

EXHIBIT 9

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PHILIP MORRIS PRODCUTS S.A.,)
)
) Civil Action
Counterclaim Plaintiff,) No. 1:20-cv-00393-LMB/TCB
)
)
v.) June 9, 2022
) 2:05 p.m.
)
R.J. REYNOLDS VAPOR COMPANY,)
)
)
Counterclaim Defendant.)
)
)

VOLUME 2 - AFTERNOON SESSION
TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE LEONIE M. BRINKEMA,
UNITED STATES DISTRICT COURT JUDGE

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Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

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CONTENTS

| EXAMINATIONS | Page |
|---|-------------|
| CONTINUED DIRECT EXAMINATION OF PAUL MEYER BY MR. SANDFORD | 433 |
| CROSS-EXAMINATION OF PAUL MEYER BY MR. McCURM | 470 |
| REDIRECT EXAMINATION OF PAUL MEYER BY MR. SANDFORD | 497 |
| DIRECT EXAMINATION OF JAMES FIGLAR BY MS. PARKER | 529 |
| CROSS-EXAMINATION OF JAMES FIGLAR BY MR. NAPLES | 567 |
| REDIRECT EXAMINATION OF JAMES FIGLAR BY MS. PARKER | 578 |
| RE-CROSS-EXAMINATION OF JAMES FIGLAR BY MR. NAPLES | 581 |

EXHIBITS

| DESCRIPTION | Page |
|--------------------|-------------|
|--------------------|-------------|

02:58PM **1** were using '911 and '265. So I took the Solo and the Alto

02:58PM **2** product information that Reynolds provided and basically went

02:58PM **3** back and added all those sales up, and took not the gross sales,

02:58PM **4** the net sales, but summarized all those amounts. And then I did

02:58PM **5** a calculation applying my reasonable royalty rates to those net

02:58PM **6** sales to come up with what I'll call the royalty damages. But

02:58PM **7** it's basically what, through December 31, 2021, Reynolds would

02:58PM **8** pay to use these two patents.

02:58PM **9** Q. And what conclusion did you reach -- going to Slide 39 --

02:58PM **10** as to the appropriate royalty damages? Let's start with the one

02:58PM **11** on the top, the '265 compact heater patent.

02:58PM **12** A. So for '265, the accused product was the Alto cartridges,

02:58PM **13** and the accused net sales were 1,333,918,837 that came from

02:59PM **14** Reynolds' records. I don't think there's any dispute about

02:59PM **15** that. I think it's just the accounting.

02:59PM **16** The reasonable royalty rate's 0.6 percent and then you do

02:59PM **17** the calculation. That's the \$8 million I mentioned earlier

02:59PM **18** today. That's the total damages through December 31st, 2021.

02:59PM **19** And then on '911, we have two products. We have the Alto

02:59PM **20** cartridges again and we have the Solo G2 cartridges. And I

02:59PM **21** added all those amounts up from the Reynolds' records, that's

02:59PM **22** 1,461,111,169. And at 2 percent, that comes out to

02:59PM **23** \$29.2 million for that period of time.

02:59PM **24** Q. And if you add up the total royalty damages for the '265

02:59PM **25** and the '911 Patent, what's the total amount of damages through

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03:01PM **1** right?

03:01PM **2** A. I assume they're infringed, yes, sir.

03:01PM **3** Q. And you made that clear multiple times in your expert

03:02PM **4** reports, right?

03:02PM **5** A. Yes.

03:02PM **6** Q. And you haven't been qualified, in fact, are not

03:02PM **7** qualified to offer an opinion on infringement, right?

03:02PM **8** A. That's something I just assume from the Court. I'm not

03:02PM **9** an engineer, so I'm not opining on infringement. So that's up

03:02PM **10** to the jury to decide infringement.

03:02PM **11** Q. So you agree with me, you're not qualified to offer an

03:02PM **12** opinion on infringement, right?

03:02PM **13** A. Well, I'm just not -- I wasn't engaged to do that. So

03:02PM **14** it's just not something I even looked at. I'm assuming it.

