

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PHILIP MORRIS PRODCUTS S.A.,)
)
Counterclaim Plaintiff,) Civil Action
) No. 1:20-cv-00393-LMB/TCB
)
v.) June 13, 2022
) 9:23 a.m.
R.J. REYNOLDS VAPOR COMPANY,)
)
Counterclaim Defendant.)
)

VOLUME 4 - MORNING SESSION
TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE LEONIE M. BRINKEMA,
UNITED STATES DISTRICT COURT JUDGE

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09:46AM **1** Q. And do you have any experience with product design and
 09:46AM **2** thermal heaters that would be relevant to the '265 Patent in
 09:46AM **3** this case?
 09:46AM **4** **A. Certainly. Every electronic product has heat generated,**
 09:46AM **5 and I think we all know about when we use our cell phone too**
 09:46AM **6 much, we feel it getting hot, and so heaters are an integral,**
 09:46AM **7 and devices that heat up are integral in every electronic**
 09:46AM **8 product.**
 09:46AM **9 In fact, we look at the picture on the cover of this book**
 09:46AM **10 here, it shows a inside of an electronic product, a black item**
 09:46AM **11 there that is the chip, and it has literally hundreds of little**
 09:46AM **12 heater elements on it. That's part of some of the things we've**
 09:46AM **13 worked on in my career here at Auburn.**
 09:46AM **14 Q.** Thank you, Doctor.
 09:46AM **15** I handed you a binder of exhibits, and there's an exhibit
 09:46AM **16** in there, RX 1923. Would you take a look at that?
 09:46AM **17** Is that a copy of your CV, your curriculum vitae?
 09:47AM **18 A. It is. That's a list of my résumé and accomplishments in**
 09:47AM **19 my career.**
 09:47AM **20** MR. DEVITT: Your Honor, we request Exhibit RX 1923, the
 09:47AM **21** curriculum vitae of Dr. Jeffrey Suhling, into evidence.
 09:47AM **22** THE COURT: It's in.
 09:47AM **23** (Defendant's Exhibit RX 1923 admitted into the record.)
 09:47AM **24** MR. DEVITT: We offer Dr. Suhling as an expert in the
 09:47AM **25** field of electronic technology and design, including thermal and
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09:47AM **1** mechanical analysis of electronic products and heater design.
 09:47AM **2** THE COURT: Any objection?
 09:47AM **3** MR. NAPLES: No objection, Your Honor.
 09:47AM **4** THE COURT: All right. He's so qualified.
 09:47AM **5** BY MR. DEVITT:
 09:47AM **6 Q.** All right. Now Dr. Suhling, I would like to turn to some
 09:47AM **7** of the work you did in forming your opinions in this case, but
 09:47AM **8** before we do, what is your opinion in this case that you're
 09:47AM **9** offering?
 09:47AM **10 A. My opinion, as shown here in the demonstrative, is that**
 09:47AM **11 the Vuse Alto product that has been accused of infringing Claims**
 09:47AM **12 1 and 4 of the '265 patent absolutely does not infringe on those**
 09:47AM **13 two claims.**
 09:47AM **14 Q.** Okay. And in informing that opinion, can you tell us
 09:47AM **15** about some of the work that you did and the materials that you
 09:48AM **16** analyzed?
 09:48AM **17 A. Sure. Of course, I started with the '265 patent itself,**
 09:48AM **18 and with a thorough reading of that and an understanding, as a**
 09:48AM **19 person of skill in the art, what the claims of the patent are**
 09:48AM **20 discussing.**
 09:48AM **21 And then I obtained physical samples of the Vuse Alto**
 09:48AM **22 product purchased from a store and did a careful teardown of**
 09:48AM **23 those to understand what was inside.**
 09:48AM **24 Besides that, I also reviewed technical drawings that**

