2026-1403

United States Court of Appeals for the Federal Circuit

BIRCHTECH CORP., fka Midwest Energy Emissions Corp.,

Plaintiff-Appellee,

(For Continuation of Caption See Inside Cover)

On Appeal from the United States District Court for the District of Delaware in No. 1:19-cv-01334-CJB, Christopher J. Burke, Magistrate Judge

NON-CONFIDENTIAL BRIEF FOR PLAINTIFF-APPELLEE

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– v. –

ARTHUR J. GALLAGHER & CO., GALLAGHER CLEAN ENERGY, LLC., AJG COAL LLC, DTE REF HOLDINGS, LLC, DTE REF HOLDINGS II LLC, CERT COAL HOLDINGS LLC, CERT HOLDINGS LLC, CERT HOLDINGS 2018, LLC, CERT OPERATIONS LLC, CERT OPERATIONS III LLC, CHEM-MOD, LLC, THOMAS HILL REFINED COAL LLC, WAGNER COALTECH LLC, JOHN DOE LLCS, BRANDON SHORES COALTECH LLC, GEORGE NEAL SOUTH REFINED COAL, LLC, HURON REFINED COAL, LLC,

Defendants,

CERT OPERATIONS II LLC, CERT OPERATIONS IV LLC, CERT OPERATIONS V LLC, CERT OPERATIONS RCB LLC, SENESCENSE ENERGY PRODUCTS LLC, RUTLEDGE PRODUCTS LLC, SPRINGHILL RESOURCES LLC, BUFFINGTON PARTNERS LLC, BASCOBERT (A) HOLDINGS LLC, LARKWOOD ENERGY LLC, COTTBUS ASSOCIATES LLC, MARQUIS INDUSTRIAL COMPANY, LLC,

Defendants-Appellants.

Relevant Patent Claims

Claim 25 of U.S. Patent 10,343,114:

> 25. A method of separating mercury from a mercury-containing gas, the method comprising:
> combusting coal in a combustion chamber, to provide the mercury-containing gas, wherein
>> the coal comprises added Br2, HBr, a bromide compound, or a combination thereof, added to the coal upstream of the combustion chamber, or
>> the combustion chamber comprises added Br2, HBr, a bromide compound, or a combination thereof, or
>> a combination thereof,
>
> injecting a sorbent material comprising activated carbon into the mercury-containing gas downstream of the combustion chamber;
> contacting mercury in the mercury-containing gas with the sorbent, to form a mercury/sorbent composition; and
> separating the mercury/sorbent composition from the mercury-containing gas, to form a cleaned gas.

Claim 26 of U.S. Patent 10,343,114

> 26. The method of claim 25, wherein the coal comprises the added Br2, HBr, the bromide compound, or a combination thereof, added to the coal upstream of the combustion chamber.

Claim 1 of U.S. Patent 10,596,517

> 1. A method for reducing mercury in a mercury-containing gas, the method comprising:
>> combusting coal in a combustion chamber, the coal comprising an additive comprising Br2, HBr, a bromide compound, or a combination thereof, to form the mercury-containing gas; and
>> collecting mercury in the mercury-containing gas with a sorbent added to the mercury-containing gas, the sorbent comprising activated carbon.

Claim 2 of U.S. Patent 10,596,517

> 2. The method of claim 1, further comprising injecting an alkaline sorbent into the mercury-containing gas stream.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 26-1403

Short Case Caption Midwest Energy Emissions Corp. v. Arthur J. Gallagher &

Filing Party/Entity Bichtech Corp. (f/k/a Midwest Energy Emissions Corp.)

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Date: 02/26/2026

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Name: Justin T. Nemunaitis

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Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Birchtech Corp. (formerly known as Midwest Energy Emissions Corp.)	MES, Inc.	

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

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

☑ Yes (file separate notice; see below) ☐ No ☐ N/A (amicus/movant)

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF RELATED CASES

1. The following cases may affect or be affected by the Court's decision in this pending appeal: *Union Electric Company et al. v. Birchtech Corp. f/k/a Midwest Energy Emissions Corp.*, IPR2025-01322, IPR2025-01323, and IPR2025-01324 (P.T.A.B.); *Union Electric Company v. Birchtech Corp. f/k/a Midwest Energy Emissions Corp.*, IPR2025-01117 and IPR2025-01118 (P.T.A.B.); *PacifiCorp d/b/a Rocky Mountain Power et al. v. Birchtech Corp. f/k/a Midwest Energy Emissions Corp.*, IPR2025-00717, IPR2025-00718, IPR2025-00687, IPR2025-00688, IPR2025-00424, and IPR2025-00425 (P.T.A.B.); *Berkshire Hathaway Energy Company et al. v. Birchtech Corp. f/k/a Midwest Energy Emissions Corp.,* IPR2025-00422 and IPR2025-00423 (P.T.A.B.); *Berkshire Hathaway Energy Company et al. v. Midwest Energy Emissions Corp. n/k/a Birchtech Corp.*, IPR2025-00280 and IPR2025-00281 (P.T.A.B.); *Berkshire Hathaway Energy Company et al. v. Birchtech Corp.*, IPR2025-00274 (P.T.A.B.); *Berkshire Hathaway Energy Company et al. v. Midwest Energy Emissions Corp.*, IPR2025-00278 (P.T.A.B.); *AEP Generation Resources Inc. et al. v. Midwest Energy Emissions Corp.*, IPR2020-01294, IPR2020-01295, IPR2020-01296, and IPR2020-01297

(P.T.A.B.); *NRG Energy, Inc. et al. v. Midwest Energy Emissions Corp.*, IPR2020-00926, IPR2020-00928, IPR2020-00832, and IPR2020-00834 (P.T.A.B.); *Midwest Energy Emissions Corp. v. Evergy Kansas Central, Inc.*, No. 4:25-cv-00154 (S.D. Iowa); *Midwest Energy Emissions Corp. v. Evergy, Inc. et al.*, No. 5:25-cv-04033 (D. Kan.); *Midwest Energy Emissions Corp. v. Evergy, Inc. et al.*, No. 4:25-cv-00046 (S.D. Iowa); *Midwest Energy Emissions Corp. v. PacifiCorp*, No. 4:25-cv-00037 (S.D. Iowa); *Midwest Energy Emissions Corp. v. Wisconsin Power and Light Company*, No. 4:25-cv-00038 (S.D. Iowa); *Birchtech Corp. f/k/a Midwest Energy Emissions Corp. v. Evergy, Inc. et al.*, No. 4:25-cv-00050 (W.D. Mo.); *Midwest Energy Emissions Corp. v. Berkshire Hathaway Energy Company et al.*, No. 2:25-cv-00015 (D. Wyo.); *Midwest Energy Emissions Corp. v. Wisconsin Power and Light Company*, No. 3:25-cv-00026 (W.D. Wis.); *Midwest Energy Emissions Corp. v. Ameren Corporation et al.*, No. 4:24-cv-00446 (S.D. Iowa); *Midwest Energy Emissions Corporation v. Tucson Electric Power Company et al.*, No. 4:24-cv-00447 (S.D. Iowa); *In re Midwest Energy Emissions Corp. Patent Litigation*, No. 4:24-md-03132 (S.D. Iowa); *Midwest Energy Emissions Corporation v. Tucson Electric Power Company et al.*, No. 3:24-cv-08145 (D. Ariz.); *Midwest Energy*

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INTRODUCTION

CERT created a web of companies designed to operate at a loss and *pay* power plants to accept refined coal. It bought coal that the power plants already had sourced and sprayed it with bromine. CERT then sold and delivered this coal directly on a conveyer belt headed towards the plant's boiler, where it would be combusted to generate energy. The emissions from the combustion would travel down an exhaust path that included an activated carbon injection system, ultimately reducing mercury emissions by 90%.

In burning the coal CERT paid them to take, the power plants directly infringed ME2C patents on mercury emission reduction. And CERT both induced and contributed to the power plants' infringement, motivated by significant pecuniary benefit. By paying the power plants to infringe, CERT unlocked hundreds of millions of dollars of Section 45 tax credits. Although its refining companies operated at a loss, they obtained significant value via tax credits that they could sell to investors. Meanwhile, ME2C was boxed out of the market, faced with the impossible situation of competing against its own technology that CERT was paying power plants to use without authorization.

The case proceeded to a jury trial, and the jury returned a verdict of induced and contributory infringement alongside a damages award. In this kitchen-sink appeal, CERT attacks the district court's opinions and jury verdict on each theory of liability, its legal standard, and its jury instructions, alongside reraising a damages *Daubert* and new trial motion. None of these arguments have merit.

COUNTER STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the jury's verdict that each CERT defendant induced infringement, where CERT made refined coal on-site at each directly infringing power plant, paid each plant to burn its refined coal, knew that every plant used activated carbon injection, promoted the combination, and indemnified the plants.

2. Whether the court erred in crafting the induced infringement instructions, which CERT conceded stated the law correctly.

3. Whether the Court needs to reach contributory infringement, given the inducement verdict against every CERT RC defendant on every asserted claim, and, if the court does reach the issue, whether the district court correctly applied 35 U.S.C. § 271(c)'s

text and this Court's precedents to define the substantial noninfringing use inquiry.

4. If reached, whether CERT can resurrect its waived challenge to the court's jury instructions and establish an abuse of discretion in the jury charge.

5. Whether the district court acted within its discretion in denying a new trial on damages and denying CERT's *Daubert* challenge on Mr. Green's comparable-license based damages opinions.

STATEMENT OF THE CASE

Birchtech Corp. ("ME2C") asserted claims 25 and 26 of U.S. Patent 10,343,114 (the '114 patent) and claims 1 and 2 of U.S. Patent 10,596,517 (the '517 patent).

