BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE MIDWEST ENERGY EMISSIONS CORP. PATENT LITIGATION	MDL No._____

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR TRANSFER OF ACTIONS TO THE SOUTHERN DISTRICT OF IOWA PURSUANT TO 28 U.S.C. § 1407

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Plaintiff Midwest Energy Emissions Corp. ("ME2C") respectfully submits this brief in support of its motion to consolidate and transfer several closely related federal patent infringement actions to Judge Stephen H. Locher in the Southern District of Iowa for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.

I. INTRODUCTION

On July 17, 2024, ME2C filed three patent infringement actions against eight power plant operators, in three different states. These cases all involve the same five patents and the same accused conduct. Defendants use ME2C's technology at several coal-fired power plants located in Iowa, Wyoming, Wisconsin, Arizona, and Missouri. ME2C previously sued several of Defendants' suppliers for mercury capture related products (the "Delaware Case"). Those suppliers ultimately shut down their operations and either agreed to pay a license fee for past infringement or were found to infringe at trial. Before and after the Delaware jury trial, ME2C reached out to various power plant operators that received mercury control products from the suppliers in the Delaware Case to request that they stop infringing and instead use ME2C's mercury control products. Those operators declined, instead choosing to continue using ME2C's technology with support from different suppliers. As a result, ME2C filed the present actions.

Because the various Defendants are incorporated in, operate in, and are parts of various corporate families in different states, ME2C could not file its claims in a single, centralized district. Nonetheless, the substantial overlap between these cases makes them prime candidates for consolidation.

II. STATEMENT OF FACTS

A. The Currently Pending Lawsuits

On July 17, 2024, ME2C filed three lawsuits against various power plant operators. The Defendants in these cases include parent companies and operating subsidiaries. In addition, some

of the accused power plants are jointly owned and/or operated by groups of Defendants, as listed below:

Southern District of Iowa

Parent Co. Defendant	Subsidiary Defendant	Power Plants
BHE	MidAmerican	Walter Scott With IPL: Louisa, George Neal North, George Neal South, Ottumwa
	PacifiCorp	Wyodak, Jim Bridger, Dave Johnston
Alliant	IPL	Prairie Creek With MidAmerican: Louisa, George Neal North, George Neal South, Ottumwa
	WPL	Columbia, Edgewater

Eastern District of Missouri

Parent Co. Defendant	Subsidiary Defendant	Power Plants
Ameren	Union Electric	Labadie, Rush Island, Sioux

District of Arizona

Parent Co. Defendant	Subsidiary Defendant	Power Plants
Tuscon Electric Power	San Carlos	Springerville Units 1 & 2
Tri-State	Springerville Unit 3 Holding LLC & Partnership	Springerville Unit 3
Salt River Project		Springerville Unit 4, Coronado

While these groups of Defendants are currently involved in three sets of cases, Defendants in the Iowa case have proposed severing and transferring various cases, as follows:

Southern District of Iowa #1

Parent Co. Defendant	Subsidiary Defendant	Power Plants
BHE	MidAmerican	Walter Scott

Southern District of Iowa #2

Parent Co.	Subsidiary	Power Plants

Defendant	Defendant	
BHE	MidAmerican	Louisa, George Neal North, George Neal South, Ottumwa
Alliant	IPL	

Western District of Wisconsin

Parent Co. Defendant	Subsidiary Defendant	Power Plants
Alliant	WPL	Columbia, Edgewater

District of Wyoming[1]

Parent Co. Defendant	Subsidiary Defendant	Power Plants
BHE	PacifiCorp	Wyodak, Jim Bridger, Dave Johnston

ME2C filed this request for consolidation shortly after the Iowa Defendants filed their motions for dismissal, transfer, and severance. While ME2C believes that their motions should and will be denied, the mere fact that the motions are pending, may cause unnecessary delay in the Iowa case. This delay is particularly prejudicial to ME2C as it currently has a motion for preliminary injunction pending in that case.

Overall, this litigation justifies the centralization of an MDL. It involves litigation of the same infringement claims against various inter-related entities in at least three different districts, and potentially in as many as five districts. As a general matter, patent infringement cases are the sort that Congress envisioned, decades ago, as particularly suitable for MDL consolidation. See H.R. Rep. No. 90-1130, at 3 (1968), as reprinted in 1968 U.S.C.C.A.N. 1898, 1900 ("The types of cases in which massive filings of multidistrict litigation are reasonably certain to occur include . . . patent and trademark suits . . . ."). The current cases illustrate the why Congress was right.

