



**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

**IN RE: MIDWEST ENERGY EMISSIONS
CORP. PATENT LITIGATION,**

MDL Docket No. 4:24-md-3132-SHL-WPK

THIS DOCUMENT RELATES TO:

MIDWEST ENERGY EMISSIONS CORP.,

C.A. NO. 4-24-CV-243-SHL-WPK

MIDWEST ENERGY EMISSIONS CORP.,

Plaintiff,

CIV. No. 4:24-cv-00243-SHL-WPK

v.

BERKSHIRE HATHAWAY ENERGY
COMPANY, MIDAMERICAN ENERGY
COMPANY, PACIFICORP, ALLIANT
ENERGY CORPORATION, INTERSTATE
POWER AND LIGHT COMPANY, and
WISCONSIN POWER AND LIGHT
COMPANY

JURY TRIAL DEMANDED

Defendants.

**PLAINTIFF ME2C'S REPLY BRIEF IN SUPPORT OF ITS
MOTION FOR PRELIMINARY INJUNCTION**



TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

 A. *Winter* Factor 1: Likelihood of Success on the Merits 1

 1. ME2C Will More Likely Than Not Prove Infringement..... 1

 2. Defendants Will More Likely Than Not Fail to Prove Patent Invalidity. 2

 (a) Defendants Are Unlikely to Prove That Downs-Boiler
 Pre-Dates the '517 Patent..... 3

 (b) Defendants Are Unlikely to Prove That Sjostrom or
 ME2C's 2010 Sales Pre-Date the '517 Patent. 6

 3. BHE, MidAmerican, and PacifiCorp Are Unlikely to Prevail
 on Their License Defense..... 8

 B. *Winter* Factor 2: Irreparable Harm in the Absence of Preliminary Relief 9

 1. ME2C Has Demonstrated Irreparable Harm Under the
 Traditional Principles of Equity 9

 2. ME2C's Prior License and Supply Agreements Do Not Negate
 the Irreparable Harm Caused by Defendants. 11

 3. ME2C's Product Sales Do Not Negate the Irreparable Harm
 Caused by Defendants. 13

 4. Defendants' Remaining Arguments Against Irreparable Harm
 Are Meritless. 14

 C. *Winter* Factor 3: The Balance of Hardships 15

 D. *Winter* Factor 4: The Public's Interest 16

 E. Defendants' Additional Arguments Do Not Weigh Against an Injunction 17

III. CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases

Brooktree Corp. v. Advanced Micro Devices, Inc.
977 F.2d 1555 (Fed. Cir. 1992)..... 7

Commonwealth Sci. & Indus. Rsch. Organisation v. Buffalo Tech. (USA), Inc.
542 F.3d 1363 (Fed. Cir. 2008)..... 7

Donaldson v. Becket (H.L. 1774)
*as reprinted in 17 The Parliamentary History of England from the Earliest Period
to the Year 1803*, at 953 (William Cobbett ed., London, 1813) 10

eBay Inc. v. MercExchange, L.L.C.
547 U.S. 388 (2006)..... 10, 11, 12

Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.
527 U.S. 308 (1999)..... 10

Guntert & Zimmerman Constr. Div., Inc. v. Gomaco Corp.
No. 20-CV-4007-CJW-KEM, 2020 WL 6948364 (N.D. Iowa Oct. 14, 2020) 14

High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.
49 F.3d 1551 (Fed. Cir. 1995)..... 11, 12

Horton v. Maltby
LI Misc MS 112 (Ch. 1783)..... 10

Hybritech Inc. v. Abbott Lab ’ys
849 F.2d 1446 (Fed. Cir. 1988)..... 15

i4i Ltd. P’ship v. Microsoft Corp.
598 F.3d 831 (Fed. Cir. 2010)..... 16, 17

In re DDMG Estate
594 F. App’x 92 (3d Cir. 2015) 9

Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal., Inc.
248 F.3d 1333 (Fed. Cir. 2001)..... 9

Johnson v. Moody
No. 4:16-cv-00449-RGE-SBJ, 2016 WL 8839427 (S.D. Iowa Nov. 14, 2016) 17

Mercexchange, L.L.C. v. eBay, Inc.
275 F. Supp. 2d 695 (E.D. Va. 2003) 11

Metalcraft of Mayville, Inc. v. The Toro Co.
848 F.3d 1358 (Fed. Cir. 2017)..... 11, 17

Microsoft Corp. v. i4i Ltd. P’ship
564 U.S. 91 (2011)..... 3

Natera, Inc. v. NeoGenomics Lab’ys, Inc.
106 F.4th 1369 (Fed. Cir. 2024) 17

Petrella v. Metro-Goldwyn-Mayer, Inc.
572 U.S. 663 (2014)..... 15

Phelps-Roper v. Nixon
545 F.3d 685 (8th Cir. 2008) 17

Polymer Techs., Inc. v. Bridwell
103 F.3d 970 (Fed. Cir. 1996)..... 14

PPG Indus., Inc. v. Guardian Indus. Corp.
75 F.3d 1558 (Fed. Cir. 1996)..... 17

Ruiz v. A.B. Chance Co.
234 F.3d 654 (Fed. Cir. 2000)..... 9

T.J. Smith & Nephew Ltd. v. Consolidated Medical Equip., Inc.
821 F.2d 646 (Fed. Cir. 1987)..... 11

