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-LMB-TCB **ORAL ARGUMENT REQUESTED**

MEMORANDUM IN SUPPORT OF PHILIP MORRIS'
MOTION FOR JUDGMENT AS A MATTER OF LAW OF INFRINGEMENT OR,
ALTERNATIVELY, A NEW TRIAL

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I. INTRODUCTION

A reasonable juror could only find the Alto infringes claims 2, 11, and 12 (which all depend from claim 1) of U.S. Patent No. 10,104,911 ("'911 Patent") based on the evidence presented at trial and the jury's contrary finding is against the clear weight of the evidence. Reynolds admitted the Alto meets each limitation of the asserted claims except three: (i) "at least one cavity is a blind hole" (claim 1); (ii) "a largest cross-sectional dimension x. . . . of the cavity . . . where x is 0.5 mm, or 1 mm, or between 0.5 mm and 1 mm" (claim 1); and (iii) "at least one cavity contains capillary material" (claim 2). Ex. 1 (Trial Tr. 6/10 a.m.) at 617:15-618:8; 626:4-15. Reynolds' ***sole*** purported evidence of non-infringement was the testimony of its technical expert, Mr. Kodama. But that testimony was legally erroneous because it contradicts the law of the case and plain language of the '911 Patent. Mr. Kodama's testimony was also untethered to any functional testing of the Alto—indeed, he admitted on cross-examination that he never even "turned on the Alto" let alone performed "any functional testing on the Reynolds products." *Id.* at 669:5-7; 671:9-13.

For the first disputed element, Mr. Kodama opined that the claimed "cavity" that is a "blind hole" cannot have open sides because Philip Morris purportedly disclaimed such structures during prosecution. That contradicts the express and unequivocal law of the case and, in any event, is legally incorrect. The Court's claim construction and *Daubert* orders held that there were no disclaimers or other departures from the plain meaning of the term. Mr. Kodama's testimony is squarely refuted by those rulings and erroneously imported negative limitations from exemplary embodiments into the claims. It was separately contrary to Reynolds' own technical documents, sworn testimony from Reynolds' director of vapor product deployment, and unrebutted functional testing that Philip Morris's technical expert, Dr. Abraham, performed on the Alto to independently show the spaces he identified meet the claim's requirements literally or under the Doctrine of Equivalents ("DOE"), including collecting liquid condensate.

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