

**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. 9 TO
EXCLUDE EVIDENCE, ARGUMENT, OR TESTIMONY RELATING TO INCORRECT
IMAGES, DIAGRAMS, DRAWINGS, OR DESCRIPTIONS OF THE VUSE ALTO
CARTRIDGE**

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Motion *in Limine* No. 9 is narrowly tailored to exclude only *incorrect* depictions of the Vuse Alto. The incorrect images, diagrams, or descriptions that Reynolds seeks to exclude are not relevant to Reynolds’s design-around arguments for the ’911 patent. Indeed, neither PM/Altria’s nor Reynolds’s experts rely on these incorrect depictions of the VUSE Alto. Thus, there is no connection between them and Reynolds’s design-around arguments. Nor is there any connection [REDACTED]

No experts rely on the incorrect VUSE Alto images, diagrams, or descriptions for the purposes of infringement or damages. On its face, Reynolds’s MIL 9 is directed only to “evidence, argument, or testimony relating to *incorrect* images, diagrams, drawings, or descriptions of the VUSE Alto cartridge.” Despite PM/Altria’s suggestion otherwise, MIL 9 seeks exclusion of [REDACTED]

[REDACTED] PM/Altria admits that it knows which specific portions of these exhibits contain inaccurate depictions of the VUSE Alto. In fact, PM/Altria, specifically agreed that [REDACTED]

[REDACTED] Dkt. 991 at 5. PM/Altria does not point to where *any* of its experts have relied on [REDACTED]

Instead, PM/Altria argues that [REDACTED]

[REDACTED] Not so.

Reynolds’s technical expert, Kelly Kodama, [REDACTED]

█ when he opined on design-around options for the '911 patent. Ex. 1 at ¶¶ 25, 41, 61, 87, 119-139, Exhibit 1. Nor did Reynolds's other experts, Dr. Sullivan and Mr. Clissold, rely on █ to support their opinions. To the contrary, both relied on Mr. Kodama's testimony when considering design-arounds for the '911 patent. Ex. 2 at ¶¶ 49, 54-55; Ex. 3 at ¶¶ 285-286, Attachment A-7.

PM/Altria's insinuation that there is a connection between █ and Mr. Kodama's opinions on design around options for the '911 patent (Dkt. 991 at 2-3) is misplaced. The best PM/Altria can do to support its argument is to cite to its expert Stacy Ehrlich's opinion, █

█ Ex. 4 at 186:5-189:16. This testimony is conclusory and speculative at best, and it is subject to Reynolds's Motion to Exclude the Testimony of Stacy Ehrlich. Dkt. 879. But more importantly, PM/Altria's argument still misses the point that █

█ Dkt. 991 at 3.

PM/Altria's relevance argument is based on a previously undisclosed damages argument. Until its Opposition to Reynolds's MIL 9, PM/Altria had not disclosed this damages argument in any expert reports, witness testimony, or discovery responses. While PM/Altria points generally to sections of its expert Stacy Ehrlich's report and deposition testimony in its Opposition, █

█ Dkt. 991 at 2-4. None of these citations, however, addresses the argument █

[REDACTED]

[REDACTED]

PM/Altria should not be allowed to claim relevance to incorrect depictions of the VUSE Alto cartridge by way of a previously undisclosed argument at this late stage in the proceeding. PM/Altria has known of [REDACTED] for *over a year*. Its expert reports were due *after* PM/Altria was aware of the issue. If PM/Altria wanted to make its argument, it could have done so at least before the close of discovery on May 12, 2021, *over nine months ago*. If PM/Altria intends to rely on expert testimony to support its argument, it has failed to do so as required by Fed. R. Civ. P. 26(a)(2)(B) (an expert witness is required to provide “a complete statement of all opinions the witness will express and the basis and reasons for them”) and as such, Fed. R. Civ. P. 37(c) applies (“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party *is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial*, unless the failure was substantially justified or is harmless.”) (emphasis added). Reynolds respectfully asks this court to grant its MIL 9.

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