Tech. Licensing Corp. v. Videotek, Inc.
545 F.3d 1316 (Fed. Cir. 2008)..... 7

Titan Tire Corp. v. Case New Holland, Inc.
566 F.3d 1372 (Fed. Cir. 2009)..... 3

Trebro Mfg., Inc. v. Firefly Equip., LLC
748 F.3d 1159 (Fed. Cir. 2014)..... 13, 14

Vertigo Media, Inc. v. Earbuds Inc.
No. CV 21-120 (MN), 2021 WL 4806410 (D. Del. Oct. 14, 2021) 11

VidStream LLC v. Twitter, Inc.
No. 2024-2265, 2024 WL 4820802 (Fed. Cir. Nov. 19, 2024) 10

Statutes

35 U.S.C. § 284..... 15



Rules

MPEP 201.06(c)..... 7

I. INTRODUCTION

After years of trying to negotiate supply agreements with these Defendants, they have finally been forced to put their cards on the table and show that they were bluffing. Defendants have no substantive non-infringement arguments, and their only invalidity theories already failed in Delaware. They also acknowledge that ME2C's technology is critical to their continued operations. Injunctive relief is appropriate now to put an end to their calculated infringement.

II. ARGUMENT

A. *Winter* Factor 1: Likelihood of Success on the Merits

1. ME2C Will More Likely Than Not Prove Infringement.

As explained in ME2C's motion, '517 patent claim 1 is a short, straightforward patent claim that requires combusting coal, adding a bromide compound to the coal or combustion chamber, adding activated carbon after combustion, and capturing mercury. Defendants do not dispute these requirements, and indeed they rely on the same straightforward reading of the claim to support their invalidity theories. *See, e.g.*, Resp. at 3.

Similarly, Defendants do not dispute that they perform each of the steps required by '517 patent claim 1. While they attack the sufficiency of the evidence that ME2C relies on at this preliminary stage, *e.g.*, by arguing that the publicly available documents are several years old, they do not even attempt to controvert that evidence. For example, they provide no permit amendments, internal documents, nor employee testimony to indicate that they switched to using a different mercury capture technique. As MidAmerican's own corporate representative testified:

Q. Is the fact that the activated carbon is listed in title five permit mean that this power plant is required to operate the activated carbon injection equipment? A. Yes, and it's an acknowledgment that that is what we need to do to meet our emission requirements and that it's an improved part of our emission controls.

Dkt. No. 58-16 at 523:10-524:5; *see also* Trettel dep. at 184:16-21 ("It's my experience that if

they go to the effort of putting it into the permit, that they generally aren't doing that for their -- you know, it's done for a reason.").

Lest there be any doubt that Defendants are currently infringing, when discussing the balance of hardships, Defendants argue that disabling their activated carbon and bromine systems would cause "Certain, Immense, and Immediate" harm, and they contend that their only alternative to these systems is to shut down or reduce production from their power plants. Resp. at 26. Because Defendants' only non-infringement argument is that ME2C has not yet discovered more recent infringement evidence, this factor weighs strongly in favor of granting an injunction.

Finally, MidAmerican makes one highly misleading argument related to infringement. In its opposition brief it states: "the permits cited by ME2C reference the use of halogenated activated carbon at MidAmerican plants." ECF 58-5 at 71. 2 As Mr. Trettel stated at his deposition, this would not infringe the claim 1 of the '517 patent." Resp. at 4. Notably, MidAmerican only lists this as a reason why MidAmerican would not do business with ME2C; it does not claim that this argument demonstrates non-infringement. Indeed, no Defendant argues that they do not infringe because they use halogenated activated carbon.

To be clear, a power plant can inject activated carbon with added halogen (*i.e.*, bromine) to assist in mercury capture. But if that power plant also uses a front-end bromine additive, the use of halogenated carbon does not negate infringement. Mr. Trettel testified that using brominated carbon *without a front-end additive* would not infringe. Resp., Ex. Q at 22:4-6 (emphasis added) ("Q. And ME2C doesn't argue that brominated activated carbon, *by itself*, is patented by ME2C; correct? A. Correct."). MidAmerican does not deny that it uses a front-end bromine additive, and thus, it infringes.

2. Defendants Will More Likely Than Not Fail to Prove Patent Invalidity.

Defendants are asserting the same invalidity theories that failed in Delaware. According

to Defendants, their asserted references—Downs-Boiler and Sjostrom—disclose the same two-part mercury capture process as the '517 patent. ME2C has never disputed that. Indeed, the Sjostrom reference cites to the work of the '517 inventors. Ex. 27 at 23 (referencing SEA2, a halogen additive developed by the '517 inventors). The problem with these theories has always been that the inventors of the '517 patent simply invented this method first.

