

**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' NOTICE OF OBJECTIONS TO VERDICT FORM AND
FINAL JURY INSTRUCTIONS**

Pursuant to the Court's orders at the June 13, 2022 charge conference and June 13, 2022 email, Plaintiff Philip Morris Products S.A. ("Philip Morris") respectfully submits the following objections and proposed edits to the Court's Verdict Form and Final Jury Instructions provided to the parties via email on June 13, 2022.

Verdict Form

Philip Morris requests that the Court strike the following language from “Question 3 – Damages” and “Question 4 – Damages” in the Verdict Form:

- “if any”
- “If you find Philip Morris is entitled to no damages, enter a ‘0’ amount.”

Philip Morris objects to this language because it incorrectly suggests that the jury can, on this evidentiary record, award no damages (assuming that the jury finds at least one claim of the asserted patents infringed and not invalid). 35 U.S.C. § 284 expressly states that, “[u]pon finding for the claimant the court *shall* award the claimant damages adequate to compensate for the infringement, but *in no event less than a reasonable royalty* for the use made of the invention by the infringer.” An award of zero damages is inconsistent with the plain language of the statute, which “establishes the fact of damage because the patentee’s right to exclude has been violated.” *Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co.*, 895 F.2d 1403, 1406 (Fed. Cir. 1990). Indeed, Section 284 is unequivocal that, upon a finding of infringement, “the district court must award damages in an amount no less than a reasonable royalty.” *Dow Chem. Co. v. Mee Indus., Inc.*, 341 F.3d 1370, 1381 (Fed. Cir. 2003). And, because “there is a presumption of damages where infringement has been established,” it is improper to instruct the jury that it may award zero damages. *See id.* at 1382 (“The district court’s conclusion that no damages could be awarded, in light of the presumption of damages when infringement is proven, was in error.”). Any suggestion that the jury may award zero damages is particularly inappropriate on this record, as Philip Morris presented significant evidence supporting its damages requests and Reynolds chose not to present any competing expert testimony.

Jury Instruction No. 12: Summary of The Issues

Philip Morris requests that the Court clarify the questions in the summary of the issues in two ways, and modify the third paragraph in this instruction.

First, Philip Morris requests that the Court clarify the first question so that it accurately reflects the products that are accused for each patent. As written, Question No. 1 incorrectly implies that the Solo G2 and Alto are both accused of infringing the '265 and '911 patents. Philip Morris therefore proposes that the first question be split into two questions as follows, which will help avoid juror confusion:

1. Has Philip Morris proven by a preponderance of the evidence that the VUSE Alto directly infringes the specified claims of the '265 Patent.
2. Has Philip Morris proven by a preponderance of the evidence that the VUSE Solo G2 or the VUSE Alto directly infringe the specified claims of the '911 Patent.

Second, for Question No. 3, Philip Morris respectfully requests that the Court modify the words “the patents are valid” to be “the '911 patent is not invalid.” Philip Morris requests this change because (i) Reynolds is only challenging the '911 patent as invalid and (ii) the jury will decide whether the patent is invalid or not, it will not decide whether the patent is “valid.”

Third, Philip Morris requests that the Court replace the word “licensed” in the last paragraph with “enforced.” That is consistent with Philip Morris’ request during the charge conference (6/13/22 p.m. Tr. at 67:16-7), where Philip Morris explained that it was (i) withdrawing its proposal as to licensing but requesting that the Court instruct the jury that whether Philip Morris has enforced its patents against any other company is irrelevant to infringement, validity, and damages, consistent with Judge O’Grady’s order on Philip Morris’ Motion *in Limine* No. 11. Dkt. 1184 at 15-17.

Jury Instruction No. 22:

Philip Morris suggests that the Court include the language “Intentionally Omitted” in the title of Instruction No. 22, as the number of this instruction appears without any title or substance in the version provided by the Court. Philip Morris defers to the Court on how best to proceed.

Jury Instruction No. 26: Invalidity – Prior Art Not Considered by the PTO

Philip Morris objects to the current version of Jury Instruction No. 26 and respectfully requests that the Court also include Philip Morris' proposed language (reproduced at the bottom of this page). During the charge conference, the Court indicated that it would accept both Parties' proposals if it gave either. 6/13/22 Tr. at 56:13-25 ("It is sadly repetitive, but this is a tougher issue in some respects because I would give both if I'm going to give either, all right?"). The current version of Jury Instruction No. 26 includes Reynolds' proposed language but omits Philip Morris' proposed language. Philip Morris requests that the Court include Philip Morris' proposed language because, absent this language, the instruction will be unbalanced. At a minimum, Philip Morris requests that the Court include the final sentence ("This burden of proof on Reynolds never changes regardless of whether the Patent Examiner considered the reference."), which will help avoid juror confusion that could be created if the jury mistakenly believes that Reynolds has a lower burden to prove invalidity if certain prior art was not considered by the Examiner.

[Regardless of whether a particular prior art reference was considered by the Patent Examiner during the prosecution of the application that matured into the asserted patents, the asserted claims are presumed to be valid. To overcome this presumption of validity, Reynolds must prove by clear and convincing evidence that the asserted claim(s) are invalid. This burden of proof on Reynolds never changes regardless of whether the Patent Examiner considered the reference.]

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