

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.

Civil Action No. 19-cv-1334-RGA

MEMORANDUM ORDER

The Magistrate Judge filed a Report and Recommendation (“the Report”) (D.I. 279) on Defendants’ Motion to Dismiss the First and Second Amended Complaints (D.I. 272) and Defendants’ Renewed Motion to Dismiss Operative Complaint (D.I. 273).

In Report is lengthy and involves over twenty-seven Defendants, which the Report sorts into several groups. In brief, the Report recommends: (1) dismissing claims against a subset of Defendants on “group pleading”/“lumping” grounds but declining to dismiss the remaining Defendants on the same grounds; (2) declining to dismiss Plaintiffs’ claims for lack of standing; (3) dismissing the pre-suit indirect infringement claims regarding the original asserted patents as to the “CERT Defendants” for lack of pre-suit knowledge; (4) declining to dismiss the remaining induced infringement claims against Defendants; (5) declining to dismiss the remaining contributory infringement claims against the CERT Defendants; (6) declining to dismiss the “Moving Refined Coal” Defendants’ motion to dismiss with respect to contributory infringement; (7) dismissing Plaintiffs’ “joint infringement” theory; (8) dismissing Plaintiffs’ single-actor direct infringement claims with respect to claim 25 of the ‘114 Patent and claim 1 of the ‘430 Patent, while declining to dismiss the remaining direct infringement claims; (9)

dismissing Plaintiffs' willful infringement claims except those dating from July 29, 2020; and (10) dismissing certain specified claims with prejudice while permitting further amendment on other claims after Plaintiffs submit a motion for leave to amend. (D.I. 279 at 12, 16, 26, 29-30, 32, 39, 41-42).

Both parties have filed Objections and Responses to sections of the Report. (D.I. 284, 286, 287, 288). I will ADOPT the Report's recommendations to which there is no objection.

I will review each objection in turn.

I. BACKGROUND

The instant case involves five patents directed to "methods for reducing mercury emissions at coal-fired power plants" and "methods of separating mercury from a mercury-containing gas." (D.I. 279 at 2-3). Midwest Energy Emissions Corp. and MES, Inc. (collectively "Plaintiffs" or "MES") assert various infringement claims against operators of coal-fired power plants and providers of refined coal. The relevant Defendants are collectively referred to as "Moving Defendants" unless a more specific subset is identified.

The procedural and factual history of this case is complex, and it is set forth in the Report (D.I. 279) and a previous Report and Recommendation (D.I. 110). I will not repeat the Report's discussion of the relevant facts or law. I review all pending objections *de novo*. 28 U.S.C. § 636(b)(1).

II. DISCUSSION

A. Plaintiffs' Objections

1. Dismissal of AJG Defendants

MES contends that the Report erred in dismissing the AJG Defendants. (D.I. 284 at 4). The Report recommended dismissing the AJG Defendants on group pleading grounds, stating

that the pleading “leaves the Court and Defendants to guess at what is the theory of liability that is being asserted here.” (D.I. 279 at 9). MES asserts that this analysis is inconsistent with the Federal Circuit’s 2018 decision in *Nalco*. (D.I. 284 at 4 (citing *Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1355 (Fed. Cir. 2018))).

The Report takes issue with paragraph 212 of the Second Amended Complaint (“SAC”), which states:

Each of Arthur J. Gallagher & Co., Gallagher Clean Energy, LLC, and AJG Coal, LLC; DTE REF Holdings, LLC, DTE REF Holdings II LLC; CERT Coal Holdings LLC, CERT Holdings LLC, CERT Holdings 2018, LLC, CERT Operations LLC, CERT Operations II LLC, CERT Operations III LLC, CERT Operations IV LLC, CERT Operations V LLC, CERT 32 Operations RCB LLC; AJG Iowa Refined Coal LLC, Joppa Refined Coal LLC, Thomas Hill Refined Coal LLC, Wagner Coaltech LLC, Walter Scott Refined Coal LLC, Louisa Refined Coal, LLC, Belle River Fuels Company, LLC, Arbor Fuels Company, LLC, Portage Fuels Company, LLC, Brandon Shores Coaltech, LLC, Senescence Energy Products, LLC, Rutledge Products, LLC, Alistar Enterprises, LLC and John Doe LLCs *operate at least one Accused RC Facility either by directly owning the facility, directly controlling the facility, or indirectly exercising control of the facility through a subsidiary that is either named above or referred to as a John Doe LLC*. For example, Arthur J. Gallagher & Co. owns and controls Walter Scott Refined Coal LLC which directly operates a refined coal facility at a power plant that directly infringes by supplying bromine-containing refined coal to a combustion chamber and injecting activated carbon sorbent downstream of the combustion chamber.

