

**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' [CORRECTED] BRIEF IN SUPPORT OF SUBMISSION OF THE
WILLFUL INFRINGEMENT ISSUE TO THE JURY**

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I. INTRODUCTION

There is more than sufficient evidence for the jury to find Reynolds willfully infringed the asserted patents.

Reynolds was monitoring its competitors' patents—particularly those of its “fierce” competitor—Philip Morris. And there is no dispute Reynolds knew of the applications that issued as the '911 and '265 patents, and knew of the issuance of the '265 patent by November 21, 2017 and the '911 patent by December 4, 2018. While Reynolds was monitoring Philip Morris' patents, it purchased the Alto, Vibe, and Ciro products and conducted tear downs of the physical devices, confirming that they knew *both* about the Philip Morris patents and the specific shapes, materials, sizes, positions, and functions of the physical structures in the accused devices. Consequently, Reynolds—informed by the monthly patent analysis of its in-house counsel and the product tear downs of its extensive engineering team, both working for Dr. Figlar—knew or should have known it was infringing Philip Morris' asserted patents.

II. FACTUAL BACKGROUND

A. Reynolds' Heat-Not-Burn Products Failed So It *Had* To Pivot to E-Cigarettes

In the early 1980s, Reynolds sought to develop an alternative to combustible cigarettes called heat-not-burn products. Tr. (6/9/22 pm) at 112:1-11. Heat-not-burn products heat tobacco, rather than burn it, which significantly reduces the amount of tar and nicotine found in smoke. *Id.* at 112:1-11. Reynolds' heat-not-burn products failed. *Id.* at 143:13-144:12, 144:23-25, 145:11-13.

Having invested over a billion dollars in two failed combustible cigarette alternatives, Reynolds moved into the e-cigarette market. Tr. (6/9/22 pm) at 145:14-146:7. In 2013, Reynolds launched its first e-cigarette product. *Id.* at 118:23-119:10. “Reynolds had aspirations to being number one in the vapor market.” *Id.* at 105:20-21. Reynolds invested tens of millions of dollars

to develop the Solo and another \$30 million in the PMTA application. *Id.* at 121:3-7. Reynolds invested more to acquire the Alto, Vibe and Ciro and spent tens of millions more on their PMTA applications. *Id.* at 137:17-22.

B. Reynolds Has Had Knowledge of Philip Morris' Asserted Patents Since Issuance

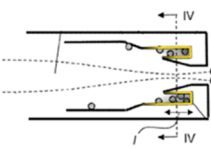
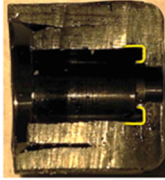
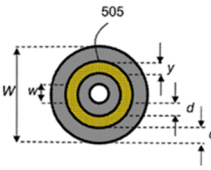
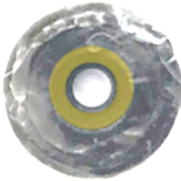
Reynolds and Philip Morris are “fierce” competitors. Tr. (6/8/22 am) at 135:18-19. Throughout this period, Reynolds monitored Philip Morris’ patents. Ex. A (6/24/21 Figlar Dep.) at 132:21-133:10 (played at trial). Reynolds looked “at the full patent landscape” and “[kept] a close eye on the patent literature,” including Philip Morris’ patents. *Id.* Reynolds’ in-house and outside counsel would review competitor patents, and every time there was a “new iteration of patent publications,” the lawyers would “compile it and send it out to the scientists” and other Reynolds employees “at least on a monthly basis.” *Id.* at 134:5-134:17. Reynolds’ corporate witness, Dr. Figlar, testified that it would be irresponsible for a company to ignore the research and patents that are out there from competitors. Tr. (6/9/22 pm) at 130:1-4. As a result, Reynolds concedes that it knew of the patent application that issued as the ’911 patent by December 3, 2013 and the asserted ’911 patent by December 4, 2018, and it knew of the application that issued as the ’265 patent by October 30, 2014 and the ’265 patent by November 21, 2017. PX-613 at 3. There is no evidence in the record that Reynolds took any steps to avoid infringement.

C. The Similarities Between The Asserted Patents And Accused Products Were Apparent

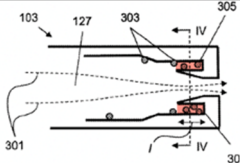
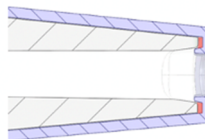
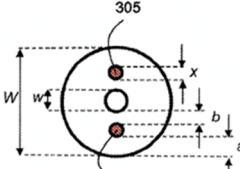
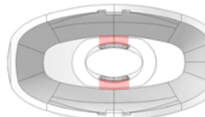
The evidence shows that the similarities between the asserted patents and accused products were, or should have been, readily apparent to the in-house counsel and many engineers at Reynolds who had access to the monthly patent reports circulated at Reynolds.

During trial, Philip Morris and Reynolds’ technical experts explained in great detail the many similarities between the products and the asserted Philip Morris patents. Those similarities

are plain even on cursory review, as shown in the table below comparing the products to the embodiments of the '911 patent disclosed in its application. For example, Dr. Abraham and Mr. Kodama each explained that the “blind hole” in the Solo is the same as the “blind hole” in Figures 5 and 6 of the '911 patent—they are both at the tip of the mouthpiece, shaped like a donut, and have a cross-sectional width between 0.5 to 1mm:

'911 Patent	Solo G2
 <p data-bbox="678 751 823 808">PX-3 at Fig. 5 (annotated)</p>	 <p data-bbox="919 768 1032 825">PX-37 at 1 (annotated)</p>
 <p data-bbox="678 1014 823 1071">PX-3 at Fig. 6 (annotated)</p>	 <p data-bbox="919 1035 1032 1092">PX-35 at 2 (annotated)</p>

Similarly, Dr. Abraham and Mr. Kodama demonstrated the striking similarity between the “blind holes” in the Alto and the “blind holes” in Figures 3 and 4 because they are all at the tip of the mouthpiece, in the same locations on opposite sides of the exit hole, and symmetric:

'911 Patent	Alto
 <p data-bbox="657 1549 805 1606">PX-3 at Fig. 3 (annotated)</p>	 <p data-bbox="927 1535 1049 1591">PX-265A (annotated)</p>
 <p data-bbox="657 1793 805 1850">PX-3 at Fig. 4 (annotated)</p>	 <p data-bbox="919 1791 1057 1848">PX-595 at 3</p>

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