I. ME2C's patents reduce coal-fired power plant mercury emissions.

ME2C's patents recite a two-part process to reduce mercury emissions from coal-fired power plants. In the typical operation of a coal-fired power plant, coal is delivered to a coal pile, which sits close to the power plant. From there, the coal is fed via a series of conveyers to a pulverizer, and that pulverizer takes the coal and grinds it into a fine powder. The powdered coal gets blown into a combustor, where it is

burned. Appx3610. The furnace generates heat, which is transferred to water, and that water turns into high-pressure and high-temperature steam, which flows into a turbine. The turbine turns a generator. Appx3610–11. When coal is burned, it creates a gas called "flue gas," which flows out of the boiler and through a series of clean-up devices that remove impurities before the gas is sent out the stack and into the atmosphere. Appx3611.

ME2C's patented process includes (1) combusting coal with added bromine (referred to at trial as combusting "refined coal," Appx284), (2) injecting an activated carbon sorbent into the mercury-containing gas downstream of the combustion chamber (referred to as using "activated carbon injection" or "ACI"), and (3) separating or collecting the mercury/sorbent composition from the mercury containing gas. Appx397, Appx472. The invention can accomplish a 90% reduction in mercury emissions and only requires use of small amounts of bromine. Appx3686, Appx3710. It also reduces the amount of activated carbon a plant needs to use, which is valuable because power plants can sell fly ash to concrete manufacturers, but only if that ash is not contaminated with excessive carbon. Appx4019–20. The only noninfringing

alternative proposed by CERT below was the installation of a "selective catalytic reduction system" for mercury control, but a SCR is not only expensive—in the order of magnitude of $40 to $120 million per plant—but eliminates the need to use refined coal altogether—and with it, CERT's Section 45 tax credits, discussed below. Appx4025–26.

Although ME2C's process is extremely efficacious, it ran into "commercial headaches" trying to commercialize its products because it had to compete with infringing businesses. Appx3707–08. ME2C's growth had "really started to take off" and it had expected growth to continue given that the plants "really needed [its] technology to get into compliance at a reasonable price." Appx3839. Yet that growth never came to fruition, as ME2C was ultimately forced to compete against its own technology that was being given away for free. Appx3840–41.

II. CERT's refined coal scheme maximizes its tax credits by paying ME2C's potential customers to infringe instead of working with ME2C.

CERT imposed itself in the refined coal business by installing facilities at each power plant at issue in this case to refine coal on site. Specifically, after the coal had been obtained by the power plant and was loaded onto a conveyer belt to travel to the pulverizer and through

the combustion path, CERT would purchase the coal on the belt, spray it with bromine, and then sell that refined coal back to the power plant for less money than CERT had paid for it. Appx3930–31. In other words, it paid the power plants to accept its refined coal. At all the plants at issue in this case, the coal proceeded to be pulverized and burned, and the resulting flue gas was treated with activated carbon injection ("ACI"). *Id.*

Why would CERT build its sprayers at these power plants only to sell the product at a loss? The Section 45 tax credit program. During the refined coal tax program (which ended in 2021), anyone who refined coal to help reduce mercury by at least 40% and NOx by at least 20% received a $5 to $7 dollar per ton tax credit on refined coal. Appx3943. After the program began, the EPA instituted stricter limits on mercury emissions, requiring a 90% removal of mercury from emissions before they went up the smokestack for a coal-fired power plant to remain operational. Appx3944, Appx3810–11, Appx4014, Appx4280. The EPA requirement was called the Mercury and Air Toxics Standard, or "MATS." Appx3709–10.

CERT created an elaborate labyrinth of companies to run its refined coal operations and maximize the value of the tax credits that flowed up to its investors. Appx3817. It had a series of refined coal (RC) companies, sometimes referred to as project companies, each of which wrote contracts for power plants that directly infringe. It also had a series of operating companies, each of which constructed and operated the refining facilities at each infringing power plant. Appx4339; Appx3946. The CERT partners oversaw these companies. Appx3946. Two CERT witnesses testified at trial: Mr. Jeff Green as CERT's live corporate representative, and Ms. Schaatt via deposition, Appx3816–19. Once the tax credit expired, CERT closed shop because, as Ms. Schaatt explained, "[t]he product [was] not economical without the tax credit." Appx3817.

ME2C proceeded to trial on an induced and contributory infringement theory against the CERT entities. As the district court summarized in its post-trial opinions below, the trial record made plain that CERT both knew about ME2C's patents and infringement theory, and knew and encouraged the plants to infringe each step of ME2C's asserted claims, including the ACI step. Appx282–325; Appx327–362.

CERT itself promoted ACI use and the fly-ash benefits of the patented technology, interposed itself directly on site at the plants, treating the coal as it traveled to the boiler to be burned and for the resulting gas to be treated as required by the patent claims, all while paying the plants to accept the coal. Its motivation to engage in this enterprise was somewhere between $300M to $350M in tax credits.

III. The court's pretrial and post-trial rulings.

Below, Defendants repeatedly moved to dismiss ME2C's complaints, filed numerous summary judgment and *Daubert* motions, and repeatedly moved to reconsider rulings. This process not only led to the court reaffirming the correct standard for induced and contributory infringement multiple times but also revealed that CERT has in this appeal contradicted its positions below. *E.g.*, *infra* § I.C. (express instruction not required for inducement), I.F. (CERT conceded jury instruction not incorrect), III.C. (CERT emphasized the importance of Alistar license to damages to get continuance). Relevant to infringement, the motion-to-dismiss practice limited ME2C's claims against CERT to begin in 2019, when this case was filed. Appx83–86; Appx121. The relevant arguments, the district court's correct

determinations of the law, and the trial record are referenced as relevant in the Argument section.

SUMMARY OF THE ARGUMENT

CERT attacks the district court's opinions and jury verdict on each theory of liability, its legal standard, and its jury instructions, alongside reraising a damages *Daubert* and new trial motion. None of these arguments have merit, and several are procedurally faulty.

I. A. & E. Substantial evidence supports the jury's inducement verdict where, as here, CERT paid power plants to use its refined coal, as the coal was traveling through those plants' facilities on a conveyer belt—all with full knowledge and expectation that the refined coal would be injected with activated carbon thereafter and that the power plants would subsequently use a baghouse or ESP to capture mercury—completing direct infringement. CERT was motivated to do so by its significant interest in tax credits, which scaled up in value proportionally to the amount of infringement CERT induced during the damages period.

B. The district court correctly articulated the standard for induced infringement, and CERT cannot find support for the rules it proposes in

precedent. Instead, it resorts to strained reading of cases that the district court correctly rejected.

C.&D. CERT cannot shift the blame to the power plants or the EPA to avoid an inducement finding because CERT cannot identify any authority for and there is no sole causation requirement for inducement.

F. CERT's challenge to the jury charge fails because CERT not only told the district court that its proposed instruction was not incorrect, but also CERT can identify no abuse of discretion in the district court's correct articulation of the law in its inducement instructions.

II. Next, CERT challenges the contributory infringement verdict insisting that the district court's careful analysis of and fidelity to this Court's *Nalco* decision was incorrect. But, because the verdict is supported against each defendant by the inducement finding, the Court need not reach contributory infringement if it affirms inducement.

A.–C. The district court's opinion was well-reasoned and consistent with precedent. Substantial evidence supports the jury's verdict, as refined coal sold by CERT to the power plants had no

substantial noninfringing use and was especially made and adapted for infringement. And CERT's jury instruction challenges were either waived or depend on an incorrect reading of the statute and this Court's cases.

III. CERT takes a series of damages issues head-on under an abuse of discretion standard, but the district court did not abuse its discretion in denying CERT's repeated motions to exclude ME2C's damages expert. CERT also raises new arguments challenging the admission of the Alistar-ME2C license and ME2C's expert's opinions on it, now arguing the opposite of what it successfully argued to the district court to obtain a continuance. But its challenge is waived, and CERT identifies no basis to overturn the damages award.

STANDARD OF REVIEW

This Court applies Third Circuit law to its review of motions for judgment as a matter of law and for new trials, reviewing JMOL de novo and new trial decisions for an abuse of discretion. *Pac. Biosciences of California, Inc. v. Oxford Nanopore Techs., Inc.*, 996 F.3d 1342, 1349–50, 1352 (Fed. Cir. 2021). In the Third Circuit, "[e]ntry of judgment as a matter of law is a 'sparingly' invoked remedy, granted only if, viewing

the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 300 (3d Cir. 2007) (citations omitted). "In determining whether the evidence is sufficient to sustain [the jury's finding of] liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993).

In the Third Circuit, "[a] district court's power to grant a new trial is limited 'to ensure that [it] does not substitute its judgment of the facts and the credibility of the witnesses for that of the jury.'" *Leonard v. Stemtech Int'l Inc.*, 834 F.3d 376, 386 (3d Cir. 2016) (quoting *Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 201 (3d Cir. 1996)). "Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order," and "the court must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ.

P. 61. "[N]ew trials because the verdict is against the weight of the evidence are proper only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1353 (3d Cir. 1991) (citation omitted).

ARGUMENT

I. The inducement infringement verdict should be affirmed.

CERT submits that the jury's liability verdicts should be reversed because it cannot be liable for induced infringement and contributory infringement under its view of the facts and of the law. But the jury's verdict is supported by substantial evidence, and CERT's arguments rest on misinterpretations of the law, facts, or both, or are procedurally defective.

A. Substantial evidence supported the jury's verdict that CERT induced infringement through its refined coal scheme.

A typical coal-fired power plant obtains coal, pulverizes it, burns it, and treats the resulting flue gas to reduce emissions of pollutants. Appx3610–11. Under CERT's refined coal scheme, the power plants still bring in their own coal. But while it is on the conveyer belt traveling to the pulverizer, CERT buys it. Appx3930. It would then

"refine it" by spraying chemicals onto the coal and sell it back to the power plant "for less money than [CERT] paid for it." Appx3930–31; Appx3817. In other words, CERT offered the plants "a financial incentive to allow [CERT] to operate a refined coal facility on their site." Appx3819. The plants then burned the coal and treated the resulting flue gas with ACI, resulting in direct infringement of ME2C's claims. Appx3947–54; Appx3989–94; Appx8921–22 (CERT RC companies admitting the coal plants used ACI). Direct infringement is not contested in this appeal.

