BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE MIDWEST ENERGY EMISSIONS CORP. PATENT LITIG.	MDL No. 3132

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

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I. INTRODUCTION

These cases all involve patent infringement allegations by the same plaintiff, including the same five asserted patents and the same claims from those patents, and they are all at the same early stage of litigation.[1] This Panel has granted centralization under similar circumstances, and Defendants fail to present a compelling argument to the contrary. Because all parties that have expressed a preference on the location of a consolidated action agree that the Southern District of Iowa is the most appropriate forum, ME2C requests that these related actions be consolidated and transferred to Judge Locher in the Southern District of Iowa.

II. ARGUMENT

A. ME2C's Delaware Case Demonstrates that Its Claims Can Be Efficiently Litigated in a Single Court.

Defendants raise various arguments against consolidation, but these arguments are simply not grounded in evidence. It is worth keeping in mind that ME2C was already able to litigate a case involving most of the current patents-in-suit and a much larger and more diverse group of defendants without any of the difficulties the current Defendants complain of now.

ME2C was able to file its Delaware case in Delaware because, consistent with the patent venue statute, all of those defendants were incorporated in that state. That case involved the assertion of five patents against dozens of defendants and involved infringement allegations against dozens of power plants located throughout the United States. No defendant moved to transfer to a more convenient forum, and Magistrate Judge Burke was able to efficiently manage that case by holding a single claim construction hearing, a single dispositive motion hearing, and a single trial for the limited set of remaining defendants. That trial involved twelve defendants

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

and eight power plants located in five states, and it was concluded in five days. That outcome was far superior to attempting to litigate ME2C's claims in multiple states throughout the country.

Here, ME2C was unable to file a single case encompassing all of the current Defendants, and thus it is requesting MDL consolidation. Nonetheless, the Delaware litigation shows that ME2C's patent claims can be, and should be, consolidated before a single court to maximize efficiency for all parties.

Defendants counter that informal consolidation would be preferable based on a handful of inapposite cases. *See* Resp. at 7. In two of the patent cases cited by Defendants—*Droplets* and *JumpSport*—the cases at issue had progressed substantially before the parties moved for consolidation. *See In re JumpSport, Inc.*, *('845 & '207) Pat. Litig.,* 338 F. Supp. 3d 1356 (J.P.M.L. 2018); *In re Droplets, Inc., Pat. Litig.*, 908 F. Supp. 2d 1377 (J.P.M.L. 2012). For example, some of the cases at issue already had long pending dispositive motions or made substantial progress at claim construction. *See JumpSport*, 338 F. Supp. 3d at 1357 (noting "procedural disparity" where some underlying actions were approaching close of discovery and others had not yet started discovery); *Droplets*, 908 F. Supp. 2d at 1378 ("Another consideration underlying our decision to deny centralization is that . . . not all actions are in their 'infancy.'"). For those cases, informal consolidation was a superior approach for managing cases that were following different timelines. In contrast, ME2C filed all of the cases at issue on the same day, and moved for consolidation before any of the courts had held a scheduling conference. Consolidation is appropriate under these circumstances, as all cases will still benefit from centralization.

In *In re Zeroclick, LLC*, 437 F. Supp. 3d 1362 (J.P.M.L. 2020), the plaintiff filed a set of

cases that were consolidated before a single judge in a single district. One of the Defendants in that group filed a declaratory judgment action in California, and several Defendants sought to consolidate the cases in California. The Panel found that these circumstances did not justify consolidation under Section 1407. *Id.* In contrast, ME2C has cases pending in three, or potentially five, districts depending on the outcome of Defendants' requests for severance and transfer or dismissal. Moreover, no party has filed a duplicative action as a strategy to transfer cases to a preferred venue. Rather, ME2C filed each of these cases in a venue that has specific ties to the respective Defendants and is seeking consolidation to the district that nearly all Defendants agree can most efficiently manage these cases.

B. The Pending Cases Have Substantial Factual Overlap

ME2C has asserted the same claims in the same patents against the same infringing conduct at coal-fired power plants. As the Panel has consistently recognized, common questions of claim construction and patent validity alone are sufficient for consolidation. *See, e.g.*, *In re Proven Networks, LLC Patent Litig.*, 492 F. Supp. 3d 1338, 1339 (J.P.M.L. 2020) ("[D]ifferences in the accused products and infringement allegations in the cases do not prevent centralization where common factual issues involving claim construction and patent validity are shared."); *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."). These principles support consolidation of the present cases, and Defendants fail to show otherwise.

