IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RAI STRATEGIC HOLDINGS, INC. and R.J. REYNOLDS VAPOR COMPANY,

Plaintiffs and Counterclaim Defendants,

v.

ALTRIA CLIENT SERVICES LLC; PHILIP MORRIS USA INC.; and PHILIP MORRIS PRODUCTS S.A.,

Defendants and Counterclaim Plaintiffs.

Case No. 1:20-cv-00393-LO-TCB

REDACTED

REPLY IN SUPPORT OF REYNOLDS'S MOTION *IN LIMINE* NO. 7 TO PRECLUDE EVIDENCE OR ARGUMENT THAT ANY VUSE PRODUCTS ALLEGEDLY INFRINGE ANY CLAIM OF THE '545 PATENT ON THE BASIS THAT JUUL AND/OR NUMARK ALLEGEDLY PRACTICE THAT PATENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Reynolds's Motion *in Limine* ("MIL") No. 7 is to preclude evidence or argument that any VUSE products allegedly infringe any claim of the '545 Patent on the basis that JUUL and/or NuMark allegedly practice that patent. PM/Altria agrees that its experts never offered that opinion. Dkt. 987 at 2. To allow PM/Altria to advance such an argument would be unfairly prejudicial to Reynolds.

ARGUMENT

I. PM/Altria Admits It Is Improper To Use RJR's Statements To Prove Infringement

Reynolds's MIL 7 is to preclude evidence or argument of infringement on the basis that JUUL and/or NuMark allegedly practice the '545 Patent. PM/Altria agrees that its experts never offered that opinion. *Id*. ("PM/Altria has never argued that the accused products 'infringe' the '545 Patent based on JUUL or Nu Mark's use of that patent.") Accordingly, the Court should grant Reynolds's MIL 7 to prevent PM/Altria from advancing a new infringement theory it did not previously raise. *See*, *e.g.*, *Ironburg Inventions Ltd. v. Valve Corp.*, C17-1182 TSZ, Dkt. 353 at 2 (W.D. Wa. Mar. 4, 2020) (granting motion to preclude defendant's experts from opining on any theories of non-infringement not contained within their expert reports); *see also* Fed. R. Civ. P. 26(a)(2)(B)(i) (providing that opening a complete statement of all opinions the witness will express and the basis and reasons for them).

PM/Altria argues that RJR's MIL 7 is "moot" citing *In re Namenda Direct Purchaser Antitrust Litigation*. Dkt. 987 at 2. But, while the *Namenda* court denied a motion *in limine* as moot, it instructed that the argument sought to be precluded was irrelevant and should not be referenced at trial. *Namenda Direct Purchaser Antitrust Litig.*, No. 15 Civ. 7488 (CM), 2019 WL 6242128, at *6 (S.D.N.Y. Aug. 2, 2019). In any event, Courts regularly grant motions *in*

limine to prevent new infringement theories or new opinions that were omitted from expert reports. *Ironburg*, No. C17-1182 TSZ, Dkt. 353 at 2; *ABS Global, Inc. v. Inguran, LLC*, 14-cv-503-wmc, Dkt. 1008 at 58-59 (W.D. Wis. Aug. 14, 2019) (granting as unopposed a motion *in limine* to bar testimony of experts that exceeds the scope of their reports). Accordingly, Reynolds requests that the Court grant its MIL 7.

II. PM/Altria Should Be Precluded From Mischaracterizing Reynolds's Statements

PM/Altria claims that it "did not mischaracterize RJR's position; they simply quoted it." Dkt. 987 at 2. As detailed in Reynolds's memorandum in support of MIL 7, Mr. McAlexander and Mr. Meyer did not "simply quote" Reynolds's position. Rather, they fundamentally mischaracterized it by omitting the qualifying language. Dkt. 842 at 3-6. PM/Altria should not be able to say that "RJR admits that 'JUUL makes, uses, sells, [or] offers for sale . . . one or more Products that practices one or more claims of the '545 Patent," when that simply is not true. *Id.*, Ex. 4, McAlexander Opening Report at ¶ 681. Reynolds offered a conditional analysis, which PM/Altria blatantly ignores.

PM/Altria attempts to justify its mischaracterization of Reynolds's position by arguing that whether JUUL practices the '545 patent is relevant to the objective indicia of non-obviousness and damages. Dkt. 987 at 3. First, objective indicia of nonobviousness is not relevant in this litigation because validity of the '545 patent under 35 U.S.C. § 103 is not at issue before this Court—anticipation and obviousness are being addressed in IPR2021-00725. Dkt. 901, Ex. 6.

Second, it does not matter whether JUUL practicing the '545 patent is relevant to damages. As explained below, PM/Altria failed to disclose this contention—and affirmatively stated the opposite— during fact discovery. This argument should be precluded. Even if PM/Altria is allowed to bring in this new argument that JUUL or NuMark practice the '545

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