[1] PacifiCorp has moved for dismissal for improper venue without specifying where this case should be brought. ME2C has identified the District of Wyoming here as that is where the accused power plants are located.

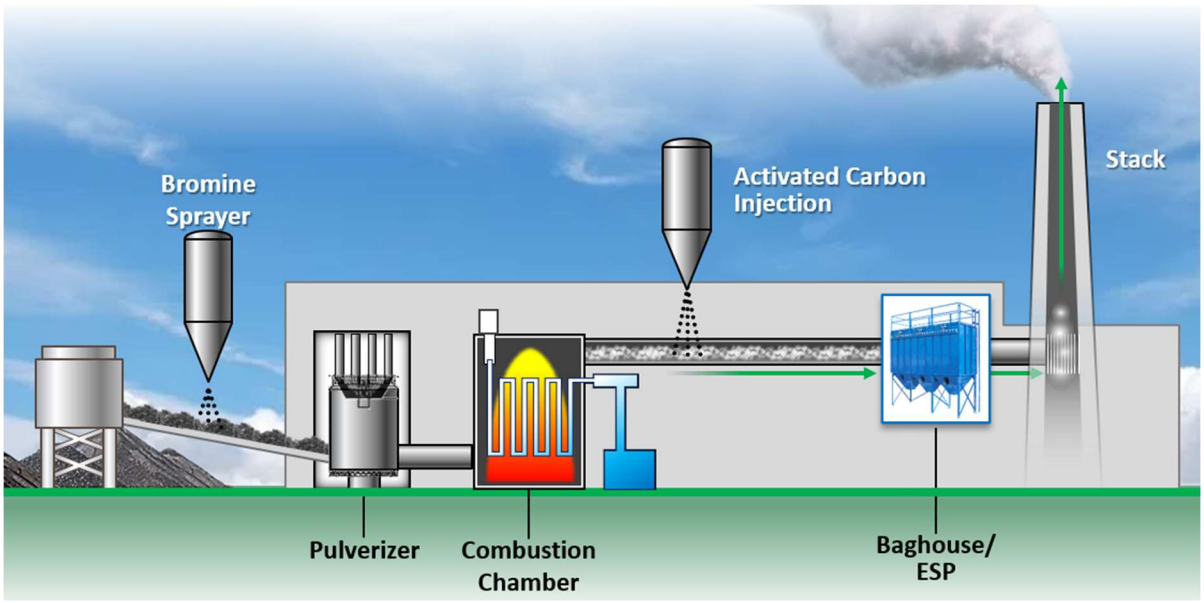
B. Background of the Litigation

1. The EPA's Call for New Mercury Capture Technologies Leads to ME2C's Patents.

In 1990, Congress resolved to significantly reduce air pollution through an amendment to the Clean Air Act. Dkt. 1 ¶ 49.[2] That law required the U.S. Environmental Protection Agency (EPA) to study the impact of various air pollutants. Dkt. 1 ¶ 50. After a multi-year study, the EPA reported to Congress on the pressing need to reduce mercury emissions from coal-fired power plants. However, the EPA also reported that for certain types of coal, existing pollution control technologies just could not solve the problem of mercury capture. Dkt. 1 ¶¶ 51–52.

In the wake of the EPA's report, various governmental and industry organizations injected millions of dollars into scientific research and experimental studies in search for new mercury capture technologies. Dkt. 1 ¶ 53. The inventors of the ME2C patents-in-suit solved that problem. Dkt. 1 ¶ 56–58. They discovered that combusting coal with added bromine, and then injecting activated carbon into the resulting exhaust gas causes a chemical reaction with the mercury in the gas—making it much easier to capture using the power plant's pre-existing pollution control equipment, as explained more fully below. *Id.* As illustrated below:

[2] Unless otherwise indicated, all citations to docket entries are to those in *Midwest Energy Emission Corp. v. Berkshire Hathaway Energy Company*, Case No. 4:24-cv-00243 (S.D. Iowa).