Separate from the core patent issues of claim construction, infringement and validity, Defendants grasp for any potentially uncommon questions of fact (differences between corporate parents and subsidiaries, a potential license defense). But these arguments simply fail to move the needle given the overwhelming commonality of factual questions in this case. *See In re*

Cygnus Telecomms. Tech., LLC, Patent Litig., 177 F. Supp. 2d 1375, 1376 (J.P.M.L. 2001) ("We point out that transfer under Section 1407 does not require a complete identity *or even a majority* of common factual issues as a prerequisite to transfer." (emphasis added)).

1. Overlapping Facts Related to Infringement Support Consolidation.

According to Defendants, these cases have little overlap because "no two power plants operate the same way." Resp. at 4. But what matters is whether there are differences between the accused power plants that matter for purposes of infringement. All of the patents-in-suit require: (i) combusting coal, (ii) adding a halogen (*e.g.*, bromine or iodine) based additive, (iii) adding activated carbon, (iv) capturing mercury pollution. Defendants do not dispute that thirteen of the fifteen accused power plants have these traits in common. That is, they infringe the same patents in the same way. Indeed, Defendants notably omit any mention of their suppliers or the specific products they use for mercury capture. Discovery may show that these Defendants use the exact same products from the same suppliers at these power plants. Given the substantial overlap *as to the accused conduct* at each of the power plants, consolidation is appropriate.

Moreover, for the two power plants Defendants identify as different, those power plants do not weigh against consolidation. According to Defendants, one of the five accused MidAmerican power plants, and one of the five accused IPL power plants allegedly do not use calcium bromide or any other halogen additive. If discovery verifies those claims—as to the entire damages period—those power plants may not infringe and may be dropped from the case. However, in connection with ME2C's motion for preliminary injunction, ME2C presented evidence that these power plants *did* use calcium bromide during the damages period, and that they could begin infringing again at any time.[2] *See, e.g.*, D.I. 27-1 at 7. Ultimately, the time

[2] Notably, Defendants only present factual assertions about *present* power plant activities, not addressing past activities within the damages period for these patents.

period and extent of infringement for these power plants is something that can be determined through fact discovery. The mere existence of a factual infringement dispute as to a small number of power plants does not warrant denial of consolidation.

2. Overlapping Facts Related to Defendants' Defenses Support Consolidation.

Defendants contend that they will all raise a patent invalidity defense but offer no specifics other than to argue that they might assert different invalidity theories. Even if that is possible, they identify no specific theories or explain why they would pursue such a strategy. Moreover, ME2C's patents were already thoroughly tested in the Delaware litigation. In that case, the defendants collectively asserted the same invalidity theories based on testimony from the same expert. That makes sense. Defendants in multi-defendant, single-district patent cases typically coordinate their invalidity defenses to conserve time, money, and resources. In any event, Defendants' theories were rejected at the summary judgment stage and ultimately resolved by JMOL of no invalidity. Thus, Defendants fail to show that they are likely to raise invalidity defenses that would weigh against consolidation.

Two Defendants also claim that they will raise defenses unique to them. PacifiCorp claims that it has a license Defense and SRP claims that it has a sovereign immunity defense. These vague assertions should not defeat consolidation. That is particularly true here as these defenses are likely to overlap with the broader issues in the case. For example, any license defense will necessarily involve a determination of the scope of the asserted license and whether the accused infringement falls within that scope.

3. Overlapping Facts and Legal Issues Related to Claim Construction Support Consolidation.

These cases involve assertion of nearly all the same patents, all from the same patent family. They all have the same inventors and trace priority back to a single provisional patent

application. Accordingly, similar claim construction issues are likely to arise in these cases. *See, e.g.*, *In re Phoenix Licensing L.L.C. Patent Litig.*, 536 F. Supp. 2d 1373 (J.P.M.L. 2008); *Proven Networks*, 492 F. Supp. 3d at 1339 (explaining that common claim construction issues supported consolidation even though the same sets of patents were not asserted in each case).

