

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

RAI STRATEGIC HOLDINGS, INC., et. al.,

Plaintiffs,

v.

ALTRIA CLIENT SERVICES, LLC, et. al.,

Defendants.

Civil Action No. 1:20-cv-393
Hon. Liam O’Grady

ORDER

The Parties have made several Motions to the Court including an Objection to Judge Buchanan’s ruling on a Motion to Show Cause (Dkt. 1191); Motion to Limit Prior art Combinations (Dkt. 1210); and a Motion to Amend the Identification of Claims (Dkt. 1221). The Parties have also brought several other issues to the Court’s attention. The Parties have fully briefed the Motions and held oral arguments to inform the Court regarding the issues to be addressed before the start of trial.

For the sake of clarity, at trial Phillip Morris USA, Phillip Morris Products S.A. and Altria Client Services will be referred to as the “Plaintiffs.” RAI Strategic Holdings Inc. and R.J. Reynolds Vapor Company will be referred to as the “Defendants.”

1. The Objection to Judge Buchanan’s ruling

The Plaintiffs have objected to Judge Buchanan’s denial of their Motion for Sanctions. The Plaintiffs previously moved for sanctions after several documents were recently disclosed to the Court on March 18, 2022. These documents reflect that negotiations between Reynolds and

third-party Fontem contained several references to a proposed 5.25% royalty rate to license patents that are comparable to the patents at issue in the present case. *See* Dkt. 1195 at 1-2. The Defendants previously moved to exclude the opinion of the Plaintiffs' damages expert on the basis that there was no factual support that this comparable technology could be licensed at a 5.25% royalty rate. Dkt. 892 at 17-19. However, based on a review of the record and the representations made to the Court, it is clear that the Defendants' law firm, Jones Day, had access to these documents as early as June of 2021 and these documents *did* support a contemplated 5.25% royalty rate for a proposed license. After obtaining these documents, Jones Day did not produce the documents in response to the Plaintiffs' discovery requests and went on to make several representations in their written briefs and oral arguments that were at best clearly inaccurate if not intentionally misleading. The Court finds that the existence of these documents directly contradicts the series of representations made by the Defendants.

The Court has reviewed Judge Buchanan's ruling and the written transcripts of the proceedings before her on the Motion for Sanctions. The Court does not find that there was any indication that Judge Buchanan misapplied the law. Judge Buchanan was also well within the exercise of her discretion to deny the Plaintiffs' Motion for Sanctions. As there was no abuse of discretion, the Court will **AFFIRM** Judge Buchanan's ruling. Dkt. 1191.

However, the Court is troubled by the dubious behavior and lack of contrition with which the Defendants have responded to this matter. For this reason and upon finding good cause to do so, the Court will grant two of the Plaintiffs' *ore tenus* Motions that were made at the hearing on May 20, 2022. The five documents identified by the Plaintiffs will be deemed admissible for use as evidence at trial.¹ Further, upon the Plaintiffs' Motion and in lieu of imposing a sanction, the

¹ The Defendants have filed a stipulation with the Court indicating that the five documents are authentic and non-hearsay. Dkt. 1235.

Court will strike the most recent supplemental report of Dr. Ryan Sullivan, which addresses these five documents, pursuant to Federal Rule of Civil Procedure 37(c)(1)(C). *See Sharpe v. United States*, 230 F.R.D. 452, 456 (E.D. Va. 2005) (a party who does not disclose information without substantial justification may not use that evidence at trial).

2. The Motions to limit prior art and to amend the identification of claims.

The Plaintiffs have filed a Motion to present an additional claim at trial from United States Patent Number 10,104,911. Discovery has been taken regarding this claim and is addressed in the expert reports of both Parties. There is no prejudice from allowing the Plaintiffs to present this claim at trial. For this reason, the Motion is **GRANTED**. Dkt. 1221.

The Plaintiff has also filed a Motion to limit the number of prior art references and combinations of prior art the Defendants will use in relation to United States Patent Number 10,104,911. There is no basis to grant this Motion and the Defendants may present all the prior art references and combinations at trial. This Motion is **DENIED**. Dkt. 1210.

3. Objection to the exclusion of unvaccinated jurors.

Individuals who have not received the coronavirus vaccine will be excluded from the pool of potential jurors for the upcoming trial. At the prior hearing, the Defendants have objected to this decision on the basis that the jury pool will be improperly skewed to include a higher number of individuals who are more “health conscious.” The Defendants argue that this composition of the jury pool may result in jurors viewing the Defendants in a negative light because the Defendants represent a tobacco company. This argument is not persuasive.

To begin, both sides in this case represent the interests of large and well-known tobacco companies. Even if there was some inherent prejudice from the composition of the jury pool, it is incredibly unlikely that one party would face more prejudice than the other party in this case.

Further, the Court is not aware of any evidence or reliable data that indicates that vaccination status is an indicator for a particular viewpoint or belief. *See United States v. Moses*, 2021 U.S. Dist. LEXIS 195735 at *8 (W.D.N.Y. October 12, 2021) (holding that “the unvaccinated are not a distinctive group for fair cross-section purposes” in a criminal proceeding); *see also United States v. Elias*, 2022 U.S. Dist. LEXIS 7002 at *13 (E.D.N.Y. January 13, 2022) (“Nor is there information sufficient to persuade the court that vaccination status is a proxy for a characteristic of a distinctive group...”.) Like the district court in *Moses*, this Court finds that it is proper to exclude unvaccinated jurors in accordance with 28 USC §1866(c)(2). *Id.* at *10 (unvaccinated jurors are likely to “disrupt the proceedings”). The exclusion of unvaccinated jurors will prevent delay to the trial from a potential outbreak of the virus and decrease the likelihood of individual infection from the coronavirus. *Id.* at *11 (“The safety of other jurors, members of the public, and its staff are of course of the utmost importance to the Court.”)

For this reason, the Defendants’ objection is **OVERRULED**.

It is so **ORDERED**.

June 2, 2022
Alexandria, Virginia

/s/ LMB for Judge O'Grady
Leonie M. Brinkema
United States District Judge

FILED
JUN 3 2022
U.S. DISTRICT COURT
ALEXANDRIA, VA