

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

MIDWEST ENERGY EMISSIONS CORP. )  
and MES Inc., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
ARTHUR J. GALLAGHER & CO., *et al.*, )  
 )  
Defendants. )

Case No. 1:19-cv-01334-CJB  
**JURY TRIAL DEMANDED**

**PLAINTIFFS MIDWEST ENERGY EMISSIONS CORP.'S AND MES INC.'S  
RULE 37 MOTION TO STRIKE EVIDENCE RELATED TO DEFENDANTS'  
IMPLIED LICENSE DEFENSE AND FOR SUMMARY JUDGMENT**

DATED: May 1, 2024

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## I. INTRODUCTION

Defendants claim that the EERC granted them an implied license to the patents-in-suit when it performed refined coal certification testing for the directly infringing CERT customer power plants. ME2C maintains that this defense is meritless. That certification testing occurred well after the EERC lost the right to license the patents, and in any event, the EERC's test reports do not grant any rights (in fact, they disclaim against that). The parties are nonetheless preparing for a May 30 bench trial to resolve this dispute.

To that end, Defendants recently served their pretrial disclosures. These disclosures indicate that, instead of trying their current theory, Defendants intend to advance new and undisclosed theories to support their defense. They apparently intend to introduce evidence related to EERC interactions with Chem-Mod, ME2C interactions with non-CERT customer power plants, and internal ME2C discussions. This evidence is plainly not relevant to CERT's theory that the EERC granted them a license through CERT's certification testing.

Moreover, Defendants proposed statement of law for the upcoming trial is filled with legal errors. Most notably, they fail to cite the Federal Circuit's controlling authority for implied license: *Winbond v. ITC*, and instead mix and match concepts from cases involving implied license, equitable estoppel, and patent exhaustion. Under the correct legal standard, Defendants must prove that they relied on a party having authority to license the patents-in-suit to have affirmatively granted them permission to engage in the infringing conduct. Defendants have not articulated how they can meet that standard.

As a result, ME2C is forced to prepare for an upcoming trial where the Defendants apparently intend to rely on factual assertions that were never disclosed during discovery, and legal theories that are simply wrong. This creates significant prejudice for ME2C.

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