2. ME2C Proves the Viability of its Technology but Contends with Infringement.

Throughout the late 2000s, the inventors demonstrated the technological success of their patented two-step mercury-capture process. In 2008, ME2C was formed to commercialize the technology, and it spent the next several years performing tests and educating power plants to demonstrate the practical and commercial viability of the technology. *See* Dkt. 1 ¶¶ 64–68. This work was important because in 2011, the EPA made clear that it intended to issue very strict regulations requiring power plants to capture 90% of the mercury produced from the combustion of coal. Dkt. 1 ¶ 59. For power plants burning certain types of coal, ME2C's technology is the most economical method for achieving such a high level of mercury capture.

3. ME2C Files the Delaware Case, and Later, the Present Litigation.

In 2016, the EPA's new mercury regulations (referred to as "MATS") became mandatory for all US power plants. Dkt. 1 ¶ 59. For several years, ME2C maintained a successful business with several power plants, but it was also aware of other power plants that were using its technology without permission. Many were purchasing "refined coal" (coal with added bromine), instead of purchasing ME2C's bromine products. *See* Dkt. 1 ¶ 69. The refined coal

suppliers did not directly infringe ME2C's patents because they only supplied a component in the process, but they did encourage and facilitate widespread infringement in the marketplace. *Id.* ME2C attempted to compete in the marketplace despite that infringement, but, ultimately, it concluded that it needed to file a lawsuit.

In 2019, ME2C filed a case in Delaware against the largest refined coal suppliers in the country as well as several power plant operators (the "Delaware Case"). Dkt. 1 ¶ 72. The refined coal suppliers in that case all stopped operating in 2022 and either settled with ME2C or were found to infringe at trial. *See* Dkt. 1 ¶ 75–76.

Given ME2C's success in Delaware, ME2C attempted to negotiate supply terms with power plant operators that had been using the refined coal found to infringe in Delaware. *See, e.g.*, Dkt. 1 ¶¶ 188, 189. Unfortunately, those operators would not recognize ME2C's patent rights and chose to continue infringing. ME2C filed the present cases in Iowa, Missouri, and Arizona to enforce its rights against those infringing operators.

III. ARGUMENT

This case presents similar facts to *In re Phoenix Licensing L.L.C. Patent Litig.*, 536 F. Supp. 2d 1373 (J.P.M.L. 2008). In that case, the Panel granted a motion to centralize actions pending in three districts. *Id.* at 1374. The actions shared three patents in common covering methods for targeted marketing of financial products. *Id.* And the actions involved many defendant entities in the same industry (finance) accused of infringement. *Id.* The Panel centralized the actions, citing "common factual allegations concerning validity of the same three patents[.]" *Id.* The Panel chose to transfer the actions to the district court in which the most actions were currently pending. *Id.*

This case currently involves the same number of districts, but Defendants are currently seeking to divide the cases across at least five districts and seven cases. All of these cases

involve the same five patents. And, not only are the defendants in this case in the same industry, but they are accused of infringing using the same products (calcium bromide and activated carbon) in the same way (to capture mercury pollution at coal-fired power plants). This case presents even more common questions of fact, larger potential convenience to the parties and witnesses, and the potential for more judicial efficiencies than in *Phoenix Licensing*. Therefore, for the reasons set forth in detail below, and for the same reasons as in *Phoenix Licensing*, ME2C respectfully requests that the Panel order transfer and consolidation of these actions to the Southern District of Iowa.

A. MDL Centralization Is Appropriate.

1. These cases have nearly identical common questions of fact.

"[T]ransfer under Section 1407 does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer." *See In re Acacia Media Techs. Corp. Patent Litig.*, 360 F. Supp. 2d 1377, 1379 (J.P.M.L. 2005). But in this litigation, the cases contain far more than a majority of common factual and legal issues. The standard for consolidation is easily met.

