

**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

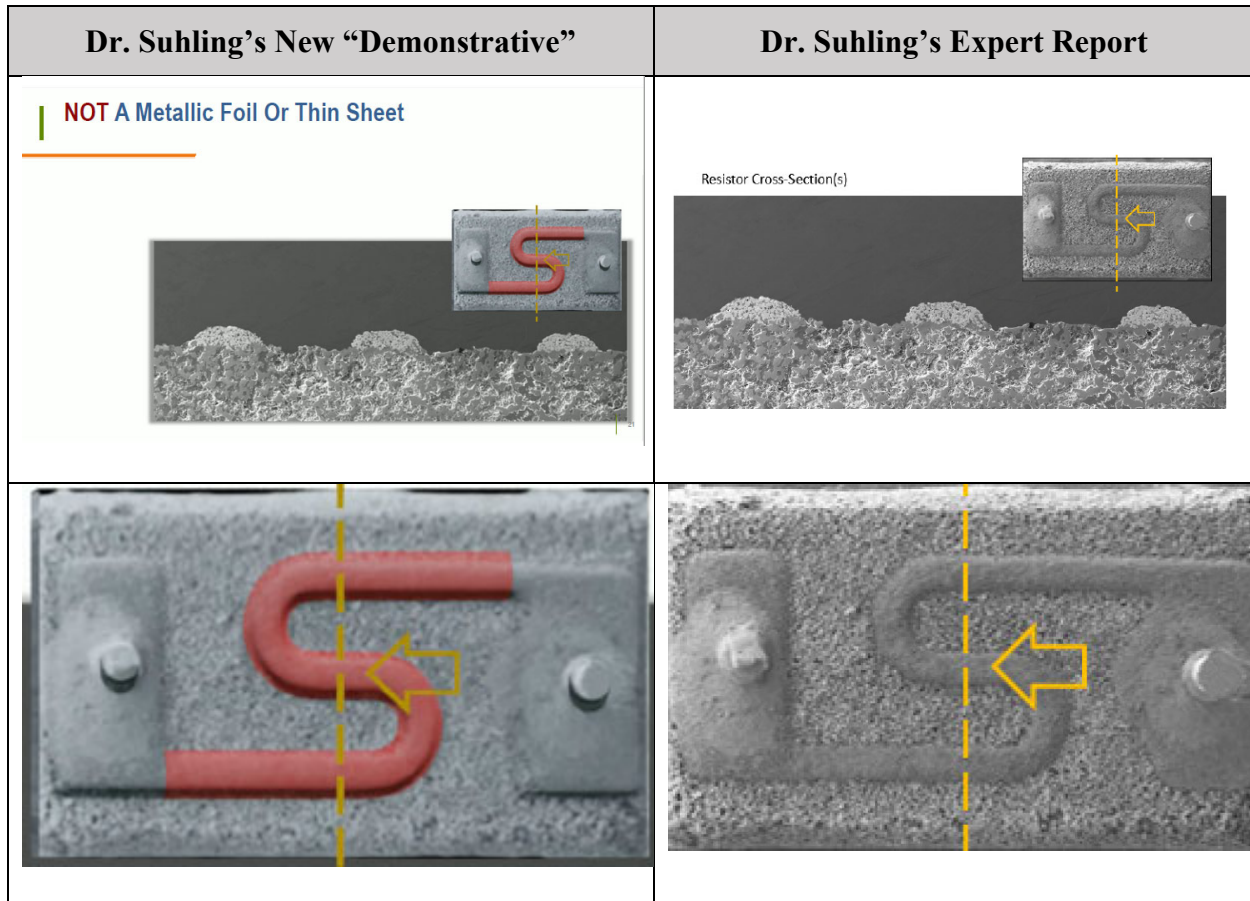
**MEMORANDUM IN SUPPORT OF PHILIP MORRIS' MOTION *IN LIMINE* TO
PRECLUDE REYNOLDS' IMPROPER DEMONSTRATIVES**

Philip Morris respectfully moves this Court *in limine* to preclude Reynolds from relying on improper demonstratives during the direct examination of its technical expert for the '265 patent, Dr. Suhling. This is Reynolds' second attempt to elicit expert testimony about previously undisclosed, made-for-litigation "demonstratives" disclosed at the last possible minute.

