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February 16, 2024

VIA CM/ECF

The Honorable Christopher J. Burke
United States District Court
for the District of Delaware
J. Caleb Boggs Federal Building
844 N. King Street
Unit 28, Room 2325
Wilmington, DE 19801-3555

Re: *Midwest Energy Emissions Corp., et al. v. Arthur J. Gallagher
& Co., et al.*, C.A. No. 1:19-cv-01334-CJB

Dear Judge Burke:

Pursuant to the Court's February 14, 2024 order, the parties provide a list of differences between the parties' proposed verdict forms (Exs. 23a and 23b to the Pretrial Order):

I. Infringement Question(s)

Number of questions: ME2C's form includes one question for both inducement and contributory infringement for both patents. Defendants' form sets forth an inducement question and a contributory question for the '114 patent and then for the '517 patent. Within each question, Defendants have a separate blank for each claim, while ME2C's form proposes a patent-by-patent question. Defendants use the term "is liable for **actively inducing**" with bold and underline and "is liable for **contributory** infringement," while ME2C's form asks whether Defendants "induced **AND/OR** contributed to infringement." Defendants form also repeats the question in a gray table before providing a table for the jury to mark infringed claims on a Defendant basis.

Form of answer: ME2C's form includes a blank for the jury to write in whether their infringement finding applies to all Defendants (regardless of whether it is a yes or no). Defendants' form includes a blank for writing "**NO**" for all Defendants. ME2C's form asks the jury to use checkmarks or to leave answers blank, whereas Defendants' form asks the jury to write "YES" or "NO."

Party order: Both forms then provide blanks for the jury to indicate yes or no for infringement on a per Defendant basis. ME2C's listing groups relevant Defendants together (*see* ME2C's damages question). Defendants' listing of Defendants is in alphabetical order. For Defendants' contributory infringement questions (Questions 2(a) and 2(b)), Defendants include a subset of parties.

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II. Invalidity Question

Instructions: ME2C's form instructs the jury to answer the invalidity question "**ONLY as to any Asserted Claim that you have found in Question No. 1 to be infringed,**" while Defendants' question has no similar instruction.

Form of answer: ME2C's form asks the jury to answer "YES or NO" on a claim-by-claim basis with a blank for "Yes" and a blank for "No." Defendants' form asks the jury to use check marks to mark invalidity and includes just one blank: "Invalid: ___," which it instructs the jury to leave empty if the jury does not find that Defendants have proven that the claim is invalid.

III. License Question

Express License Defense: Defendants' form includes a question asking whether "Defendants [have] proven by a preponderance of the evidence that **Vistra**'s license agreement with ME2C authorized the Vistra power plant operator at Coletto Creek to use ME2C's patented methods prior to July 30, 2020." Defendants' form also includes a second, analogous question regarding the NRG license. ME2C's form has no analogous question.

Additional License Instructions: ME2C's form does not mention any license, while Defendants' form asks the jury to answer the willfulness and damages questions (within each individual question) only if the jury does not find an express license.

IV. Willfulness Question

Instructions: ME2C's form instructs the jury to answer the willfulness question "**ONLY if [the jury] found infringement in Question No. 1,**" while Defendants' form instructs the jury to "**STOP. Answer Questions 6 and 7 ONLY if you have found using questions 1–5 that at least one Defendant has infringed at least one valid claim and that such Defendant's actions were not licensed under an express license.**"

Format: ME2C's willfulness question is formatted like its infringement question and provides the jury first with a blank to write "YES" or "NO" if their answer is the same for all Defendants. If not, it provides a space for the jury to fill in checkmarks on a per-Defendant basis (with Defendants listed the same order as the infringement question). ME2C's instruction states that a check mark indicates a finding that a Defendant "Infringed," but does not state "Willfully Infringed" in that portion of the instruction. Defendants' form provides no blank to fill out if the answer is the same for all Defendants and includes a chart that lists the Defendants in alphabetical order. Defendants repeat the willfulness question within the chart with blanks for each defendant. Defendants also underline and bold "**willful**" and "**willfully infringed**" in their form.

Dates: ME2C's form does not include any dates for willfulness. Defendants' form asks the jury to determine willfulness "after June 29, 2020 (or, as to Rutledge Products LLC and Senescence Energy Products LLC only, after September 24, 2020)."

V. Damages Question

Instructions: ME2C's form instructs the jury to answer the damages question "**ONLY as to any Asserted Claim that [the jury] found in Question Nos. 1 and 2 to be BOTH infringed AND not invalid.**" Defendants' form instructs the jury to "**STOP**" as explained above for the willfulness question. Defendants' form also includes language in Question 7 that instructs the jury to answer "ONLY" if the jury found infringement of a valid claim without an express license.

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Date: ME2C’s question does not include a blank for the jury to fill any dates. Defendants’ form includes a chart asking the jury to fill in the Date of First Infringement for each defendant.

Format: ME2C’s form gives the jury the option of assessing damages by either circling “ME2C’s Proposed Damages Calculation” or by filling in an amount for each defendant. ME2C groups together Defendants for which damages would be assessed on a joint and several basis (*i.e.*, CERT Operations RCB is accused for the same tonnage sold by Bascobert (A) Holdings LLC, Larkwood Energy LLC, Cottbus Associates LLC, Senescence Energy Products LLC, and Rutledge Products LLC, so those are listed together in a box). ME2C’s instruction does not inform the jury why Defendants are separated into different groups. Defendants’ form includes a chart with a blank for “Amount” for each Defendant, listed in alphabetical order.

Respectfully,

/s/ James M. Lennon

James M. Lennon (No. 4570)

cc: Clerk of the Court (via CM/ECF)
Counsel of Record (via CM/ECF)