Defendants bear the burden of proving with clear and convincing evidence that the prior art date of their asserted references pre-dates the '517 inventors' actual invention date. *See Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1377 (Fed. Cir. 2009); *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 95 (2011) (explaining that a patent is presumed valid and that the burden of proving invalidity must remain at all times with the accused infringer). ME2C presented proof of its invention date at trial in Delaware, and that same evidence was provided to Defendants through the IPR records and the trial and deposition materials that ME2C produced to Defendants. Because Defendants offer no evidence on this critical issue, *Winter* factor 1 weighs in ME2C's favor.

(a) Defendants Are Unlikely to Prove That Downs-Boiler Pre-Dates the '517 Patent.

Defendants assert that '517 patent claim 1 is invalid in light of Downs-Boiler. ME2C does not dispute—and indeed has never disputed—that this reference discloses the same basic method as ME2C's '517 patent. But Downs-Boiler cannot invalidate the '517 patent because it was filed after the '517 inventors' reduced their invention to practice. Contrary to Defendants' assertions, the PTAB never endorsed the Downs-Boiler invalidity theory, and it was instead resolved at the Delaware trial in ME2C's favor.

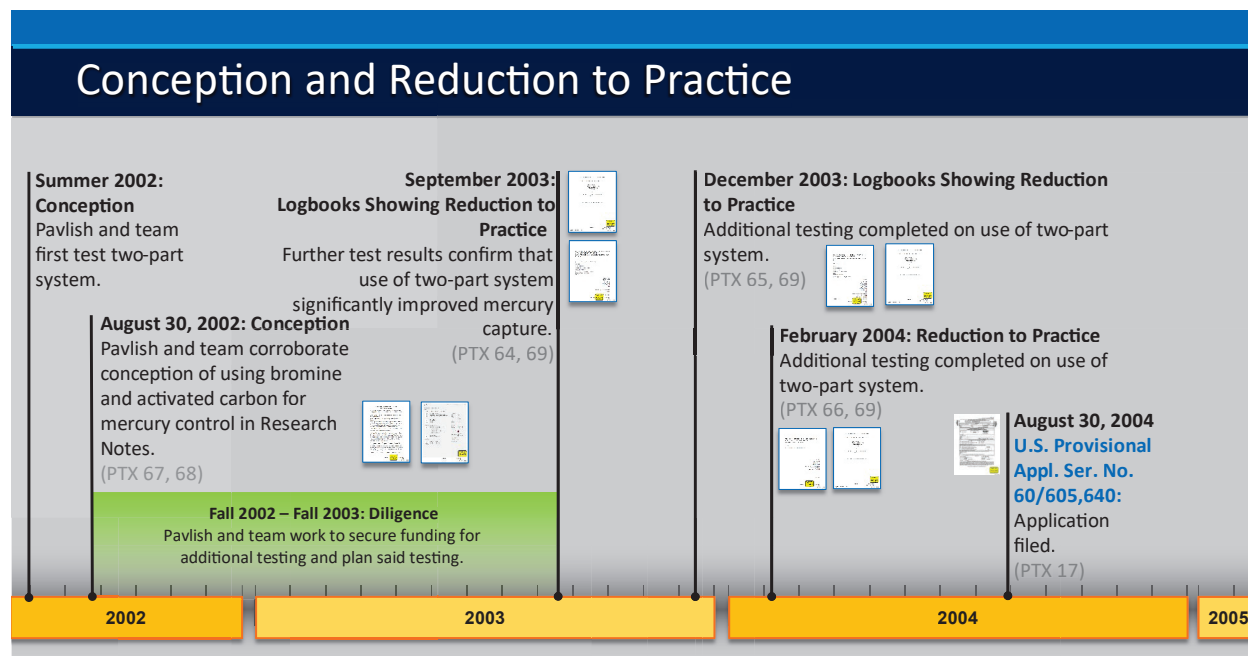
In response to ME2C's Delaware complaint, various Defendants petitioned for *Inter Partes* Review of U.S. Patent No. 10,343,114 (“the '114 patent”), which is related to ME2C's

'517 patent. Their petition asserted invalidity based on Downs-Boiler and an earlier filed reference, "Vosteen." ME2C responded by submitting inventor declarations indicating that they had developed their invention before the prior art dates for Downs-Boiler and Vosteen. The Defendants disputed those declarations and argued that they needed an opportunity to depose the inventors on this issue. With that background, the PTAB ruled, "on this record and at this preliminary stage, we are not persuaded that the evidence and arguments before us are sufficient to show the asserted conception date, reduction to practice date(s), or diligence." Dkt. No. 46 at 33. Thus, the PTAB did not endorse Defendants' invalidity theory; rather, it placed the burden on ME2C to prove a prior invention date (which is legally improper at the district court level), and it ruled that further discovery and briefing was necessary. Ultimately, ME2C settled with the Vistra Defendants before the PTAB's decision, and with the remaining Defendants over the next few months, which ended the IPR proceedings.

