from before the patent’s priority date (despite previously stipulating it was not raising such a defense). For claim construction, Ardagh first insisted that “mixed color cullet” and “unsorted mixed color cullet” mean the same thing. Just before trial, it insisted they have different meanings. Ardagh’s infringement position repeatedly shifted, but always reduced to a construction of claim terms that was fundamentally atextual, never asserted at claim construction, and contrary to basic physics. Green Mountain Br. 37-39. Even Ardagh’s witnesses changed their stories. They were so incredible, and so often tried to deny the undeniable, that Ardagh’s own counsel was reduced to apologizing for its “terrible” witnesses. Appx2332.

ARGUMENT

I. THE DISTRICT COURT FAILED TO CONDUCT THE EXERCISE OF DISCRETION REQUIRED BY THIS COURT’S CASES

Ardagh does not dispute that enhanced damages serve to punish “egregious infringement behavior.” *Halo*, 136 S. Ct. at 1932. Courts must examine “the particular circumstances of each case,” guided “by . . . sound legal principles.” *Id.* at

1933, 1935. The “‘channel of discretion’” directs enhancement to “‘egregious cases of culpable behavior.’” *Id.* at 1932. As this Court has observed, the “paramount determination” is “the egregiousness of the defendant’s conduct.” *Read*, 970 F.2d at 826.

A. In this case, the jury found “the most egregious behavior.” Appx75. Having heard the witnesses, seen the evidence, and assessed credibility, the jury found that Ardagh had engaged in conduct that was “wanton, malicious, consciously wrongful, or done in bad faith” and “especially worthy of punishment.” Appx75; Appx19. Those findings were made based on a jury instruction that Ardagh itself sought. Appx1997-2007. Indeed, Ardagh proposed that “egregiousness” language (and the court adopted it) despite warnings that the language was addressed not to willfulness, but to the court’s “deci[sion] in its discretion” whether to enhance after willfulness is found. Appx2001-2002.

The district court, moreover, nowhere disagrees with the jury’s determination. To the contrary, its decision repeatedly identifies aggravating circumstances that highlight the egregiousness of Ardagh’s conduct. These include:

- Ardagh’s “‘deliberate copying’” of the invention, Appx32, and “draft[ing] a secret dossier” to help it obtain more information about Green Mountain’s invention, Appx19; Appx5683.
- Ardagh’s lack of “a ‘good faith belief’ that the ’737 Patent was invalid or not infringed.” Appx32.

- Ardagh’s “attempts to conceal its infringement.” Appx19.
- Ardagh’s “failure to take remedial action” and “continued” infringement “post-suit.” Appx19.

The district court thus found that Ardagh *copied* the patented invention, deliberately *concealed* infringement, *continued* its infringement, and made *no remedial* efforts, all with *no* good-faith belief of non-infringement or invalidity.

Such extreme and culpable conduct ordinarily results in enhanced damages. *See, e.g., Arctic Cat Inc. v. Bombardier Recreational Prods., Inc.*, 198 F. Supp. 3d 1343, 1350-54 (S.D. Fla. 2016) (enhancement warranted because infringer copied, concealed the infringement, failed to take remedial action, and had no good-faith belief in defenses), *aff’d in relevant part*, 876 F.3d 1350 (Fed. Cir. 2017); *K-TEC, Inc. v. Vita-Mix Corp.*, 696 F.3d 1364, 1378 (Fed. Cir. 2012) (copying without a good-faith basis of invalidity or non-infringement); *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1225 (Fed. Cir. 2006) (similar); *WBIP*, 829 F.3d at 1339-42 (similar). Ardagh does not contend otherwise. It cites no case in which the jury found such “egregious behavior”—conduct “especially worthy of punishment”—that resulted in no enhancement whatsoever.

“*Halo* emphasize[s] that subjective willfulness alone—i.e., proof that the defendant acted despite a risk of infringement that was ‘either known or so obvious that it should have been known’ . . . —can support an award of enhanced damages.” *WesternGeco LLC v. ION Geophysical Corp.*, 837 F.3d 1358, 1362 (Fed.

Cir. 2016) (quoting *Halo*, 136 S. Ct. at 1930), *rev'd on other grounds*, 138 S. Ct. 2129 (2018). Even when mere subjective willfulness is found, district courts must “provide reasons for *not* increasing a damages award.” *Jurgens*, 80 F.3d at 1572 (emphasis added); *see also WhitServe, LLC v. Comput. Packages, Inc.*, 694 F.3d 10, 37 (Fed. Cir. 2012) (same).

