IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RAI STRATEGIC HOLDINGS, INC. and R.J. REYNOLDS VAPOR COMPANY,

Plaintiffs and Counterclaim Defendants,

v.

ALTRIA CLIENT SERVICES LLC; PHILIP MORRIS USA INC.; and PHILIP MORRIS PRODUCTS S.A.,

Defendants and Counterclaim Plaintiffs.

Case No. 1:20-cv-00393-LMB-TCB

REYNOLDS'S REPLY IN SUPPORT OF
RULE 50(b) RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND
RULE 59 MOTION FOR A NEW TRIAL

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INTRODUCTION

Despite PMP's constant refrain that "Reynolds is wrong," so saying does not make it true. Because PMP has failed to identify sufficient evidence to support the jury's verdict, and the jury's verdict is both against the weight of the evidence and contrary to law, the Court should grant Reynolds's motion for judgment as a matter of law, or, alternatively, a new trial.

ARGUMENT

I. REYNOLDS IS ENTITLED TO JUDGMENT OR A NEW TRIAL ON THE '265 PATENT.

A. The Asserted Claims of the '265 Patent Are Invalid as Indefinite.

Reynolds established in its *Markman* briefing and its Opening Brief (Dkt. 1380) that independent claim 1 of the '265 patent is invalid because it fails to inform a POSA of its scope and provides no guidance for the claimed "dimensions substantially the same as a cross-section of a cigarette or cigar." Dkt. 1380 at 1-3. PMP concedes that the specification offers no definition or guidance for the claimed dimensions, and ignores Reynolds's cited authority (Dkt. 1380 at 2 & n.1) finding "substantially" terms indefinite where "there are no objective boundaries in the patent for when [a dimension] is considered 'substantially same.'" *Varian Med. Sys., Inc. v. ViewRay, Inc.*, No. 19-cv-5697, 2020 WL 4260714, at *6 (N.D. Cal. July 24, 2020). PMP argues (without support) that "cigarette and cigar sizes are extremely well-known and easily ascertainable," and cites cases where the parties agreed that the dimensions were well-known,[1] but all of that blinks the main issue: the specification provides no objective dimensions or standard for measuring them. *See* Dkt. 1387 at 2-3. Conceding that the patent provides no standard, PMP asserts that it may

[1] *See Parker Compound Bows, Inc. v. Hunter's Mfg.*, No. 5:14-cv-4, 2016 WL 617464, at *14, *26 (W.D. Va. Feb. 12, 2016) (party agreement that dimensions of "a user's foot" were "extremely well-known in the art"); *Warsaw Orthopedic, Inc. v. NuVasive, Inc.*, 778 F.3d 1365, 1371 (Fed. Cir. 2015) ("[T]he parties stipulated that 'the average dimensions of the human vertebrae are well-known, easily ascertainable, and well-documented ….'"), *vacated*, 577 U.S. 1099 (2016).

define the term "in terms of the environment in which it is to be used," *i.e.*, a "cigarette or cigar," *id.* at 2, but that assertion merely (and circularly) repeats the indefinite language. That Dr. Suhling testified about "dimensions of various cigarettes and cigars, without any suggestion that he did not understand the claim scope," *id.*, does not render the term definite; what "a POSITA would know" cannot suffice when "the specification does not disclose any dimensions" and thus "the patent lacks information as to the boundaries of the claim." *See Varian*, 2020 WL 4260714 at *6.

PMP mistakenly argues that Reynolds "waived" its entitlement to relief, but "[w]hen the claim construction is resolved pre-trial, and the patentee presented the same position in the *Markman* proceeding as is now pressed, a further objection to the district court's pre-trial ruling may indeed have been not only futile but unnecessary." *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.,* 521 F.3d 1351, 1359 (Fed. Cir. 2008). That Reynolds narrowed its case by declining to present its prior-art based invalidity defenses at trial similarly does not affect its preserved indefiniteness challenge to claim 1.

B. The Alto Thermal Resistor Does Not Have "Dimensions Substantially the Same as a Cross-Section of a Cigarette or Cigar."

Reynolds is entitled to judgment of no infringement or a new trial because the Alto thermal resistor does not meet the "dimensions substantially the same as" limitation. *See* Dkt. 1380 at 3-4. PMP cannot contest that the claim language requires plural "dimension*s*," that dimensions of a circular shape require a measurement of area, and that the invention aimed to provide "a large contact area for the heater," Dkt. 1380-1 at 358:17-19 (Walbrink). And PMP's own summation of the evidence debunks its infringement argument. Specifically, PMP can point only to Mr. Walbrink's misleading demonstration comparing Alto's entire *heater assembly* to dimensions of various cigarettes, which jurors "saw with their own eyes" to assess the relevant dimensions. Dkt. 1387 at 3. That show-and-tell, and PMP's misguided arguments based on it now, cannot form

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