IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

CERT DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR CURATIVE INSTRUCTION

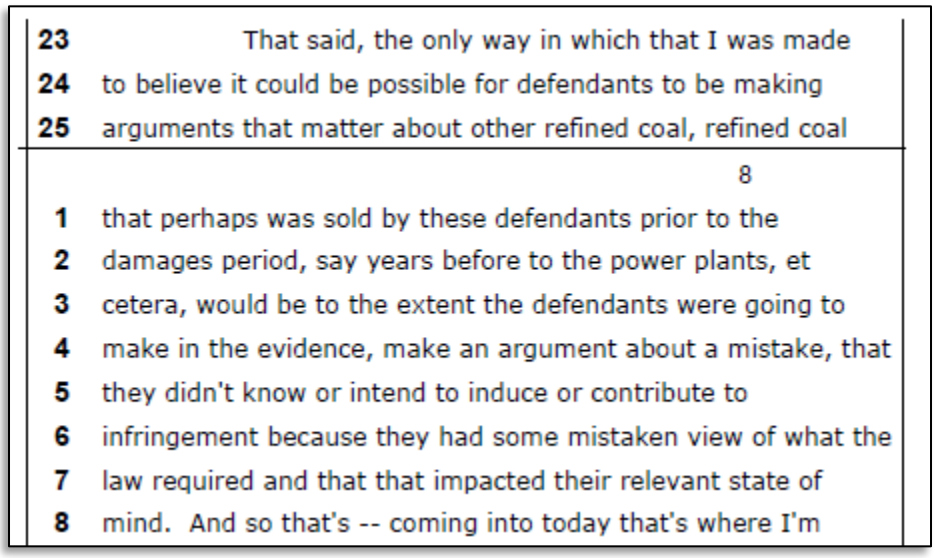
Defendants are trying this case cleanly. And Defendant would also prefer that both sides play by the rules set forth in the Court's orders. Defendants' opening statement followed the repeated instructions that the Court has given on the standard for contributory infringement and the arguments that Defendants can make. Plaintiffs, on the other hand, ignored the Joint Pretrial Order's dispute resolution process and filed at the break of dawn, without notice, a motion to relitigate arguments the Court just addressed (for the third time) about 22 hours earlier.

The Joint Pretrial Order sets out specific procedures with deadlines each evening for identifying disputes with respect to witnesses, demonstratives, and deposition designations to bring order to what otherwise would surely devolve into an unmanageable burden on the Court in the hectic week of trial. *E.g.*, D.I. 669 ¶¶ 32, 44, 47, 49, 79. If the parties fail to reach agreement on an issue, the Order contemplates notifying the Court of that failure. *Id.* ¶ 79. At both pretrial conferences, the Court noted these procedures, and the Court has made itself available to the parties at 8:30 a.m. to attempt to resolve disputes before the trial day begins. D.I. 676 at 4:20-5:3; D.I. 610 at 18:8-23. Plaintiffs have availed themselves of this process, including to raise other separate issues with argument presented during the preceding trial day, and subsequently brought those issues to the Court's attention with an email at 6:34 a.m. In this instance, however, Plaintiffs ignored that procedure, and Defendants received their first notice of this motion standing on the courthouse steps. Of course, setting aside the failure to follow the Pretrial Order's procedure, Plaintiffs' actions also violated this Court's requirement to meet and confer on non-dispositive issues. D. Del. LR 7.1.1. Plaintiffs' failure to respect the parties' and the Court's process for orderly disposition of disputes in this hectic time should not be rewarded with the issuance of a prejudicial curative instruction.

Furthermore, any complaint regarding the substance of Defendants' opening statement is

waived. Plaintiffs were acutely aware of and attuned to the issue about which they now complain. They raised objections regarding the slides excerpted in their motion before the trial day began. As detailed below, the Court explained the permissible use of that information and allowed the slides. If Plaintiffs believed that Defendants strayed beyond permissible limits—at least seven times according to their motion—they had ample opportunity to object. They did not.

