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. 10 TO EXCLUDE EVIDENCE OR ARGUMENT THAT REYNOLDS INFRINGED OR HAS BEEN ACCUSED OF INFRINGING THIRD-PARTY PATENTS

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As Reynolds's Motion *in Limine* ("MIL") 10 showed, third-party infringement allegations are not relevant to this trial, other than as a narrow carve-out regarding solely the Fontem-Reynolds Settlement Agreement and solely for purposes of damages. PM/Altria largely agrees; its response represents that it will not "reference third-party infringement allegations against RJR (other than Fontem's allegations) or suggest that RJR is a serial infringer." Dkt. 997 at 1. PM/Altria's carve-out for "Fontem's allegations," however, is far too open-ended for purposes of Federal Rules of Evidence 402 and 403. That broad carve-out fails to limit such references to the only arguably relevant context—damages—and it also fails to cabin the argument and evidence to avoid the very suggestion of serial infringement that PM/Altria agrees would be improper.

PM/Altria's open-ended carve-out for "Fontem's allegations" would permit eliciting testimony on, *e.g.*, specific details of the patent infringement allegations underlying the Fontem-Reynolds Settlement Agreement, and would even permit such details to be raised as "topics during opening statements and closing argument." Dkt. 997 at 2. That breadth encompasses evidence that has no relevance to the issues to be decided by the jury in this case. Any argument or evidence regarding the Fontem-Reynolds Settlement Agreement should be limited to *relevant* information—namely, the scope of each side's damages theory. Neither side's damages theory relies on much, if any, [redacted]—PM/Altria's own expert opines that the nature of the agreement, [redacted]'" the agreement. *See* Dkt. 863 at 6-7 (quoting Meyer Report at ¶ 195). There is thus no basis for permitting the agreement's irrelevant litigation context to be injected into this trial. Moreover, open-ended freedom to raise such third-party infringement allegations would invite argument and evidence that is unfairly

prejudicial to Reynolds and risks confusing and being conflated with the infringement allegations that are before the jury. Thus, based on lack of relevance and Rule 403 concerns, PM/Altria's open-ended proposal should be rejected. Instead, as Reynolds requested, superfluous or unnecessary references, argument, or evidence relating to the Fontem-Reynolds Settlement Agreement and underlying litigation should be excluded.

PM/Altria does not dispute the irrelevance of the litigation context of the Fontem-Reynolds agreement for each side's damages theory, but nonetheless argues that it "can examine any competent witnesses on the license in the Fontem-RJR Agreement and the underlying litigation." Dkt. 997 at 2. Exploring that litigation with "any competent witness[]" beyond the scope of each side's damages theories, however, would be irrelevant and unfairly prejudicial. PM/Altria similarly disregards the basic principle that expert testimony is limited to the scope of the expert reports. *See Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 725 F.3d 1377, 1381 (Fed. Cir. 2013) ("An expert witness may not testify to subject matter beyond the scope of the witness's expert report unless the failure to include that information in the report was 'substantially justified or harmless.'" (quoting Fed. R. Civ. P. 37(c)(1)). As for PM/Altria's assertion that "the law requires" experts to "discuss[] the underlying litigations," Dkt. 997 at 2, that is misplaced and irrelevant. In this case, Mr. Meyer does not discuss or rely on the litigation underlying the Fontem-Reynolds agreement in any meaningful way, and it would be impermissible for him to add new opinions on that topic at this stage.

PM/Altria further claims that Fontem's infringement allegations against Reynolds are not inadmissible hearsay because they would not be offered "to prove that RJR actually infringed Fontem's patents," and in any event experts may rely on such hearsay. *Id.* at 3. But even when an expert reasonably relies on inadmissible hearsay, that does not mean the expert can be the

conduit for introducing inadmissible hearsay. Fed. R. Evid. 703; *see United States v. Ayala*, 601 F.3d 256, 275 (4th Cir. 2010) (finding experts cannot "act as mere transmitters"). Further, PM/Altria's argument still fails to acknowledge the lack of relevance of Fontem's infringement allegations and the risk of unfair prejudice if PM/Altria is permitted to dwell on third-party infringement allegations.

Finally, PM/Altria tries to suggest that the stipulation it proposed to Reynolds during the course of this briefing resolves the issue and can (or even must) be adopted. Dkt. 997 at 1. But for the same reasons that PM/Altria's proposal in its opposition is inadequate, so too was PM/Altria's proposed stipulation, and PM/Altria mischaracterizes Reynolds's response to that proposal. *See id.* As the email communications reflect, Reynolds's counsel did not seek "to bar" all testimony regarding the Fontem case. *Id.* Rather, as Reynolds's counsel explained, PM/Altria's proposal was inappropriate because it would permit delving into "*specific* testimony about" the Fontem case. Dkt. 997-2 at 1 (emphasis added).[1]

There is simply no need to delve into the Fontem litigation in this case. The Court should grant Reynolds's MIL No. 10 and exclude evidence or argument that Reynolds infringed or has been accused of infringing third-party patents, with a carve-out solely for the Fontem-Reynolds Settlement Agreement and solely for the issue of damages, and to a scope consistent with each side's disclosed expert theories on damages.

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[1] As for PM/Altria's suggestion that the law compels "binding" Reynolds to the proposed stipulation, neither cited case supports PM/Altria. In *TecSec v. Adobe Inc.*, No. 1:10-CV-115, 2018 WL 11388472, at *4 (E.D. Va. Nov. 21, 2018), TecSec—unlike Reynolds—had previously *agreed* to the joint stipulation. In *In re Namenda Direct Purchaser Antitrust Litigation*, No. 15 Civ. 7488 (CM), 2019 WL 6242128, at *6 (S.D.N.Y. Aug. 2, 2019), the court directed the parties to jointly *agree* on a statement to be read to the jury, with the court preparing the statement if no agreement could be reached.

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