03:02PM **15** Q. And you also assumed for purposes of your opinions that

03:02PM **16** the asserted patents are valid?

03:02PM **17** A. Yes, and I documented that. That's correct.

03:02PM **18** Q. And again, you're not offering an opinion on the validity

03:02PM **19** of the patents, right?

03:02PM **20** A. That's correct.

03:02PM **21** Q. And you understand that the ladies and gentlemen of the

03:02PM **22** jury will be asked to decide the issues of infringement and

03:02PM **23** validity, and they're not just going to assume that they are

03:02PM **24** valid and infringed like you did, right?

03:03PM **25** A. That's right. I understand that. That's up to them,

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02:59PM **1** December 2021 that you believe is appropriate in this case?

02:59PM **2** A. Based on my analysis, my opinion, it's \$37.2 million.

02:59PM **3** Q. And just for reference, these figures can be found at

03:00PM **4** PX 133; is that right?

03:00PM **5** A. Yes, PX 133. That's correct, sir.

03:00PM **6** MR. SANDFORD: I pass the witness, Your Honor. Thank you

03:00PM **7** very much, Mr. Meyer.

03:00PM **8** THE COURT: All right. Cross-examination.

03:00PM **9** MR. McCURUM: Thank you, Your Honor, if I may pass out some

03:00PM **10** binders.

03:00PM **11** THE COURT: All right.

03:00PM **12** MR. McCURUM: With the help of Marshal Hendrick, I'd

03:00PM **13** appreciate it.

03:01PM **14** MR. McCURUM: May I proceed, Your Honor?

03:01PM **15** THE COURT: Yes.

03:01PM **16** MR. McCURUM: Thank you.

03:00PM **17** CROSS-EXAMINATION OF PAUL MEYER

03:00PM **18** BY MR. McCURUM:

03:01PM **19** Q. Good afternoon, Mr. Meyer. I don't think we have met.

03:01PM **20** My name is Ryan McCrum. I represent Reynolds and I have some

03:01PM **21** questions for you today.

03:01PM **22** A. Thank you.

03:01PM **23** Q. And to start, I just want to make sure we're all on the

03:01PM **24** same page about something. With respect to the opinions that

03:03PM **1** that's right. That's their decision.

03:03PM **2** Q. Okay. And if there's no infringement, there's no

03:03PM **3** damages?

03:03PM **4** A. I agree with that. If they find no infringement, there's

03:03PM **5** no damages.

03:03PM **6** Q. And similarly if the patents are valid, there's no

03:03PM **7** damages, right?

03:03PM **8** A. That's my understanding.

03:03PM **9** Q. Okay. So in that sense, just to wrap this up, your

03:03PM **10** opinion on damages only becomes relevant if one or more of the

03:03PM **11** claims are found to be both valid and infringed?

03:03PM **12** A. I agree with that.

03:03PM **13** Q. Now, let's talk about your opinions. You were in the

03:03PM **14** courtroom when Mr. Grant gave his opening statement?

03:03PM **15** A. Yes, I heard that.

03:03PM **16** Q. And that's Philip Morris's lawyer, right?

03:03PM **17** A. Yes, sir.

03:03PM **18** Q. And you heard him when he referred to the '911 and '265

03:03PM **19** patents as, quote, essential to any commercial e-cigarette. Did

03:03PM **20** you hear him say that?

03:03PM **21** A. I mean, I listened to it. We'd have to go back and see

03:04PM **22** it, but that wouldn't surprise me.

03:04PM **23** Q. Because you, yourself, have characterized these patents

03:04PM **24** as foundational?

05:14PM **1** BY MS. PARKER:

05:14PM **2** **Q.** All right. And if you'll tell the jury, what is it

05:14PM **3** you're holding and tell us how that came about.