(D.I. 218-1 ¶ 212) (emphasis added). Paragraph 212 lays out the basis for liability of AJG and several other Defendants. The Report explained that the allegations are insufficient because the fact that “a company is the parent of a subsidiary, that does not (without more) mean that the parent is automatically liable for patent infringement committed by the subsidiary.” (D.I. 279 at 9).

MES objects, because, to make out a claim of indirect infringement, one does not have to allege alter ego or an agency theory of liability. (D.I. 284 at 6). MES’ statement of the law is correct, but it sidesteps the fact that its theory of liability as to the AJG Defendants remains

unclear. Does it allege that the AJG Defendants induced infringement by operating an infringing subsidiary? Or, that one of its subsidiaries induces the infringement of a power plant and AJG is responsible? (D.I. 279 at 9). If AJG induces the infringement of its subsidiary, then MES need not plead some theory of vicarious liability. *See A. Stucki Co. v. Worthington Indus., Inc.*, 849 F.3d 593, 597 (Fed. Cir. 1988). However, if its theory of liability is merely that AJG owns a subsidiary that is an induced infringer, that is insufficient.

Thus, I agree with the Report that the theory of liability asserted against the AJG Defendants is unclear, as demonstrated by paragraph 212. *Adverio Pharma GmbH v. Alembic Pharm. Ltd.*, 2019 WL 581618, at *6 (D. Del. Feb. 13, 2019) (explaining “allegations lumping multiple defendants together without providing allegations of individual conduct are frequently . . . insufficient to satisfy the notice pleading standard”).

Contrary to MES’ suggestion, *Nalco* does not address this issue. Group pleading does not appear to have been at issue in *Nalco* and the Court upheld the induced infringement claims where the complaint “alleg[ed] that Defendants acted with specific intent to induce infringement of [Asserted Patent] by the Refined Coal LLCs and other downstream customers of the Chem–Mod Solution.” *Nalco*, 883 F.3d at 1356.

Even analyzing the claims under the assumption that MES actually intended to assert a theory of induced infringement, as MES argues in its Objections, the pre-suit induced infringement claims still fail. As the Report explains in the context of the CERT Defendants, the SAC fails to allege pre-suit knowledge of the Asserted Patents. (D.I. 279 at 16-20). The allegations of pre-suit knowledge against AJG are substantively identical to those against CERT, which MES does not challenge. (*See* D.I. 218-1 ¶¶ 192-204). MES’ Objections do not address any pre-suit/post-suit distinction with respect to the AJG Defendants.

Lastly, MES argues that dismissal is prohibited under Federal Rule of Civil Procedure 12(g). (D.I. 284 at 7). The Report addresses this argument by providing citations to the Record wherein Defendants previously raised the group pleading issue. (D.I. 279 at 6 n.4). MES does not explain why the Report's conclusion is wrong when it appears plain that the issue was previously raised.¹

For the reasons set forth above, I will **ADOPT** the Report's conclusions as to the AJG Defendants.

2. "Single Actor" Direct Infringement

MES argues that the Report's analysis of direct infringement committed a legal error. (D.I. 284 at 2, 7). The Report concluded that the SAC "sufficiently establish[ed] that the Moving Defendants perform these steps of the claimed methods in the course of Section 45 certification testing." (D.I. 279 at 38). However, the Report then examined MES' allegations with respect to two exemplary claims of the '430 Patent and the '114 Patent. (*Id.*). Finding those allegations insufficient, the Report recommended dismissal of only those specific exemplary claims. (*Id.* at 38-39).

I agree that, in light of the Report's conclusion that the pleading sufficiently alleges that the Moving Defendants perform the claimed steps, there is no basis to dismiss specific exemplary allegations. Defendants do not object to the Report's conclusion that the SAC's

¹ MES notes that the Court did not address AJG's dismissal in its previous Report, and that the AJG Defendants did not raise a "lack of control" defense but rather argued against group pleading. (D.I. 284 at 3). One of the failures of group pleadings is that it does not give adequate notice. One of the consequences is that the other party is prejudiced in knowing how to respond. Any failure to identify an issue in the first round of pleadings is the fault of MES, not of Defendants.

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