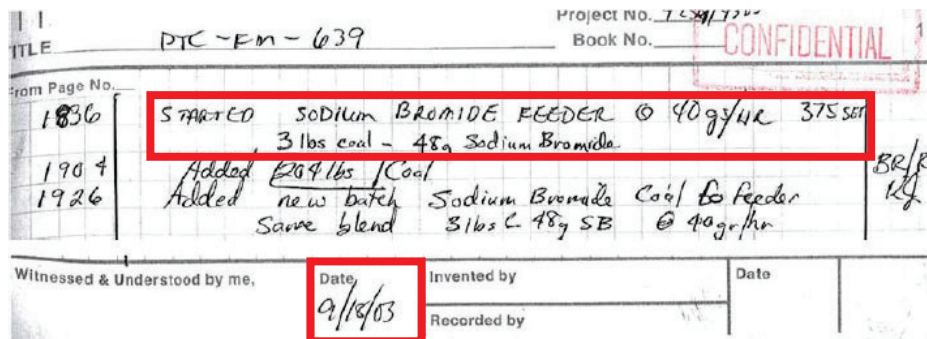
The remaining Delaware defendants continued to pursue this same invalidity theory. They obtained further discovery, deposed the inventors, and ultimately pursued the issue at trial. They even indicated in their opening statement that they would be calling Dr. Constance Senior—the same expert Defendants rely on to oppose this motion for preliminary injunction—to support their case. Dkt. No. 58-16, Trial Tr. at 183:20-25; 216:5-8. However, inventor John Pavlish who carefully walked through his invention process for the '517 patent as supported by contemporaneous documents and lab notebooks. *Id.* at 291:21-300:15. The defendants then declined to call Dr. Senior, and the Court granted JMOL of no invalidity.

Notably, Defendants now rely on Dr. Senior to testify that the disclosure of Downs-Boiler matches up to '517 patent claim 1. But Dr. Senior *does not opine that Downs-Boiler actually pre-dates and invalidates '517 patent claim 1.* See Dkt. No. 124-1 at 2-3. Her testimony

is entirely irrelevant to the issues in dispute. Overall, the inventors' invention date is well supported by evidence. The relevant timeline is reflected below, and shows a reduction to practice before the earliest possible prior art date for Downs-Boiler of March 22, 2004:



As illustrated above, the inventors first practiced their invention in the summer of 2002, and they proved it up through formal testing in September 2003, as documented in contemporaneous lab notebooks. Dkt. No. 58-16, Trial Tr. at 291:21-300:15 (inventor John Pavlish explaining testing process involving sodium bromide added to coal and activated carbon injection after combustion). This testing was corroborated via logbooks, as illustrated below:



11:58	Added 196.8 grams of Carbon to the k-tron feeder inlet to the ESP	BR
12:25	open port, installing sampling Probe for M-26	RL
12:26	Started M-26 sampling, ESP-inlet T1-9	GF
13:26	Done with M-26	
13:27	Port open to Remove Sampling probe M-26	RL
To Page No. _____		
Witnessed & Understood by me,		Date
		9/18/03
Invented by		Date
Recorded by		

Exs. 17-23. This evidence has been available to Defendants at least since ME2C filed its motion with the attached Delaware trial transcript, and their own expert saw it presented live at trial. Their failure to even acknowledge this evidence, despite bearing the burden of proving invalidity, is another strong indicator that ME2C is likely to succeed on the merits.

(b) Defendants Are Unlikely to Prove That Sjostrom or ME2C's 2010 Sales Pre-Date the '517 Patent.

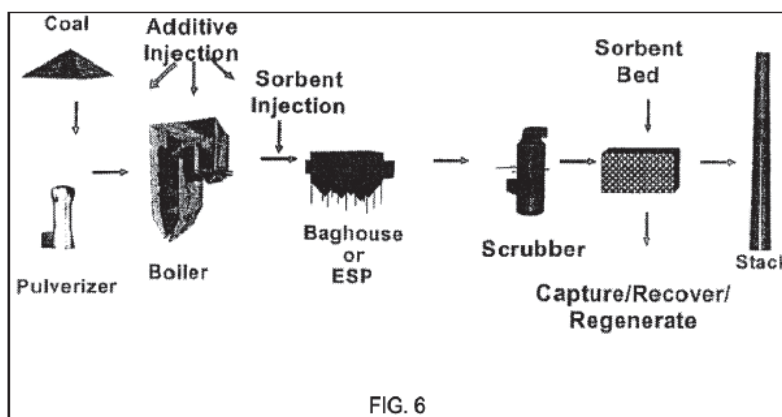
According to Defendants, ME2C's patents are invalid based on Sjostrom, which is dated January 25, 2005, and ME2C product sales from 2010. These references post-date the priority date claimed on the face of the '517 patent, i.e., August 2004. Thus, to prevail on this theory, Defendants must prove by clear and convincing evidence that the '517 patent is not entitled to that earlier priority date. They face an especially high burden for this theory.