Substantial evidence supports the jury's verdict that CERT induced the power plants' infringement. CERT acted with specific intent to knowingly induce the power plants to infringe ME2C's patents. *See Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1328 (Fed. Cir. 2009) (citing *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1304 (Fed. Cir. 2006)).

CERT affirmatively acted to encourage infringement by paying the power plants to use its refined coal, as the coal was traveling through those plants' facilities on a conveyer belt—all with full knowledge and expectation that the refined coal would be injected with

activated carbon thereafter and that the power plants would subsequently use a baghouse or ESP to capture mercury. Appx4095; Appx299 n.20; Appx297–303; Appx3910–11; Appx3811; Appx3992–94; Appx4024–25. Indeed, the bargain refined coal CERT sold the plants had nowhere else to go; it could only continue on that conveyer belt through the power plant. Appx4007 ("the coal, after it's refined, it has no place to go except on the conveyer belt to the power plant to be pulverized and burned in the combustion chamber."); Appx297–303; Appx4260–62 (CERT admitting it could not identify anywhere else the coal would be burned and that it made the most sense for it to be burned at the site at which it was produced); Appx4243–44. CERT's corporate representative, Jeff Green, testified that before this lawsuit CERT knew the exhaust path after the boiler at every one of the power plants in this case included ACI. Appx4262–64; Appx3953–54. And CERT indemnified the plants, in many instances encouraging the plants' infringement by removing patent liability as an obstacle for each to use CERT's coal. Appx298 n.17; Appx4021–4022; Appx7431; Appx7542; Appx7597; Appx7696.

CERT was motivated to pay the power plants to infringe to obtain the benefit of tax credits. Appx3817. A large refined-coal facility processing around four million tons of coal would generate close to $30 million in Section 45 tax credits per year. Appx3818. Operating the refined coal businesses at a loss allowed the losses to be allocated to "the members pro rata based on their ownership," while the power plant received "all associated environmental benefits of an emission reduction at no cost." Appx3817–18. Although use of ACI itself was not required for tax credit qualification, plants had to use ACI to stay operational, and only operational power plants could generate tax credits. Appx299 n.20; Appx3910–11 (ACI is required to comply with regulations and is generally not shut off for more than hours of time in a given year); Appx3811 (compliance with MATS required or plant must shut down); Appx3992–94 (plants must use ACI to meet permit and MATS and stay operational); Appx3810–11, Appx4014, Appx4281. And, regardless, CERT further encouraged ACI use by marketing the benefits of using its coal with ACI because it provided rate optimization and fly ash benefits. Appx4298–4301; *see also* Appx4019–20.

Now, CERT argues that no reasonable jury could have found induced infringement liability because the district court applied an incorrect legal standard and because there was insufficient evidence of its affirmative acts to encourage infringement, causation of direct infringement, and specific intent. Each challenge either misapprehends the law, the record, or both.

B. The district court correctly articulated and applied induced infringement law.

First, the district court applied the correct standard for inducement in denying CERT's JMOL. The court found that CERT's acts encouraged the plants to perform the claimed process, including the ACI steps: "

> [I]n order to later obtain significant benefits in the form of Section 45 tax credits, CERT took action that resulted in the power plants getting paid to accept CERT's refined coal, as the coal was traveling through those plants' facilities on a conveyer belt—all with full knowledge that this coal would certainly be injected with activated carbon thereafter (and that the power plants would subsequently use a baghouse or ESP to capture mercury).

Appx298–99. It found that these "acts—providing refined coal to the power plants while being physically located at those very plants, and paying the power plants to take that coal—amount to substantial

evidence supporting the jury's finding that CERT took *affirmative action* with the intent to cause the power plants to directly infringe the asserted claims." Appx299 (citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 n.13 (2005)). And it rejected CERT's argument that its actions "cannot constitute substantial evidence of an affirmative act of encouragement to infringe because there is no evidence that this was 'tied to ACI in any way,'" explaining that the infringing plants "*had to* combust the refined coal with the use of ACI in order to remain operational." Appx299 n.20; Appx3910–11; Appx3811; Appx3992–94; Appx3810–11, Appx4014, Appx4280.

CERT suggests the district court made an unsupported leap by connecting evidence of CERT's affirmative acts, which it deems is simply "provision of refined coal to the power plants," to inducement of an infringing process, CERT Br. 23, but CERT's characterization ignores both the district court's well-reasoned opinion and the record.

Nor is the district court's analysis at odds with the prevailing precedent on induced infringement. CERT heavily relies on *Cox Commc'ns, Inc. v. Sony Music Ent.*, 607 U.S. 583 (2026), likely because

it issued after the district court's opinion.[1] But nothing in *Cox* is inconsistent with the district court's analysis. There, the Supreme Court confirmed that someone "induce[s] infringement if it actively encourages infringement through specific acts," but that "mere knowledge that a service will be used to infringe is insufficient to establish the required intent to infringe." *Id.* at 594. Cox was not contributorily liable when it provided general internet service to its subscribers, without intending that the "service be used to commit copyright infringement," without marketing or promoting infringement, and actively discouraging infringement through warnings, service suspensions, and account terminations. *Id*. at 595.

No similar facts are present here. CERT's refined coal is nothing like the general internet service Cox provides: it is a specialized product that CERT manufactured at each power plant for each power plant and *paid the power plants* to combust in a process that it knew infringes ME2C's patents. Indeed, refined coal is not fungible. Each power plant sources coal with particular properties for that power plant, and CERT

[1] Notably, even CERT recognizes that Cox merely "confirms what *Grokster* and *Global-Tech* established," both of which were considered by the district court. CERT Br. 23.

tailored the bromine used with that coal for the particular plant where it was combusted. Appx3615 (explaining how different varieties of coal impact power plant design and operations); Appx4382–83 (explaining that CERT performed repeated tests to determine bromine rates for each power plant's coal). CERT installed its sprayers on the premises such that the refined coal had no place to go but into the boiler and through ME2C's patented process. *Supra* § I.A. And CERT further encouraged the ACI steps by marketing the rate optimization and fly ash benefits of using its coal with ACI. Appx4298–4301; *see also* Appx4019–20.

C. CERT committed an affirmative act to encourage the power plants' infringement

Next, CERT suggests that it did not take affirmative acts to encourage direct infringement, singling out ACI-related steps. CERT Br. 24–28. But substantial evidence supports the jury's findings. *See supra* § I.A. In CERT's view, the evidence was insufficient because (1) it sold to plants that both used and did not use ACI, CERT Br. 24–25; (2) "uncontroverted evidence" showed that power plants make their own decisions on using ACI, *id.* at 25; and (3) evidence showed that ACI use

was required by the EPA, not CERT, *id.* at 26. None of these arguments have merit.

First, CERT's accused sales in this case were only to plants with ACI systems. CERT confirmed that this was true below. Appx2114–15 ("THE COURT: . . . [I]s it the case that that defendant sold refined coal not only to the accused power plant, who was using ACI, but in the same part-time period and thereafter to other power plants that weren't using ACI? MR. KREMER: No, that's not the case."); *see also* Appx165 ("during the damages period, [CERT] only sold coal to plants with ACI systems"); Appx313 n.27.[2] The coal that CERT paid the power plants to burn as it traveled on a conveyer belt to be pulverized and burned was neither burned, nor could have been burned, in a different plant without ACI. And CERT knew that. Appx4246 (Jeff Green acknowledging that he knew "the exhaust path after the boiler at every one of the power plants involved in this case" included ACI); Appx4262–64 (confirming again for the plants at issue in this case, CERT knew before the lawsuit that each used ACI). These acts bear no resemblance

[2] CERT's brief cites to questioning about coal outside of the damages period at issue in this case, or, perplexingly, to its oral Rule 50 motion.

to the provision of general-purpose internet in *Cox*: the refined coal it paid the power plants to accept was only suitable for one thing—infringement.

CERT also suggests that it never instructed the power plants to use ACI. For liability to attach, CERT need not have provided an express instruction. Appx302 n.22; Appx126–27. Nor could CERT take the position that an express verbal instruction is required, given that it conceded this before the district court. Appx302 n.22; Appx10529 ("We are not saying that there needs to be oral or written communication aimed at teaching the use of each step."). As the district court aptly put it, "[u]nder these circumstances, CERT's provision of refined coal to power plants at a loss, with the knowledge that it was absolutely going to be used to infringe the asserted claims, was akin to a word-based communication to the power plants—i.e., one encouraging the plants to keep that refined coal on the conveyer belt and to use it for infringing purposes." Appx302.

Second, CERT suggests that the plants made their own decisions on whether to use ACI, so CERT "at most sold the refined coal that could be used in an infringing manner by some power plants." CERT

Br. 25. But the question for infringement is whether CERT encouraged the power plants to infringe by, *inter alia*, selling them brominated coal at a loss on conveyer belts that routed the coal to systems that used ACI—not whether CERT encouraged the power plants to install ACI systems.

CERT insists that, because ACI use is "left entirely to the power plants," *HZNP Medicines LLC v. Actavis Lab'ys UT, Inc.*, 940 F.3d 680 (Fed. Cir. 2019), allows it to escape liability. But *HZNP* has limited applicability here. There, the patented method required three steps: applying an inventive formula, waiting for the area to dry, and then applying sunscreen, insect repellant or a second topical medication. *Id.* at 701. Actavis addressed the first two steps with an if-then statement, warning a user that "*if* the user want[ed] to cover the treated area with clothing or apply another substance over it, *then* the patient should wait until the area is dry." *Id.* It did not require the third step—the application of sunscreen, insect repellant, or a second topical medication. This label did not encourage infringement because it did not encourage performance of each step of the patented method. The facts here are just different: CERT paid the power plants to use refined

coal under circumstances that necessarily led to infringement. *See supra* § I.A.

Third, CERT blames EPA regulations for the power plants' infringement. CERT Br. 26. The EPA does not mandate the use of ACI.[3] Regardless, CERT's argument hinges on its mistaken belief that, for it to be liable for induced infringement, CERT must solely and alone cause the direct infringement. But "an entity that has decided that it may wish to take an action relevant to patent infringement" can be "further spurred on to do so by the act of another." Appx305.

