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

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

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE COURT SHOULD ENTER JUDGMENT AS A MATTER OF LAW THAT THE ALTO INFRINGES CLAIMS 2, 11, AND 12 OF THE ’911 PATENT OR, ALTERNATIVELY, GRANT A NEW TRIAL 2

A. There Is No Legally Sufficient Evidence For A Reasonable Juror To Find That The Alto Does Not Meet The “cavity is a blind hole” Element 2

B. There Is No Legally Sufficient Evidence For A Reasonable Juror To Find That The Alto Does Not Meet The Cross-Sectional Dimension Element 5

C. There Is No Legally Sufficient Evidence For A Reasonable Juror To Find That The Alto Does Not Meet The “cavity contains capillary material” Element 7

III. CONCLUSION..9

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TABLE OF AUTHORITIES

CASES

DeMarini Sports, Inc. v. Worth, Inc.,
239 F.3d 1314 (Fed. Cir. 2001) 3

Erfindergemeinschaft UroPep GbR v. Eli Lilly & Co.,
No. 2:15-CV-1202-WCB, 2017 WL 1050120 (E.D. Tex. Mar. 17, 2017) 5

Fontem Ventures, B.V. v. NJOY, Inc.,
No. CV 14-1645-GW(MRWx), 2015 WL 12743861 (C.D. Cal. Oct. 22, 2015).................... 4, 5

Jeneric/Pentron, Inc. v. Dillon Co., Inc.,
205 F.3d 1377 (Fed. Cir. 2000) 5

Level 3 Commc'ns, LLC v. Limelight Networks, Inc.,
No. 2:07cv589, 2009 WL 10689350 (E.D. Va. June 23, 2009) 4

Nuance Commc'ns, Inc. v. Abbyy Software House, Inc.,
No. 08-cv-2912, 2012 WL 1188903 (N.D. Cal. Apr. 9, 2012),
aff'd sub nom., 813 F.3d 1368 (Fed. Cir. 2016) 3

Oatey Co. v. IPS Corp.,
514 F.3d 1271 (Fed. Cir. 2008) 6

Pulse Elecs., Inc. v. U.D. Elec. Corp.,
860 F. App'x 735 (Fed. Cir. 2021) 3

Summit 6, LLC v. Samsung Elecs. Co.,
802 F.3d 1283 (Fed. Cir. 2015) 4, 5

Unwired Planet, LLC v. Apple Inc.,
829 F.3d 1353 (Fed. Cir. 2016) 4

Wahpeton Canvas Co., Inc. v. Frontier, Inc.,
870 F.2d 1546 (Fed. Cir. 1989) 3, 4

Whitserve, LLC v. Comput. Packages, Inc.,
694 F.3d 10 (Fed. Cir. 2012) 1, 8

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I. INTRODUCTION

No reasonable juror could find that the accused VUSE Alto does not infringe claims 2, 11, and 12 of the '911 Patent. For each of the three disputed limitations, Reynolds' only purported evidence of non-infringement is its expert's self-serving and uncorroborated testimony that contradicts the law of the case—including Judge O'Grady's claim construction and *Daubert* orders—and is against the clear weight of the evidence—including the unrebutted functional testing that Dr. Abraham performed.

For the first disputed element ("cavity is a blind hole"), Reynolds' only argument is that the claimed structure cannot have any open sides in view of the patentee's alleged statements during prosecution. That contradicts Judge O'Grady's prior orders holding that all of the disputed terms are "well known common English words given their common meaning" and "[n]one of the terms were modified by a clear disclaimer in the prosecution[.]" Dkt. 360 at 1. For the second disputed element ("largest cross-sectional dimension x"), Reynolds relies on Mr. Kodama's measurement that is undisputedly not wall-to-wall and thus improperly contradicts the specification's guidance and excludes disclosed embodiments. For the third disputed element ("cavity contains capillary material"), Reynolds concedes the patent teaches a "capillary material" is any material that "retain[s] the collected liquid" and does not challenge Dr. Abraham's functional testing showing that the silicone material in the Alto does exactly that. That should be dispositive. Reynolds instead relies on Mr. Kodama's conclusory testimony, which "is not enough to be even substantial evidence in support of a verdict." *Whitserve, LLC v. Comput. Packages, Inc.*, 694 F.3d 10, 24 (Fed. Cir. 2012).

The Court should grant Philip Morris' motion for judgment as a matter of law that the Alto infringes claims 2, 11, and 12 of the ' 911 Patent or, alternatively, a new trial on the issue.

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II. THE COURT SHOULD ENTER JUDGMENT AS A MATTER OF LAW THAT THE ALTO INFRINGES CLAIMS 2, 11, AND 12 OF THE '911 PATENT OR, ALTERNATIVELY, GRANT A NEW TRIAL

A. There Is No Legally Sufficient Evidence For A Reasonable Juror To Find That The Alto Does Not Meet The "cavity is a blind hole" Element

Reynolds argues that "the space in the Alto mouthpiece is not a cavity or a blind hole because it has open sides." Dkt. 1386 ("Opp.") at 2. Reynolds in turn relies on Mr. Kodama's testimony to the same effect and asserts it was proper because Judge O'Grady allowed Reynolds to "introduc[e] evidence of the Rose patent and related prosecution history." Opp. at 4. Reynolds mischaracterizes Judge O'Grady's statement and is wrong on the merits.

First, Mr. Kodama's testimony contradicts Judge O'Grady's claim construction and *Daubert* orders.[1] There is no dispute that Judge O'Grady's claim construction order held all disputed terms had their plain and ordinary meaning and "[n]one of the [disputed] terms were modified by a clear disclaimer in the prosecution[.]" Dkt. 360 at 1. There is also no dispute that Mr. Kodama testified that the Applicants' statements to the Patent Office about Rose were supposedly "***defining*** what blind means, which means a space . . . that is not open around the side." Dkt. 1376 ("Mot."), Ex. 1 (Trial Tr. 6/10 a.m.) at 605:1-11. That contradicts the law of the case, as confirmed twice by Judge O'Grady. In particular, Mr. Kodama's testimony contradicts Judge O'Grady's claim construction order, which gave each term its plain meaning and held there were no disclaimers based on Rose or any other reference. Dkt. 360 at 1. The Court's *Daubert* order likewise held that "the discussion of the '975 patent [Rose] during the prosecution history was mere criticism and ***did not expressly disclaim*** the subject matter of ***any blind-hole that also contained additional spaces or cavities***." Dkt. 1184 at 23 (emphasis added).

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[1] Even if Reynolds or Mr. Kodama did not "use the word 'disclaim'" at trial, Mr. Kodama's testimony was still improper and contradicts the law of the case. Opp. at 4.

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