Under 35 U.S.C. § 120, patent claims are entitled to the priority date of an earlier-filed application if they have written description support in the entire chain of applications tracing back to the desired priority date. This chain is presumed to remain intact, and a patent challenger bears the burden of proving a break in the chain by clear and convincing evidence. *Tech.*

Licensing Corp. v. Videotek, Inc., 545 F.3d 1316, 1327 (Fed. Cir. 2008). Moreover, when the Patent Office has already implicitly determined a patent's priority date, that determination is entitled to "an especially weighty presumption of correctness." *Brooktree Corp. v. Advanced*

Micro Devices, Inc., 977 F.2d 1555, 1574 (Fed. Cir. 1992); *see Commonwealth Sci. & Indus. Rsch. Organisation v. Buffalo Tech. (USA), Inc.*, 542 F.3d 1363, 1380 (Fed. Cir. 2008) (explaining that challenger failed to overcome presumption of correct priority date).

To simplify this analysis, a patent owner may incorporate earlier applications by reference. If the invention is disclosed in the earliest application, it is necessarily disclosed in the later applications. *See* MPEP 201.06(c) (explaining that a party can maintain a priority date by merely identifying an application number along with an incorporation statement such as “hereby incorporated by reference”). That is precisely what the ’517 patent’s inventors did. They filed a provisional application that describes their two-part process for mercury capture.



Ex. 30, Provisional application at fig. 6, 7-8 (“We now teach that the formation of the new bromide compound with carbon increases the reactivity of the carbon forms toward mercury and other pollutants”); 13 (“the sorbent is injected into the flue gas after the boiler. The additive can be injected where desired (e.g., before, after, or within the boiler”). And they incorporated this application into all references leading up to the ’517 patent. *See, e.g.*, Dkt. No 1-3, ’517 patent at 1:24-27 (“U.S. Provisional Patent Application No. 60/605,640 filed Aug. 30, 2004, the disclosure of which is hereby incorporated by reference in its entirety.”); *see also* Exs. 31-35 (intervening applications also containing incorporation by reference statements). Nothing more is

required to maintain a priority date.

Defendants bear the burden of identifying some application in the chain leading up to the '517 patent that failed to disclose the claimed invention. But they do not even attempt to do so. They cite to the PTAB's preliminary decision related to the '114 patent, but that patent had different disclosures, and its incorporation by reference statement was not at issue in the PTAB's preliminary decision. Simply put, Defendants have no basis for finding the '517 patent invalid.

3. BHE, MidAmerican, and PacifiCorp Are Unlikely to Prevail on Their License Defense.

According to the BHE Defendants, when ME2C signed a license agreement with [REDACTED], it also granted a license to all of the accused BHE, MidAmerican, and PacifiCorp power plants. This defense has no merit.

ME2C's license agreement with [REDACTED] does contain a license and covenant not to sue provision. However, Defendants fail to mention that the license is [REDACTED]

[REDACTED] Defendants do not claim that any of the power plants accused in this case are [REDACTED]. As such, the license is limited to particular power plants, *none of which are at issue in this suit*.

It is unclear why Defendants cited to the agreement's covenant not to sue provision without citing the immediately preceding definition of the license grant. A patent license is "a covenant by the patent owner not to sue the licensee for making, using, or selling the patented invention." *Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal., Inc.*, 248 F.3d 1333, 1345 (Fed. Cir. 2001). Thus, if Defendants were trying to create the impression that the [REDACTED] agreement grants a license that is limited to [REDACTED] plants and a covenant not to sue that extends

¹ The term "Affiliates" is defined to include entities owned or controlled by [REDACTED].

beyond [REDACTED] plants, that interpretation of the agreement would be nonsensical and incorrect. *See, e.g., In re DDMG Estate*, 594 F. App'x 92, 94 (3d Cir. 2015) (explaining that covenant not to sue provision could not be interpreted more broadly than the patent license provision).

Regardless, Defendants have identified no legal theory that would allow them to enforce ME2C's agreement with [REDACTED] in this case. As they acknowledge, "PacifiCorp, BHE, and MidAmerican had no involvement in drafting, negotiating, or approving the [REDACTED]." Resp. at 4 n.4. Thus, they have no basis to assert breach of contract. To the extent these Defendants intend to assert some theory of third-party promissory estoppel, that would fail as well. Estoppel requires a showing of reliance. *See, e.g., Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 673 (Fed. Cir. 2000) (approving summary judgment of no promissory estoppel because the proponent failed to present credible evidence of reliance). Because these Defendants have expressly stated that they had no involvement in signing the [REDACTED], they are unlikely to prove that they relied on the agreement to their detriment. Indeed, although ME2C alleges that it contacted these Defendants numerous times from 2018 through 2024, they offer no evidence that they claimed to already have a license to ME2C's patents.

Overall, Defendants offer no substantive non-infringement arguments, and while they identify potential affirmative defenses, they fail to come forward with evidence or coherent legal theories to support those defenses. The first *Winter* factor weighs in favor of an injunction.