09:48AM **1 of drawings that was submitted to the FDA called a PMTA, the**
 09:48AM **2 premarket tobacco application.**
 09:48AM **3 And also had access to both photographs and videos**
 09:48AM **4 provided by the manufacturer of the heating device inside of the**
 09:48AM **5 Vuse Alto product.**
 09:48AM **6 And finally, the deposition and trial transcripts from**
 09:49AM **7 these proceedings.**
 09:49AM **8 Q.** Now, Dr. Suhling, when you're analyzing these materials
 09:49AM **9** in a patent case, do you understand that you have to look at
 09:49AM **10** them from a certain perspective?
 09:49AM **11 A. Yes.**
 09:49AM **12 Q.** And that's the perspective of a person of ordinary skill
 09:49AM **13** in the art, right?
 09:49AM **14 A. Correct.**
 09:49AM **15 Q.** Do you have an opinion as far as what a person of
 09:49AM **16** ordinary skill in the art would be in this case?
 09:49AM **17 A. I do. And I've listed it here in the slide. I believe a**
 09:49AM **18 person of skill in the art for this particular patent would have**
 09:49AM **19 a college degree at the bachelor's level most likely in**
 09:49AM **20 mechanical or electrical engineering or it could also be in a**
 09:49AM **21 related field like physics or a similar technical program. And**
 09:49AM **22 one should also have some experience working with electronic**
 09:49AM **23 products, in particular ones that involve heaters, and I**
 09:49AM **24 suggested one or two years of experience in that area.**
 09:49AM **25 Now, if one has gone on and got a higher degree beyond**
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09:49AM **1 the bachelor's degree, that could offset for some of the**
 09:50AM **2 experience one would get in the industry.**
 09:50AM **3 Q.** And do you consider yourself to be at least a person of
 09:50AM **4** ordinary skill in the art?
 09:50AM **5 A. I do.**
 09:50AM **6 Q.** Okay. Dr. Suhling, let's talk about your opinions with
 09:50AM **7** the '265 Patent. I think you said already, but you're saying
 09:50AM **8** Claims 1 and 4 of the '265 Patent, that's what your opinions are
 09:50AM **9** with respect to?
 09:50AM **10 A. Yes.**
 09:50AM **11 Q.** And did you compare Claims 1 and 4 of the '265 Patent to
 09:50AM **12** the Vuse Alto product?
 09:50AM **13 A. I did.**
 09:50AM **14 Q.** And in your opinion, does the Vuse Alto product infringe
 09:50AM **15** either Claims 1 or 4?
 09:50AM **16 A. It does not.**
 09:50AM **17** MR. DEVITT: I'd like to pull up the next slide.
 09:50AM **18** BY MR. DEVITT:
 09:50AM **19 Q.** Why does the Vuse Alto not infringe Claim 1 of the '265
 09:50AM **20** Patent?
 09:50AM **21 A. Well, Claim 1, which is listed here on the slide, is the**
 09:50AM **22 primary independent claim of the patent. And I analyze, in**
 09:51AM **23 particular, three sections of Claim 1 which all have to be**
 09:51AM **24 followed if a product is to infringe, and they are listed here**

09:51AM **1** them up on the right.

09:51AM **2** And the first one, part, relates to the heating device in

09:51AM **3** the product and how it is positioned with respect to the

09:51AM **4** mouthpiece and requires that the heating device be configured to

09:51AM **5** be connected to the mouthpiece.

09:51AM **6** The second and third parts that I analyzed were regarding

09:51AM **7** a thermal resistor.

09:51AM **8** The second one talks about how the thermal resistor is

09:51AM **9** made and what kind of material it's made from. And it says

09:51AM **10** that, "The thermal resistor must be comprised of a metal foil or

09:51AM **11** thin sheet."

09:51AM **12** And the third part talks about the thermal resistor and

09:51AM **13** its relative size in the system, and it specifically says it

09:51AM **14** has to have -- "having dimensions substantially the same as a

09:52AM **15** cross-section of a cigarette or cigar."

09:52AM **16** Q. Thank you. Let's talk about that first -- let's start

09:52AM **17** with the first element, "a heating device configured to be

09:52AM **18** connected to the mouthpiece." How did you determine whether the

09:52AM **19** Vuse Alto had a mouthpiece?

09:52AM **20** A. Well, I started, of course, by looking at the actual

09:52AM **21** product itself.

09:52AM **22** Q. Dr. Suhling, there's a sample there of a Vuse Alto there

09:52AM **23** behind you. Do you recognize that?

09:52AM **24** A. I certainly do.

09:52AM **25** Q. I believe that's already been admitted into evidence as

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09:52AM **1** PPX 8 and 9, the complete device and the cartridge. Are you

09:52AM **2** familiar with that device?

09:52AM **3** A. Very familiar.

09:52AM **4** Q. So you've -- from that device, can you identify the

09:52AM **5** mouthpiece?

09:52AM **6** A. Certainly. And I think you can see it on -- the same one

09:52AM **7** on the screen, but the device separates into a battery

09:52AM **8** compartment and what we call a cartridge or a pod, and they

09:52AM **9** slide together. And when you use the product, the black tip

09:53AM **10** here at the end is the part that touches your lips and,

09:53AM **11** certainly, just in a common sense way, we would view that as the

09:53AM **12** mouthpiece that we place in our mouth.

09:53AM **13** Q. The black tip at the end, that's what you're considering

09:53AM **14** the mouthpiece; is that correct?

09:53AM **15** A. That is correct.

09:53AM **16** Q. Other than looking at the device, did you do anything

09:53AM **17** else to confirm your opinion that that's the mouthpiece?