CERT suggests that *Microsoft Corp. v. DataTern, Inc.*, 755 F.3d 899 (Fed. Cir. 2014), supports its view that it can escape liability by pointing to the EPA. CERT Br. 26–28. It does not. There, DataTern sued several Microsoft customers alleging infringement, but for one of the patents, DataTern's claim charts cited only third-party

[3] Rather, it mandates specific levels of mercury emission reductions. Plants burning some types of coal (*e.g.*, sub-bituminous and lignite varieties) need to use ACI to meet the EPA's requirements. Appx3615; Appx3710; Appx3840. Plants burning different types of coal (*e.g.*, some bituminous varieties), may be able to achieve the EPA requirements using other techniques. For the power plants at issue in this case, the only potential alternative to ACI identified by CERT was the use of an SCR, which would have been economically impractical. Appx4025–26.

documentation. *Microsoft*, 755 F.3d at 905. Microsoft brought declaratory judgment claims against DataTern seeking declarations of noninfringement and invalidity. *Id.* DataTern moved to dismiss for lack of jurisdiction, which was denied. *Id.* On appeal, this Court held, as to third-party charted patent, that "[n]othing in the record suggest[ed] that Microsoft encouraged the acts accused of direct infringement, and simply selling a product capable of being used in an infringing manner is not sufficient to create a substantial controversy regarding inducement." *Id.*

This case bears no resemblance to the dismissed claims in *Microsoft*, where the plaintiff had plainly accused customers of direct infringement for using a product with noninfringing uses. Here, CERT paid power plants to burn refined coal at power plants that required the use of ACI. And CERT did not sell a product merely "***capable*** of being used in an infringing manner"; as the jury found, CERT sold a product that was ***required*** to be used in an infringing manner. *See supra* § I.A.

CERT also relies on *Takeda Pharms. U.S.A., Inc. v. W.-Ward Pharm. Corp.*, 785 F.3d 625, 630 (Fed. Cir. 2015), but CERT is not an "unaffiliated, third party" as it suggests. CERT Br. 27. It contracted

with the plants, Appx7346–7836, and paid them to accept refined coal knowing and intending for that coal to be burned in facilities equipped with ACI. Indeed, CERT recruited host plants by selling the benefits of combining its refined coal with the ACI systems. *See supra* § I.A. CERT disclaims its role in emission control, but it sold an emission control product to obtain tax credits designed to reward reductions in mercury and NOx emissions. What is more, CERT was invited into and participated in discussions about combining bromine with ACI. *See, e.g.*, Appx7837 (CERT email recognizing that certain plants were "relying on Calcium Bromide together with activated carbon"); Appx4071 (CERT "worked with the power plants so that they could set the Br, the bromine rates, the MerSorb rates, and the ACI rates so that they still met the MATS standards of 90 percent mercury removal but they didn't have to use any more activated carbon injection than necessary."). And CERT presented the plants' ACI-based mercury control to its own investors. Appx4272 (Mr. Jeff Green confirming that the Sargent & Lundy reports it commissioned "spelled out" activated carbon). CERT cannot absolve itself of liability by simply pointing to the EPA.

D. CERT caused the power plants' infringement.

CERT's next theory is that it could not have caused direct infringement because the power plants had been using ACI "for extended periods before and after the period when CERT supplied refined coal," and purportedly "only used ACI to comply with EPA's MATS regulations." CERT Br. 28–30.

Baked into CERT's argument is a mistaken legal principle—that CERT had to, again, be the *sole* cause of the power plants' infringement for inducement. CERT can identify no case or precedent that imposes a sole causation requirement for inducement, and without one, its factual arguments do not make sense. *See infra* §I.F.2. The inducement question focuses on what CERT did to induce the power plants, not whether the power plants could have been influenced by or further spurred on to infringe based on other factors or could have used their ACI for other purposes.

E. CERT acted with specific intent to induce infringement.

CERT also contests that record evidence could support a finding that it acted with specific intent. In its view, "[t]ax credits are not a

sufficient basis to infer intent," and "at best . . . CERT had a financial interest in selling refined coal to the power plants." CERT Br. 31.

"[S]pecific intent may be inferred from circumstantial evidence where a defendant has both knowledge of the patent and specific intent to cause the acts constituting infringement." *Ricoh Co. v. Quanta Computer Inc.*, 550 F.3d 1325, 1342 (Fed. Cir. 2008). There is ample evidence of specific intent on this record. *Supra* § I.A.

CERT corporate representative Jeff Green testified that CERT Defendants earn $5–7 per ton of refined coal burned in tax credits, which flow up to CERT's investors, like JP Morgan, Mylan, and Kiewit. Appx4232; Appx4240; Appx4318. The CERT investors then pay real money to the CERT partners' respective holding companies. Appx4235. According to Mr. Green, the majority owners (i.e., the investors) of each CERT Defendant would have the power to stop infringing. Appx4314–16. However, had operations shut down in 2019 when the lawsuit was filed, CERT's investors would have forgone around $300–350 million in tax credits, which Mr. Green agreed was a "significant" amount of money. Appx4318–20. And Mr. Green testified that his LLC alone, which made less than 20% of the total earnings of the CERT partners,

made around $50 million in connection with the CERT Defendants in the case. Appx4238–39.

Given these incentives, CERT was willing to pay power plants to take its refined coal. Appx3818–19; Appx3930–31. And they did so knowing that the power plants would need to use activated carbon to remain operational. Appx3811, Appx3911, Appx3992, Appx4281, Appx128.

CERT does not contest these facts. Instead, it suggests that *Cox*, *Global-Tech*, and *DSU* require more, and "mere financial motive cannot sufficiently show" specific intent. CERT Br. 31. As described *supra* § I.B., *Cox* had markedly different facts, as Sony provided no evidence of promotion, marketing, and intent to promote infringement and, in fact, discouraged infringement by issuing warnings, suspending services, and terminating accounts. 607 U.S. at 595. In *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 770–71 (2011), Pentalpha's infringement *was* financially motivated, as even the Supreme Court noted that "sales of SEB's fryer had been growing for some time" and that Pentalpha believed it embodied "advanced technology that would be valuable in the U.S. market is evidenced by its decision to copy all but the cosmetic

features of SEB's fryer." *DSU Med.*, 471 F.3d at 1306, too, does not prohibit reliance on a financial motive for affirmative intent.

CERT also ignores *Grokster*. There, the Supreme Court found significant that the inducer's profits scaled with the amount of infringement it induced in its users, a fact that supported a finding of unlawful intent. *Grokster*, 545 U.S. at 940. That, coupled with evidence that the inducer did not attempt to implement mechanisms to reduce or diminish the infringing activity and actively marketed to users who were seeking to distribute copyrighted material, rendered Grokster's "unlawful objective . . . unmistakable." *Id.*

Here, not only did CERT's tax credits scale directly with the amount of infringement it induced in the power plants, it paid the power plants on a per ton of coal basis to infringe—directly incentivizing the infringement with cash. It did not seek to reduce or diminish the infringement and, instead, interposed itself directly on the conveyer belts at the power plants to ensure that its refined coal traveled along to be combusted with the resulting flue gas treated using ACI. It even marketed the benefits of using the refined coal with ACI in its pitch presentations. Appx4298–4301. CERT was further motivated

to ensure that the plants used ACI because without it, they could not stay operational, and CERT could not obtain the $300–350 million in tax credits it obtained during the damages period. Appx4318–19. These facts, like those in *Grokster*, make CERT's unlawful objective unmistakable.

F. CERT's instruction challenge fails because the charge is correct and CERT acknowledged that during the charge conference.

CERT's next attempt at unseating the verdict is an objection to the district court's jury instructions. CERT argues that (1) the jury should have been instructed that the "Plaintiffs must show 'that the defendants encouraged the power plants to perform each and every step of the asserted claim,'" and (2) that the jury should have been instructed that causation could not be found if "other factors" also contributed to infringement. CERT Br. at 32–33. Neither provides a basis for new trial.

A party seeking a new trial based on a jury instruction must establish: "(1) it made a proper and timely objection to the jury instructions, (2) those instructions were legally erroneous, (3) the errors had prejudicial effect, and (4) it requested alternative instructions that

would have remedied the error." *Seachange Int'l, Inc. v. C-COR, Inc.*, 413 F.3d 1361, 1381 (Fed. Cir. 2005). But "[n]o litigant has a right to a jury instruction of its choice, or precisely in the manner and words of its own preference." *Douglas v. Owens*, 50 F.3d 1226, 1233 (3d Cir. 1995). The court "look[s] at the totality of the charge given to the jury, not merely a particular paragraph or sentence." *Dressler v. Busch Ent. Corp.*, 143 F.3d 778, 780 (3d Cir. 1998); *Walters v. Mintec/Int'l*, 758 F.2d 73, 76 (3d Cir. 1985).