Defendants counter that a patentee must identify specific claim term disputes to justify consolidation, but the cases they cite do not support that argument. In *In re ArrivalStar S.A. Fleet Mgmt. Sys. Pat. Litig.*, 802 F. Supp. 2d 1378 (J.P.M.L. 2011), only one out of several dozens of defendants sought consolidation, and the plaintiff argued that consolidation was unnecessary because these cases were unlikely to make it to claim construction. In *In re Alexsam, Inc. ('608 & '787) Pat. & Cont. Litig.*, 437 F. Supp. 3d 1374 (J.P.M.L. 2020) the Panel found that the "Section 1407 motion appears to be largely predicated on [the plaintiff's] dissatisfaction with certain of the magistrate judge's rulings in the New York action, as well as, relatedly, the action's progress," which is not a basis for transfer under Section 1407. In short, none of these cases are similar to the present case, and none require a patentee to predict potential claim construction disputes in its Section 1407 motion.

4. Overlapping Facts Related Defendants' Corporate Structures Support Consolidation.

According to Defendants, consolidation is inappropriate because ME2C has asserted claims against related corporate entities that will require individualized discovery. However, Defendants fail to mention that two of the three corporate families, BHE and Alliant, jointly own and operate several accused power plants. Indeed, the overlap between these Defendants is so strong that even their own severance motion admits that most of ME2C's claims against them should be heard in a single case. *See* Mot. at 2-3 (requesting that the Iowa court sever ME2C's

claims against PacifiCorp and WPL but maintain a case for certain of ME2C's claims against BHE, MidAmerican, Alliant, and IPL).

5. ME2C Is Not Required to Make a Final Election of Patent Claims Before Consolidation.

Defendants do not dispute that ME2C has asserted the same claims from the same patents against all Defendants.[3] However, Defendants claim that ME2C should have identified the specific claims it will assert at trial before seeking consolidation. Defendants offer no authority to support this argument, and as a practical matter, it is contrary to how patent cases are litigated. To state a claim for infringement, a patentee need only allege that at least one claim is infringed. As the case progresses, patentees will typically reduce the number of asserted claims, in conjunction with Defendants reducing the number of asserted invalidity theories. This reciprocal narrowing ensures that both sides can litigate the case fairly and efficiently. Defendants' assertion that a patentee must unilaterally narrow its case before Defendants identify their invalidity theories would provide a powerful and undue advantage to accused infringers.

Regardless, this argument is particularly inappropriate here where all of the asserted patents are from the same patent family and cover similar subject matter. This is not a case where ME2C is asserting a group of patents that each covers a different feature of a product, or entirely disparate products. All of ME2C's asserted patents cover a process of capturing mercury using halogen additives and activated carbon sorbents.

Finally, Defendants accuse ME2C of gamesmanship and compare this case to *In re PersonalWeb Techs., LLC et al., Pat. Litig.*, 2020 WL 5910080, at *16 (N.D. Cal. Oct. 6, 2020). This attack is entirely unfounded. In that case, the plaintiff represented that its claims against a

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

single defendant were representative as to a group of defendants in 85 pending lawsuits. *Id.* at *14. The court stayed the case as to all but the representative defendant, later granted summary judgment of non-infringement as to that defendant, and then applied the same reasoning to grant summary judgement as to the other defendants. *Id.*. The patentee argued that this approach was error because its claims against the representative defendant were not actually representative. *Id.* at *16. In this case, Defendants offer no evidence that ME2C has taken such inconsistent positions, and this accusation does not even pertain to this case—no party contends that ME2C's case should be stayed as to all but a single Defendant.

C. Defendants Fail to Show that Consolidation Would Inconvenience the Witnesses and Parties Such that Consolidation Should Be Denied.

Defendants' argument that consolidation would be inconvenient for some parties is no reason to deny consolidation. While the Panel considers geographic proximity when selecting a transferee district for consolidation, the Panel has not relied on traditional § 1404(a) convenience factors or analysis due to the unique pretrial nature of multidistrict litigation:

> We note that since Section 1407 transfer is for pretrial proceedings only, there is usually no need for the parties and witnesses to travel to the transferee district for depositions or otherwise. Furthermore, the judicious use of liaison counsel and lead counsel will eliminate the need for most counsel ever to travel to the transferee district.

In re Cygnus Telecomms. Tech., LLC, 177 F. Supp. 2d at 1376. Nevertheless, even assuming Defendants' arguments—which blur the lines between § 1407 and § 1404(a)—are proper, Defendants do not specify or put forth actual information about convenience. Indeed, all of the Defendants that have expressed an opinion on a proposed transferee district agree that the Southern District of Iowa—*the same venue requested by ME2C*—is the most appropriate choice.