Here, the jury’s determinations (and the court’s) go well beyond “subjective willfulness.” With respect to the “paramount determination”—“the egregiousness of the defendant’s conduct”—the jury found the infringement to be “the most egregious” and “especially worthy of punishment.” Appx75; Appx19. Yet the district court’s opinion identifies nothing that mitigated Ardagh’s misconduct to render it less than extraordinarily “egregious” and “especially worthy of punishment.” Ardagh insists the court *mentions* egregiousness as the paramount consideration. Ardagh Response 44. But that mention is a broken promise. The decision cites factors but never relates how they might explain “the most egregious” infringement, Appx75, to render it not “sufficiently egregious as to warrant enhancement,” *WBIP*, 829 F.3d at 1341 n.13. Its enhancement analysis does not explain why mitigating factors overcome the egregious copying, concealment, and continued infringement—with no good-faith belief in any defense—the court found. Nor does it address, let alone explain, the jury’s finding that Ardagh engaged in “the most egregious behavior.” That failure of explanation—on the

“paramount determination” of “egregiousness”—is classic abuse of discretion. *In re Nintendo Co.*, 544 F. App’x 934, 939-40 (Fed. Cir. 2013) (“Failure to exercise discretion is not exercising discretion; it is making a legal mistake.”); *Polara Eng’g Inc. v. Campbell Co.*, 894 F.3d 1339, 1355-56 (Fed. Cir. 2018).

B. Rather than focus on egregiousness, the decision below walks through *Read* factors. Appx31-35. That was error: The *Read* factors are guides for evaluating egregiousness; they are not substitutes for that evaluation. *Read* itself holds, immediately before discussing the factors, that the “paramount determination” is “the egregiousness of the defendant’s conduct based on all the circumstances.” 870 F.2d at 826; *see Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 875 F.3d 1369, 1383 (Fed. Cir. 2017) (“[T]he particular circumstances of the case . . . determine whether” the defendant’s infringement was “egregious.”). Yet the decision below employed the *Read* factors to subordinate “[t]he paramount determination” of egregiousness to a subsidiary point among nine others.

Of course, a finding of “egregiousness” does not require enhancement. *Halo*, 136 S. Ct. at 1933; *see Ardagh Response* 41-44. But the enhancement determination *depends on* egregiousness—the court exercises “discretion to decide whether the case is sufficiently egregious to warrant enhancing damages” and “the amount of enhancement.” *WBIP*, 829 F.3d at 1342; *see Halo*, 136 S. Ct. at 1392 (“channel” for discretion is “egregious cases of culpable behavior”). Especially

given the finding of “the most egregious behavior,” the district court *was* required to address that paramount inquiry (egregiousness)—not count the number of *Read* factors in “favor[.]” to compare them to the number putatively neutral or against. Appx35. Any list of nonexclusive factors loses its purpose, and ceases to reflect a proper exercise of discretion, when the district court loses sight of the ultimate inquiry. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (“We agree that such [nonexclusive] factors may be used to guide courts’ discretion, so long as such factors are faithful to the purposes of the Copyright Act.”). “[D]iscretion has limits,” and a “district court’s decision must reflect its consideration of the particulars of the case, lest the outcome become too divorced from the purposes underlying” the statute. *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 701 (7th Cir. 2014); *see also S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 201 (Fed. Cir. 1986) (A “discretionary ruling should be in furtherance of the policies of the laws that are being enforced.”).

Here, the district court committed precisely that error. It made repeated findings showing egregious infringement: copying, concealment, and continued infringement, all with *no* good-faith belief in *any* defense. The jury found “the most egregious” infringement. By ignoring all of that in favor of a rote recitation of *Read* factors, the district court “divorced” its analysis from the ultimate

inquiry—whether Ardagh deserved a “‘punitive’ or ‘vindictive’ sanction for [its] egregious infringement behavior.” *Halo*, 136 S. Ct. at 1932.

Exacerbating the error, the district court weighed factors relevant primarily to *the extent of* enhancement as if they bear equally on the *appropriateness* of enhancement. Factors like “whether the infringer deliberately copied,” whether it performed any investigation of the patent, and whether it had “a good-faith belief” of invalidity or non-infringement weigh heavily in the “egregiousness” inquiry, *i.e.*, whether the “infringer ‘acted in [such] bad faith as to merit an increase in damages awarded against him.’” *Read*, 970 F.2d at 826-27 (alteration in original) (quoting *Bott v. Four Star Corp.*, 807 F.2d 1567, 1572 (Fed. Cir. 1986)). The factors the district court identified as putatively neutral or against enhancement—including defendant’s size, duration of misconduct, closeness of the case, and motivation to harm—focus not on the propriety of enhancement but “on the extent of enhancement.” *Id.* at 827. Had the district court invoked just the three *Read* factors that bear on whether to enhance damages in the first place—copying, litigation misconduct, and bad-faith infringement, *id.*—it would have found that at least two favor enhancement, Appx31-32.

Even taking all the factors together, the district court never explains why any of the cited factors are *mitigating* so as to make Ardagh’s deliberate, concealed, and bad-faith infringement unworthy of punishment. For example, a finding of no

litigation misconduct may eliminate an aggravating factor that would favor enhancement. *Green Mountain Br.* 75. But litigating in good faith does not eliminate years of concealed, deliberate, willful, and bad-faith infringement found to be “the most egregious.” *Id.* A defendant “cannot insulate itself from liability for enhanced damages by creating an (ultimately unsuccessful) invalidity defense for trial after engaging in the culpable conduct of copying.” *WBIP*, 829 F.3d at 1340. The district court’s factor-tallying countenanced just that nonetheless.