1. The district court did not err in rejecting CERT's additional encouragement language.

CERT's challenge to the instructions should fail for one basic reason: CERT never made the objection it now advances before the district court: The district court even ***expressly asked*** CERT if the district court's instruction was incomplete or incorrect and if encouragement was a separate element. Appx4535–36 ("Any argument why that's wrong? What's distinctive or separate about encouragement from the causation element that's already in there?"); Appx4537 ("is it your understanding there's some distinction made by the Federal Circuit when it lists out elements of induced infringement that they say, [w]ell, you have to cause the infringement, but then you have to

separately encourage the infringement?"). CERT responded that it did not "know that it's a separate requirement" and that it was seeking "a finer articulation" of the standard. Appx4537. CERT asked for its instruction not because the court's instruction was incorrect but because "the feeling of encouragement has a helpful gloss to it." *Id.*

Having conceded at the charge conference that the instruction *was not incorrect* but instead, could benefit from CERT's proposal's "helpful gloss," CERT cannot now take the position that the court's instruction was erroneous to secure a new trial. CERT Br. 32–33; *see Palmer v. Hoffman*, 318 U.S. 109, 119 (1943) ("In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."). A party is not entitled to a "a jury instruction of its choice" in "precisely . . . the manner and words of its preference." *Douglas*, 50 F.3d at 1233. CERT is entitled only to an instruction that "accurately and fairly sets forth the current status of the law," *id.*, and CERT itself conceded at trial that the instruction did so.[4]

[4] Any error based on the exclusion of this instruction would be subject only to plain error review, *see Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 340 (3d Cir. 2005), which requires the error be

Regardless, the court's instruction is correct. CERT cites *Cox*, *Global-Tech*, *HZNP*, and *Microsoft* for the proposition that the accused infringer must take an affirmative act to encourage infringement, CERT Br. 32–33, but the district court instructed the jury that ME2C has to prove that "that the Defendant took some affirmative action, intending to cause a power plant to directly infringe one or more asserted claims of the asserted ME2C patents." Appx3071. As the court explained at the charge conference, there does not appear to be a difference between "encouragement and causation . . . in this context," Appx4535–36. And CERT still has not explained why that is wrong.[5]

"fundamental and highly prejudicial, such that the instructions failed to provide the jury with adequate guidance and our refusal to consider the issue would result in a miscarriage of justice," *Robinson v. First State Cmty. Action Agency*, 920 F.3d 182, 187 (3d Cir. 2019). CERT has not even attempted to explain how it could meet this standard.

[5] CERT does not appear to justify the "each and every" language in its proposed instruction. But the absence of that language, too, does not render the court's charge erroneous. For the causation requirement, on CERT's proposal, the district court instructed the jury that ME2C must show that "the Defendant's actions . . . actually caused the power plant to perform each and every step of the asserted claim." Appx336; Appx3071. CERT could not identify any daylight between encouragement and causation, so it effectively obtained its "each and every step" language in the instructions. Appx4536–37. And, for the avoidance of any doubt, immediately before the inducement instruction, the court also explained to the jury that finding direct infringement requires finding *each and every* limitation. Appx3065, 3070.

And, notably, the court accepted CERT's proposal, over ME2C's objection, to instruct the jury that for inducement it must find "that [CERT's] actions actually caused the power plant to perform each and every step of the asserted claim," Appx3071; Appx336, so the substance of the instruction it sought was already present.

2. The district court did not err in rejecting CERT's sole causation instruction.

Next, CERT argues that the district court erroneously instructed the jury on causation. CERT Br. 33. CERT requested a causation instruction over ME2C's objection "that the Defendant's actions, as opposed to other factors, actually caused the power plant to perform each and every step of the asserted claim." Appx10697–98. And the court adopted that instruction without the phrase "as opposed to other factors." Appx4539, Appx3071.

CERT's proposal imposes not just a causation requirement but a *sole* causation requirement. That is not supported by precedent. Here, as below, CERT cites "no authority for the proposition that an entity that has decided that it may wish to take an action relevant to patent infringement cannot nevertheless be further encouraged (or influenced, or moved) to do so by another party." Appx213 ("Even if one is

predisposed to do something, one might still be further spurred on to do so by the act of another."). Indeed, inducement is about Defendants' actions—their affirmative action that intended to cause the direct infringement—not the state of mind of the direct infringer. *See Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 843 F.3d 1315, 1335 (Fed. Cir. 2016) ("Indeed, we have affirmed induced infringement verdicts based on circumstantial evidence of inducement . . . without requiring hard proof that any individual third-party direct infringer ***was actually persuaded to infringe by that material***." (emphasis added)). Precedent does not impose a separate requirement to show the state of mind of the direct infringer—to prove that the only thing that influenced it to infringe was Defendants' actions.[6]

CERT also suggests that the exclusion of its instruction permitted the jury to find inducement "even if factors other than CERT's actions actually caused the direct infringement." CERT Br. 34–35. But over ME2C's objection, CERT secured an instruction that required the jury to find its actions "actually caused the power plant to perform each and

[6] CERT cites *HZNP*, but *HZNP* does not require but for causation. *See* 940 F.3d 680, 702; *see also supra* § I.C.; Appx215 n.3.

every step of the asserted claim," so the instructions could not have led the jury astray. "District Courts deserve, and receive, great latitude in the difficult task of crafting jury instructions." *In re Processed Egg Prods. Antitrust Litig.*, 850 F. App'x 142, 146 (3d Cir. 2021). The district court provided the jury with accurate instructions that do not warrant a new trial.

II. The jury's contributory infringement verdict does not warrant reversal or vacatur.

CERT next takes aim at the contributory infringement verdict, CERT Br. 36, but the Court need not reach contributory infringement if it affirms induced infringement because every CERT RC defendant was found liable for inducement on every claim, and damages were determined on a per-defendant basis. The operations entities were not charged with contributory infringement. If reached, however, CERT's arguments regarding the contributory infringement verdict have no merit.

A. CERT's accused refined coal has no substantial noninfringing use.

CERT first insists that the district court should have considered and permitted the jury to consider whether general refined coal writ

large, stripped of its context, has a substantial noninfringing use, as opposed to the refined coal as sold and delivered in this case.

1. The court applied the law accurately.

CERT is incorrect. The appropriate question for the jury is whether the refined coal that is accused in this case—not some abstract concept of refined coal—has a substantial non-infringing use. Squarely on point is this Court's opinion in *Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337 (Fed. Cir. 2018). There, Defendants claimed that MerSorb and S-Sorb had substantial noninfringing uses. Nalco had pled, however, that "[a]s sold and delivered," the additives had no substantial noninfringing uses: "When a coal-fired power plant or a Refined Coal LLC receives MerSorb and S–Sorb it purchased, the coal-fired power plant or Refined Coal LLC has no other use for MerSorb and S–Sorb except to use those additives in the Chem–Mod™ Solution." *Id.* at 1357. Taking that allegation as true under the motion to dismiss standard, this Court held that Nalco had adequately stated a claim for contributory infringement. *Id.* That is, provided the additives *as sold and delivered* had no substantial noninfringing uses, the contributory infringement claim met the legal requirements for contributory

infringement. If those allegations about the additives as sold and delivered *could not meet the statutory requirements for contributory infringement*, the claim would have failed.

Nalco reflects the reality that the contributory infringement question is focused on the *accused product* in its market context. Indeed, its holding finds direct support in the statute, which imposes contributory infringement liability on "[w]hoever sells . . . a material or apparatus for use in practicing a patented process, ***knowing the same to be*** . . . not a staple article or commodity of commerce suitable for substantial noninfringing use." 35 U.S.C. § 271(c) (emphasis added); *see also Hodosh v. Block Drug Co.*, 833 F.2d 1575, 1578 (Fed. Cir. 1987) (explaining that the statute "deals with the material actually sold by the accused and the uses made of it by its purchasers").[7] The focus is on what the defendant sells and whether ***the same*** has substantial noninfringing use, not whether hypothetical, other products can be used in noninfringing ways.

[7] CERT suggests that *Hodosh* is irrelevant because, in *Bill of Lading*, this Court commented that *Hodosh* did not include a holding on whether the product at issue had substantial noninfringing uses. CERT Br. 41. But *Hodosh* accurately parses the statute, and CERT has not identified authority suggesting otherwise.

The practical reality of the market matters. *See i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 851 (Fed. Cir. 2010), *aff'd*, 564 U.S. 91 (2011). For example, in *i4i*, this Court upheld a jury verdict of contributory infringement where the jury could have reasonably concluded that the custom XML editor had no substantial noninfringing use by discounting each of Microsoft's purported uses as insubstantial in the relevant market. *Id.* ("the jury heard ample testimony that the noninfringing, binary file format was not a practical or worthwhile use for the XML community, for which the custom XML editor was designed and marketed."). CERT wants to strip away the context of how the accused refined coal is sold and delivered to power plants to ratchet down the "substantial noninfringing use" standard and credit uses of *other* refined coal, but precedent forecloses that maneuver.

For its part, CERT relies on *Bill of Lading*, *Mitek*, and *Cox*, but none support its position. *Bill of Lading* is entirely consistent with *Nalco*.[8] The patent in *Bill of Lading* automated "the process of

[8] CERT also attempts to sidestep *Nalco* by arguing that it is "incompatible with *Bill of Lading* and *Mitek*," and that the pleadings there were a "far cry" from the factual record here. CERT Br. 42–43. But all three of these cases evaluate the product actually sold and whether it has a substantially noninfringing use, not theoretical unsold products.

receiving transportation documentation and producing advance loading manifests" for optimizing load planning, product shipment, and delivery control. *Id.* at 1329. The contributory infringement allegations amounted to a statement that, "*if* the products are used to scan bills-of-lading and *if* the bills-of-lading are used to make a loading manifest, then the products have no substantial noninfringing uses." *Id.* at 1338. Scanning the bills of lading and using them to create a loading manifest were steps of the claim. *Id.* at 1329. In other words, the allegations merely stated that, if the product was used to infringe, then it had no substantial noninfringing use. This court disagreed, explaining that "[t]he fact that a product may be unavailable for simultaneous noninfringing uses while being used to infringe" was "not determinative," and "[w]here the product is equally capable of, and interchangeably capable of both infringing and substantial non-infringing uses," there is no contributory infringement. *Id.* at 1338. Importantly, materials attached to the complaint repeatedly described the accused products' noninfringing uses, supplying "the very facts

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And the *Nalco* allegations are quite similar to the factual record here. Like the refined coal here, there, the power plants had no other use for MerSorb and S-Sorb except infringement. 883 F.3d at 1357.

which defeat[ed R+L's] claims of contributory infringement." *Id.* *Bill of Lading* does not require stripping the context away from an accused product to determine whether it has a substantial noninfringing use.