Indeed, this case represents a textbook example of common questions of fact. Not only do all of the cases involve patent infringement allegations by the same plaintiff—they all involve the exact same five asserted patents and the same claims from those patents.[3] This Panel has granted centralization under similar circumstances. *See, e.g., In re TR Labs Patent Litig.*, 896 F. Supp. 2d 1337 (J.P.M.L. 2012); *In re Innovatio IP Ventures, LLC Patent Litig.*, 840 F. Supp. 2d 1354 (J.P.M.L. 2011); *In re Rembrandt Techs, LP Patent Litig.*, 493 F. Supp. 2d 1367 (J.P.M.L. 2007). In addition, commonality between "the patents' transfer history and associated valuation,

[3] One additional patent is asserted against power plants operated by Defendants BHE, MidAmerican, and PacifiCorp in the Iowa case.

damages, and standing issues," all support consolidation. *See In re Proven Networks, LLC, Patent Litig.*, 492 F. Supp. 3d 1338, 1340 (J.P.M.L. 2020) ; *see also In re Embro Patent Infringement Litig.*, 328 F. Supp. 507, 508 (J.P.M.L. 1971) ("We have consistently held that the issue of patent validity presents common questions of fact which satisfy the statutory requirements of § 1407.").

Moreover, these cases are uniquely suitable for centralization because they also share nearly identical questions of fact related to infringement. The Panel has repeatedly said that "differences in the accused products and infringement allegations in the cases do not prevent centralization where common factual issues involving claim construction and patent invalidity are shared." *See, e.g., In re Proven Networks, LLC*, 492 F. Supp. 3d at 1339. But this case needs no such caveat. All of the Defendants operate power plants that use the same chemicals to perform the patented methods—calcium bromide and activated carbon. Indeed, many of the Defendants used the same suppliers, and many likely continue to use overlapping suppliers.

2. Centralization promotes the just and efficient conduct of the actions, conserves judicial resources, and safeguards against inconsistent rulings or judgments.

Because of the significant overlap in common questions discussed above, litigating these cases in five separate forums will result in duplicative proceedings. These proceedings would include preliminary injunction hearings, claim construction hearings, discovery and discovery-related hearings, and expert and dispositive motion pre-trial hearings on common issues like infringement, validity, and damages. In turn, this also leads to the risk of inconsistent rulings on injunctive relief, Rule 12 motions, discovery disputes, Daubert motions, dispositive motions, and the "complex and time-consuming matter of claim construction." *See In re Proven Networks, LLC*, 492 F. Supp. 3d at 1340. And because the districts in which the separate actions are pending have varied rules and schedules governing pretrial proceedings in patent cases, the

proceedings will assuredly move forward at different paces, causing inefficiency, duplicative proceedings, and inconsistent rulings.

Moreover, this case is uniquely situated such that MDL centralization here maximizes the benefits of consolidation in terms of promoting judicial efficiency, conserving judicial resources, and preventing inconsistent rulings. The three pending cases were all filed on the same day, and the cases have barely begun. *See In re Neo Wireless, LLC, Patent Litig.*, 610 F. Supp. 3d 1383, 1385 (U.S. Jud. Pan. Mult. Lit. 2022) (granting consolidation in part because "the common early procedural posture among the actions will facilitate their efficient coordination."); *Cf. In re Droplets, Inc. Patent Litig.*, 908 F. Supp. 2d 1377, 1378 (J.P.M.L. 2012) (denying consolidation because "not all actions [were] in their 'infancy'"—some had reached a Markman hearing and summary judgment).

MDL consolidation here would be far superior to alternative measures, like party cooperation and informal coordination. *See In re Liquid Toppings Dispensing Sys.*, 291 F. Supp. 3d at 1379–80 ("Substantial efficiencies can be gained by centralizing these actions which involve a similar class of accused infringers . . . , a similar allegedly infringing product, . . . and the same or related patents. . . . Alternative measures and the cooperation of the parties (and the ten judges across the nation) are inferior, in these circumstances, to centralization."). In particular, because the five districts have different local rules for patent cases, differing case scheduling and management policies for patent litigation, and are spread out geographically, there is little possibility that informal coordination can substitute for centralization by this Panel, even if the parties are able to cooperate informally. *See, e.g., In re Bill of Lading Transmission and Proc. Sys. Patent Litig.*, 626 F. Supp. 2d 1341, 1342 (J.P.M.L. 2009) (while "applaud[ing] the parties' cooperative efforts," disagreeing that informal coordination between the parties was

an adequate substitute for MDL centralization, in a case similar to this one). Indeed, by seeking to split the Iowa case into five cases with multiple overlapping Defendants, the Defendants have indicated that they are not seeking efficiency, but are instead prioritizing delay and complexity to avoid a ruling on ME2C's motions for preliminary injunction and a speedy trial date.