C. Ardagh argues that, contrary to all objective indicators, the district court properly exercised discretion. *Ardagh Response* 44-45. While Ardagh asserts that the district court’s opinion reflects a “detailed weighing of the circumstances,” *id.* at 44, it offers little support—two sentences in all.

1. The first sentence is a recitation of the relevant standard—that egregiousness is the paramount determination. *See Ardagh Response* 44. But reciting the inquiry and applying it are different things. The district court’s actual analysis all but ignores the “paramount determination” of egregiousness by treating the absence of some further aggravating factors (*e.g.*, litigation misconduct or misuse of size) as countermanding what is otherwise egregiously willful infringement. *See pp. 5-7, supra; Green Mountain Br.* 70-71.

The second sentence Ardagh invokes is more telling still. It reads: “Having assessed and weighing each of the *Read* Factors, the court concludes that

an award of enhanced damages is not warranted.’” Ardagh Response 45 (quoting Appx35). Ardagh overlooks the next three sentences, which explain the reasoning behind that conclusion. The first: “Only *three factors* favor[] enhancement,” the district court declared. Appx35 (emphasis added) (citing “deliberate copying,” lack of “investigation and good faith belief,” and “attempts to conceal”). The second: “*Most of the other factors* . . . disfavor enhancement.” *Id.* (emphasis added). The third: “The remaining factors . . . are essentially neutral.” *Id.* The district court’s assessment and weighing thus consisted of counting: Three factors, versus most factors, versus neutral factors. Ardagh is incorrect to assert that “there is no indication that the district court merely ‘tallied factors.’” Ardagh Response 45 (quoting Green Mountain Br. 70-71). A tally was *the* justification for the district court’s decision not to enhance damages.

2. Tally or not, the decision below still fails to meaningfully address the finding of especially egregious behavior, the court’s own findings of egregious aggravating conduct (deliberate copying, concealment, absence of any good-faith belief in any defense), or why enhancement was inappropriate despite those findings. While Ardagh invokes “a detailed weighing of the circumstances,” Ardagh Response 44, consideration of relative weight and importance was missing. The district court nowhere suggested the three factors it found in favor of enhancement somehow were insufficient by themselves to show egregious

misconduct warranting punishment, as the jury found. Nor did it explain why other factors somehow mitigated Ardagh's egregious misconduct. Vacatur and remand is warranted. *See Polara Eng'g*, 894 F.3d at 1355-56 (vacating enhanced damages ruling when "explanation [was] insufficient for us to determine why the court viewed" the *Read* factors in support of enhancement).

II. THE DISTRICT COURT'S *READ* ANALYSIS ITSELF CONTRAVENES PRECEDENT AND IS CLEARLY ERRONEOUS

Even within the confines of the *Read* analysis, the decision below cannot be sustained. For several factors, the court's rationale is contrary to precedent. For others, its findings are internally contradictory, foreclosed, or clearly erroneous. A district court "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

Precisely that happened here for at least three *Read* factors. Green Mountain Br. 72-77. Ardagh largely ignores those errors. Instead, Ardagh attempts to re-argue its twice-rejected view of the evidence. *See* Ardagh Response 47 (arguing that Ardagh "investigated the patent and confronted GMG with strong, repeated statements" that it "did not infringe or the patent was invalid"). But Ardagh cannot overcome the defects in the reasoning below by arguing a view of the evidence that

both the jury and the district court rejected. Appx31-32. The district court's legally flawed analysis of the *Read* factors independently requires reversal.

A. Ardagh Does Not and Cannot Defend the District Court's Erroneous Analysis of Three *Read* Factors (Remedial Measures, Duration, and Motivation To Harm)

1. The district court declared “remedial actions taken by [Ardagh] . . . disfavor enhancement.” Appx35; *accord* Appx33 (factors including “[r]emedial action’ [Ardagh] has taken—do not favor enhancement”). As Green Mountain observed (Br. 75), that determination is hard to fathom. For one thing, the court identified *no* “remedial actions taken” by Ardagh at any point. For another, in sustaining willfulness, the district court expressly invoked Ardagh’s “failure to take remedial action” and “continued post-suit infringement.” Appx19; *see Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1370-71 (Fed. Cir. 2004). That sort of internally contradictory determination—finding that remedial efforts do not exist and that the (non-existent) remedial efforts weigh against enhancement—cannot be sustained. “[I]nternally inconsistent findings constitute clear error.” *John Allan Co. v. Craig Allen Co.*, 540 F.3d 1133, 1139 (10th Cir. 2008).

