

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

MIDWEST ENERGY EMISSIONS)	
CORP. and MES INC.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 19-1334-CJB
)	
ARTHUR J. GALLAGHER & CO., et al.,)	
)	
Defendants.)	

James M. Lennon, DEVLIN LAW FIRM, Wilmington, DE; Bradley W. Caldwell, Jason D. Cassady, John Austin Curry, Justin T. Nemunaitis, Daniel R. Pearson, Adrienne R. Dellinger, CALDWELL CASSADY CURRY P.C., Dallas, TX; Attorneys for Plaintiffs.

Kenneth L. Dorsney and Cortlan S. Hitch, MORRIS JAMES LLP, Wilmington, DE; Jeff Dyess, Paul Sykes and Benn Wilson, BRADLEY ARANT BOULT CUMMINGS LLP, Birmingham, AL; Jessica Zurlo, BRADLEY ARANT BOULT CUMMINGS LLP, Washington, D.C., Attorneys for Defendants CERT Operations IV LLC, CERT Operations V LLC, CERT Operations RCB LLC, Senescence Energy Products, LLC, Rutledge Products, LLC, Springhill Resources LLC, Buffington Partners LLC, Bascobert (A) Holdings LLC, Larkwood Energy LLC, Cottbus Associates LLC, CERT Operations II LLC, and Marquis Industrial Company, LLC.

Jack B. Blumenfeld, Brian P. Egan and Anthony D. Raucci, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, DE; Richard W. Mark, Joseph Evall and Paul J. Kremer, GIBSON, DUNN & CRUTCHER LLP, New York, NY; David Glandorf, GIBSON, DUNN & CRUTCHER LLP, Denver, CO; Attorneys for Defendants AJG Iowa Refined Coal LLC, Arbor Fuels Company, LLC, Belle River Fuels Company, LLC, Canadys Refined Coal, LLC, Chouteau Fuels Company, LLC, Coronado Refined Coal, LLC, DTE Energy Resources, LLC, Erie Fuels Company, LLC, George Neal North Refined Coal, LLC, George Neal Refined Coal, LLC, Hastings Refined Coal, LLC, Huron Fuels Company, LLC, Jasper Fuels Company, LLC, Jefferies Refined Coal, LLC, Joppa Refined Coal LLC, Louisa Refined Coal, LLC, Newton Refined Coal, LLC, Portage Fuels Company, LLC, Superior Fuels Company 1, LLC, Walter Scott Refined Coal LLC, and Williams Refined Coal, LLC.

Nicole A. DiSalvo, Jessica R. Kunz and Daniel S. Atlas, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, DE; Douglas R. Nemecek and Leslie A. Demers, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, New York, NY; Attorneys for Defendant Alistar Enterprises, LLC.

MEMORANDUM OPINION

November 8, 2023
Wilmington, Delaware

Christopher J. Burke
BURKE, United States Magistrate Judge

This is a patent action filed by Plaintiffs Midwest Energy Emissions Corp. (“Midwest Energy”) and MES Inc. (“MES” and collectively with Midwest Energy, “Plaintiffs” or “ME2C”) against 34 Defendants, in which Plaintiffs assert five patents-in-suit. The Court has set out a listing of all of the parties and asserted patents in its October 16, 2023 Memorandum Opinion (“October 16, 2023 MO”), (D.I. 586 at 2); it incorporates that discussion by reference here. Presently pending before the Court is Defendants’ motion for summary judgment No. 7: no inducement under 35 U.S.C. § 271(b) (“Motion”). (D.I. 569) ME2C opposes the Motion. For the reasons set forth below, the Motion is DENIED.¹

I. BACKGROUND

ME2C commenced this action on July 17, 2019. (D.I. 1) Defendants filed the instant Motion on March 23, 2023. (D.I. 527; *see also* D.I. 569) The Motion was fully briefed as of April 18, 2023. (D.I. 555) A trial is set to begin on November 13, 2023. (D.I. 507)

As the Court writes primarily for the parties here, any facts relevant to this Memorandum Opinion will be discussed in Section III below.

II. STANDARD OF REVIEW

The Court incorporates by reference the standard of review for summary judgment motions, which it set out in the October 16, 2023 MO, (D.I. 586 at 3-4), and the summary

¹ The parties have jointly consented to the Court’s jurisdiction to conduct all proceedings in this case, including trial, the entry of final judgment and all post-trial proceedings. (D.I. 398)

judgment-related legal standards specifically relating to claims of patent infringement, which it set out in an October 17, 2023 Memorandum Opinion, (D.I. 588 at 3). Further relevant legal standards will be discussed below in Section III.