Finally, the parties and courts would benefit from consolidation as early as possible. Consolidation will allow one judge to become familiar with the core issues in the case and be in a position to efficiently manage these cases moving forward. *See In re Neo Wireless, LLC, Patent Litig.*, 610 F. Supp. 3d at 1385 ("We find that the most efficient management of these complex patent cases likely cannot be accomplished through informal coordination. Centralization offers substantial savings in terms of judicial economy by having a single judge become acquainted with the complex patented technology and construing the patent in a consistent fashion (as opposed to having five judges separately decide such issues)."). Conversely, denial of consolidation would require the Southern District of Iowa to resolve multiple jurisdictional challenges and severance requests. This could potentially delay resolution of ME2C's motion for preliminary injunction and require multiple judges to address ME2C's requests for injunctive relief.

3. Centralization promotes the overall convenience of parties and witnesses.

With multiple actions spread across three, or potentially five, district courts, the potential for duplicative discovery is high, and the duplicative discovery would be voluminous. For example, the duplicative discovery would potentially include: claim construction discovery; depositions of three inventors and ME2C's other knowledgeable executives; third-party depositions; depositions and other discovery of ME2C's expert witnesses; cumulative and repetitive expert discovery from multiple defendants' expert witnesses about invalidity and infringement (instead of potentially joint expert testimony that could be accomplished via

consolidation); third-party depositions and other discovery of potential third party witnesses related to ME2C's licensing history and Defendants' suppliers. *See, e.g., In re Bill of Lading*, 626 F. Supp. 2d at 1342 (stating that centralization before a single judge "ensur[es] that the common parties and witnesses are not subjected to discovery demands that duplicate activity that will or has occurred in other actions").

B. Transfer to the Southern District of Iowa Is Most Appropriate.

The Panel has articulated a variety of factors for selecting a particular forum for transfer, including: the number of pending actions in a forum; the geographic centricity of a forum; the proximity of a forum to parties and witness; the presence of a party's principal place of business or headquarters in the forum; other pending MDLs occupying the resources of the transferee forum; the transferee judge's experience and familiarity with the particular type of litigation; the judge's experience with MDL or conversely the chance to afford a judge the opportunity to preside over an MDL; and the transferee judge's ability to efficiently steer the MDL and actions on a prudent course. While the five forums at issue undoubtedly all have capable jurists, in this litigation, all of these factors point to the Southern District of Iowa.[4]

First, Iowa is also the headquarters to two of the largest power plant operators in these cases, Berkshire Hathaway Energy (subsidiaries include MidAmerican and PacifiCorp) and Alliant (subsidiaries include IPL and WPL). These operators also control subsidiaries that operate the accused power plants located in Wyoming (PacifiCorp) and Wisconsin (WPL). Thus, even if WPL and PacifiCorp prove successful in transferring ME2C's claims against them out of Iowa, the parties would still likely need to obtain discovery from the parent entities and other

[4] The District of Delaware may also be an appropriate forum. Magistrate Judge Burke already presided over a trial involving suppliers to some of the power plants at issue in the pending cases and he is very familiar with the patents and claims asserted in this case.

important witnesses located in Iowa.

Second, the largest number of accused power plants are located in Iowa. Iowa is also centrally located compared to the other forums: Arizona, Wyoming, Wisconsin, Missouri. While Iowa may prove to be slightly less convenient for some parties, Des Moines has a large, accessible airport and will provide the most overall convenience to the parties.

Finally, the docket for the Southern District of Iowa is not currently occupied with MDL assignments. *See* Ex. 4 (MDL Statistics Report—Distribution of Pending MDL Dockets by District (September 3, 2024)); *accord In re Nat'l Century Fin. Enterprises, Inc.*, 293 F. Supp. 2d 1375, 1377 (J.P.M.L. 2003) (selecting transferee forum that is a "geographically central district, not currently occupied with multiple other MDL assignments, [and] that is equipped with the resources that this complex docket is likely to require"). In addition, the Southern District of Iowa currently has a median time to disposition in civil cases that is below the national average. Ex. 5, United States District Courts — National Judicial Caseload Profile.

IV. CONCLUSION

For the reasons set forth above, the Panel should grant ME2C's motion to transfer and consolidate these related actions to Judge Locher in the Southern District of Iowa.

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Respectfully submitted,

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