Ardagh responds by not responding. It ignores the absence of any evidence of remedial efforts. It says nothing about the district court’s finding that Ardagh “fail[ed] to take remedial action” and “continued post-suit infringement.” Appx19.

And it makes no effort to reconcile the contradiction between finding willfulness supported by the failure to remediate and ruling that (non-existent) remediation weighs against enhancement. Ardagh instead repeats the district court's statement that "the record cannot be reasonably understood to show an uninterrupted 7-year period of un-remediated wrongs.'" Ardagh Response 46 (quoting Appx34). But that is unresponsive. It does not identify evidence of remedial efforts (there is none). Nor does it reconcile the decision's internal contradiction. Such "bare assertion" is insufficient. *Intercontinental Great Brands LLC v. Kellogg N. Am. Co.*, 869 F.3d 1336, 1342 n.3 (Fed. Cir. 2017); *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 437-38 n.11 (3d Cir. 2005) ("failing to respond to an appellant's argument in favor of reversal... 'waives, as a practical matter anyway, any objections not obvious to the court to specific points urged by the [appellant]'" (alteration in original) (quoting *Hardy v. City Optical Inc.*, 39 F.3d 765, 771 (7th Cir. 1994))).

2. Far from supporting the district court's decision, that lone sentence points up error on another *Read* factor, "duration of misconduct." Appx35. As Green Mountain observed (Br. 75-76), that factor focuses on the *defendant's* conduct (how long it infringed). The district court did not dispute that Ardagh had infringed for at least 15 years (with no good-faith belief in non-infringement or invalidity). The court nonetheless found that duration weighed against enhance-

ment because *Green Mountain* “approached [Ardagh] with [its] patents” early on but, following Ardagh’s denial of liability, did not sue for 15 years. Appx34. That, too, is error: *Read* directs courts to the “[d]uration of *defendant’s* misconduct.” 970 F.2d at 827 (emphasis added); see *Stryker Corp. v. Zimmer, Inc.*, No. 1:10-CV-1223, 2017 WL 4286412, at *5 n.6 (W.D. Mich. July 12, 2017) (when suit filed is irrelevant because defendant “is responsible for its own actions”), *aff’d*, 745 F. App’x 167 (Fed. Cir. 2018). As Green Mountain explained, “the question is the ‘[d]uration of defendant’s misconduct,’—not [plaintiff]’s actions.” Green Mountain Br. 75 (quoting *Read*, 970 F.2d at 827).

Ardagh does not address that argument either. Nor does Ardagh dispute that *Read’s* focus makes sense: A longer period of infringement (without a good-faith belief in any defense) is more aggravating than a shorter one. And the district court never explains how Green Mountain’s conduct made Ardagh’s willful infringement less culpable anyway. To the contrary, the district court identified evidence Ardagh had “attempted concealment” of its infringement, Appx34; see Appx19 (citing “Defendant’s attempts to conceal its infringement”), which “is why [Green Mountain] did not seek redress earlier,” Appx35.

Ardagh’s invocation of the district court’s refusal to find an “‘uninterrupted 7-year period of un-remediated wrongs,’” Ardagh Response 46 (quoting Appx34), helps Ardagh not at all. The district court never identifies any “remediation” or

“interruption” in infringement. Nor does Ardagh’s brief. (Indeed, Ardagh’s position is that its processes never changed.) Any such claim would contradict Ardagh’s own damages expert, who calculated damages for the entire 7-year period from March 28, 2008 to March 3, 2015, when the patent expired. Appx2164-2165; Appx2187-2188; Appx2192; Appx1692. On this factor, too, the decision below is not merely wrong on the law. It defies the record as well.

3. The district court also inverted the motivation-to-harm analysis. As Green Mountain observed, *Read* holds that the *absence* of pressure from customers to infringe is an *aggravating* consideration. Green Mountain Br. 76; *see Read*, 970 F.2d at 827. In this case, the district court did the opposite: It ruled that the *absence* of economic pressure to infringe “disfavor[s]” enhancement. Appx34-35.

Ardagh’s response is, again, silence. Ardagh cites no case and makes no argument in support of the district court’s inversion of that factor. Ardagh Response 46. Ardagh quotes the ultimate conclusion of no “‘motivation for harm.’” *Id.* Under *Read*, however, the fact that the infringement was deliberate and internally (rather than externally) motivated is an aggravating circumstance. Green Mountain Br. 76. Failing to respond, Ardagh concedes the point.

B. The District Court’s Analysis of Litigation Misconduct Was Erroneous

The district court’s reliance on the supposed absence of litigation misconduct as weighing against enhancement was doubly mistaken. Green Mountain Br.

72-75. For one thing, after *Halo*, litigation misconduct can be aggravating, but its absence is not mitigating. *Id.* at 75. What matters is the defendant’s conduct and mindset *at the time of infringement*. *Id.* “[A]s the Supreme Court explained in *Halo*, timing *does* matter.” *WBIP*, 829 F.3d at 1340. After-the-fact upstanding conduct by litigation counsel does not absolve piratical infringement. It simply avoids exacerbating an already-egregious wrong. Ardagh nowhere disagrees. The district court’s contrary approach—which treats litigating without misconduct as mitigating egregiously willful infringement—requires reversal.