09:53AM **18** A. Yes. I also examined, of course, the technical drawings

09:53AM **19** and documents provided by Reynolds corporation that specifically

09:53AM **20** identify all the various components that go together into this

09:53AM **21** product.

09:53AM **22** Q. Dr. Suhling, I would like to direct your attention to

09:53AM **23** your exhibit binder again, and in particular, I believe it's

09:53AM **24** PX 028.

09:53AM **1** Q. Do you recognize that document?

09:53AM **2** A. Yes. This is the PMTA document that Reynolds has

09:53AM **3** submitted to the FDA.

09:54AM **4** Q. And you relied on this document in forming your opinion;

09:54AM **5** is that correct?

09:54AM **6** A. I did. It contains a set of highly technical drawings on

09:54AM **7** the device.

09:54AM **8** Q. Were there any particular figures that you found

09:54AM **9** instructive, in your opinion, with respect to a mouthpiece?

09:54AM **10** A. There were.

09:54AM **11** Q. I direct your attention to page 30 of PX 028.

09:54AM **12** Do you see it on the screen?

09:54AM **13** A. I do. And I have it here in the binder with that page.

09:54AM **14** This is what I call a cutaway view and splits up all the

09:54AM **15** different components and shows you how they are put together and

09:54AM **16** assembled into the system.

09:54AM **17** Q. And in this figure, they have some numbers identifying

09:54AM **18** what each of the component's parts are, right?

09:54AM **19** A. They do.

09:54AM **20** Q. Does the PMTA also identify the names of those pieces and

09:54AM **21** what they do?

09:54AM **22** A. Yes, it has a separate table that lists each part by

09:54AM **23** number, and you can see they're numbered from top to bottom, 1,

09:55AM **24** 2, 3 through 11. And it gives a specific technical name to

09:55AM **25** that, and what -- lists what type of material it is made from.

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09:55AM **1** Q. So is this -- is this the table of the parts that you're

09:55AM **2** referring to in the PMTA on page 31?

09:55AM **3** A. It is. And as you can see there are 11 of them listed

09:55AM **4** there. The first one is what is the mouthpiece, and the

09:55AM **5** technical name is the cartomizer holder tap.

09:55AM **6** Q. Now, I want to talk a little bit about that. So did

09:55AM **7** you -- you prepared a demonstrative and put these two things

09:55AM **8** together, didn't you?

09:55AM **9** A. I did.

09:55AM **10** MR. DEVITT: Can you put that up, please?

09:55AM **11** THE COURT: While you're doing that, the word

09:55AM **12** "cartomizer," what do you understand that word to mean?

09:55AM **13** THE WITNESS: I believe a cartomizer is a -- is talking

09:55AM **14** about the vaporized fluid, but, you know, that's not a word that

09:56AM **15** I use in my normal life very often, to be honest.

09:56AM **16** THE COURT: It's not a word out of the mechanical

09:56AM **17** engineering field?

09:56AM **18** THE WITNESS: I would believe it's a field out of the

09:56AM **19** cigarette field.

09:56AM **20** THE COURT: Cigarette field. All right. Thank you.

09:56AM **21** BY MR. DEVITT:

09:56AM **22** Q. So on Slide 8 up here is a demonstrative, and it shows

09:56AM **23** Figure H-10 from the PMTA and Table H-5; is that right?

09:56AM **24** A. Yes.

10:03AM **1** that you have these items as separate components, and that's

10:03AM **2** what we have when we first start assembling an Alto pod in the

10:03AM **3** manufacturing facility. You have all these different parts, the

10:03AM **4** mouthpiece, the tank, the heater, and you're going to assemble

10:03AM **5** them together.

10:03AM **6** That claim is talking about how they're going to be

10:03AM **7** assembled. They're configured to be assembled together, and so

10:03AM **8** they're configured to be connected.

10:03AM **9** Q. And do you have an opinion as far as what the mouthpiece

10:03AM **10** is configured to be connected to?

10:03AM **11** A. I do. In my mind, you see the mouthpiece, it's shaped a

10:04AM **12** certain way. It's contoured. It's shaped to fit precisely over

10:04AM **13** the top of the reservoir or the tank of e-liquid and fit very

10:04AM **14** nicely and slide right over that, and as a matter of fact, I

10:04AM **15** think we've heard in this trial that it is actually designed,

10:04AM **16** when you slide it over, to snap into place, and that's mainly to

10:04AM **17** prevent the mouthpiece from falling off and having the product

10:04AM **18** fall apart when you are using it.

10:04AM **19** Q. You said you've handled some of these. Have you ever

10:04AM **20** taken the mouthpiece off the tank?

10:04AM **21** A. I have.

10:04AM **22** Q. It takes a little bit of work, but it's something you can

10:04AM **23** do?