05:14PM **4** **A.** All right. This is Vuse Alto, so this is the last

05:14PM **5** product that we brought up into the marketplace under the Vuse

05:14PM **6** umbrella, and, again, it was a product that we licensed from one

05:15PM **7** of our suppliers that we found to be pretty compelling, and it

05:15PM **8** met the requirements that I talked about earlier in terms of the

05:15PM **9** regulatory requirements and then we started developing the

05:15PM **10** science around it and all that stuff. So this is the last of

05:15PM **11** the line for now until we continue to innovate and -- we have to

05:15PM **12** go through -- I think as the judge pointed out the other day,

05:15PM **13** straight through the PMTA process, so from here on in, any new

05:15PM **14** innovations have to either be off of this design or any new

05:15PM **15** design has to go straight to the FDA before you can go into

05:15PM **16** market.

05:15PM **17** **Q.** So what is Reynolds's most popular Vuse product today?

05:15PM **18** **A.** Today it is Vuse Alto.

05:15PM **19** **Q.** All right. And how is Vuse Alto doing in the United

05:15PM **20** States generally?

05:15PM **21** **A.** It's doing quite well right now. So I think it's neck

05:15PM **22** and neck with the other major competitor and probably leading in

05:16PM **23** the marketplace today.

05:16PM **24** **Q.** All right. Now, I want to go back and ask you some

05:16PM **25** specifics about some of the parts of the product that the jury

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05:16PM **1** has heard about earlier.

05:16PM **2** The jury's heard about e-liquid. What is e-liquid?

05:16PM **3** **A.** Yes. So e-liquid is what's in all of these products that

05:16PM **4** is the base that generates the aerosol. So I think I described

05:16PM **5** it earlier. It's mostly comprised of vegetable glycerine,

05:16PM **6** propylene glycol, a little bit of water, and then flavorings and

05:16PM **7** pharmaceutical-grade nicotine, and that's all the liquid is.

05:16PM **8** And so depending on how these products are configured,

05:16PM **9** once the heater is activated, it is in contact, the liquid is in

05:16PM **10** contact with that heater and it forms an aerosol that the

05:17PM **11** consumer can then draw into their mouth and hold in their mouth,

05:17PM **12** inhale, to basically smoke the product. So that's the basics on

05:17PM **13** how it works.

05:17PM **14** **Q.** Is the e-liquid important to the product?

05:17PM **15** **A.** It's very important to the product, yes.

05:17PM **16** **Q.** And does Reynolds have its own formulations of e-liquid

05:17PM **17** for the product?

05:17PM **18** **A.** We do, yes.

05:17PM **19** **Q.** Okay. And could you describe those very generally for

05:17PM **20** the jury? And I understand that they're proprietary, so if

05:17PM **21** you'll tell the jury what "proprietary" means also?

05:17PM **22** **A.** Sure. So, I mean, proprietary means there are kind of

05:17PM **23** secret formulas, right, so, you know, it's like the Coke recipe,

05:17PM **24** and Reynolds, when they developed Solo, we developed all of our

05:17PM **1** we thought that was, you know, basically the Coca-Cola formula

05:17PM **2** for us and these products. And they have specific formulations,

05:17PM **3** right, and they offer specific consumer benefits when applied

05:18PM **4** especially in the Solo format.

05:18PM **5** **Q.** And can you tell the jury, again just very top line, how

05:18PM **6** is the e-liquid manufactured and where and just a little bit

05:18PM **7** about that process?

05:18PM **8** **A.** Sure. It's basically a food-grade operation, mixing

05:18PM **9** operation, where you mix the individual components to the

05:18PM **10** specification that's necessary, and for Solo for many years we

05:18PM **11** made it -- we started making it first in the R&D facilities and

05:18PM **12** in Winston-Salem, and now we make it kind of up the street at

05:18PM **13** the factory just outside of Winston-Salem for Vuse Solo.

05:18PM **14** **Q.** Now, I know you've been sitting here with us during the

05:18PM **15** trial, so you probably heard this yourself, but there's been

05:18PM **16** some talk in front of the jury about leakage of e-liquids, okay?

05:19PM **17** So can you tell the jury about that?