B. *Winter* Factor 2: Irreparable Harm in the Absence of Preliminary Relief

1. ME2C Has Demonstrated Irreparable Harm Under the Traditional Principles of Equity

The Supreme Court has explained that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity[.]" *eBay Inc. v. MercExchange, L.L.C.*,

547 U.S. 388, 394 (2006). The defendants do not dispute that the “traditional principles of equity” are “the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.” *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). Nor do the defendants dispute that, under the traditional principles of equity, ongoing infringement constituted irreparable injury. *Horton v. Maltby*, LI Misc MS 112, p. 10 (Ch. 1783) (likening ongoing patent infringement to ongoing copyright infringement where an accused infringer “may in the mean time print of a number of copies to the irreparable injury of the Owner”). Nor do the defendants dispute that, under the traditional principles of equity, it was established that the remedy at law was inadequate in copyright and patent-infringement cases. *See Donaldson v. Becket* (H.L. 1774), as reprinted in 17 *The Parliamentary History of England from the Earliest Period to the Year 1803*, at 953, 989 (William Cobbett ed., London, 1813) (De Grey, C.J., explaining that, when opposing a motion for interlocutory injunction in a copyright-infringement case, it is no “objection that the party applying for it has a remedy at law.”).²

Moreover, ME2C has demonstrated the type of commercial harm commonly found to be irreparable. *See, e.g., Metalcraft of Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358, 1368 (Fed. Cir. 2017). Indeed, while courts sometimes struggle to determine whether an injunction against a competitor would actually cause customers to switch to purchasing from the patentee, here, ME2C is seeking to enjoin the specific infringing customers. Overall, ME2C has demonstrated irreparable harm and Defendants arguments to the contrary are unavailing.

² In a non-precedential opinion granting summary affirmance the Federal Circuit explained that Courts may not rely on a categorical rule that ongoing infringement, on its own, justifies an injunction. The Court declined to address the broader issue of how ongoing infringement is analyzed under traditional principles of equity. *See VidStream LLC v. Twitter, Inc.*, No. 2024-2265, 2024 WL 4820802 (Fed. Cir. Nov. 19, 2024).

2. ME2C's Prior License and Supply Agreements Do Not Negate the Irreparable Harm Caused by Defendants.

The defendants' primary argument is that ME2C's willingness to license its patents is evidence that monetary damages are adequate, thereby disproving the irreparable injury caused by the defendants' ongoing infringement. This argument misreads the relevant case law, and fails to account for the fact that ME2C has never licensed a competitor to use its technology in the same market. Rather, ME2C has consistently used its patents to shut down competitors and to create financial incentives for power plants to purchase its products.

To support their argument, the defendants cite three cases—*High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551 (Fed. Cir. 1995), *T.J. Smith & Nephew Ltd. v. Consolidated Medical Equip., Inc.*, 821 F.2d 646 (Fed. Cir. 1987), and *Vertigo Media, Inc. v. Earbuds Inc.*, No. CV 21-120 (MN), 2021 WL 4806410 (D. Del. Oct. 14, 2021)—to try to give the impression that their argument is well-supported. In fact, all three cases come from the *High Tech Medical* line of cases. *High Tech Medical* cites *T.J. Smith*, and *High Tech Medical* was cited by *Vertigo Media*. But the much bigger problem is that *High Tech Medical* runs afoul of the traditional principles of equity. In *eBay*, the district court denied injunctive relief in part by noting “the plaintiff’s willingness to license its patents” and by citing *High Tech Medical*. See *Mercexchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695, 712 (E.D. Va. 2003). While the Supreme Court did not explicitly overrule *High Tech Medical*, it heavily criticized that part of the district court’s opinion—specifically page 712—as having no basis in the traditional principles of equity:

Neither the District Court nor the Court of Appeals below fairly applied these traditional equitable principles in deciding respondent’s motion for a permanent injunction. Although the District Court recited the traditional four-factor test, 275 F.Supp.2d, at 711, it appeared to adopt certain expansive principles suggesting that injunctive relief could not issue in a broad swath of cases. Most

notably, it concluded that a “plaintiff’s willingness to license its patents” and “its lack of commercial activity in practicing the patents” would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue. *Id.*, at 712. But traditional equitable principles do not permit such broad classifications.

eBay, 547 U.S. at 393. Given how the Supreme Court directly criticized the district court for believing that a plaintiff’s willingness to license somehow proves it would not suffer irreparable harm for by ongoing infringement, it would be error for this Court to follow *High Tech Medical* and make the same mistake. The reality is that licensing is entirely consistent with property ownership and enjoyment. Real property owners can rent their houses to tenants, lease their mineral interests to wildcatters, and invite their neighbors over for dinner—all without losing the ability to enjoin trespassers. It is no different for intangible property rights of patents and copyrights under the traditional principles of equity.

Moreover, the *High-Tech Medical* line of cases is distinguishable in that ME2C practices its patents and has never licensed competitors to use its technology in the same market. Defendants focus on three of ME2C’s past agreements as evidence that ME2C need not enforce its patent rights—[REDACTED]—but all of those agreements were with potential customers and contain [REDACTED] [REDACTED] Dkt. Nos. 124-15 to 124-17. In short, they are designed to incentivize commercial agreements, not to allow exploitation of its technology by competitors. ME2C’s agreement with [REDACTED] led it to becoming a customer, and [REDACTED] stopped infringing because it shut down its coal plants. Dkt. No. 131-1 at 21:14-21. While ME2C has not yet retained [REDACTED] as a customer, that one agreement should not forever foreclose ME2C’s ability to enforce its patent rights.