Reynolds disclosed Dr. Suhling's demonstratives last night at 7 p.m. ET. These proposed "demonstratives" include what appear to be magnified images of the accused heater in the VUSE Alto. Ex. 1 (Suhling "Demonstratives"). *None of these images are on Reynolds' exhibit list.* During meet and confer, Reynolds asserted that the images are proper "demonstratives" and represented that they were disclosed in Dr. Suhling's March 24, 2021 non-infringement rebuttal expert report. Ex. 2. Reynolds subsequently confirmed in writing that the images, including the image below, "*was disclosed* in Paragraphs 76, 96, 98, 201-207 of Dr. Suhling's rebuttal report." *Id.*¹ That was false.

After closer inspection, Philip Morris discovered that certain demonstratives positioned the newly-disclosed images to look like those in Dr. Suhling's expert report. But, as shown below, the inset images (the small squares in the top right-hand corner) are actually *materially different* in ways that impact key disputed issues. For example, the S-shaped heater in Dr. Suhling's "demonstratives" is thicker, rounder, and has a higher profile casting a consistent shadow along the "S" as compared to the image disclosed in his expert report, which is flat and lacks any shadow. As the Court is aware, the parties hotly contest whether the S-shaped heating element is a "thin sheet," rendering these differences highly material to the issues at trial.

¹ All emphases added unless otherwise noted.



Philip Morris immediately asked Reynolds to identify *specifically* where the inset image appeared in Dr. Suhling's rebuttal report. *See* Ex. 2. Only then did Reynolds admit, contrary to its prior unequivocal (yet false) representations, that the image above was *not* in Dr. Suhling's rebuttal report. Instead, Reynolds stated: "[i]t is the image from the paragraph I identified in my email below *mapped onto a 3-D object for presentation.*" *Id.* After Philip Morris asked for clarification, Reynolds confusingly claimed the image "mapped 3-D object for presentation" was actually an "animation in powerpoint that uses the image," despite the fact that it is plainly a static photographic image. *Id.*

The Court should put an end to Reynolds' gamesmanship and eleventh-hour maneuvering. Reynolds should not be permitted to parade photograph-like "demonstratives" before the jury that are actually "3-D objects for presentation," as they were undisputedly *not* (i) disclosed on

Reynolds' exhibit list, (ii) disclosed in Dr. Suhling's expert reports, or (iii) produced during fact discovery. While the differences may appear subtle at first glance, Reynolds' "demonstratives" have an artificially *thickened and rounded* S-shaped heating element and thus are intended to mislead and confuse the jury, who will be asked to decide whether that heating element is a "metallic foil or *thin* sheet." Fed. R. Evid. 403. The danger is exacerbated by the fact that Dr. Suhling intends to tell the jury that these "demonstratives" are magnified images of the S-shaped heater that he took. And Philip Morris' concerns, as well as the risk of unfair prejudice, are amplified by Reynolds' repeated verbal and written misrepresentations during meet and confer.

Moreover, it is still unclear *what* these "demonstratives" are. Even a detective would have a hard time figuring out at least the following:

1. What exactly is a "3-D object for presentation"?
2. What was "mapped" and onto what "object"?
3. Is the "3-D object for presentation" to scale?
4. Were the shadows or anything else manually added?
5. What aspects are not accurate or omitted?
6. How could a static "3-D object" be an "animation"?
7. When were they created (and by whom)?

Reynolds does not say. Like the replicas that Reynolds sought to use with Mr. Kodama, which the Court properly excluded, Dr. Suhling's demonstratives also lack evidentiary foundation and should be struck. Dkt. 1308 at 4 (compiling cases requiring evidentiary foundation for demonstratives).

Philip Morris respectfully requests that the Court preclude Reynolds from presenting the so-called “demonstratives” on slides 19-23, 30, 31, 33 and 34 of Dr. Suhling’s slide deck.²

Dated: June 13, 2022

Respectfully submitted,

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² Although other “demonstratives” appear to more closely resemble those in Dr. Suhling’s rebuttal report, they are neither on Reynolds’ exhibit list nor proper demonstratives. At this late juncture and given Reynolds’ repeated misrepresentations, it is impractical for Philip Morris to confirm whether they are what Reynolds purports them to be. This is precisely why such images should have been disclosed on Reynolds’ exhibit list, which would have allowed the parties to resolve any objections before the eleventh-hour. Indeed, Reynolds amended its exhibit list multiple times and declined each time to include any of these alleged images that Dr. Suhling intends to rely on.

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