

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

MIDWEST ENERGY EMISSIONS	)	
CORP. and MES INC.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 19-1334-CJB
	)	
ARTHUR J. GALLAGHER & CO., et al.,	)	<b>REDACTED VERSION</b>
	)	
Defendants.	)	

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**MEMORANDUM OPINION**

October 16, 2023  
Wilmington, Delaware

*Christopher J. Burke*  
**BURKE, United States Magistrate Judge**

In this patent action filed by Plaintiffs Midwest Energy Emissions Corp. (“Midwest Energy”) and MES Inc. (“MES” and collectively with Midwest Energy, “Plaintiffs” or “ME2C”) against Defendants Canadys Refined Coal, LLC; Coronado Refined Coal, LLC; George Neal Refined Coal, LLC; George Neal North Refined Coal, LLC; Hastings Refined Coal, LLC; Jefferies Refined Coal, LLC; Joppa Refined Coal, LLC; Louisa Refined Coal, LLC; Walter Scott Refined Coal, LLC and Williams Refined Coal, LLC (the “AJG RC Defendants”); Arbor Fuels Company LLC; Superior Fuels Company LLC; Belle River Fuels Company, LLC; Huron Fuels Company, LLC; Chouteau Fuels Company, LLC; Portage Fuels Company LLC; Erie Fuels Company, LLC; Jasper Fuels Company LLC and Newton RC LLC (the “DTE RC Defendants”); Bascobert (A) Holdings, LLC; Buffington Partners, LLC; Cottbus Associates, LLC; Larkwood Energy, LLC; Marquis Industrial Company, LLC; Rutledge Products, LLC; Senescence Energy Products, LLC and Springhill Resources, LLC (the “CERT RC Defendants”); CERT Operations II LLC; CERT Operations IV LLC; CERT Operations V LLC; and CERT Operations RCB LLC (the “CERT Operations Companies Defendants”); Alistar Enterprises, LLC; AJG Iowa Refined Coal LLC and DTE Energy Resources, LLC (“collectively, “Defendants”), ME2C alleges infringement of United States Patent Nos. 8,168,147 (the “147 patent”), 10,343,114 (the “114 patent”), 10,589,225 (the “225 patent”), 10,596,517 (the “517 patent”) and 10,668,430 (the “430 patent” and collectively with the other patents, the “asserted patents”). (D.I. 406 at ¶¶ 40-

44) Presently pending before the Court is Defendants’ motion for summary judgment No. 1: non-infringement based on licensed use of process (the “Motion”). (D.I. 563) ME2C opposes the Motion. For the reasons set forth below, the Motion is DENIED.<sup>1</sup>

## **I. BACKGROUND**

ME2C commenced this action on July 17, 2019. (D.I. 1) Defendants filed the instant Motion on March 23, 2023. (D.I. 527; *see also* D.I. 563) The Motion was fully briefed as of April 18, 2023. (D.I. 555)

The Court here writes primarily for the parties, and so any facts relevant to this Memorandum Opinion will be discussed in Section III below.

## **II. STANDARD OF REVIEW**

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.10 (1986). If the moving party has sufficiently demonstrated the absence of such a dispute, the nonmovant must then “come forward with specific facts showing that there is a genuine issue for trial.” *Id.* at 587 (internal quotation marks, citation and emphasis omitted). If the nonmoving party fails to make a sufficient showing in this regard, then the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). During this process, the Court will “draw all reasonable inferences in favor of the nonmoving party, and it

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<sup>1</sup> The parties have jointly consented to the Court’s jurisdiction to conduct all proceedings in this case, including trial, the entry of final judgment and all post-trial proceedings. (D.I. 398)

may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

However, in order to defeat a motion for summary judgment, the nonmoving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. The “mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Facts that could alter the outcome are “material,” and a factual dispute is “genuine,” only where “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248. “If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted.” *Id.* at 249-50 (internal citations omitted).

A party asserting that a fact cannot be—or, alternatively, asserting that a fact is—genuinely disputed must support the assertion either by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;” or by “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(A) & (B).

### **III. DISCUSSION**

The asserted claims of the asserted patents relate to methods for reducing mercury emissions from coal-fired power plants (“power plants”) with the use of bromine-enhanced coal (or “refined coal”) and a sorbent such as activated carbon. (D.I. 533, exs. 1-5; *see also* D.I. 546,

ex. A at ¶¶ 49, 70) ME2C alleges that Defendants induced and contributed to infringement of certain method claims of the asserted patents by manufacturing and selling refined coal to non-party power plants. (D.I. 406 at ¶¶ 67, 208, 217; D.I. 546, ex. A at ¶ 99) The power plants are alleged to add activated carbon to the process in which refined coal is combusted, in a manner that amounts to direct infringement of the patents. (D.I. 406 at ¶¶ 208, 217; D.I. 546, ex. A at ¶¶ 102, 108)

The original Complaint in this action included as Defendants certain power plant operators. (See D.I. 1 at ¶¶ 116, 132, 138, 148-49) ME2C subsequently granted licenses to four of the power plant operators—Vistra (the “Vistra license”), NRG (the “NRG license”), Talen and AECI, (D.I. 533, exs. 7-10)—and dismissed these entities (and related entities) from the case, (D.I. 167; D.I. 249; D.I. 266; D.I. 267). The licenses to Vistra and NRG are the licenses relevant to the instant Motion.<sup>2</sup> The effective date of the Vistra license is July 30, 2020, and the effective date of the NRG license is January 5, 2021. (D.I. 533, exs. 7, 8)

To prevail under their theory of indirect infringement, Plaintiffs must prove that Defendants’ actions led to direct infringement of the asserted patents. *See, e.g., Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1274 (Fed. Cir. 2004). Direct infringement requires the use of a patented invention “without authority.” 35 U.S.C. § 271(a).