Mitek Sys., Inc. v. United Servs. Auto. Ass'n, 139 F.4th 1340 (Fed. Cir. 2025), does not support CERT, either. There, this Court asked what the actual purchaser of the product could do with the product, and it turned out the same customer could use the same product without infringing by flipping a switch. *Id.* at 1351. Here, asking the analogous question—what the actual power plants that purchased CERT's refined coal could do with it—has a totally different answer: the refined coal they bought (and that CERT sold them at a loss) was already on the conveyer belt to the boiler, the exhaust from which would necessarily be treated with ACI. Any other fate could not be credited as it would be unusual, illusory, impractical, occasional, aberrant, or experimental. *Bill of Lading*, 681 F.3d at 1338.[9]

[9] CERT also ascribes error to the Court declining to consider the use of *other* refined coal, calling its coal "customized" like the software in *Mitek*. CERT Br. 39. But that argument depends on misunderstanding *Mitek*: there was no substantial noninfringing use there because USAA admitted as much and because the software—as sold and delivered to customers—could easily be switched into a noninfringing mode while retaining check cashing functionality.

Cox, too, does not support CERT. CERT suggests that the Supreme Court's "focus on the *capability* of a product reinforces that the district court erred by not considering the 'relevant inquiry' in *Bill of Lading*." CERT Br. 40. But in *Cox*, like in *Mitek*, the Court analyzed the service Cox provided to its subscribers—general internet services—and whether that service, as provided, had substantial noninfringing use. *Cox*, 607 U.S. at 595 ("Cox did not tailor its service to make copyright infringement easier."). Of course, general purpose internet has uses beyond copyright infringement, *id.*, so the facts easily failed the contributory liability test.

2. Substantial evidence supports the jury's finding that CERT's accused refined coal has no substantial noninfringing use.

Here, as the district court aptly noted, "[i]t is not as if during this time, the CERT Defendants had one large factory from which they made and sold refined coal, and then they shipped that coal out to third party customers all over the country—whereafter, some customers used the coal in an infringing way (e.g., along with the use of ACI) and some didn't." Appx317. Instead, there was no other "realistic outcome" for

the refined coal made by the CERT defendants and accused in this case. Appx318. Whether *other* refined coal—coal bought, sold, or treated by other entities at other times—has a substantial non-infringing use is beside the point, just as in *Cox*, where the Court did not consider or ask whether *other* provider's internet services had substantial noninfringing uses. As the district court noted, "the evidence shows that CERT knew that there was no other outcome for the refined coal it was providing to these power plants—coal that, it again bears emphasizing, was traveling *on a conveyer belt to the boiler in the plants* at the time that the refined [coal] was made and sold—other than to be combusted in a manner that directly infringed the asserted claims." Appx301–02.

3. CERT's remaining arguments depend on accepting its incorrect view of the law.

CERT makes additional discrete arguments, but they fail under the correct legal standard. For example, CERT challenges that the district court applied the "as sold and delivered" language in *Nalco*, but as explained above, *Nalco*, *Bill of Lading*, *Mitek*, and *Cox* all considered the accused product in its environment and did not adopt the rule CERT posits—that the court must consider whether "the accused product *in general* has substantial noninfringing uses." CERT Br. 38.

Cf. Hodosh, 833 F.2d at 1578 ("the language of § 271(c) . . . deals with the material actually sold by the accused and the uses made of it by its purchasers"); *i4i*, 598 F.3d at 851 (jury permitted to consider use's "frequency" and "practicality" and discount potential substantial noninfringing use as "not a practical or worthwhile use" for the relevant market); *see also supra* § II.A.1.

CERT nevertheless maintains that coal used in Section 45 tax credit certification testing, and refined coal sales and uses not accused of infringement in this case and outside of the damages period should be credited as substantial noninfringing uses. Neither qualify.

a. Coal used for certification testing is not a substantial noninfringing use

CERT's argument to credit coal in Section 45 tax credit certification testing, which it argues is "commercially significant," as substantial noninfringing use, CERT Br. 40, fails on the procedure and the facts.

For starters, this argument is waived. CERT did not make it in its Rule 50(a) motion at trial, in its later-filed Rule 50(b) motion, or even its new trial motion. Whether a use is substantial is a factual question, and CERT waived its right to challenge the jury's finding on

this issue. *See, e.g.*, *Kars 4 Kids Inc. v. Am. Can!*, 8 F.4th 209, 220 (3d Cir. 2021) (issues not raised at Rule 50(a) are waived for Rule 50(b)); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404–05 (2006) (failure to file a Rule 50(b) motion forecloses appellate consideration of the challenge); *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011) (same); *Williams v. Runyon*, 130 F.3d 568, 571–72 (3d Cir. 1997) ("Under normal circumstances, a defendant's failure to raise an ***issue*** in a Rule 50(a)(2) motion with sufficient specificity to put the plaintiffs on notice waives the defendant's right to raise the issue in their Rule 50(b) motion." (emphasis added)).

Even if it was considered on the merits, however, certification testing refined coal was *never sold by anyone*: CERT operating companies shipped the coal to a lab, where it was expended in testing. It is simply not use of CERT's accused product, as required by the statute or case law. *See supra* § II.A.1. And at best, certification testing would constitute an occasional and experimental use that cannot be credited under *Vita-Mix Corp. v. Basic Holding, Inc.,* 581 F.3d 1317, 1327 (Fed. Cir. 2009) ("unusual, far-fetched, illusory, impractical, occasional, aberrant, or experimental" uses not substantial). The jury

was entitled to disregard it, as the jury did to the purported alternative uses in *i4i*, and the verdict cannot be unseated on this basis.

b. Refined coal used and sold outside of the damages period is not substantial noninfringing use.

CERT also argues as a factual matter that "there are several power plants that substantially used refined coal in a noninfringing manner during the damages period." CERT Br. 43. Yet the sales it identifies do not stand accused in this case. Those sales are outside the scope of the contributory infringement question, which is focused on the product the defendant sells and the context it is sold in. *See supra* § II.A.–B. Under that lens, the actual accused coal "*absolutely had to be used* to practice the patented method—again, there was no other realistic outcome for it." Appx318.

CERT suggests that *Nalco* does not support limiting the substantial noninfringing use inquiry to products sold in the damages period and that the allegations there covered "*any* power plant (as opposed to only a limited set of uses during the damages period)." CERT Br. 44. That is inaccurate. The *Nalco* complaint alleged that when the purchaser received *what it purchased* (MerSorb and S-Sorb),

that purchaser had "no other use" for the chemicals except infringement. 883 F.3d at 1357. That is not an allegation about "*any* power plant" but the specific sale at issue there.

B. Substantial evidence supports that CERT's refined coal was especially made or adapted for infringement.

Next, CERT argues that there is insufficient evidence that refined coal was especially made or adapted for use in an infringement, and that, instead, it was designed to obtain tax credits, not to infringe. CERT Br. 46–47. The statute asks whether the material *was* especially made or adapted for use in an infringement, not *why* it was formulated in a certain way or whether CERT was motivated *solely* by infringement (as opposed to obtaining hundreds of millions of dollars in tax credits).

Regardless, the jury's finding rests on solid ground. The accused refined coal at issue was made on-site at each individual infringing power plant using the coal specifically transported to that power plant to be burned there. The coal had no place to go other than to be burned with ACI. Appx4007–08; *see also* Appx4024–25, 4095. Moreover, Mr. Jeff Green testified that CERT's expectation was that the refined coal made at a facility would be burned at the same facility. *See* Appx4243–44; *see also* Appx4261; *see supra* § I.B. (explaining that refined coal is

not fungible).[10] Accordingly, the jury reasonably could have concluded that refined coal was especially made or adapted for use to be burned at power plants that use ACI, *i.e.*, in an infringement.

CERT argues that the additive amounts used to prepare refined coal were calculated by the EERC before the damages period, but this is beside the point. ME2C did not accuse the EERC of contributing to infringement by calculating additive rates. And CERT cites no authority for the position that a defendant can escape liability for contributory infringement as long as it makes decisions regarding aspects of its infringement before the damages period.

C. CERT's jury instruction challenges are either waived or depend on an incorrect reading of *Nalco*.

Finally, CERT argues that the jury instructions (1) should not have included the "as sold and delivered" language from *Nalco*, (2) improperly stated that the only relevant coal to substantial noninfringing use was "the refined coal that [CERT RC] supplied during

[10] Notably, Mr. Jeff Green made this admission on the third day of trial. Appx4243–44. On day four, he then refused to answer the same question in the same way, appearing evasive. Appx4255–61. Mr. Green's inconsistent and evasive testimony, on this point and throughout trial, reasonably could have led the jury to discount his testimony. Mr. Green also reversed himself on whether CERT knew about the power plants' ACI usage, further damaging his credibility to the jury. Appx4262–64.

the damages periods to a power plant that is alleged to have directly infringed the patents-in-suit in this case," and (3) should not have "directed the jury to 'not consider refined coal' sold prior to the start of the damages period or to entities other than the accused plants." CERT Br. 48. In CERT's view, the instructions were erroneous because they did not include its preferred "equally capable" language. *Id.* at 49. For starters, the as-sold-and delivered language is correct and cannot form the basis for the grant of a new trial. *See supra* § II.A.1.

The remainder of CERT's challenge to the instructions is waived. To be sure, CERT did challenge the "as sold and delivered" language below. Appx4546. However, it did *not challenge* the other aspects of the instruction, namely instructions (2) and (3) to the jury, which instruct that the only relevant refined coal is that sold during the damages period to a directly infringing power plant by CERT. Appx3074. Instead, CERT informed the district court that it "agree[d] with" the court's "reading of 271(c)," for some aspects of the instruction, and had "[n]o objection to either proof or the additional language" to others. Appx4545, Appx4549; Appx4551–52 ("Knowing that Defendants don't have any objections to the additional proposals that the Court

made and that the plaintiffs do . . ., I'm going to overrule the plaintiffs' objection").