Procedure aside, Plaintiffs' complaints are without merit. This is not a new issue, nor is it a stale one. Before the trial day began, the Court reiterated its position that evidence regarding refined coal burned prior to the issuance of the patents in suit or at plants that do not use activated carbon could be relevant to the Defendants' state of mind:



That said, the only way in which that I was made to believe it could be possible for defendants to be making arguments that matter about other refined coal, refined coal

8

that perhaps was sold by these defendants prior to the damages period, say years before to the power plants, et cetera, would be to the extent the defendants were going to make in the evidence, make an argument about a mistake, that they didn't know or intend to induce or contribute to infringement because they had some mistaken view of what the law required and that that impacted their relevant state of mind. And so that's -- coming into today that's where I'm

2/26/2024 Trial Tr. (Rough) at 7:23-8:8. After hearing further argument on the issue, the Court restated that arguments regarding Defendants' state of mind and evidence relevant to those beliefs were proper and would be allowed:

THE COURT: I got you. Let me say this because I want to make sure I try to resolve as many as I can. Based on what I heard from both sides it strikes that the arguments that defendants say they're going to make with regard to what I'll call other refined coal are asserted to go to the mistake defense or not a defense, this argument that they don't infringe, contributorily infringe, because they made a mistake about the law requires but they didn't think they did. And essentially the arguments go to I said what the refined coal that counts is for purpose of the elements, but it's asserted it can't be an argument that the defendants believe other refined coal counted or -- in some way for purposes of knowing that you were doing something wrong. I think that's an argument defendants can make. I

2/26/2024 Trial Tr. (Rough) at 17:4-17. This was not the first time the Court made its position on this issue clear. In resolving the parties' remaining disputes regarding the jury instruction for contributory infringement, while the Court adopted Plaintiffs' construction with respect to the scope of the material or material part of the invention referenced in § 271(c), the Court also stated its intention to adopt Defendants' language regarding a reasonable belief of non-infringement. D.I. 679. The Court specifically noted that it had "previously explained that a reasonable but mistaken belief that one does not infringe is a viable defense to indirect infringement," and that "Plaintiffs have not explained why this is incorrect." *Id.* And indeed, the Court had already laid out its reasoning on that issue in response to Plaintiffs' MIL No. 1 last November. D.I. 619. The Court's consistent, repeated rulings are wholly in accord with Supreme Court and Federal Circuit precedent. *See Commil USA, LLC v. Cisco Systems, Inc.*, 575 U.S. 632, 642 (2015); *Kinetic Concepts, Inc. v. Blue Sky Medical Group, Inc.*, 554 F.3d 1010, 1024-25 (2009); *see also* D.I. 674 at 5.

None of the statements identified by Plaintiffs run afoul of the Court's instructions. To the

extent Plaintiffs still contend Defendants' slides are improper, D.I. 686 at 2-3, the Court has already found otherwise, 2/26/2024 Trial Tr. (Rough) at 18:5-7 ("[M]y decision is I don't have any reason to strike or preclude any evidence with regard to this issue that I've seen so far."). Plaintiffs' challenges to specific statements made in Defendants' opening statement either elide the context in which the statement was made or outright ignore the context present in the challenged statements.

In each of the following three instances, D.I. 686 at 3-4, the surrounding context links the statement to Defendants' knowledge and beliefs.

For 182:1-6:

> We knew when this lawsuit was filed we've got an understanding what the claims were, that we had sold and were continuing to sell thousands and actually tens of millions of tons of refined coal to power plants that weren't using activated carbon at all.
>
> So how could our product be specially made to be used with it, and how could there be no uses except activated carbon? It did not make any sense to us.

2/26/2024 Trial Tr. (Rough) at 182:7-14.

For 199:10-24:

> You'd think that if it had been our specific intent to cause a power plant to infringe by using activated carbon that, we'd know about it, and we would have to ask them but we did.

2/26/2024 Trial Tr. (Rough) at 199:5-8.

For 175:10-15:

> Because they were selling to plants that did not use activated carbon all the way through the lawsuit, and

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