

**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-LO-TCB

**MEMORANDUM IN SUPPORT OF REYNOLDS'S MOTION *IN LIMINE* NO. 7 TO
PRECLUDE EVIDENCE OR ARGUMENT THAT ANY VUSE PRODUCTS
ALLEGEDLY INFRINGE ANY CLAIM OF THE '545 PATENT ON THE BASIS THAT
JUUL AND/OR NUMARK ALLEGEDLY PRACTICE THAT PATENT**

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INTRODUCTION

RAI Strategic Holdings, Inc. and R.J. Reynolds Vapor Company (collectively, “Reynolds”) respectfully move for an order excluding all evidence and argument, whether presented in attorney argument, on direct or cross-examination, for impeachment or otherwise, that (1) misrepresents Reynolds’s position on whether vaping products by JUUL and/or NuMark practiced the ’545 patent (or any other asserted patent); or (2) suggests that Reynolds’s position is relevant to whether Reynolds’s VUSE products infringe the ’545 patent. Philip Morris Products S.A. (“PMP”), Altria Client Services, LLC (“ACS”), and Phillip Morris USA Inc. (“PM USA”) (collectively “PM/Altria”) should be precluded from offering such evidence and argument because their expert’s opinions to that effect are based on deliberate misrepresentations of Reynolds’s discovery responses, and such arguments would only serve to confuse and mislead the jury.

BACKGROUND

JUUL and NuMark are affiliates of PM/Altria who sold electronic smoking devices under licenses to the ’545 patent (and to the ’374 patent). Throughout this case, the parties have disagreed over whether JUUL and NuMark’s products would infringe the patent if they were not licensed—i.e., whether they “practice the claims” of the ’545 patent. If the JUUL and NuMark products practiced the claims of the patent, then PM/Altria would be barred from recovering pre-suit damages for infringement of the ’545 patent because they failed to ensure that the products were marked with the patent number. *See* 35 U.S.C. § 287(a). The failure to mark would also be relevant to PM/Altria’s claims for ongoing royalty and willful infringement. It is undisputed that the JUUL and NuMark products were not marked with the ’545 patent.

During discovery, each party sought the other’s contentions on whether the JUUL and NuMark products practiced the claims of the ’545 patent. While PM/Altria refused to provide

meaningful responses to Reynolds's discovery request, Reynolds answered in full. Reynolds contended (and still does) that the JUUL and MarkTen products must practice the claims of the '545 patent under PM/Altria's apparent interpretation of the claims in which they believe Reynolds infringes, as all of the products have lithium ion batteries and use pulse width modulation to regulate power. In other words, although Reynolds believes that it does *not* infringe the '545 patent, and that the JUUL and MarkTen products also do not practice the patent, Reynolds believes that the JUUL and MarkTen products must practice the patent if PM/Altria is correct about infringement.

Reynolds's initial discovery responses accordingly took the following form: "Reynolds admits that JUUL makes, uses, sells, offers for sale, and/or imports into the United States and has made, used, sold, offered for sale, and/or imported into the United States one or more Products that practices one or more claims of the '545 Patent *as those claims are construed and asserted by Defendants.*" Ex. 1, Plaintiffs' Response to Defendants' Third Set of Requests for Admission (Nos. 108-110) (January 1, 2021) at 4 (emphasis added). And to make its position even more explicit, Reynolds later supplemented its responses, stating: "Reynolds denies that JUUL makes, uses, sells, offers for sale, and/or imports into the United States and has made, used, sold, offered for sale, and/or imported into the United States one or more Products that practices one or more claims of the '545 Patent as Reynolds applies the claims." Ex. 2 Plaintiffs' First Supplemental Response to Defendants' Third Set of Requests for Admission (Nos. 108-111) (March 29, 2021) at 2. Reynolds's expert witness Dr. Blalock similarly opined that JUUL and MarkTen Elite "practice one or more of the asserted claims of '545 Patent *to the extent that the Reynolds Accused VUSE Products do.*" Ex. 3, Blalock Rebuttal Report at ¶ 159 (emphasis added).

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