Besides, the opinion below fails to address the extensive litigation misconduct Green Mountain identified below (Appx6461-6463) and in its brief here (at 72-75). Ardagh defends none of its conduct on the merits. It does not dispute that, because it failed to send document preservation notices to key employees and plants, it produced *no* pre-suit e-mails from its servers, Green Mountain Br. 72-73; refused to defer an un-noticed deposition until a discovery master intervened, *id.* at 73-74; attempted to introduce evidence from that un-noticed deposition anyway, *id.*; obfuscated its invalidity case by raising 37 references in discovery but relying only on two at trial, *id.* at 74; and offered to pay fact witnesses, *id.*

Ardagh does not even deny that it prepared and presented a false declaration that a key witness (Katie Flight) later recanted. Nor does it defend the district court’s reasoning on that issue. Green Mountain Br. 74. The court acknowledged

the declaration was false but stated, without explanation, that it does not support enhancement. Appx32. Ardagh attempts to dismiss the declaration as a minor “grievance[.]” Ardagh Response 45. But the declaration—served with Ardagh’s mandatory disclosures about its accused processes—denied infringement by falsely asserting Ardagh did “*not* use” or “purchase ‘mixed color cullet’ (as that term is described in U.S. Patent No[.]. 5,718,737 . . .).” Appx5984-5987 (emphasis added). Ardagh later would take the exact opposite position, asserting that it had always used mixed-color cullet, *see* Ardagh Opening Br. 19-25; pp. 27-29, *infra*, but not before threatening Green Mountain with sanctions, Appx7007-7008. The district court’s *ipse dixit* treatment of that conduct is unexplained and inexplicable.

Ardagh likewise does not dispute that its witnesses repeatedly feigned ignorance and gave evasive testimony on key issues, forcing its counsel to apologize for those “terrible witnesses.” Appx2332-2333; Green Mountain Br. 73. That omission is telling, given Ardagh’s focus—through nearly 20 pages of its brief—on arguing that the jury was required to believe its witnesses’ claims that it practiced the claimed invention first. Ardagh Response 18-37. The trial testimony of those witnesses so directly contradicted their deposition testimony that the jury was entitled to infer intentional deceit. *See* Green Mountain Br. 51. Heidi Root, for example, testified in her deposition (played at trial) that she did not know what “mixed color cullet” was and had never used the term, Appx1590-1591; at trial,

she testified she could identify mixed-color cullet in what she claimed was an old Ardagh batch record, created years before she joined the company, Appx1977.

Ultimately, Ardagh invokes the district court's presence at "numerous hearings and a week-long trial." Ardagh Response 45. Participation and observation at trial is not a license to ignore relevant facts. "A district court abuses its discretion when it . . . ignores . . . relevant evidence.'" *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1352 (Fed. Cir. 1999). Discretion imposes a "need to weigh and balance multiple factors in determining a just remedy." *SRI Int'l, Inc. v. Advanced Tech. Labs., Inc.*, 127 F.3d 1462, 1469 (Fed. Cir. 1997) (affirming trebling of damages in patent case). The district court's failure to even mention seven of eight instances of litigation misconduct cannot be excused by its presence in the case.¹

Ardagh's view that the district court need not address every jot-and-tittle accusation, Ardagh Response 45, is no answer. False affidavits, document destruction, and willfully increasing complexity are no small matters. To "enable appellate review," district courts must "explain the basis" for their decisions. *Read*, 970 F.2d at 828; *High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1319 (Fed. Cir. 2013). By ignoring the vast majority of Ardagh's litigation misconduct and offering only unsupported assertion in connection with another,

¹ Nor can presence at trial cure the failure to address misconduct during discovery. See *Green Mountain Br.* 73-74.

the district court deprived this Court of the analysis it needs to provide meaningful review. Remand is appropriate.²

C. The “Closeness of the Case” Factor Favors Enhancement As Well

Ardagh devotes much of its cross-appeal argument (Response 46-48) to “closeness of the case,” *Read*, 970 F.2d at 827. But the case was not close; Ardagh largely rehashes its losing positions at trial. The jury heard that evidence and did not think the case remotely close. It found not only willful infringement, but also “the most egregious” conduct that was “especially worthy of punishment.” Appx19; Appx33; Appx75; pp. 24-29, *infra*. Nor were the legal issues close.