With their Motion, as an initial matter, all Defendants moved for summary judgment with respect to any sale or provision of refined coal to a licensed power plant after the effective date of the relevant license. (D.I. 527 at ¶ 1; 555 at 1; D.I. 573 at 1) Here, Defendants’ position is that because ME2C has authorized the Vistra and NRG power plants to use its patents pursuant

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<sup>2</sup> ME2C is not pursuing any claim against any current Defendant for providing refined coal to the Talen-related and AECI-related power plants. (D.I. 545 at 5 n.2)

to the licenses, these entities cannot directly infringe the asserted patents. This, in turn, means that Defendants that provided refined coal to these power plants after the respective licenses were signed cannot indirectly infringe the asserted patents (since there would be no direct infringement in those scenarios). (D.I. 528 at 14)

Plaintiffs, however, have stated that they are not alleging any claims that have to do with provision of refined coal to a licensed power plant after the date of the licenses. (D.I. 545 at 4 & 5 n.2) Rather, with respect to any power plant that obtained a license, ME2C is only alleging “indirect infringement for sales of refined coal that occurred before the date of those licenses.” (*Id.* at 4; *see also* D.I. 528 at 13; D.I. 533, ex. 14 at ex. C-1) With Plaintiffs affirming that they do not intend to press claims regarding the provision of refined coal to a licensed power plant after the date of the licenses at issue, it appears that the right thing for the Court to do is to DENY the Motion as MOOT with regard to any such claims. *See e.g., Ross v. Kopocs*, No. 1:14-cv-60-SKL, 2015 WL 1650910, at \*2 (E.D. Tenn. Apr. 13, 2015); *Hopper v. M/V UBC SINGAPORE*, Civil Action No. H-09-1223, 2010 WL 2977296, at \*5 (S.D. Tex. July 20, 2010); *Cryovac Inc. v. Pechiney Plastic Packaging, Inc.*, 430 F. Supp. 2d 346, 355 (D. Del. 2006). So the Court will do that here.

Additionally, certain Defendants who sold refined coal to Vistra-related and NRG-related power plants are seeking a broader grant of summary judgment. These nine Defendants<sup>3</sup> not

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<sup>3</sup> More specifically, Defendants Chouteau Fuels Company LLC, Jasper Fuels Company LLC, Joppa Refined Coal LLC, Newton RC LLC, and Bascobert (A) Holdings, LLC seek summary judgment of noninfringement of all asserted claims of all asserted patents with respect to any sale or provision of refined coal to a power plant covered by the Vistra license. (D.I. 527 at ¶ 1; D.I. 573 at 1) Defendants Alistar Enterprises, LLC, Rutledge Products, LLC, Senescence Energy Products, LLC, and Spring Hill Resources, LLC seek summary judgment of noninfringement of all asserted claims of all asserted patents with respect to any sale or provision of refined coal to a power plant covered by the NRG license. (D.I. 527 at ¶ 1; D.I. 573 at 1)

only sold refined coal to power plants covered by the Vistra or NRG licenses after those licenses were signed, but they also sold such coal to the plants *before* license execution. And with the instant Motion, these Defendants are also seeking summary judgment for those pre-license sales. So the issue here is whether the Vistra and NRG license grants cover this pre-license conduct. (D.I. 545 at 4 & 5 n.2)

In their opening brief, Defendants argue that the licenses contain “complete releases” from all pre-license infringement claims, as they “retroactively authorized the power plants’ activity,” thus: (1) negating any claim of direct infringement for pre-license conduct; and (2) precluding any claim of indirect infringement predicated on such activity. (D.I. 528 at 14; *see also id.* at 12)<sup>4</sup> Defendants appear to be referring to Section 3.1 of the Vistra and NRG licenses, (*id.* at 12, 14)—wherein ME2C [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (D.I. 533, ex. 7 at § 3.1; *id.*, ex. 8 at § 3.1) In their reply brief, Defendants also point to certain covenants included in both licenses [REDACTED]

[REDACTED]

[REDACTED] (D.I. 555 at 2 (citing D.I. 533, ex. 7 at § 2.2; *id.*, ex. 8 at § 2.2)) Defendants

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These nine Defendants are the Defendants who have claims against them that are relevant to this motion and that are not moot.

