ORAL ORDER: The Court, having reviewed the parties' motions for claim construction regarding the second of two disputed terms ("injecting the particulate sorbent material at a sorbent material injection rate and injecting separately the bromine containing promoter into a gas stream whereby in-flight reaction produces the promoted brominated sorbent," hereinafter referred to as the "injecting" term), (D.I. 388; D.I. 391), the briefing related thereto, (D.I. 392), having considered the legal standards regarding claim construction, see Virco Mfg. Corp. v. SSI Liquidating, Inc., Civil Action No. 20-906-LPS-CJB, 2022 WL 1184060, at *1-2 (D. Del. Apr. 21, 2022), report and recommendation adopted, 2022 WL 2235840 (D. Del. June 22, 2022), and having heard argument at a Markman hearing on April 28, 2022, (D.I. 407 (hereinafter, "Tr.")), hereby ORDERS that the "injecting" term be afforded its plain and ordinary meaning (i.e., Plaintiffs' proposal). The Court adds the following with regard to its rationale: (1) Defendants argue that this term (found in claim 17 of United States Patent No. 8,168,147, hereinafter, the "'147 patent") should be construed to require that: (a) the injecting term's reference to "gas stream" after "the bromine containing promoter" be moved, inter alia, to before "the bromine containing promoter"; and (b) the bromine promoter and sorbent material must both be injected downstream of a furnace exit. (D.I. 392 at 27, 29, 38; Tr. at 8-9) However, Defendants have failed to justify the narrow construction that they seek.; (2) The plain language of the claims at issue counsels against Defendants' proposed construction. With regard to the first dispute, the inventors made a choice to utilize the term "gas stream" where they wanted to. The inventor did not insert "gas stream" before reference to the bromine containing promoter as Defendants' proposal seeks to do (instead, the inventor did so after reference to the bromine containing promoter). (Tr. at 8; '147 patent, col. 24:34-37) And with regard to the second dispute -- which was the primary dispute in the parties' briefing, (see Tr. at 8, 13) -- the claim language simply does not specify the location of the injections. Instead, the claim language simply requires that there be two injections (one of the sorbent material and the other of the bromine containing promoter), and that in-flight reaction produces the promoted brominated sorbent. (D.I. 392 at 27; Tr. at 14-15, 19 (Plaintiffs' counsel noting that "[a]s long as we can prove [as] a factual matter for infringement that injection [into] the gas stream occurs, the particular location in relation to the furnace does not matter to the claim.")) To the extent that Defendants suggest that the claim language supports their position because it requires an "in-flight reaction," (D.I. 392 at 38, 40), the record before the Court is not clear that "in-flight" must only mean "downstream of a furnace exit[,]" (see Tr. at 15, 59-61).; (3) In contrast to Defendants' proposal, the specification describes an example which expressly discloses that "the inventive sorbent can be injected where desired (e.g., before, after, or within the boiler)." ('147 patent, col. 20:11-13 (cited in D.I. 392 at 27); Tr. at 41-42) This example also refers to a "flue gas stream," ('147 patent, col. 20:9), which indicates that the patentee knew how to expressly refer to a gas stream downstream of the furnace (and knew that it should use words in addition to "gas stream" in doing so), (Tr. at 18, 31).; (4) Plaintiffs point to Figure 2 of provisional application no. 60/605,640 (which the 147 patent incorporates by reference) as disclosing an example of bromine being injected upstream of the furnace exit. (D.I. 392 at 27-28; see also '147 patent, col. 1:5-15) This figure is helpful to Plaintiffs, in that it has arrows depicting the "[bromine] [a]dditive [i]njection" as taking place before, after and/or into the furnace. The parties dispute whether or not this figure is properly incorporated into the specification of the '147

patent (and, if not, the extent to which the Court should rely on the figure). (D.I. 392 at 32-33, 36, 39-40) But regardless of whether the figure was incorporated by reference into the patent itself, the Court can at least take note of the fact that the figure from a related application provides some support for the concept that bromine can at times be added into a gas stream upstream of a furnace exit.; (5) Defendants point to Figure 3 of the '147 patent as dictating that the scope of the claim is "cabin[ed]" in accordance with their proposed construction. (Id. at 31-32, 34; see also Tr. at 61) It is true that Figure 3 appears to depict the gas streams and injection points as occurring after the furnace exit. ('147 patent, FIG. 3; see also D.I. 392 at 35) However, Defendants fail to persuasively explain why the claim must be limited to the embodiment depicted in Figure 3. (D.I. 392 at 35); see, e.g., Arlington Indus., Inc. v. Bridgeport Fittings, Inc., 632 F.3d 1246, 1254 (Fed. Cir. 2011) ("[D]rawings in a patent need not illustrate the full scope of the invention."); Virco Mfg. Corp., 2022 WL 1184060, at *4 (same).; (6) One motivation for Defendants' proposal seems to be their position that pre-treating coal with a bromine promoter that is then combusted cannot constitute "injecting... the bromine containing promoter into a gas stream[,]" as required by the claim term. (D.I. 392 at 30, 38; Tr. at 55, 57) However, the current record before the Court is not robust regarding this dispute. And it may well be that whether circumstances like this meet the claim's requirements is an infringement dispute for the fact-finder to resolve (as opposed to a claim construction dispute). (Tr. at 20-21, 25-27, 31-33); and (7) In the end, here again, it is Defendants who want the narrower construction, and they simply have not given the Court enough to go on for their proposed construction to prevail. (See D.I. 392 at 27, 34-35). Ordered by Judge Christopher J. Burke on 7/12/2022. (dlb) (Entered: 07/12/2022)
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