

**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 NOTICE OF FILING REVISED PROPOSED VERDICT FORM AND
ADDITIONAL FINAL JURY INSTRUCTIONS**

Pursuant to the Court's Orders of June 6, 2022 (Dkt. 1271) and June 8, 2022 (Dkt. 1300), Defendants RAI Strategic Holdings, Inc. and R.J. Reynolds Vapor Company (collectively "Reynolds") respectfully submit the following documents.

1. *Reynolds's Revised Proposed Verdict Form (Exhibit 1)*. As requested by the Court, Reynolds attaches a revised proposed verdict form as Exhibit 1 that reflects the changes to the claims identified in Plaintiffs' notice, Dkt. 1261. In addition, Reynolds's revised proposed verdict form reflects the dismissal of the infringement claims for the '374 and '545 patents (Dkt. 1300) and the change to the case caption discussed on the record at trial.

In addition to these changes, Reynolds has revised its proposed verdict-form questions on damages to reflect the withdrawal of its objection to Plaintiffs' Proposed Final Instruction No. 47, "Lump Sum vs. Running Royalty." *See* Dkt. 1204-1 at 59; *see also id.* n.6 (Reynolds's request that "a line be added to the verdict form instructing the jury to fill in the lump sum damages award

(if any)” in the event Plaintiffs’ instruction is given). These revisions (a) adopt language proposed by Plaintiffs on damages from their proposed verdict form (*see* Dkt. 1204-3 at 6); (b) omit a limitation for the jury to award damages “for any past infringement”; and (c) add an additional line for lump sum damages as an alternative to damages based on a running royalty. Reynolds requests these changes to avoid any uncertainty about the form of the damages awarded by the jury, if it reaches these questions. We expect that the jury will hear evidence about assertedly relevant lump-sum license agreements. Based on that evidence, the jury could award a one-time or lump-sum award encompassing both past and future damages, even though neither party’s expert proposes such a form of damages. *See Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1328 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) (“[I]f the record evidence does not fully support either party’s royalty estimate, the fact finder must still determine what constitutes a reasonable royalty from the record evidence.”). As Philip Morris’s proposed instruction makes clear, “[i]t is up to you [the jury], based on the evidence, to decide what type of royalty is appropriate in this case.” Dkt. 1204-1 at 59.

Reynolds respectfully submits that the Court should adopt instructions and verdict-form questions that minimize the risk of confusion or uncertainty after trial. *See, e.g., Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 35 (Fed. Cir. 2012) (“The jury’s verdict did not indicate that the award was meant to cover future use of WhitServe’s patents”); *Telcordia Techs., Inc. v. Cisco Sys., Inc.*, 612 F.3d 1365, 1378 (Fed. Cir. 2010) (“[I]t is unclear whether the jury based its award on a lump-sum, paid-up license, running royalty, some variation or combination of the two, or some other theory.”). Reynolds’s proposed verdict-form questions on damages, in combination with the instructions discussed next, help to achieve that goal.

2. *Reynolds's Additional Proposed Final Jury Instructions (Exhibit 2)*. Reynolds also attaches two modified final instructions with additional instructions identified in *italicized* font. Proposed Final Instruction No. 47 (we have retained the numbering from the original joint set of Final Instructions) withdraws Reynolds's objection to Plaintiffs' proposed instruction on "Lump Sum vs. Running Royalty" and proposes two paragraphs defining "lump sum payment" and "running royalty." These additional instructions are drawn directly from FCBA Model Patent Jury Instruction No. 5.7. These instructions are necessary to explain the distinction between lump-sum payments and running-royalty damages to avoid the risk of uncertainty and confusion after trial, as noted above.

Proposed Final Instruction No. 20 adds a new paragraph on the significance of independent versus dependent claims to the jury's verdict on direct infringement. This instruction too is drawn directly from the FCBA model instructions. Reynolds inadvertently omitted this instruction from the joint set previously submitted to the Court, and it is a necessary instruction given the mix of independent and dependent claims still at issue in the case for the '265 and '911 patents.

Last, Reynolds withdraws its proposed instruction, which Plaintiffs objected to, that "You also may not award damages for any future losses PMI/Altria may incur," as part of Proposed Final Instruction No. 44 (Damages – Generally). Dkt. 1204-1 at 55.

Dated: June 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th 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.

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