III. DISCUSSION

In this case, ME2C asserts that all Defendants indirectly infringed certain method claims of the asserted patents by manufacturing and selling refined coal to non-party power plants. (D.I. 406 at ¶¶ 67, 208, 217; D.I. 546, ex. A at 123, at ¶ 99) The non-party power plants are alleged to add activated carbon to the process in which refined coal is combusted, in a manner that amounts to direct infringement of the patents. (D.I. 406 at ¶¶ 208, 217; D.I. 546, ex. A at 125, at ¶ 102; D.I. 546, ex. A at 127, at ¶ 108)

The Motion here is brought by all Defendants. It seeks summary judgment with respect to all of the asserted claims of all asserted patents regarding Plaintiffs' induced infringement allegations against them, made pursuant to 35 U.S.C. § 271(b) ("Section 271(b)"). (D.I. 573 at 2)

Section 271(b) states that "[w]henever *actively induces* infringement of a patent shall be liable as an infringer." 35 U.S.C. § 271(b) (emphasis added). Inducement requires a showing that the alleged inducer knew of the patent, knowingly induced the infringing acts, and possessed a specific intent to encourage another's infringement of the patent. *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1328 (Fed. Cir. 2009). With regard to the active inducement requirement, the United States Court of Appeals for the Federal Circuit has explained that a patentee must plead and prove that the accused inducer "took an affirmative act to encourage [direct] infringement[.]" *Microsoft Corp. v. DataTern, Inc.*, 755 F.3d 899, 904 (Fed. Cir. 2014); *see also Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 760 (2011) ("The addition of the

adverb ‘actively’ suggests that the inducement must involve the taking of affirmative steps to bring about the desired result[.]”), which in turn “led to [such] infringement[.]” *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 843 F.3d 1315, 1331 (Fed. Cir. 2016) (citation omitted). The Federal Circuit has explained that while this “affirmative act” requirement “has connotations of active steps knowingly taken . . . the term is [otherwise] as broad as the range of actions by which one in fact causes, or urges, or encourages, or aids another to infringe a patent[.]” *Tegal Corp. v. Tokyo Electron Co.*, 248 F.3d 1376, 1378-79 (Fed. Cir. 2001) (citations and emphasis omitted). Indeed, to “induce” can mean, *inter alia*, “[t]o lead on; to influence; to prevail on; to move by persuasion or influence.” *Glob.-Tech Appliances, Inc.*, 563 U.S. at 760 (internal quotation marks and citation omitted). The induced infringer must encourage the performance of every single step in the patented method. *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1219 (Fed. Cir. 2014). And with regard to the specific intent requirement, such intent can be shown by circumstantial evidence, but the mere knowledge of possible infringement will not suffice. *Vita-Mix Corp.*, 581 F.3d at 1328.

With their Motion, Defendants press three arguments. The Court will address them in turn.

Defendants’ first argument is that Defendants could not have acted to cause any power plant (the alleged direct infringers) to perform the activated carbon step of the claimed methods. (D.I. 528 at 25) This is purportedly because “the record shows that the accused power plants made their own decisions about how to meet mercury emissions regulations.” (*Id.*) In support of that proposition, Defendants cited to the deposition testimony of only two power plant representatives. (*Id.* at 26) In one case, the representative states that his power plant coordinated with refined coal providers only on the amount of bromine additive added to the coal and not on

the amount of activated carbon used in the combustion process. (D.I. 533, ex. 16 at 22-23) The other representative (who appears to work for a power plant no longer at issue with regard to the induced infringement claims here)² states that the activated carbon equipment was installed at his plant to help comply with certain mercury emissions limits, and that it was not often used. (*Id.*, ex. 17 at 11-12)

As an initial matter, what representatives of two of the many power plants at issue in this case had to say on this matter falls far short of a demonstration of why *all* implicated power plants chose to utilize activated carbon. But assume that at the time they first started receiving refined coal from a Defendant, each power plant at issue had made an independent decision that it was in their interest to use activated carbon when combusting the coal (in order to satisfy certain mercury emissions regulations, or for other reasons). Defendants cite to 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. Even if one is predisposed to do something, one might still be further spurred on to do so by the act of another.

On this “spurred on” point, Defendants make one last, one-sentence argument (in support of which they cite to or refer to no evidence of record): that there is “not a shred of evidence that the use of Refined Coal spurred a power plant to install or use” activated carbon. (D.I. 528 at 26) As the Court noted in its October 19, 2023 Memorandum Order and reiterated recently in its November 6, 2023 Oral Order, a party bringing a summary judgment motion may not simply

² The Court notes that this representative appears to be discussing the Cope Station power plant. (D.I. 533, ex. 17 at 11-12) The former named Defendant that supplied this plant with refined coal was Canadys Refined Coal, LLC (“Canadys”), and it appears that Plaintiffs are no longer pursuing claims against Canadys. (*See* D.I. 528 at ix; D.I. 598 at 1 n.2)

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.