Moreover, ME2C’s patent enforcement strategy includes agreement structures designed



to shut down infringement or incentivize commercial relationships, as summarized below:

Agreement	Terms
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

In short, ME2C has consistently used its patents to develop commercial relationships with power plant operators, and it seeks that same result in this case. Defendants’ refusal to respect ME2C’s patent rights has prevented ME2C from negotiating similar agreements for the accused power plants, and thus constitutes irreparable harm.

3. ME2C’s Product Sales Do Not Negate the Irreparable Harm Caused by Defendants.

Loss of market share constitutes irreparable harm supporting an injunction. *See Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1170 (Fed. Cir. 2014). Denial of an injunction in this case will necessarily cause a loss of market share because ME2C is seeking to enjoin the specific infringing power plants that would otherwise purchase product from ME2C. Moreover, the loss of those customers prevents ME2C from developing longer-term supply relationships, selling related products and services, and negotiating better terms with its own suppliers. *See, e.g.*, Dkt. No. 58-3 ¶¶ 22-24; Dkt. No. 131-1 at 123:22-124:7.

Relying on *Guntert v. Gomaco*, Defendants argue that ME2C’s market loss is not irreparable because its lost product sales can be calculated. Defendants are wrong. As the Federal Circuit explained, quantification of lost sales does not negate irreparable harm. *See Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1170 (Fed. Cir. 2014) (“Even though Trebro may be able to estimate the price of sod harvesters, how much profit it makes per sod harvester, and how

many sod harvester sales it makes (and thus may lose) per year, that does not automatically mean money damages are adequate.”). Indeed, the *Guntert* court distinguished *Trebro*, not because the patentee quantified its lost sales, but instead because the patentee failed to show that enjoining the competitor defendant would actually generate any new customers for the patentee. *See Guntert & Zimmerman Constr. Div., Inc. v. Gomaco Corp.*, No. 20-CV-4007-CJW-KEM, 2020 WL 6948364, at *12 (N.D. Iowa Oct. 14, 2020) (noting that the Defendant had an established customer base such that the proposed injunction would not cause those customers to switch to the patentee). But in this case, ME2C is seeking to enjoin the specific infringing customers, not a competitor that may or may not be encroaching on its market share. ME2C’s loss of market share is certain and specific to the power plants that would be subject to the injunction.

4. Defendants’ Remaining Arguments Against Irreparable Harm Are Meritless.

Defendants’ other arguments related to irreparable harm are no better. Defendants argue that the purported “delay” in sequencing litigation (as opposed to pursuing all infringers simultaneously) weighs against a finding that their ongoing infringement causes irreparable injury. Defendants make no attempt to show that their argument has any basis in the traditional principles of equity. Moreover, the Federal Circuit has more recently observed that “[t]he fact that other infringers may be in the marketplace does not negate irreparable harm.” *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 975 (Fed. Cir. 1996). The *Polymer* court continued: “A patentee does not have to sue all infringers at once. Picking off one infringer at a time is not inconsistent with being irreparably harmed.” *See id.*; *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 682 (2014) (“It is hardly incumbent on copyright owners, however, to challenge each and every actionable infringement.”). Moreover, the Federal Circuit has recognized that, where a patent owner prevails in a bellwether case, that prior adjudication can help justify subsequent requests for injunctive relief:

It is well-established that in context of a motion for preliminary injunction against further infringement of a patent, the patent holder may use a prior adjudication of patent validity involving a different defendant as evidence supporting its burden of proving likelihood of success on the merits.

Hybritech Inc. v. Abbott Labs, 849 F.2d 1446, 1452 (Fed. Cir. 1988). Unsurprisingly, the *Hybritech* court found that the district court did not abuse its discretion in rejecting the argument that the purported “delay” in litigating against a first defendant precluded a finding of irreparable harm. *See id.* at 1457. This principle is particularly appropriate here. ME2C successfully enforced its patents against the refined coal suppliers that initially caused infringement at many of the accused power plants at issue in this case. It then sought to take over the supply contracts for those power plants and filed the present cases when those Defendants refused.

Defendants also criticize ME2C for waiting until Defendants appeared in this case to file its motion. But this approach is entirely reasonable given that Defendants would no doubt move for additional time to respond to ME2C’s motion.

Finally, Defendants criticize ME2C for seeking reasonable royalty damages. But that is simply how damages for infringement are calculated. 35 U.S.C. § 284 (“Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty”). ME2C’s right to receive legal relief, i.e., damages for past infringement, does not preclude its right to equitable relief preventing future infringement.

