

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

**REYNOLDS'S BENCH BRIEF REGARDING EXPECTED IMPERMISSIBLE TOPICS  
OF TESTIMONY OF MOIRA GILCHRIST**

PM/Altria intend to call Dr. Moira Gilchrist to testify on Wednesday, June 8. Reynolds anticipates that Dr. Gilchrist's testimony will implicate several topics on which this Court has already granted motions *in limine*. Consistent with those Orders, Dr. Gilchrist should be precluded from testifying about these topics.

- *First*, this Court has excluded all reference to PM/Altria's IQOS tobacco product save for the "narrow purpose of establishing the competitive relationship of" the parties. Dkt. 1184-1 at 9 (Order on Reynolds MIL 11).
- *Second*, PMP's VEEV product is potentially relevant only to PM/Altria's claim for injunctive relief, and is therefore excluded as "evidence solely related to a request for an injunction." Dkt. 1184-1 at 3 (Order on Reynolds MIL 4).

Reynolds respectfully requests that the Court exclude any reference by Dr. Gilchrist to IQOS beyond the narrow reference previously identified by the Court, and exclude altogether any reference to the irrelevant VEEV product.

## ARGUMENT

### **I. DR. GILCHRIST MAY NOT TESTIFY ABOUT IQOS BEYOND THE NARROW PURPOSE ALLOWED BY THE COURT’S ORDER ON REYNOLDS’S MIL 11**

The Court excluded “any evidence regarding the technology in IQOS, regulatory history of the IQOS device, or regulatory benefits of the IQOS device” as “not relevant.” Dkt. 1184-1 at 9. The Court reasoned that such evidence “would be confusing and misleading” to the jury. *Id.* at 8-9. Accordingly, the only permissible reference to IQOS is “for the narrow purpose of establishing the competitive relationship of” the parties. *Id.* at 9. Reynolds nonetheless expects that PM/Altria may attempt to elicit additional, prohibited testimony from Dr. Gilchrist about IQOS, such as the IQOS technology or regulatory history. Such irrelevant testimony would be plainly inadmissible under the Court’s ruling on Reynolds’s MIL, and should be excluded.

### **II. DR. GILCHRIST MAY NOT TESTIFY ABOUT PMP’S VEEV PRODUCT**

The Court similarly ruled that “evidence solely related to a request for an injunction will not be admissible.” Dkt. 1184-1 at 3. Reynolds nonetheless expects that PM/Altria may attempt to elicit such testimony regarding PMP’s VEEV product, which is related only to PMP’s request for an injunction. During discovery, PMP identified the VEEV product as relevant to its claim for injunctive relief, *see* Dkt. 709-4, but no expert relies on VEEV to address the issues of infringement and invalidity. Nor does VEEV support a claim that the parties are competitors for the purpose of damages. Unlike IQOS, the VEEV product (sometimes also called “IQOS VEEV”) has never been sold in the United States. PMP has never contended that VEEV practices any of the asserted patents. Additionally, any connection between VEEV and FDA’s PMTA Authorization of any other product would be purely speculative, and the Court already excluded such speculation. *See* Dkt. 1184-1 at 13 (excluding “irrelevant testimony” regarding “whether a device will or will not be granted FDA authorization”). Indeed, it is undisputed that PMP has not filed a PMTA for

VEEV. Accordingly, VEEV has no relevance to the issues, any minimal relevance would be substantially outweighed by the risk of juror confusion, and evidence solely related to PMP's request for an injunction or about prospective FDA action is already excluded under the Court's Orders. Dr. Gilchrist should not be permitted to testify about VEEV.

### **CONCLUSION**

Reynolds respectfully requests that the Court exclude any testimony from Dr. Gilchrist that goes beyond the narrow purpose of establishing the parties' competitive relationship, as well as any testimony related to PMP's VEEV product.

Dated: June 7, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of June, 2022, a true and correct copy of the foregoing was served using the Court's CM/ECF system, with electronic notification of such filing to all counsel of record.

*/s/ David M. Maiorana*

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