05:19PM **18** **A.** Well, all these products have liquid in them. By -- the

05:19PM **19** only way that they can work is -- everything that's holding the

05:19PM **20** liquid in, there's still holes, two holes, minimally, on every

05:19PM **21** product that is in existence today, so they kind of have a

05:19PM **22** propensity to leak. I mean, you've got liquid trying to be held

05:19PM **23** into a matrix and it's got two holes in it.

05:19PM **24** Now, you can try to minimize leakage by the design of the

05:19PM **25** cartridge that it sits in through gaskets, but also design of

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05:19PM **1** the liquids itself and the density of the liquid can also help

05:19PM **2** keep things in place and minimize leakage.

05:19PM **3** It's my experience that all these products at some point

05:19PM **4** in time leak, and it's -- I think it's -- I mean, I just think

05:20PM **5** they're always going to leak at some point in time. It's got

05:20PM **6** two holes in it, and there's a liquid inside.

05:20PM **7** **Q.** What about Vuse products? Did the Vuse products still

05:20PM **8** leak?

05:20PM **9** **A.** Yes.

05:20PM **10** **Q.** Okay. Now, switching gears, you've again been here in

05:20PM **11** the courtroom so you understand that Philip Morris is alleging

05:20PM **12** in this lawsuit that Reynolds willfully infringed its patents.

05:20PM **13** You know that, right?

05:20PM **14** **A.** I'm aware, yes.

05:20PM **15** **Q.** Okay. Does Reynolds have any corporate policies that are

05:20PM **16** related to respecting patent rights of other companies?

05:20PM **17** **A.** We do, yes.

05:20PM **18** **Q.** And if you can tell the jury who developed the policies,

05:20PM **19** what are they, and how they work?

05:20PM **20** **A.** Yeah. So they -- the policies would have been derived

05:20PM **21** through both the legal department as well as consultation with

05:20PM **22** the leadership team.

05:20PM **23** **Q.** Did you have any role in them?

05:21PM **24** **A.** I did not in writing these specific policies because

05:21PM **1** well before I ever got close to being on a leadership team, but

05:21PM **2** the basic essence of the policy is, you know, you respect

05:21PM **3** intellectual property and then explains, you know, how you

05:21PM **4** respect that. You don't, you know, infringe if you -- you don't

05:21PM **5** do any of that stuff, and at the same time, it also speaks to

05:21PM **6** what will happen with intellectual property developed by the

05:21PM **7** people who work for the company and how it's the company's

05:21PM **8** property, et cetera.

05:21PM **9** Q. And if you could tell the jury, what are the efforts that

05:21PM **10** Reynolds takes to ensure that the Reynolds products do not

05:21PM **11** infringe other patents?

05:21PM **12** A. Well, you have to -- you have to be cognizant of what is

05:22PM **13** happening in the patent literature landscape, right. So patent

05:22PM **14** applications are public domain things, right, so they get

05:22PM **15** published and they're public knowledge. They're supposed to be.

05:22PM **16** And so when an application is filed and that literature becomes

05:22PM **17** available, everyone and anyone can read that and understand

05:22PM **18** what's in those applications and in the granted patents, and so

05:22PM **19** it's contingent upon a company to stay abreast of that

05:22PM **20** information because, as an innovation developer, you know that

05:22PM **21** there's more than one person working on ideas all around the

05:22PM **22** world, right, and so in some instances it's like a race of, you

05:22PM **23** know, who's developing technology first and who's going to file

05:22PM **24** first, et cetera, things like that. So you have to keep abreast

05:23PM **25** of what's happening in the patent landscape.

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05:24PM **1** A. Sure, so we -- we've done surveys of the market

05:24PM **2** landscape, and worked with our suppliers in China and other

05:24PM **3** places and, of course, were introduced to this product, which I

05:24PM **4** think was originally called TF16 -- or at least one version of

05:24PM **5** it was -- and it had a market presence in the U.S., though

05:24PM **6** small, at the time when we saw it with a supplier, and we found

05:24PM **7** it highly interesting, and we thought, this is the -- this is

05:25PM **8** where consumers are going, is they -- they're moving away from

05:25PM **9** these cigalike products, like Vuse Solo, and moving more to

05:25PM **10** these what we call pod mods in the marketplace, and so we wanted

05:25PM **11** a decent pod mod, but if we were to develop it all by ourselves

05:25PM **12** on our own, which we do have developments of doing that, but we

05:25PM **13** know that that's a long road because you have to get through

05:25PM **14** FDA, and that's going to be several years. This was already on

05:25PM **15** the market.