1. Ardagh insists that claim construction was a “close call[.]” Ardagh Response 46 (quoting Appx33). But the district court’s claim-construction ruling says the opposite. It ruled that “[t]here is *nothing* in the patent that supports Ardagh’s construction.” Appx44 (emphasis added). Nothing Ardagh presents to this Court changes that conclusion. The specification and claims use “unsorted mixed color cullet” and “mixed color cullet” interchangeably to mean “broken pieces of glass of mixed colors and types.” Appx139, 1:13-16. “[M]ixed colored cullet glass” is *defined* as “broken pieces of glass of mixed colors.” *Id.*; Green Mountain Br. 25 (citing *SkinMedica, Inc. v. Histogen, Inc.*, 727 F.3d 1187, 1195

² The district court’s exceptional-case decision (Ardagh Response 45-46) does not fill the gap. In that discussion as well, the district court failed to address the litigation misconduct identified by Green Mountain. Appx36.

(Fed. Cir. 2013)). Ardagh conceded throughout this case, until the eleventh hour, that “mixed color glass cullet” and “unsorted mixed color glass cullet” mean “the same thing.” Appx4064; *see* Appx4004; Green Mountain Br. 25-26.

Ardagh now contends they mean different things. It insists that “[t]here is no inconsistency between the specification’s frequent use of the more generic ‘mixed color cullet’ and its occasional use of the more specific ‘unsorted mixed color cullet.’” Ardagh Response 7. But Ardagh ignores the interpretive absurdities that would result from its construction. Green Mountain Br. 25-28 (identifying portions of the title, abstract, and specification that require the terms to be identical). While Ardagh attempts to dismiss *later mentions* of “mixed color cullet” as short-hand references to earlier uses of “unsorted mixed color cullet,” Ardagh Response 3-5, the specification *begins with* and *repeatedly discusses* “mixed color cullet” before the phrase “unsorted mixed color cullet” ever appears, *see* Green Mountain Br. 25-28. Ardagh ignores the fact that its own construction would exclude embodiments from the scope of the claims. *See id.* at 34. Ardagh offers no response to the fatal defects in its construction, because none exists.

If the issue were “close,” Ardagh would not have urged below that “unsorted mixed color cullet” and “mixed color cullet” are the same. Green Mountain Br. 25-26. Ardagh attempts to explain its about-face by insisting that, at the time, it believed that even “mixed color cullet” would be construed as glass pieces “that

have never been sorted by color.’” Ardagh Response 5 (quoting Appx4019; Appx4064). But the express definition of “mixed color cullet” forecloses that construction, as the district court held. Appx39 (citing Appx139, 1:14-16); Green Mountain Br. 25. At bottom, Ardagh contends that it “equated th[e] terms” “mixed color cullet” and “unsorted mixed color cullet” because it thought both had a narrower meaning. Ardagh Response 5. In Ardagh’s view, the two terms mean the same thing only if a narrow meaning is adopted; otherwise, they mean different things. To state the position—heads I win, tails you lose—is to reject it. *See* Appx39.

The prosecution history makes the case no closer. Prosecution disclaimer “does not apply unless the disclaimer is ‘both clear and unmistakable to one of ordinary skill in the art.’” *Tech. Props. Ltd. v. Huawei Techs. Co.*, 849 F.3d 1349, 1357 (Fed. Cir. 2017). As the district court found, the prosecution history supports Green Mountain’s view, not Ardagh’s. Appx44; *see also* Green Mountain Br. 35 (citing Appx3040). Even the portions of the prosecution history that Ardagh invokes make clear that the amendment sought “to *clarify*” the invention, not avoid a reference. Ardagh Response 8-9 (citing Appx3139-3140). Ardagh’s claim that the amendment was made to avoid the Hirsch reference makes no sense: Both the applicant and examiner agreed that “Hirsch makes no mention of mixed colored glass cullet” of any sort. Appx3142. It would be wholly unnecessary to narrow

“mixed color cullet” to avoid Hirsch, when Hirsch does not disclose mixed-color cullet in the first place.

Besides, such after-developed arguments do not mitigate bad-faith infringement. As *Halo* makes clear, a later-invented defense is not sufficient to mitigate earlier egregious conduct. If the rule were otherwise, “someone who plunders a patent—infringing it without any reason to suppose his conduct is arguably defensible—can nevertheless escape any comeuppance . . . solely on the strength of his attorney’s ingenuity.” *Halo*, 136 S. Ct. at 1933. A close case may be probative of a defendant’s good faith, *see Polara Eng’g*, 894 F.3d at 1355, but after-the-fact litigating positions are not, *see Halo*, 136 S. Ct. at 1933. Ardagh “cannot insulate itself from liability for enhanced damages by creating an (ultimately unsuccessful) invalidity defense for trial after engaging in the culpable conduct of copying, or ‘plundering,’ . . . prior to litigation.” *WBIP*, 829 F.3d at 1340-41. Here, moreover, Ardagh’s view that “mixed color cullet” and “unsorted mixed color cullet” are different was not merely conceived solely for litigation; it was invented days before trial, in contravention of Ardagh’s prior position. *See Green Mountain Br.* 12, 26; pp. 21-22, *supra*.

