UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PHILIP MORRIS PRODUCTS S.A. Plaintiff, v. R.J. REYNOLDS VAPOR COMPANY, Defendant.	Case No. 1:20-cv-00393-LO-TCB

PHILIP MORRIS'S MOTION *IN LIMINE* TO EXCLUDE IMPROPER REYNOLDS DEMONSTRATIVES

Philip Morris respectfully moves this Court *in limine* to preclude Reynolds from relying on improper demonstratives during the direct examination of its expert, Mr. Kelly Kodama. Last night, Reynolds disclosed for the first time as purported "demonstratives" enlarged replicas of certain components of the accused VUSE Alto and Solo devices. Reynolds provided only photos of these purported replicas, reproduced below:

At the meet and confer, Reynolds said that it intends to tell the jury that these previously undisclosed, made-for-litigation, replicas are ***to-scale*** accurate representations of the accused devices based on CAD files. Reynolds's expert has provided no opinions regarding these replicas, including how they were created; there is *nothing* in any Reynolds expert report on these purportedly "representative" models of components of the accused VUSE devices. Given they were never disclosed in any expert report or pre-trial, Philip Morris is unable to have its own experts review these replicas to evaluate their alleged accuracy, including measurements, form, or features. Allowing use of such unverified, previously undisclosed, replicas with the jury under these circumstances is highly prejudicial and raises a substantial risk of confusing the issues and misleading the jury. Moreover, their disclosure for the first time the night before Reynolds plans to use them is the very definition of trial by ambush.

First, demonstrative evidence must satisfy the relevancy standard of Federal Rule of Evidence 401 and can be excluded under Rule 403 "where its helpfulness is substantially outweighed by the dangers of unfair prejudice, delay, or confusion." *Derouin v. Kenneth L. Kellar Truck Line, Inc.*, No. C08-1049-JCC, 2010 WL 11684278, at *4 (W.D. Wash. Nov. 8, 2010). "Demonstrative evidence requires particularly careful judicial monitoring under [Rule] 611(a) because of its capacity to mislead and because of the potent, and often inalterable, image it leaves in jurors' minds." *Id*. And yet, apart from vague claims of alleged accuracy, Reynolds has provided no details regarding these purported replicas, the sort of details that would be *required* to be disclosed in a Rule 26 expert report:

- How were they created?
- What is the evidentiary basis to contend they are "representative" of the actual accused devices?

- What aspects of the accused devices are purportedly "representative"?
- What aspects are *not* accurate or omitted?
- Which CAD drawings purportedly were the basis for their creation?
- Who made them?
- Who confirmed their purported accuracy?

At this stage, it is improper and prejudicial for Reynolds to expect that (i) Plaintiff, (ii) the Court, or most concerningly, (iii) the jury, should simply take Reynolds's word for their "representative" nature. FED. R. EVID. 403.

Second, unlike animations or other demonstratives that are only used to illuminate functions that are then discussed with evidence disclosed by an expert in his or her expert report, the purported replicas lack evidentiary foundation. The use of demonstrative exhibits "assum[es] a proper foundation is laid" to provide relevant information to the jury. *Seidman v. Am. Family Mutual Ins. Co.*, No. 14-cv-3193, 2016 WL 9735768, at *5 (D. Colo. May 26, 2016) (citing *Sanchez v. Denver & Rio Grande W.R.R.*, 538 F.2d 304, 306 (10th Cir. 1976)). "In assessing [whether a sufficient foundation is laid], courts consider . . . whether the proffered demonstrative exhibit 'fairly and accurately summarize[s] previously admitted competent evidence.'" *Id.* (quoting *Wilson v. United States*, 350 F.2d 901, 907 (10th Cir. 1965)).

Reynolds has not identified any fact witness to lay foundation of its purported replicas. And Reynolds's expert cannot lay foundation for the first time at trial. Whether the purported replicas are truly to-scale representations of the accused devices is a matter of expert opinion, which needs to be disclosed so it can be the subject of expert discovery. Rule 26(a)(2)(B)(iii) requires the disclosure of "any exhibits that will be used to summarize or support" expert testimony in an expert report, which includes demonstrative exhibits. *See also Salgado v. General Motors*

Corp., 150 F.3d 735, 741 n.6 (7th Cir. 1988) (expert exhibits include demonstrative evidence). Mr. Kodama failed to timely disclose these replicas in his expert report in accordance with this rule.

Last, it is plain that these purported replicas took considerable time to create. Despite amending its exhibit list multiple times in the weeks leading to trial, Reynolds never disclosed these purported replicas to Philip Morris. Instead, repeating a now familiar approach favored by Reynolds, Defendant strategically delayed their disclosure until the last possible moment. The prejudice to Philip Morris cannot be remedied in the midst of trial. If permitted during trial, Reynolds's belated disclosure – by design – would force Philip Morris to conduct a discovery deposition of Reynolds's expert on these exhibits and their foundation before the jury. This is *not* merely "a matter for cross-examination." Cross-examination is intended to present adversarial questioning on issues that were fairly disclosed and vetted during discovery. Because of the decision by Reynolds and its expert to withhold disclosure, there is no opportunity for Plaintiff to have its experts evaluate and conduct independent testing to arrive at their own analysis of whether the mock ups are "representative" of componentry in the accused devices. Absent that opportunity, Plaintiff's counsel has been denied – by design – the ability to prepare for, much less conduct, a competent cross-examination. Reynolds effort to mischaracterize what it claims are to-scale, representative models of components of the accused devices as "demonstratives" provides no basis to permit their use at trial.

Under these highly prejudicial circumstances, exclusion is the only appropriate remedy.

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