

**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.,	)	<b>REDACTED VERSION</b>
	)	
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**

October 16, 2023  
Wilmington, Delaware

*Christopher J. Burke*  
**BURKE, United States Magistrate Judge**

In this patent action filed by Plaintiffs Midwest Energy Emissions Corp. (“Midwest Energy”) and MES Inc. (“MES” and collectively with Midwest Energy, “Plaintiffs” or “ME2C”) against Defendants Canadys Refined Coal, LLC; Coronado Refined Coal, LLC; George Neal Refined Coal, LLC; George Neal North Refined Coal, LLC; Hastings Refined Coal, LLC; Jefferies Refined Coal, LLC; Joppa Refined Coal, LLC; Louisa Refined Coal, LLC; Walter Scott Refined Coal, LLC and Williams Refined Coal, LLC (the “AJG RC Defendants”); Arbor Fuels Company LLC; Superior Fuels Company LLC; Belle River Fuels Company, LLC; Huron Fuels Company, LLC; Chouteau Fuels Company, LLC; Portage Fuels Company LLC; Erie Fuels Company, LLC; Jasper Fuels Company LLC and Newton RC LLC (the “DTE RC Defendants”); Bascobert (A) Holdings, LLC; Buffington Partners, LLC; Cottbus Associates, LLC; Larkwood Energy, LLC; Marquis Industrial Company, LLC; Rutledge Products, LLC; Senescence Energy Products, LLC and Springhill Resources, LLC (the “CERT RC Defendants”); CERT Operations II LLC; CERT Operations IV LLC; CERT Operations V LLC; and CERT Operations RCB LLC (the “CERT Operations Companies Defendants”); Alistar Enterprises, LLC; AJG Iowa Refined Coal LLC and DTE Energy Resources, LLC (“collectively, “Defendants”), ME2C alleges infringement of United States Patent Nos. 8,168,147 (the “147 patent”), 10,343,114 (the “114 patent”), 10,589,225 (the “225 patent”), 10,596,517 (the “517 patent”) and 10,668,430 (the “430 patent” and collectively with the other patents, the “asserted patents”). (D.I. 406 at ¶¶ 40-

44) Presently pending before the Court is Defendants’ motion for summary judgment No. 1: non-infringement based on licensed use of process (the “Motion”). (D.I. 563) ME2C opposes the Motion. For the reasons set forth below, the Motion is DENIED.<sup>1</sup>

## 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. 563) The Motion was fully briefed as of April 18, 2023. (D.I. 555)

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

## II. STANDARD OF REVIEW

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.10 (1986). If the moving party has sufficiently demonstrated the absence of such a dispute, the nonmovant must then “come forward with specific facts showing that there is a genuine issue for trial.” *Id.* at 587 (internal quotation marks, citation and emphasis omitted). If the nonmoving party fails to make a sufficient showing in this regard, then the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). During this process, the Court will “draw all reasonable inferences in favor of the nonmoving party, and it

---

<sup>1</sup> 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)

may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

However, in order to defeat a motion for summary judgment, the nonmoving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. The “mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Facts that could alter the outcome are “material,” and a factual dispute is “genuine,” only where “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248. “If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted.” *Id.* at 249-50 (internal citations omitted).

A party asserting that a fact cannot be—or, alternatively, asserting that a fact is—genuinely disputed must support the assertion either by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;” or by “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(A) & (B).

### III. DISCUSSION

The asserted claims of the asserted patents relate to methods for reducing mercury emissions from coal-fired power plants (“power plants”) with the use of bromine-enhanced coal (or “refined coal”) and a sorbent such as activated carbon. (D.I. 533, exs. 1-5; *see also* D.I. 546,

ex. A at ¶¶ 49, 70) ME2C alleges that Defendants induced and contributed to infringement of 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 ¶ 99) The 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 ¶¶ 102, 108)

The original Complaint in this action included as Defendants certain power plant operators. (See D.I. 1 at ¶¶ 116, 132, 138, 148-49) ME2C subsequently granted licenses to four of the power plant operators—Vistra (the “Vistra license”), NRG (the “NRG license”), Talen and AECI, (D.I. 533, exs. 7-10)—and dismissed these entities (and related entities) from the case, (D.I. 167; D.I. 249; D.I. 266; D.I. 267). The licenses to Vistra and NRG are the licenses relevant to the instant Motion.<sup>2</sup> The effective date of the Vistra license is July 30, 2020, and the effective date of the NRG license is January 5, 2021. (D.I. 533, exs. 7, 8)

To prevail under their theory of indirect infringement, Plaintiffs must prove that Defendants’ actions led to direct infringement of the asserted patents. *See, e.g., Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1274 (Fed. Cir. 2004). Direct infringement requires the use of a patented invention “without authority.” 35 U.S.C. § 271(a).

With their Motion, as an initial matter, all Defendants moved for summary judgment with respect to any sale or provision of refined coal to a licensed power plant after the effective date of the relevant license. (D.I. 527 at ¶ 1; 555 at 1; D.I. 573 at 1) Here, Defendants’ position is that because ME2C has authorized the Vistra and NRG power plants to use its patents pursuant

---

<sup>2</sup> ME2C is not pursuing any claim against any current Defendant for providing refined coal to the Talen-related and AECI-related power plants. (D.I. 545 at 5 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.