<sup>4</sup> In support, Defendants cite solely to *JVC Kenwood Corp. v. Nero, Inc.*, 797 F.3d 1039 (Fed. Cir. 2015). (D.I. 528 at 14) However, *JVC Kenwood* is not particularly helpful with respect to the issue before the Court. That is because in that case, the United States Court of Appeals for the Federal Circuit did not assess whether the license at issue retroactively reached pre-license conduct. 797 F.3d at 1045-46; *see also* (D.I. 545 at 5-6).

contend that these broad releases and covenants convey an intent to grant retrospective rights, and cover the assertion of claims against indirect infringers. (*Id.*)

Summary judgment is not warranted here. To the extent that Defendants are arguing that the licenses authorized the power plants' conduct even before the effective dates of the licenses, that would seem to depend on the particular language in the particular license at issue. *See, e.g., Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 501 (1964) (“A release given a direct infringer in respect of past infringement, which clearly intends to save the releasor’s rights against a past contributory infringer, does not automatically surrender those rights.”); *Berall v. Teleflex Med. Inc.*, No. 10-CV-5777 (LAP), 2021 WL 9629067, at \*3 (S.D.N.Y. Sept. 13, 2021) (“[T]he Agreement does not establish that Aircraft’s sales of the McGrath Laryngoscope—all of which occurred prior to the execution of the Agreement—were authorized, let alone that they were sanctioned *at the time they were made*. Instead, the Agreement simply represents the parties’ bargain that Aircraft would not face liability for its past infringing acts.”) (emphasis in original); *Canon Inc. v. Tesseron Ltd.*, 146 F. Supp. 3d 568, 577-78 (S.D.N.Y. 2015) (explaining that “whether a license or sublicense may have retroactive effect depends upon whether the licensor has conferred that right”).

Here, while the licenses include releases that absolve the power plants from liability for any claims relating to pre-license infringement, the licenses also “clearly intend[] to save [ME2C’s] rights against” past indirect infringers. *Aro*, 377 U.S. at 501. [REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]. (D.I. 533, ex. 7 at § 3.1; *id.*, ex. 8 at § 3.1)<sup>5</sup> To the extent that the releases leave any doubt, however, the licenses contain another key provision that Defendants failed to meaningfully address (despite ME2C’s focus on it in ME2C’s answering brief). (D.I. 545 at 6) This provision provides that:

[REDACTED]

(D.I. 533, ex. 7 at § 2.5; *id.*, ex. 8 at § 2.5 (emphasis added) (*cited in* D.I. 545 at 6)) Defendants’ only reference to this provision comes in the Statement of Facts section of their opening brief. There, they acknowledge that ME2C is purporting to “reserve its right to ‘pursue’ third parties for infringement” with this provision, but posit that the provision “apparently does not apply to Refined Coal suppliers” because: (1) ME2C has dismissed the defendants that supplied refined coal to Talen and AECI after execution of those licenses (which have similar provisions); and (2) ME2C is not seeking damages from Vistra’s or NRG’s refined coal suppliers for the period after the effective dates of the Vistra and NRG licenses. (D.I. 528 at 12-13)

Nevertheless, the plain language of this “Notwithstanding” provision expressly preserves ME2C’s “ability to pursue infringement claims” against refined coal entities that operated at

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[REDACTED]

Vistra and NRG power plants—despite what any other portion of the agreement might otherwise suggest. *See, e.g., MSPA Claims 1, LLC v. Kingsway Amigo Ins. Co.*, 950 F.3d 764, 773 (11th Cir. 2020) (explaining that the “ordinary meaning of ‘notwithstanding’ is ‘in spite of,’ or ‘without prevention or obstruction from or by[.]’” and that “[a]nother way to think about the ‘notwithstanding’ phrase is that it ‘merely shows which provision prevails in the event of a clash’”—and that in the event of a clash, it is the “notwithstanding” provision that prevails) (internal quotation marks and citations omitted).<sup>6</sup> The fact that ME2C made agreements to dismiss other refined coal suppliers unaffiliated with Vistra or NRG, or that it is not alleging indirect infringement for sales of refined coal that occurred post-license, does not change the import of this language. *See Aro*, 377 U.S. at 500 (“With respect to the post-agreement sales the agreement necessarily absolved Aro of liability . . . because it had the effect of precluding any direct infringement to which Aro could contribute. With respect to the pre-agreement sales, however, Aro’s contributory infringement had already taken place at the time of the agreement. . . it cannot be held, in the teeth of its contrary language and intention, to have erased the extant infringement.”). Thus, with regard to any pre-license infringement claims as to the nine Defendants at issue, the Court DENIES the Motion.

#### IV. CONCLUSION

For the foregoing reasons, the Court finds that Defendants’ Motion should be DENIED. An appropriate Order will issue.

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<sup>6</sup> The parties did not discuss what jurisdiction’s law would apply to an analysis of the text of the license agreements at issue, effectively indicating that the answer would not alter the outcome here.

Because this Memorandum Opinion may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Memorandum Opinion. Any such redacted version shall be submitted no later than **October 19, 2023** for review by the Court. It should be accompanied by a motion for redaction that shows that the presumption of public access to judicial records has been rebutted with respect to the proposed redacted material, by including a factually-detailed explanation as to how that material is the “kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure.” *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Opinion.