IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

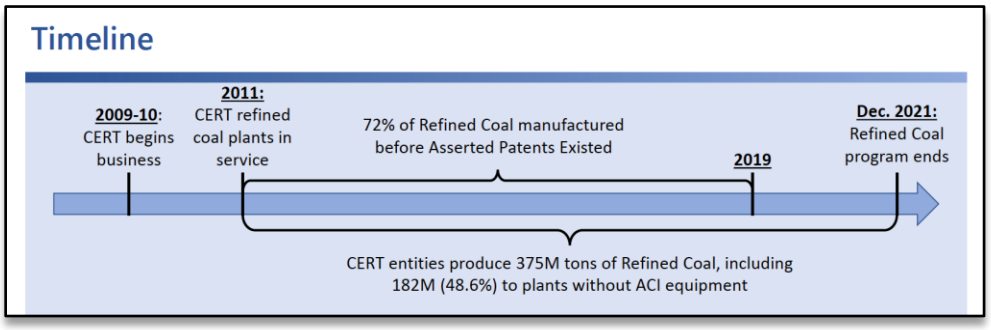
PLAINTIFFS' MOTION FOR CURATIVE INSTRUCTION BASED ON DEFENDANTS' IMPROPER ARGUMENTS MADE TO THE JURY CONCERNING INDIRECT INFRINGEMENT

Plaintiffs would like to try this case cleanly and for both sides to play by the rules as set forth in the relevant legal tests and this Court's orders. On the other hand, counsel for Defendants presented highly prejudicial evidence during his opening statement that this Court has already deemed irrelevant to the proper legal test for contributory infringement. Counsel for Defendants then urged the jury to apply a legally erroneous test for contributory infringement using this prejudicial and irrelevant evidence.

There can be no excuse for this in view of the parties' very recent pre-trial arguments and the Court's very recent pre-trial rulings *on this precise issue*. At the pre-trial hearing ME2C expressed concern that Defendants may mislead and confuse the jury by introducing legally improper evidence of irrelevant refined coal—*e.g.*, refined coal burned prior to the issuance of the patents-in-suit, or refined coal burned at plants which do not use activated carbon—to fit inside a legally wrong framework for analyzing "substantial non-infringing uses" under 35 U.S.C. § 271(c). The parties submitted their competing proposals on this issue. *See* D.I. 674. ("The different proposals reflect one substantive dispute between the parties: what is the scope of the

refined coal the jury must evaluate for contributory infringement? ME2C's position is that it is the specific accused refined coal at issue in this case [i.e., "the refined coal supplied to that power plant"]. In contrast, Defendants that it is all refined coal—even coal prepared for non-accused power plants that burn different ranks and categories of coal and refined coal sold before the patents issued."). ME2C asked that this issue be resolved pre-trial to ensure no juror confusion and prejudice. *Id.* The Court agreed, and did in fact resolve the issue—in favor of ME2C. *See* D.I. 679 ("[T]he Court agrees with Plaintiffs that in assessing contributory infringement in this case, the proper focus is on 'whether ***the accused refined coal***, as it was ***sold and delivered by Defendants to their power plant customers***, could practically be used for purposes other than infringement.") (emphasis added).

Counsel for CERT ignored the Court's order in its opening statement. This was not an inadvertent argument or an isolated issue. This entailed repeated presentation of both visual and verbal argument that lasted nearly ninety minutes. For example, Defendants presented the following slide and data that calculated the refined coal that this Court already rejected as inapplicable to the proper legal inquiry under 35 U.S.C. 271(c):