C. *Winter* Factor 3: The Balance of Hardships

According to Defendants—and despite their contention that ME2C presented insufficient evidence that they are using a two-part process for mercury capture—Defendants contend that the harm to them from an injunction would be “Certain, Immense, and Immediate.” Dkt. 124 at 26. Apparently, their only available alternatives to using bromine and activated carbon would be

to shut down, or significantly reduce production from their power plants. ME2C is unsurprised that its technology provides Defendants with such profound benefits, but there is no need for Defendants to face these difficulties; ME2C can supply bromine and activated carbon to these power plants. And while it is extremely unlikely that ME2C would have difficulty supplying these products, the parties could even negotiate supply terms that allow the Defendants to use products from other suppliers in the event that ME2C is unable to deliver its products on time. *See generally* Dkt. No. 132-1, Trettel Dep. at 199:16-200:10 (explaining that the accused power plant purchase volumes are well within ME2C's supply capacity).

At worst, the harm to Defendants is an increase in product prices for bromine and activated carbon. But this type of financial harm born from their decision to infringe is irrelevant under *Winter* factor 3. *See i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 862 (Fed. Cir. 2010), *aff'd*, 564 U.S. 91 (2011) (explaining that “neither commercial success, nor sunk development costs, shield an infringer from injunctive relief. [A defendant] is not entitled to continue infringing simply because it successfully exploited its infringement.”).

In contrast, the harm to ME2C is that it will be permanently prevented from negotiating supply terms for these power plants during the remaining life of its patents. Those supply agreements could allow ME2C to negotiate more favorable terms from its suppliers and assist in generating further business from other power plants. This type of unquantifiable commercial harm is exactly the type of harm that tilts this factor in favor of an injunction. *See, e.g., Metalcraft of Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358, 1368 (Fed. Cir. 2017).

D. *Winter* Factor 4: The Public's Interest

“It is in the public interest to protect rights, so ‘the determination of where the public interest lies is also dependent on the determination of the likelihood of success on the merits.’” *Johnson v. Moody*, No. 4:16-cv-00449-RGE-SBJ, 2016 WL 8839427, at *10 (S.D. Iowa Nov.

14, 2016) (quoting *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008)). Indeed, public policy strongly favors enforcing patent rights. *PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1567 (Fed. Cir. 1996). If an injunction will promote the protection of the patentee's private rights without causing adverse effects on the public, this factor weighs in favor of an injunction. *See i4i*, 598 F.3d at 863 (affirming injunction that prevented infringing sales to new parties but did not disrupt operations of third parties); *Natera, Inc. v. NeoGenomics Lab 'ys, Inc.*, 106 F.4th 1369, 1380 (Fed. Cir. 2024) (affirming grant of injunction where patentee could supply the same cancer treatment drug in place of the enjoined infringing drug). As noted above, ME2C is likely to succeed on the merits, and can negotiate supply agreements for each of the accused power plants that will avoid any interruptions in power production. Thus, this factor must weigh in favor of an injunction. Finally, Defendants dispute whether ME2C's proposed bond amount is adequate. However, they do not identify an alternative amount that they believe would be adequate. Overall, this factor also weighs in favor of an injunction.

E. Defendants' Additional Arguments Do Not Weigh Against an Injunction

Defendants' individual opposition briefs re-raise the arguments in their motions to dismiss. If the Court denies those motions, these arguments are moot. On the other hand, if the Court were inclined to find venue or personal jurisdiction defects, ME2C respectfully requests that the Court transfer ME2C's claims to an appropriate forum (Wisconsin or Wyoming), so that ME2C can move for the MDL Panel to re-transfer its claims back to the Southern District of Iowa. This would eliminate their objections and allow the Court to grant ME2C's motion for a preliminary injunction without unnecessary delay.

III. CONCLUSION

Plaintiff has satisfied the prerequisites for obtaining a preliminary injunction and respectfully asks that its proposed injunction against Defendants be granted.

DATED: December 23, 2024

Respectfully submitted,

/s/ Jeffrey D. Harty

Bradley W. Caldwell (admitted *pro hac vice*)

Texas State Bar No. 24040630

Email: bcaldwell@caldwellcc.com

Austin Curry (admitted *pro hac vice*)

Texas State Bar No. 24059636

Email: acurry@caldwellcc.com

Justin T. Nemunaitis (admitted *pro hac vice*)

Texas State Bar No. 24065815

Email: jnemunaitis@caldwellcc.com

Richard A. Cochrane (admitted *pro hac vice*)

Texas State Bar No. 24116209

Email: rcochrane@caldwellcc.com

CALDWELL CASSADY & CURRY P.C.

2121 N Pearl Street, Suite 1200

Dallas, Texas 75201

Telephone: (214) 888-4848

Facsimile: (214) 888-4849

Jeffrey D. Harty

Iowa Bar No. IA AT0003357

Email: jharty@nyemaster.com

NYEMASTER GOODE, P.C.

700 Walnut Street

Suite 1300

Des Moines, Iowa 50309

Telephone: (515) 283-3100

Facsimile: (515) 283-3108

**ATTORNEYS FOR PLAINTIFF
MIDWEST ENERGY EMISSIONS CORP.
(N/K/A BIRCHTECH CORP.)**

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2024, the foregoing was filed electronically and served on all counsel of record.

/s/ Jeffrey D. Harty

Jeffrey D. Harty