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. 11 TO EXCLUDE EVIDENCE AND TESTIMONY REGARDING PM/ALTRIA'S IQOS PRODUCTS

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INTRODUCTION

PM/Altria cannot and does not contest that the upcoming trial in this case is limited to whether Reynolds's VUSE products infringe PM/Altria's counterclaim patents; that, as a matter of law, PM/Altria cannot prove its case by comparing VUSE to PM/Altria's own IQOS products; and that in any event, the patents at issue do not even *cover* IQOS. Nevertheless, PM/Altria argues that it should have an unfettered ability to introduce evidence about IQOS before the jury, on the ground that this evidence is relevant to (1) demonstrate the competitive relationship between PM/Altria and Reynolds as it relates to the consideration of *Georgia Pacific* factor 5 in assessing damages; and (2) suggest, based on the experience around FDA's approval of IQOS, that [redacted] Dkt. 1001 ("Opp.") at 1-5.

Reynolds does not object to the introduction of limited damages-related evidence that Reynolds and PM/Altria are market competitors. But this evidence should be cabined to that purpose only. This one *Georgia Pacific* factor certainly does not require the sort of broad-based story of IQOS's supposed benefits that PM/Altria seems intent on pursuing, but that will only lead to jury confusion and a collateral trial about whether (as the ITC has found) the IQOS products actually trade on *Reynolds's* patented technology.

The second proffered ground for admissibility should be discarded outright. PM/Altria's counterclaim patents do not cover IQOS; that is undisputed. Accordingly, evidence about the regulatory approval process for IQOS can shed no light whatsoever on whether features claimed in the counterclaim patents are important to FDA.

ARGUMENT

I. EVIDENCE ABOUT IQOS SHOULD BE LIMITED TO THE NARROW PURPOSE OF DEMONSTRATING THE COMPETITIVE RELATIONSHIP BETWEEN THE PARTIES AS IT RELATES TO *GEORGIA PACIFIC* FACTOR NO. 5

PM/Altria first argues that IQOS is relevant because "evidence regarding IQOS is considered by both parties' damages experts when analyzing *Georgia Pacific* Factor No. 5" (Opp. at 1), which looks at "[t]he commercial relationship between the licensor and licensee, such as whether they are competitors in the same territory in the same line of business." *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970). The fact that Reynolds and PM/Altria are competitors is hardly a disputed issue. As such, evidence concerning IQOS that bears on this issue should be limited in scope. Indeed, PM/Altria need not say more about it than what is set forth in the report of their expert Mr. Meyer in addressing *Georgia Pacific* Factor 5, which PM/Altria touts in its opposition. *See* Opp. at 1 (citing Opp. Ex. A ¶¶ 346, 358-365). *Georgia-Pacific* Factor 5 does not require or even contemplate the exhaustive evidence that PM/Altria seems ready to introduce concerning IQOS's regulatory authorizations, or the supposed virtues of PM/Altria's [redacted] IQOS products. Indeed, in the portions of Mr. Meyer's report cited by PM/Altria in its opposition, Mr. Meyer [redacted] *See id.* Evidence of IQOS is relevant *only* for the limited purpose of discussing the competitive relationship between the parties to the hypothetical negotiations, and PM/Altria should not be permitted to use this narrow ground of limited relevance to force additional, irrelevant evidence and testimony into the case.[1]

[1] PM/Altria claims that Reynolds's "silen[ce] on Georgia Pacific Factor No. 5 . . . is fatal to its motion." Opp. at 3. Not so. The dividing line is clear—the competitive relationship between

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