05:25PM **16** And so that's why we negotiated with our supplier to get

05:25PM **17** a license to use that product because it's really quite good.

05:25PM **18** Q. So in your role as head of R&D at Reynolds, at the time

05:25PM **19** that these e-cigarettes were being developed, can you tell the

05:25PM **20** jury whether Reynolds copied any other e-cigarettes as part of

05:25PM **21** that process?

05:25PM **22** A. I would say no.

05:25PM **23** Q. Now, I want to switch gears one more time, and this is

05:26PM **24** the last area I'm going to ask you about this afternoon, and

05:26PM **25** that's about the FDA, and you told the jury a little bit about

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05:23PM **1** Q. Would it be responsible for a company just to ignore the

05:23PM **2** research and patents that are out there from competitors?

05:23PM **3** A. In my opinion it would not be responsible because then

05:23PM **4** you wouldn't know what has come -- what has happened before.

05:23PM **5** Q. Does Reynolds monitor other companies' patents in order

05:23PM **6** to copy and infringe them?

05:23PM **7** A. No, not -- we monitor the whole tobacco landscape patent

05:23PM **8** literature so that we know what's happening from a competitive

05:23PM **9** landscape perspective and understand if we're developing things,

05:23PM **10** are we -- you know, are we kind of being -- are we on top of

05:23PM **11** somebody else's development or are we way ahead of somebody else

05:23PM **12** in some other area. I mean those are the things you try to get

05:23PM **13** an assessment of.

05:23PM **14** Q. Did Reynolds copy any other e-cigarette product when

05:24PM **15** developing the Vuse Solo?

05:24PM **16** A. No.

05:24PM **17** Q. Did Reynolds copy any other company's patents when

05:24PM **18** developing the Vuse Solo?

05:24PM **19** MR. NAPLES: Objection, Your Honor.

05:24PM **20** THE COURT: Yes, I'm going to sustain that objection.

05:24PM **21** BY MS. PARKER:

05:24PM **22** Q. Now, you mentioned earlier that Reynolds had purchased

05:24PM **23** the Vuse Alto from another company or companies. Can you tell

05:24PM **24** us a little bit more about that? Can you tell the jury a little

05:26PM **1** the FDA already, but I would like to follow up and ask you a few

05:26PM **2** more questions if I may.

05:26PM **3** Okay. So you told us that when you had this -- at the

05:26PM **4** time you retired, you had these dual roles and you were head of

05:26PM **5** R&D and you were head of the FDA regulatory work. As head of

05:26PM **6** the FDA regulatory work, did you yourself deal with the FDA?

05:26PM **7** A. Yes.

05:26PM **8** Q. And if you can tell the jury about that, please.

05:26PM **9** A. Well, sure. I participated in direct meetings with the

05:26PM **10** director of the Center for Tobacco Products. I had direct

05:26PM **11** meetings with the -- with FDA Commissioner Scott Gottlieb at the

05:26PM **12** time when I had those meetings, so I -- and, you know, to talk

05:26PM **13** about the company, to talk about developments, to talk about

05:26PM **14** e-cigarettes, to talk about a variety of things in the

05:27PM **15** marketplace that were happening and concerns.

05:27PM **16** In addition to that, I've met with a variety of

05:27PM **17** individual FDA reviewers because we've had to talk about a

05:27PM **18** number of applications that we've had, both on the traditional

05:27PM **19** front as well as e-cigarettes. I've sat in those meetings as

05:27PM **20** well.

05:27PM **21** And then, you know, helped -- helped develop some of

05:27PM **22** these PMTAs. I certainly read them all. I didn't write them

05:27PM **23** all, but I certainly read the narratives. I read large parts of

05:27PM **24** these applications, commented on them for my scientists, because

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