What is more, CERT was acutely aware of the relevant law and district court's view on the law because it argued a "mistake of law" defense below—that it should be absolved of liability because it mistakenly understood that refined coal sold "prior to the issuance of the patents-in-suit, prior to this litigation, or outside the scope of the damages period, or refined coal sold by entities that are not Defendants in this case" could be considered in the contributory infringement analysis. Appx3075 (jury instruction setting forth Defendants' position). But it declined to object to the lines of the instructions that set forth the court's (correct) statements of the law, waiving its objection. And "waived arguments about jury instructions may not be resurrected on appeal." *Robinson*, 920 F.3d at 187.[11]

[11] CERT may argue that it merely forfeited its challenge, as opposed to waived it, seeking plain error review. But it cannot reasonably be concluded on this record that CERT's actions amount to mere forfeiture where, "[t]hroughout the history of this litigation, including in its early stages," *Robinson*, 920 F.3d at 187–88, CERT not only briefed this issue but was repeatedly overruled by the district court, Appx94–96 & Appx116–118; Appx165–167; Appx3397–98; Appx226–27 (adopting "as sold and delivered" instruction before trial).

In fact, ME2C raised the need for a curative instruction on CERT's "mistake of law" defense, Appx10776–83, and CERT responded that it understood the court to have "adopted Plaintiff's position regarding the relevant 'material' or 'material part of the invention' for purposes of § 271(c) and intends to instruct the jury accordingly" but stated "[n]othing further [was] warranted." Appx10789. The only discrete objections it made to a curative instruction were to the instruction's timing, redundancy, and a request for a carve out that for its mistake of law defense. Appx10790. That is precisely what it received, and it registered no objection at the charge conference. Appx4549 ("No objection"). These facts support waiver. *See Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 359 (3d Cir. 2005) (counsel stating it "still request[ed]" a proposed instruction but had no "objections at this point" resulted in forfeiture); *Franklin*, 424 F.3d at 340 ("failure to preserve" when no objection made to draft charge).

Further, the instructions are considered as a whole, *Dressler*, 143 F.3d at 780; *Walters*, 758 F.2d at 76, and, because the substance of the unobjected to instructions simply reflects the "as sold and delivered" standard, any error in the instructions cannot support reversal.

III. The district court did not abuse its discretion in admitting ME2C's damages opinions or denying CERT a new trial on damages.

Finally, CERT takes aim at the damages verdict. CERT Br. 50. Specifically, CERT argues that Mr. Phil Green, ME2C's damages expert, based his opinions on licenses that were not technically or economically comparable, that he should not have relied on the ME2C-Alistar license, and that he did not apportion out the value of the tax credits from the licenses he relied upon. CERT did not move under Rule 50(b) for judgment as a matter of law on damages. Instead, it can only renew the substance of its *Daubert* challenge below. But the district court's *Daubert* ruling is not an abuse of discretion, and CERT rested on its rights to challenge the admission of and opinions regarding the ME2C-Alistar license.

For the CERT defendants, Mr. Green relied on a hypothetical negotiation date of 2019. He explained that for CERT (as opposed to other defendants that were no longer at issue by the time of trial), "the parties would have negotiated a reasonable royalty rate of no less than $0.65 per [ton] to as much as $1.00 per ton of Refined Coal processed using the technology claimed by the Asserted Patents." Appx1790.

This was based on a consideration of the *Georgia-Pacific* factors, where Mr. Green considered the Chem-Mod licenses and Nalco agreement rates and the fact that, by entering into a license, ME2C would be foregoing the profit it would have made on every ton of sorbent it sold. Appx1788. Mr. Green also considered qualitative factors, like the fact that the parties directly compete and there was a lack of noninfringing alternatives to land at a royalty rate range of $0.65 to $1 per ton of refined coal. Appx1788–89, Appx4145–4147, Appx4149. Through a supplemental report and in his ultimate trial presentation relied on the Alistar-ME2C agreement as well, which itself states that it reflects the jury's $1 per ton rate, finding it highly comparable because it covered comparable technology and parties.

A. CERT identifies no defects in Mr. O'Keefe's technical comparability opinions or in Mr. Green's reliance on them.

CERT first argues a lack of technical comparability between the patents in this case and the patents in what it calls the "Expert Report Agreements." CERT Br. 52. But Mr. O'Keefe supplied the technical opinion linking the technology in those agreements to the technology at issue in this case, and the district court was well within its discretion to

admit Mr. Green's opinions. Mr. O'Keefe, for his part, reviewed the patents underlying those licenses and explained how each was "related to mercury removal from power plant emissions." Appx4026–27; Appx4095–4097 (opining that the patents "all claim to reduce mercury emissions in coal-fired power plants" and agreeing that the patents are in "the same field of technology as the Midwest patents").

CERT seizes on one exchange where Mr. O'Keefe commented that the patents were not technically comparable, but in the same discussion, he followed up with his opinion that the patents "achieve the same result" as the patents-in-suit. Appx4059–60 ("They're in the same – they achieve the same result."); Appx4097 (explaining that while these patents "are not as good or as impressive technically as [ME2C's] patents" they are "comparable in terms of the field of technology"). CERT's generalized factual criticisms that the agreements included a variety of other technologies that "are all irrelevant" are not only unsupported by citation to the record, but CERT even declined to present a technical expert who could speak to technical comparability at all. The district court did not abuse its discretion in finding that ME2C had shown a baseline level of comparability and CERT's criticisms go to

the degree of comparability—a factual question that the jury resolved in ME2C's favor. *See Bio-Rad Lab'ys, Inc. v. 10X Genomics Inc.*, 967 F.3d 1353, 1374 (Fed. Cir. 2020) ("'degree of comparability' was appropriately left for the jury to decide" (citation omitted)); *ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1333 (Fed. Cir. 2012) (criticisms about technical comparability are disagreements about "factual assumptions" not "methodology" and "go to the weight to be afforded the testimony and not its admissibility").

B. CERT identifies no defect in Mr. Green's economic comparability opinion.

Next, CERT argues that the Expert Report Agreements were not economically comparable, arguing that the Chem-Mod Agreements were not the result of arms-length transactions between competitors and include ancillary services. CERT Br. 53. CERT criticizes the ADA-ES license because it was an exclusive one with "terms unknown to Mr. Green." CERT Br. 54. And CERT argues that the Nalco Agreement is a litigation settlement agreement inherently "suspect" that Mr. Green did not connect to the hypothetical negotiation sufficiently. CERT Br. 54.

But as to the Chem-Mod Agreements, Mr. Green explained that he found them economically comparable as agreements "among entities

that were essentially the refined coal LLCs to use a technology, the Chem-Mod coal modification technology." Appx4126; *see also* Appx202 (summarizing Mr. Green's opinion). Indeed, Mr. Green relied on agreements between Chem-Mod and ***the CERT RC companies themselves***. *See infra* § III.D. As to ADA-ES, Mr. Green did not rely on it as a quantitative data point and expressly noted that it "differs from the licenses resulting from the hypothetical negotiation," Appx1784, recognizing in his trial testimony that it did not seem to be an arms-length transaction, Appx4116. As to Nalco, Mr. Green explained that Nalco, Chem-Mod and AJG were similar parties to those in the hypothetical negotiation and why. Appx4129. He also expressly recognized that the license was the result of litigation and declined to imply a per-ton royalty rate to the lump sum agreement. Appx4127–28, 4131. CERT cannot show an abuse of discretion in the admission of these opinions.

C. CERT cannot obtain a new trial based on the ME2C-Alistar license.

The procedural history shows that CERT fully endorsed the use of the Alistar-ME2C in assessing damages. This case was originally scheduled for a jury trial in November 2023, with three sets of

defendants proceeding to trial—CERT, Alistar, and the AJG/DTE Defendants. On the eve of *that trial date*, the AJG/DTE Defendants and Alistar settled. The court held a status conference, and at that conference, CERT pressed the court for a continuance. By CERT's telling, the settlement licenses were significant and were likely to have a material effect on the damages case. Appx10588 (as to the AJG/DTE agreement: "Your Honor, the settlement agreement that has just been entered into are obviously highly relevant to damages"); Appx10603 ("[W]e, obviously, don't yet have the Alistar agreement. ***Alistar would also be very relevant, be highly relevant***, because Alistar at one time was, you know, associated with CERT" (emphasis added)); Appx10604 ("bottom line is it has a major and material impact on damages").

The court agreed with CERT and granted it a continuance. Appx10612–10614 (the court agreeing that the agreements "are going to be some important and relevant data points with regard to damages and reasonable royalty" and granting a continuance in light of that fact along with the fact that CERT was not prepared to present its case alone). It then set a February 2024 trial date, and the parties jointly

stipulated to enter a schedule with dates for CERT's damages expert, Ms. Lawton, to provide her supplemental expert report, Plaintiffs to serve a reply report, a deadline for expert depositions, and other updated pretrial disclosures. Appx10652–53. Plaintiffs complied with the schedule and served Mr. Green's supplemental report that relied on the Alistar license as additional support for the rate calculated in Mr. Green's earlier reports. Despite asking the court for a continuance for the experts to address the settlements, CERT actually declined to supplement at all. It did not seek to file a *Daubert* on Mr. Green's updated opinion. Nor did it raise any issue with ME2C's updated report's reliance on the Alistar license at the next pretrial conference. It registered no objection to the admission of the license or Mr. Green's Alistar-based opinion at trial. Appx3851, Appx4116–21. And declined to call Ms. Lawton altogether, telling the jury instead that it did not need a damages expert because it "trust[ed the jury's] common sense" and did not "need to put somebody talking about a 12-point Georgia-Pacific multifactor hypothetical negotiation" or "hypothetical world." Appx4654–55.

1. CERT waived its Alistar argument.

Against this background, CERT now argues that Mr. Green's reliance on the Alistar settlement is flawed because "the rate in the Alistar Settlement Agreement" was of too small a volume to be "extrapolated" to the large amount of coal the CERT entities sold. CERT Br. 55.