2. Ardagh also urges (at 47) its non-infringement position “had merit.” But Ardagh’s corporate witness admitted that Ardagh practiced each limitation of the claims, including “selectively coloriz[ing] or decoloriz[ing] one of the colors of

the cullet.” Green Mountain Br. 40-41 (citing Appx1712). Ardagh now says (at 14) that the admission is “divorced from this context,” but no context can alter that corporate witness’s unequivocal “Yes.” Green Mountain Br. 40. The same is true of the documents and testimony in which Ardagh employees repeatedly admit they began using the claimed invention in 1997 or 1998—after the patent’s priority date. *Id.* at 41 (citing Appx4291; Appx1201-1202; Appx6017).

Green Mountain’s expert, Dr. Martin, independently established infringement. Batch-by-batch, he identified the unsorted mixed-color cullet with an unwanted color and the decolorizer (and colorizer) used to selectively remove (or enhance) a color of cullet. Green Mountain Br. 43-44. This was not infringement “by analogy.” Ardagh Response 17 (quoting *Kim v. ConAgra Foods, Inc.*, 465 F.3d 1312, 1320 (Fed. Cir. 2006)). For each Ardagh batch, Dr. Martin identified the cullet colors, colorizer, and decolorizer used. Appx6331; Green Mountain Br. 42-43. He explained the “well known” “role” and “function” of each decolorizer and colorizer—which color it removed (or enhanced) and how. Appx1414-1415; Appx1538-1539; *see, e.g.*, Appx1413-1414 (cuprous oxide “blocks the green color”); Appx1416 (manganese and iron oxide “block the green wavelengths”); Appx1417 (cobalt oxide blocks “red”). The specification similarly describes their

well-known functions, and dependent claims list exemplary colorizers and decolorizers. *E.g.*, Appx139, 2:18-3:19; Appx142, 8:5-13.³

The case gets no closer with Ardagh's argument (at 11-12) that Dr. Martin considered Ardagh to infringe if the decolorizer acted on colors from other parts of the batch, rather than the cullet. Dr. Martin plainly understood that the '737 patent "talks about the undesired color of the mixed color cullet." Appx1535. He identified years of infringing batches that decolorized such a color. Even if, as Dr. Martin testified, the decolorizers *also* acted on other materials in the glass melt, the evidence conclusively showed infringement. Appx6331-6364; Green Mountain Br. 41-45.

Ardagh's response is to shift arguments. At trial, Ardagh urged that the decolorizer had to act specifically on the *cullet*, as opposed to materials in the *batch*. *E.g.*, Appx2338 (arguing that Ardagh did not infringe because, in its process, "the decolorizer doesn't operate on one thing. It operates on a whole batch."); Appx1155-1156 (similar). Ardagh repeats that argument—never asserted in claim construction—in its opening brief here (at 29); Green Mountain Br. 37-39. But Ardagh then changes position, arguing that decolorizers must act on "*a color of the cullet*"—not on the cullet to the exclusion of the rest of the batch. Ardagh

³ Dr. Martin thus did not need to conduct the tests that Ardagh belatedly demands. *See, e.g., Martek Biosciences Corp. v. Nutrinova, Inc.*, 579 F.3d 1363, 1373 (Fed. Cir. 2009) (no "actual tests" required to prove effect of ingredient, because expert testified "the literature [was] quite clear' regarding the . . . effects").

Response 12. But two pages later, Ardagh reverts to arguing decolorizers must act solely on molecules of cullet, asserting that Dr. Martin “failed to analyze” the stages of the glass-melting process “to determine how the ingredients interacted before reaching their uniform state.” *Id.* at 14. Ardagh’s inability to settle on a position is symptomatic. Neither position is persuasive. So Ardagh shifts from one to the other to avoid arguments fatal to each. And the district court rejected any suggestion that Ardagh actually believed it was not infringing based on those arguments. Appx32. They do not mitigate the egregious nature of years of infringement.

3. The invalidity case was no closer. One year after Green Mountain filed suit in March 2014, Ardagh attempted to invalidate the patent in an inter partes review before the Patent Trial and Appeal Board. The Board refused even to institute review, finding Ardagh had failed to show it was reasonably likely that any claim was unpatentable. *Ardagh Glass Inc. v. CulChrome, LLC*, IPR2015-00944, Paper 9 (P.T.A.B. Sept. 29, 2015) at 11, 13-16. Ardagh returned to district court and asserted another 37 prior-art references. Appx6472; Appx6529-6530. One week before trial, Ardagh dropped all but two references. *Contrast* Appx81-82, *with* Appx6472; *see* Appx6529-6530.