10:04AM **24** A. It's something you can do. The manufacturer would prefer

10:04AM **25** you not do it. They would not want the liquid to leak all over

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10:04AM **1** the place.

10:04AM **2** Q. Now, you know Mr. Walbrink, Philip Morris's expert, has

10:04AM **3** offered a different opinion of the mouthpiece; is that right?

10:04AM **4** A. I do.

10:04AM **5** Q. Now, Mr. Walbrink's mouthpiece includes the black

10:05AM **6** endpiece the cartomizer tap, the silicone gasket and the

10:05AM **7** cartomizer tube, as well as I think that last item is 4; is that

10:05AM **8** right?

10:05AM **9** A. It does.

10:05AM **10** Q. Do you agree with his construction or opinion of

10:05AM **11** mouthpiece?

10:05AM **12** A. I do not.

10:05AM **13** Q. Why not?

10:05AM **14** A. Well, as it's labeled here, Mr. Walbrink has decided to

10:05AM **15** combine several of the components in the system and arbitrarily,

10:05AM **16** I think, redefine and say that this is the mouthpiece, and where

10:05AM **17** clearly those components all together were not designed to be a

10:05AM **18** mouthpiece. The part to be put in your mouth is only part

10:05AM **19** number 1 there at the top.

10:05AM **20** Q. Dr. Suhling, does the fact that Reynolds sells the

10:05AM **21** cartridge as a completed, fully assembled assembly, does that

10:05AM **22** affect your opinion as to what is the mouthpiece and whether the

10:06AM **23** mouthpiece in the Alto is configured to be connected to the

10:06AM **24** heater?

10:06AM **1** Q. Can you explain?

10:06AM **2** A. Sure. As a user, we want to buy a system that's fully

10:06AM **3** assembled. We don't want to buy 11 little parts in a box and

10:06AM **4** have to put together this pod every time we want to use it. And

10:06AM **5** so that assembly is done by the manufacturer, and again, Claim 1

10:06AM **6** is talking about making sure that the mouthpiece is configured

10:06AM **7** to be assembled right to the -- to -- well, in the case of the

10:06AM **8** Alto, to the tank, but in Claim 1 they say it has to be

10:06AM **9** configured to be connected to the heater, and which it's not.

10:06AM **10** Q. And that's, I guess, my next question. So in your

10:06AM **11** opinion, Dr. Suhling, are the mouthpiece and the heater

10:06AM **12** positioned in a manner prescribed by the claims?

10:06AM **13** A. They are not.

10:07AM **14** Q. I would like to turn to the next limitation that you

10:07AM **15** identified and it's up on the slide. It's "a thermal resistor

10:07AM **16** comprising a metallic foil or thin sheet."

10:07AM **17** Do you see that?

10:07AM **18** A. I do.

10:07AM **19** Q. What's a metallic foil or thin sheet?

10:07AM **20** A. Well, I believe probably everyone in the courtroom is

10:07AM **21** familiar with at least one type of metallic foil, and that I've

10:07AM **22** shown with a picture here on the left of the slide. That's an

10:07AM **23** aluminum foil that we would use in our kitchen for cooking or

10:07AM **24** other sealing purposes. Aluminum foil is a very thin metal

10:07AM **25** sheet, and as you probably remember, you can damage it and bend

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10:07AM **1** it very easily.

10:07AM **2** In the industry we will also use thicker metal sheets,

10:07AM **3** but thin, that can be rolled, and there's an example of one of

10:07AM **4** those shown on the right. They are -- both of these type of

10:08AM **5** products come in a uniform thickness. They can typically be

10:08AM **6** rolled, and they're of thin enough nature that they can be cut

10:08AM **7** and patterned and bent.

10:08AM **8** Q. And in your opinion, does the Vuse Alto product have a

10:08AM **9** metallic -- is the thermal resistor in the Vuse Alto product a

10:08AM **10** metallic foil or thin sheet?

10:08AM **11** A. It is not.

10:08AM **12** Q. Okay. So your interpretation or the meeting of metallic

10:08AM **13** foil or thin film -- or strike that. That metallic foil or thin

10:08AM **14** sheet, what's your view of -- understanding of that term based

10:08AM **15** on?

10:08AM **16** A. Mainly based on my career as a scientist and working with

10:08AM **17** industry, and these type of metal, rolled metal sheets, thin

10:08AM **18** sheets are used in a variety of different industries.

10:09AM **19** Q. These terms and the ideas of using metallic sheets or

10:09AM **20** metallic foils and thin sheets, these are well known?

10:09AM **21** A. They're well-known, very common terms in the industry.

10:09AM **22** Q. Did you find anything in the patent that helped confirm

10:09AM **23** your understanding of what was meant in the patent on these

10:09AM **24** terms?

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