D. Consolidation Does Not Undermine the Authority of District Court Judges.

According to Defendants, consolidation would undermine the Iowa district court's ability

to manage its own docket as it relates to motions to dismiss for lack of personal jurisdiction. Defendants are wrong. ME2C is not requesting any relief regarding docket management in Iowa. ME2C merely explained that, if consolidation is denied, and if Defendants' severance and dismissal motions pending in Iowa are granted, then at least three different judges in three different districts would need to rule on the single motion for preliminary injunction that ME2C filed against all of the Iowa Defendants. This is plainly not an efficient use of resources.

If the Panel orders consolidation, the transferee judge will still be able to rule on Defendants' motions. *In re Delta Dental Antitrust Litig.*, 509 F. Supp. 3d 1377, 1379 (J.P.M.L. 2020) ("[T]he transferee court can exercise personal jurisdiction to the same extent as the transferor court could."). If the transferee court grants Defendants' motions—which it should not given Defendants' various contacts with Iowa—the jurisdictional issues may be cured by transferring Defendants to a court with jurisdiction and then reconsolidating those Defendants under Section 1407. *See, e.g.*, *In re RealPage, Inc., Rental Software Antitrust Litig.*, No. 3:23-CV-00742, 2024 WL 993302, at *7 (M.D. Tenn. Mar. 7, 2024) (ruling on motion to dismiss for lack of personal jurisdiction by transferring Defendant to a court with jurisdiction and requesting that the JPML transfer the Defendant back pursuant to Section 1407).

As a practical matter, Defendants' motions may impact where trial is ultimately held for certain Defendants following remand, but that should not weigh against consolidation for *pre-trial* purposes. Consolidation would allow a single transferee court to evaluate all pending motions, set a consolidated schedule, and resolve those motions as efficiently as possible. Delaying a ruling on ME2C's Section 1407 Motion would merely inject needless delay.

E. Defendants' Remaining Arguments Are Unavailing.

Defendants note that ME2C settled with some of the Arizona Defendants, and that it moved for a preliminary injunction against the Iowa Defendants, but not the remaining Arizona

Defendant or Missouri Defendants. Defendants also criticize ME2C for not seeking an injunction in its prior Delaware case. They fail to explain why these facts should weigh against consolidation.

ME2C is a practicing company that is very reluctant to sue potential customers. But when those companies refuse to abide by ME2C's patent rights, it has no choice. With that in mind, ME2C has elected not to move for an injunction against Defendants that have been willing to engage in good faith settlement discussions (*e.g.*, the Defendants that have been dismissed from the Arizona case), or where further discovery is appropriate before moving for an injunction. Similarly, in ME2C's Delaware litigation, nearly all of the defendants in that case settled with ME2C either became an ME2C customer, agreed to terms designed to facilitate a commercial relationship, or shut down operations.[4] The one set of defendants that did not settle were found to infringe by a jury and shut down their infringing operations. The Defendants in the Iowa case have not been willing to stop infringing or negotiate, despite ample evidence of infringement, and thus ME2C filed its motion for a preliminary injunction. This is entirely reasonable litigation strategy that does not weigh against consolidation.

III. 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.

[4] In passing, Defendants highlight ME2C's prior settlements while evoking case law under which centralization is denied if large scale early resolution is likely. *See* Resp. at 5 n.4, 7 (citing *JumpSport*, 338 F. Supp. 3d at 1356). Of course, Defendants don't actually attempt to argue that ME2C has engaged in that conduct. In the Delaware case, for example, parties were added and dropped throughout multiple rounds of amended pleadings, and several settled on the eve of trial, after ME2C had successfully litigated through claim construction and dispositive motions. ME2C proceeded to trial against the remaining Defendants and won on all issues, including receiving its precise damages request. While ME2C strives to resolve these disputes amicably, ME2C's past or current litigation conduct in no way demonstrates a pattern of premature mass settlement.

DATED: November 14, 2024

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BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE MIDWEST ENERGY EMISSIONS CORP. PATENT LITIGATION	MDL No. 3132

PROOF OF SERVICE

In compliance with Rule 4.1 (a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that on November 14, 2024, I caused a copy of the foregoing document to be filed with the Clerk of the Court using CM/ECF, which will send electronic notifications of such filing to all registered participants.

DATED: November 14, 2024

Respectfully submitted,

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