As with claim construction and infringement, Ardagh’s invalidity positions gyrated wildly. In the pretrial order, Ardagh emphatically disclaimed reliance on

prior use: “Ardagh is *not* asserting that prior use or invention by Ardagh . . . renders the ’737 patent invalid . . . or is otherwise a defense.” Appx7242 (emphasis added); *see* Appx7425 ¶7 (Amended Answer denying prior use). On the eve of trial, Ardagh reversed course and raised precisely that defense. Appx81-82; Appx6529-6530. The patent was invalid, it insisted, because Ardagh “did it first” and was practicing the invention “before they were.” Appx2326; Appx2335. That prior-use theory, moreover, rested critically on the testimony of Heidi Root. Appx1932-1938. But Ms. Root claimed at her deposition that she did not even know what mixed-color cullet was, *see* pp. 19-20, *supra*, and joined Ardagh in 2001, years after the patent’s priority date, Appx1979; Appx1938-1940. Ardagh’s theory also rested critically on records from Ardagh’s Plainfield plant. Contemporaneous compositional analyses showed the Plainfield plant bottles were not made from mixed-color cullet. Green Mountain Br. 50-51.

Ardagh’s narrative that its confidential “process predated GMG’s patent,” rendering the patent “invalid,” Ardagh Response 18-37, 47, rests on that same testimony. But the jury heard Ardagh’s supposed prior-use evidence, upheld validity, and found that Ardagh’s infringement was “the most egregious” and “especially worthy of punishment.” Green Mountain Br. 46-59. Like the district court, the jury found that Ardagh had not even shown a *good-faith belief* the patent was invalid. *See* pp. 5-6, *supra*; Appx19; Appx32; Appx75. The district court

rejected Ardagh’s anticipation defense “for six distinct reasons.” Appx20; *see* Appx22 (finding Ardagh “failed to present sufficient evidence” that any reference “anticipate[s]”); Appx24 (obviousness defense “conclusory”).

While Ardagh attacks Green Mountain’s evidence (at 18, 19, 28), it was Ardagh—not Green Mountain—that had the burden of proving the patents invalid by clear-and-convincing evidence. *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 95 (2011). Regardless, Green Mountain presented ample evidence that Ardagh started infringing only after it learned of the patented invention and that Ardagh kept its infringement secret. Green Mountain Br. 47-54.⁴ Ardagh’s lengthy attempt to retry its failed case here does not make the case any closer than the one the jury and the district court resoundingly rejected.⁵

⁴ Ardagh does not dispute that its executive, Roger Erb, said he would be “impressed” if Green Mountain could make amber glass from a 50/50 mix of amber and green. Ardagh Response 36. Ardagh insists that is irrelevant because “the ’737 patent is incapable of doing so.” *Id.* But the cited pages do not support that assertion. Dr. Lehman testified that the claimed method in the ’737 patent was *necessary* to produce that impressive result. Appx1270. He merely agreed that the patent did not by itself provide everything needed to produce commercially viable bottles. *Id.*; *see* Green Mountain Br. 64-65. Ardagh never says why that qualification matters. Ardagh raises no enablement defense, and the patent provided those skilled in the art with all the information needed to enable.

⁵ Reaching beyond the trial, Ardagh now contends that there was prior use by other companies. Ardagh Response 26. But Ardagh admits it conducted no “limitation-by-limitation analysis” for those companies’ processes. *Id.* While Ardagh’s expert reviewed batch records from each of those manufacturers, he gave no testimony or opinion based on them. Appx2130-2132; Appx2134. Ardagh cannot rely on evidence it never presented at trial.

Ardagh’s invocation of the district court’s denial of summary judgment, Ardagh Response 46, does not mean the case was close. Even weak cases can proceed to trial. Summary judgment does not allow courts to weigh the evidence; judgment as a matter of law can be granted only if the evidence is so insubstantial that “no ‘reasonable jury’” could find for the non-moving party. *Optical Disc Corp. v. Del Mar Avionics*, 208 F.3d 1324, 1333 (Fed. Cir. 2000). The summary-judgment ruling reflects only that facts remained in dispute. The jury’s finding that Ardagh was “especially worthy of punishment” shows how utterly lopsided those disputes were. *See* Appx75; Appx19.

* * *

This case was never close. The jury and the court found Ardagh never possessed a good-faith belief in non-infringement or invalidity, despite Ardagh’s myriad defenses (or perhaps because of them). The jury flatly rejected Ardagh’s position that it had been practicing the patented invention—an invention that revolutionized how recycled glass was made—since well before the patent’s priority date. The district court concurred for six independent reasons. The district court should have found that lack of “closeness of the case” favored enhancement.

Besides, the jury found Ardagh’s conduct egregious and especially worthy of punishment. The district court found factor after factor confirming egregiousness—copying, concealment, and continued infringement, all with no good-faith

belief in any defense. The court purported to find other factors weighing against enhancement, but it never explained why any of them actually mitigate egregiousness. And the district court misapplied factor after factor. Reversal is warranted.

CONCLUSION

The district court's judgment refusing to enhance damages should be reversed.

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CERTIFICATE OF SERVICE

I certify that today, January 28, 2019, I electronically filed the foregoing Cross-Appeal Reply Brief for Plaintiffs - Cross-Appellants Green Mountain Glass, LLC and CulChrome, LLC with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

January 28, 2019

/s/ Jeffrey A. Lamken

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