CERT's challenge to the reliability of Mr. Green's Alistar opinion is waived, or, at a minimum, forfeited. CERT did not object to Mr. Green's Alistar opinion ***in any way***. *See* Fed. R. Evid. 103(a) (requiring timely objection to preserve a claim of error in admitting or excluding evidence). It did not seek to file a motion on the opinion, despite repeatedly moving to challenge Mr. Green's opinions on other bases and having a deposition to fully explore the issue with Mr. Green. It did not object to the testimony coming in at trial. It certainly mentioned the Alistar agreement in its Rule 50(a), but that was a challenge to the sufficiency of the evidence, not the reliability or admissibility of the expert's testimony. Appx4520. Regardless, CERT did not renew that challenge in a Rule 50(b) motion. Indeed, CERT did not suggest the

Alistar opinion was unreliable even in its new trial motion,[12] which challenges the reliability of other aspects of Mr. Green's opinions. These facts mandate a waiver finding under Third Circuit law. *See, e.g.*, *Unitherm*, 546 U.S. at 404–05 (failure to file a Rule 50(b) motion forecloses appellate consideration of the challenge); *Ortiz*, 562 U.S. at 189 (same); *Williams*, 130 F.3d at 571–72; *Kars 4 Kids*, 8 F.4th at 220.

Indeed, CERT had full knowledge of this issue and affirmatively waived its objection. In fact, far from objecting—CERT embraced the Alistar license below as "highly relevant" to get a continuance. Appx10603. When asked at trial whether it had told the court the agreements would be "super relevant," CERT confirmed that it had "actually referenced" the "Alistar agreement" as relevant. Appx3408–09. CERT cannot totally reverse course now after representing that the Alistar license is highly relevant to obtain continuance, and its arguments about that license are waived.

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[12] In the new trial motion, CERT suggested that the damages verdict was against the great weight of the evidence and that the Alistar license should not be accorded *weight* because it was a litigation settlement entered into years after the hypothetical negotiation and included additional patents, Appx357, but the district court did not abuse its discretion in denying that request, as the jury could have easily credited the Alistar and Chem-Mod licenses over CERT's preferred licenses, *id.*

2. The ME2C-Alistar agreement is comparable.

In any event, the Alistar license *is* economically and technologically comparable. It involves the same technology—indeed the very same patents-in-suit—and the same accused activity, committed by a former co-defendant that was associated with CERT. Appx4116–21; Appx9643–49. Mr. Green's reliance on it was not unreliable, and the jury could have easily credited it over CERT's preferred damages data points.

Indeed, CERT presented its criticisms of the $1 per ton rate in the Alistar agreement to the jury: it argued that the agreement actually covered 1.4 million tons of coal, Appx4171, and accused Mr. Green of "chang[ing his] damages numbers the night before the agreement was signed" so that the number "magically works out to about a dollar per ton," Appx4178–79. But Mr. Green did not agree and explained that the tonnage specified in the agreement was correct based on a stipulation between Alistar and ME2C that had been entered much earlier in the case. Appx4173, Appx4214–15; *see also* Appx8439, Appx4610–11. The jury correctly rejected that position, given that the tonnage in the agreement was accurate.

CERT has flipped its argument for appeal: instead of insinuating that Mr. Green changed his opinions to prop up the royalty rate and implying that the license covered 1.4 million tons, CERT now embraces that the license was for relatively low tonnage—now complaining that the tonnage is *too low* to extrapolate to the hypothetical negotiation. CERT Br. 55 (citing *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1330 (Fed. Cir. 2009)). But this Court did not reject any license in *Lucent* for being "too small." *Lucent*, 580 F.3d at 1330. To be sure, the court did find "little evidentiary basis . . . for awarding roughly three to four times the average amount in the lump-sum agreements in evidence," highlighting that the award was out of line with the dollar value of comparable, fully-paid up licenses. *Id.* at 1332. But it did not rule that express license rates in a smaller volume agreement cannot be relevant to a hypothetical negotiation over larger volumes of product. And, contrary to CERT's assertion, Mr. Green did explain why Alistar fits the hypothetical negotiation: similar technology, accused activity, former co-defendant associated with CERT, during the damages period. Appx4116–4121. These similar circumstances to the hypothetical negotiation rendered the Alistar license comparable despite being the

result of a settlement, particularly given that the parties settled right before the November 2023 trial date. *See Prism Techs. LLC v. Sprint Spectrum L.P.*, 849 F.3d 1360, 1369 (Fed. Cir. 2017) (settlement agreements may be "especially probative if reached after the litigation was far enough along that the issue was already well explored and well tested").

D. CERT identifies no abuse of discretion in the district court's rejection of its apportionment arguments.

Next, CERT challenges apportionment, suggesting that Mr. Green should have removed the value of tax credits from his royalty. CERT Br. 58. In his report, Mr. Green did not rely on tax credits as a line item in his damages calculation, but the tax credits nevertheless influenced what comparable licensees paid. Appx3031. After the parties talked past each other in the *Daubert* briefing, the district court took the issue up on CERT's reconsideration motion and rejected it on the merits, and reaffirmed its holding in denying a new trial. Appx10770–75; *see also* Appx354–55.

CERT's argument is based on two premises: that the asserted patents are completely unrelated to tax credits, CERT Br. 58, and that Mr. Green should have apportioned the value of the tax credits out of

the licenses, analogizing the tax credits to the value of standardization in the SEP context. *Id.* at 59. Neither premise holds.

First, the record clearly establishes a link between practicing the asserted patents and the Section 45 tax credit: the credits required reductions in mercury and NOx emissions, Appx3943, and CERT's refined coal was used for infringement—with the amount of infringement proportional to the available tax credit. *See, e.g.*, Appx3810–11. What is more, if the power plants did not continue to infringe, as CERT paid them to, CERT could not have netted any tax credits because the plants would have shut down. *See supra* § I.A.

Second, on standardization, CERT cites no authority for the proposition that the value of tax credits is similar to the value of a standard to a standard-essential patent. Instead, it relies on only *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1233 (Fed. Cir. 2014), which stands for the proposition that the royalty rates for SEPs should reflect the value of those patents, not the value of adoption due to standardization, and *VLSI Tech. LLC v. Intel Corp*., 87 F.4th 1332, 1345 (Fed. Cir. 2023), which, as cited by CERT, states a general apportionment requirement. Regardless, *Ericsson* requires

apportioning out the value a patent gains from being part of a standard. 773 F.3d at 1233 ("We merely hold that the royalty for SEPs should reflect the approximate value of that technological contribution, not the value of its widespread adoption due to standardization.").

Section 45 tax credits are totally different: they were designed to reward and incentivize reducing mercury emissions, Appx4505, and any value that flows to ME2C's technology therefrom reflects the inventions' value in the marketplace. CERT could only generate tax credits from operational power plants that infringed ME2C's patents. *Supra* § I.A. Its credits scaled with the amount of coal burned by those plants. And it identified no noninfringing way to earn those credits at the plants.[13] Appx4144–45. And tax credits are part of the commercial picture; without them, the jury would have only heard that CERT's infringing companies operated at a loss, and through that lens, CERT could argue that ME2C's technology lacked value.

Mr. Green considered the commercial context relevant to the license agreements in this case. He simply did not deduct a discrete

[13] CERT's proposed noninfringing alternative was installing an SCR, which is not only expensive but eliminates the need to use refined coal altogether—and with it, CERT's Section 45 tax credits. Appx4025–26.

value from comparable license rates and ascribe them to tax credits. There is no blanket rule that he was required to do so. *Bio-Rad Lab'ys, Inc. v. 10X Genomics Inc.*, 967 F.3d 1353, 1376 (Fed. Cir. 2020). And Mr. Green did not need to strip out the value of the tax credits from the licenses he relied on because, "when a sufficiently comparable license is used as the basis for determining the appropriate royalty, further apportionment may not necessarily be required." *Vectura Ltd. v. Glaxosmithkline LLC*, 981 F.3d 1030, 1040 (Fed. Cir. 2020). "Built-in apportionment effectively assumes that the negotiators of a comparable license settled on a royalty rate and royalty base combination embodying the value of the asserted patent." *Id.* at 1041.

CERT does not identify what *specific* licenses it thinks contain a tax credit component. But a review of the relevant licenses reveals that tax credits did not drive the rates. For example, Mr. Green relied on the Alistar-ME2C agreement, a settlement license involving a defendant formerly affiliated with CERT in this very case, and the Nalco agreement. Appx4116–21; Appx9645; Appx7840–48. There are no indications that tax credits factored into the rates of either agreement. Similarly, Mr. Green also relied on Chem-Mod licenses, and

each Chem-Mod license with a CERT entity in the record includes a provision that the rate [redacted] License Term and includes a [redacted] License Term. Appx8536, Appx8541; Appx7891, Appx7896; Appx8621, Appx8626; Appx8657, Appx8662; Appx8693, Appx8698; Appx8729, Appx8734; Appx8765, Appx8770. As does the Alistar-Chem-Mod license. Appx4212–13; Appx8057. That agreement even provides a mechanism to increase the license rate with [redacted] License Term, Appx8052, which is beyond the requirements to qualify for Section 45 credits and supports that mercury control performance has a distinct market value apart from those credits. So, as a factual matter, it is unclear what tax credit component of these licenses CERT would have had Mr. Green apportion out to rely on it. To the extent any agreement Mr. Green presented did have a tax credit rate, he relied only on the per-ton rate. CERT has not established any additional apportionment was necessary.

E. The damages verdict is not against the great weight of the evidence.

CERT also insists that the damages verdict is against the great weight of the evidence. But the Alistar-ME2C license, for example, as discussed above sits at the same rate as the jury's verdict and involved

extremely similar circumstances. It is highly relevant evidence, a fact that even CERT recognized when seeking and obtaining a continuance. The district court did not abuse its discretion by rejecting CERT's great-weight-of-the-evidence challenge.

CONCLUSION

ME2C respectfully requests that the Court affirm the verdict.

Dated: October 22, 2026

Respectfully submitted,

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

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 26-1403

Short Case Caption: Birchtech Corp. v. Arthur J. Gallagher & Co.

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Name: Aisha Mahmood Haley

FORM 31. Certificate of Confidential Material **Form 31**
July 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF CONFIDENTIAL MATERIAL

Case Number: 26-1403

Short Case Caption: Birchtech Corp. v. Arthur J. Gallagher & Co.

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