Location/Accused Power Plant		2011	2012	2013	2014	2015	2016	2017	2018	To 7.8.19	From 7.9.19	2020	2021	Total Refined Coal	Refined Coal Without ACI	%	Refined Coal Before Patents	%
Labadie	Larkwood/CERT RCB			0	7,645,569	8,995,946	*2,622,257*	*0*	*943,540*	*4,383,690*	4,077,552	9,225,450	8,631,171	**46,525,175**	16,641,515	35.8%	24,591,002	52.9%
Rush Island	Buffington/CERT V	236,191		4,733,379	4,742,409	*4,358,619*	*4,013,131*	*5,518,626*	*4,725,917*	*1,701,985*	1,800,320	4,593,588	4,681,993	**41,106,158**	9,711,979	23.6%	30,030,257	73.1%
Antelope Valley	Marquis/CERT II			2,207,977	4,759,859	*5,526,873*	*4,973,766*	*5,233,936*	*5,402,594*	*2,526,052*	2,627,154	4,816,322	4,167,405	**42,241,938**	6,967,836	16.5%	30,631,057	72.5%
Laramie River	Cottbus/CERT RCB			243,290	6,056,265	*6,076,803*	*5,956,447*	*5,997,353*	*6,228,394*	*3,029,445*	2,291,158	4,865,740	4,509,590	**45,254,485**	6,299,555	13.9%	33,587,997	74.2%
Big Cajun II	Springhill/CERT IV	190,252	5,705,020	5,026,765	4,260,063	*3,857,744*	*2,903,660*	*990,558*	*0*	*0*	214,675	280,975	2,257,672	**25,687,384**	15,182,100	59.1%	22,934,062	89.3%
Limestone	Rutledge/CERT RCB	116,627	6,515,310	2,576,956	6,787,910	5,518,518	*1,904,213*	*0*	*784,884*	*2,877,923*	2,722,548	3,869,084	3,780,615	**37,454,588**	21,515,321	57.4%	27,082,341	72.3%
WA Parish	Senescence/CERT RCB	303,098	4,525,230	3,990,505	10,231,504	9,689,750	*1,250,647*	*0*	*1,209,060*	*4,586,962*	4,067,840	6,890,619	8,310,888	**55,056,103**	28,740,087	52.2%	35,786,756	65.0%
Coleto Creek	Bascobert (A)/CERT RCB									*0*	358,333	1,831,574	1,583,914	**3,773,821**	0	0.0%	0	0.0%
Subtotal														**297,099,653**	**105,058,393**	35.4%	**204,643,473**	68.9%
Dolet Hills	Larkwood/CERT Ops	375,749	2,744,936											**3,120,685**	3,120,685	100.0%	3,120,685	100.0%
Marshall	Bascobert/CERT II	31,216	38,470	616,034	3,320,895	*910,874*								**4,917,489**	4,006,615	81.5%	4,917,489	100.0%
Chesterfield	Shermont/CERT Ops	56,635	631,677	786,381	973,374	1,195,505	1,073,606	135,808	-	-		216,029	344,985	**5,414,000**	5,414,000	100.0%	4,852,986	89.6%
Mount Storm	Powder St/CERT Ops	1,211,002	1,902,987	1,715,979	3,484,191	3,745,675	3,526,110	2,803,743	2,337,895	889,341	1,061,524	2,017,366	1,627,728	**26,323,541**	26,323,541	100.0%	21,616,923	82.1%
Cayuga	Cottbus/CERT II	102,132												**102,132**	102,132	100.0%	102,132	100.0%
Gibson	Marquis/CERT II	41,268	86,430											**127,698**	127,698	100.0%	127,698	100.0%
Intermountain Power Project	Deogun/CERT III	641,114	4,389,490	2,878,845	5,324,260	5,159,670	3,793,510	3,673,808	3,576,590	1,531,450	1,651,680	2,859,610	2,811,360	**38,291,387**	38,291,387	100.0%	30,968,737	80.9%
Subtotal														**78,296,932**	**77,386,058**	**98.8%**	**65,706,649**	**83.9%**
TOTAL														**375,396,585**	**182,444,451**	**48.6%**	**270,350,123**	**72.0%**

Counsel for Defendants then presented numerous, repeated arguments with reference to this material—calling upon the jury to use this evidence in applying the already-rejected legally erroneous contributory infringement framework. For example:

Argument that refined coal sold prior to the patent issuance was a substantial non-infringing use:

> We sold refined coal at the very same formulation, a formulation to reduce mercury and NOx without activated carbon that was set years before these patents even existed, and again talking about substantial uses, substantial non-infringing uses.

See 2/26/2024 Trial Tr. (Rough) at 182:1-6.

> So looking at that, assuming the top set of plants was using activated carbon the whole time and they weren't -- I'll get to that in a minute -- we confirmed from the get-go that the entire time of the program since 2011, every single day for eight and a half years we've been making and selling refined coal to power plants that weren't using activated carbon.

See 2/26/2024 Trial Tr. (Rough) at 199:10-24.

> And as you'll see, as the evidence will show, 72 percent of our refined coal was manufactured before these asserted patents even existed. The one that we're sued under, the first one, the '114, it issued in July 2019, and they filed the lawsuit about a week or ten days later, in July 2019.

See 2/26/2024 Trial Tr. (Rough) at 175:10-15.

Argument that refined coal sold to plants who don't use activated carbon was a substantial non-infringing use:

> there's about 1.6 million before 2.8 million in 2020 and 2.8 million in 2021. That's all refined coal, our refined coal that we were selling to a power plant that's burning it without activated carbon, 7500 tons a day. Remember, one of the issues is did we, you know, believe there was a substantial amount non-infringing uses and did we know and

See 2/26/2024 Trial Tr. (Rough) at 200:8-12.

> without activated carbon, 7500 tons a day. Remember, one of the issues is did we, you know, believe there was a substantial amount non-infringing uses and did we know and believe our coal was specially made and adapted to be used with refined carbon or activated carbon. And so that's 15 million tons -- or 15 million pounds of refined coal every day this lawsuit is going on, burning without activated carbon. And the evidence will show the CERT companies that

See 2/26/2024 Trial Tr. (Rough) at 200:12-17.

> So thank you for your time. Again, you will be hearing "specially made and adapted" and "substantial non-infringing uses." I think, as you've seen, our people reasonably believed, having sold tens of millions of tons of, refined coal, that was never combusted with activated carbon while the suit was going on by the defendant companies had reason to believe they did not infringe and no

See 2/26/2024 Trial Tr. (Rough) at 219:12-17.

> And so while the lawsuit is going on, we have a defendant company that is making, you know, things work out to 7500 tons a day of coal without any activated carbon at all. And that's what we believe. It's not just what we believe, but what we knew absolutely, and there's no

> contrary evidence. And that's why we believe there was substantial non-infringing uses of refined coal and we didn't infringe.

See 2/26/2024 Trial Tr. (Rough) at 206:20-207:2.

The Court had already clarified what is the "material part of the invention" referenced in Section 271(c) that is at issue in this case. *See* D.I. 679. That clarification excluded from consideration the very materials that Defendants presented to the jury in its opening statements. By presenting this improper evidence and inviting the jury to apply the wrong legal test for contributory infringement, Defendants have now created a substantial risk of juror confusion as well as imposed severe prejudice on ME2C. The appropriate response is for the Court to issue a curative instruction to the jury to ensure Defendants do not take this infringement case further off the rails.

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