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.	)	

CERT DEFENDANTS' MOTION TO DISMISS PLAINTIFF MES INC. AND TO ALTER OR AMEND JUDGMENTS (D.I. 697-708)

The CERT Defendants move under Federal Rule of Civil Procedure 12(b)(1) to dismiss Plaintiff MES Inc. (MES) and under Federal Rule of Civil Procedure 59(e) for the Court to alter or amend the judgments entered against each individual defendant (D.I. 697-708) to remove MES from those judgments.

MES lacks constitutional standing and must be dismissed from this case immediately for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").[1] To satisfy the constitutional standing requirements of Article III, a plaintiff must allege and show a concrete and particularized injury that is actual and imminent. That injury must be fairly traced to the defendant and likely redressed by a judgment in its favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In a case for patent infringement, "those who possess

[1] "A challenge to constitutional standing goes to the Court's subject matter jurisdiction and may be raised at any time." *Cirba Inc. v. VMWARE, Inc.*, No. CV 19-742-LPS, 2020 WL 7489765, at *4 n.4 (D. Del. Dec. 21, 2020).

exclusionary rights in a patent suffer an injury when their rights are infringed." *Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d 1225, 1234 (Fed. Cir. 2019).

MES has no such exclusionary rights in the remaining asserted patents or any right to recover damages for alleged infringement in the time period at issue in this case. The Court previously declined to dismiss MES on the basis that "MES *could* hold exclusive rights to obtain patent infringement damages as to [the 147 patent] for a portion of the relevant time period." D.I. 279 at 16. The facts, however, have changed. MES did not assert a claim for infringement of the 147 patent at trial. Moreover, MES terminated any exclusive license it had to the 147 patent or related applications[2] when the EERC assigned the patents-in-suit to ME2C. D.I. 406 ¶ 99. As the Court has recognized, the assignment of rights occurred on April 24, 2017. D.I. 279 at 14. As of that date, MES's exclusive license was terminated. Regardless of whether it retained a right to recover damages for past infringement of the 147 patent, *id.* at 14-5, MES has not pled any exclusionary interest or right to recover for damages after April 24, 2017, nor was there any evidence presented at trial that it possesses such rights. The Complaint is clear that ME2C owns "*all* rights, title, and interest" in the 114 and 517 patents, and that ME2C "holds *all* substantial rights pertinent to this suit, including the right to sue and recover for all past, current, and future infringement." D.I. 406 ¶¶ 243, 315 (emphases added). MES is not alleged to hold and not evidence was presented that it holds *any* rights regarding the 114 and 517 patents. As the case stands now, Plaintiffs are no longer asserting the 147 patent, and no right has been asserted to damages prior to July 2019. Either of those facts standing alone, much less both together, indisputably demonstrate that MES is not asserting and cannot assert a constitutional cognizable injury.

[2] As the Court recognized, MES's relevant rights were limited to the 147 patent as it was the only asserted patent (at that time) that issued prior to April 24, 2017. D.I. 279 at 14 n.10.

When notified of this issue, Plaintiffs identified the Closing Agreement between ME2C, MES, and the EERC, PTX-054, as evidencing MES's constitutional standing. Plaintiffs provided no explanation for how this document demonstrates constitutional standing on the part of MES.

Plaintiffs did not provide any explanation because there is no reasonable explanation supporting their claim. The Closing Agreement states that "the Company," defined collectively as ME2C and MES, has "the option to acquire the Patent Rights" and that "the Company has elected to exercise" that option. PTX-054 at 1.[3] That statement, however, does not define any division or allocation of rights as between ME2C and MES. On the other hand, the Closing Agreement later provides that the "Assignment of Patent rights" shall be "execute[d] and deliver[ed] to ME2C." PTX-054 at 1. That provision is wholly in accord with Plaintiffs' allegations that ME2C owns "*all* rights, title, and interest" in the 114 and 517 patents. D.I. 406 ¶ 243 (emphasis added). And, indeed, the assignments filed with the PTO, along with the accompanying Assignment agreements, show ME2C as the sole assignee. PTX-039; PTX-046. Plaintiffs adduced no evidence to show that MES holds any title, interest, or rights to recover for infringement of the 114 or 517 patents. Rather, the the pleadings and evidence establish precisely the opposite.

MES's deficiency is of a constitutional, not statutory, nature. The issue is not whether MES has some exclusionary rights that are sufficient to satisfy the requirements of 35 U.S.C. § 281. *See Lone Star*, 925 F.3d at 1235-36 (concluding that satisfying the "all substantial rights" test of § 281 does not go to standing or subject-matter jurisdiction). The issue is whether MES has any exclusionary rights *at all* sufficient to satisfy Article III. *Id.* at 1234. Indisputably, it does not.

[3] The trial exhibits cited herein will be included in the parties' joint submission of exhibits cited in the parties' briefing regarding CERT's motions for judgment of a matter of law and a new trial.

To the extent that Plaintiffs argue that MES has suffered some constitutionally sufficient harm other than harm to exclusionary rights, that argument should be rejected. To begin, although a limited number of district courts have entertained the argument that harms other than to exclusionary rights might be sufficient for Article III standing, the Federal Circuit has not endorsed that reasoning. Following *Lonestar*, the Federal Circuit confirmed that its prior decisions "routinely held that constitutional standing requires at least one exclusionary right." *In re Cirba Inc.*, 2021 WL 4302979, at *3 (Sept. 22, 2021). The Federal Circuit noted that conferring Article III standing on a bare licensee (which MES is not even alleged to be) would be "a change in the law" "contrary to [its] precedent." *Id.* The court concluded that it was not clear that *Lone Star* or the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), required it to alter its precedent that exclusionary rights were a touchstone for Article III standing. *Id.* Equally importantly, Plaintiffs did not adduce any evidence that MES suffered any harm other than to the exclusionary rights it held at one time to the 147 patent. So, even if the legal argument didn't stray beyond Federal Circuit law, it would have no factual basis. Accordingly, MES must be dismissed as a plaintiff.

On March 8, 2024, the Court entered judgments on the jury's verdict in favor of MES as a plaintiff (D.I 697-708). Because MES lacks standing and must be dismissed as a plaintiff, it is not entitled to a judgment against the CERT Defendants. Those judgments must be altered and amended to remove MES.

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