ORAL ORDER: The Court, having reviewed the parties' motions for claim construction regarding one of two terms to be construed ("combusting a mixture comprising coal, pyrolysis char, and an additive comprising HBr, a bromide compound, or a combination thereof," hereinafter referred to as the "combusting a mixture" 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), and having heard argument at a Markman hearing on April 28, 2022, (D.I. 407 (hereinafter, "Tr.")), hereby ORDERS that the "combusting a mixture" term be afforded its plain and ordinary meaning (i.e., Plaintiffs' proposal). The Court adds the following with regard to its rationale: (1) The dispute with respect to this term (found in claims 1 and 17 of United States Patent No. 10,589,225, hereinafter, the "'225 patent")) is whether the limitation allows for the pyrolysis char to be created within the combustor -- i.e., by combusting a mixture of coal and a bromine compound that produces pyrolysis char -- and then be combusted along with the coal and the bromine compound in the combustor (Plaintiffs' position), or whether the coal, bromine compound and pyrolysis char must each be added to the combustor, and then be combusted (Defendants' position). (D.I. 392 at 43-45; Tr. at 79, 82-84, 92, 98-99, 122); (2) The plain language of the claims at issue supports Plaintiffs' position. Both parties are in agreement that a "mixture" comprising coal, pyrolysis char and a bromine compound means that all three elements need to be present together in the combustor. (Tr. at 82, 120-21) Defendants' position would essentially rewrite the claim language to be "providing to the combustor a mixture comprising coal, pyrolysis char and a bromine compound... to then be combusted" -- and yet the claim simply does not use that kind of terminology. (Id. at 100-01, 115-16, 121; D.I. 392 at 42 ("[T]o prove infringement, [Plaintiffs] need only show that the combustion step has been performed [and do not need to] present further evidence of material being added to the combustor[.]")) Instead, the claims at issue simply require "combusting a mixture[,]" ('225 patent, cols. 23:64-66, 25:1-3), which seems to allow for the pyrolysis char to be created within the combustor, so long as it is then present (and combusted) with the coal and the bromine compound.; (3) The language of other claims also supports Plaintiffs' position as to this term. (D.I. 392 at 42; Tr. at 89-90) For example, in contrast to claims 1 and 17, claim 16 of the '225 patent recites, inter alia, "combusting coal in a combustor and adding within the combustor a pyrolysis char promoted by" a bromine compound. ('225 patent, col. 24:60-63) Thus, the language of claim 16 demonstrates that the inventors knew how to make clear that the pyrolysis char had to be added into the combustor from the outside in some way but they did not use this same language (or language similar to it) for the claim term at issue. See, e.g., Chemours Co. FC, LLC v. Daikin Indus., Ltd., Civil Action No. 17-1612-MN-CJB, 2022 WL 605357, at *3 (D. Del. Jan. 13, 2022) (citing cases); Impulse Tech. Ltd. v. Microsoft Corp., C.A. No. 11-586-RGA-CJB, 2013 WL 2020055, at *17 (D. Del. May 13, 2013) (citation omitted).; (4) To the extent that Defendants argue that their proposed construction is supported by the specification because the specification does not contain "an express discussion of using pyrolysis char in the combustion mixture" and instead only refers to pyrolysis char being added to the combustor, (D.I. 392 at 44-45, 48), that is not a persuasive argument, see, e.g., GPNE Corp. v. Apple, Inc., Case No.: 12-CV-02885-LHK, 2013 WL 4446819, at *30 n.22 (N.D. Cal. Aug. 13, 2013) ("The fact that the specification does not discuss transmitting communications data in a time slot

does not foreclose the possibility that the Patents encompass within their scope inventions wherein communications data is transmitted in a time slot.") (citing SunRace Roots Enter. Co., Ltd. v. SRAM Corp., 336 F.3d 1298, 1305 (Fed. Cir. 2003)).; (5) While Defendants posit that adoption of Plaintiffs' position with respect to this claim limitation would render these claims indefinite and/or invalid for lack of written description, Defendants ultimately conceded that such arguments are not ripe at this time. (D.I. 392 at 45; Tr. at 94, 96, 103-05, 111-12); (6) Finally, while Defendants suggest that Plaintiffs' position does not make sense from a scientific perspective, this is merely attorney argument with no evidentiary support in the record. (Tr. at 101-03); (7) In the end here, 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 46); (8) While the parties focused on the combusting a mixture term found in claims 1 and 17 of the 225 patent, (see, e.g., Defendants' Slide Presentation, Slide 8; D.I. 392 at 43), it appears that a similar term is at issue from claim 14 of the '225 patent, (D.I. 392 at 41). The same rationale and conclusion applies to that term in claim 14.; and (9) There is one other term left for the Court to construe, and the Court will do so by way of an additional forthcoming order shortly. Ordered by Judge Christopher J. Burke on 6/24/22. (mlc) (Entered: 06/24/2022)
As of June 27, 2022, PACER did not contain a publicly available document associated with this docket entry. The text of the docket entry is shown above.

Midwest Energy Emissions Corp. et al. v. Arthur J. Gallagher & Co., et al.
1-19-cv-01334 (DDE), 6/24/2022, docket entry 440