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

REDACTED

MEMORANDUM IN SUPPORT OF REYNOLDS'S MOTION *IN LIMINE* NO. 11 TO EXCLUDE EVIDENCE AND TESTIMONY REGARDING PM/ALTRIA'S IQOS PRODUCTS

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INTRODUCTION

Pursuant to Federal Rules of Evidence 401, 402, and 403, Reynolds respectfully moves the Court *in limine* to preclude PM/Altria from introducing any evidence or argument before the jury at trial regarding any IQOS® heat-not-burn tobacco products.[1] On December 10, 2021, the parties met and conferred regarding their proposed motion *in limine* topics, and Reynolds raised the topic of excluding any evidence, testimony, or argument relating to PM/Altria's IQOS products. The parties were unable to reach a resolution on these issues.

Based on the PM/Altria's proposed trial exhibits and deposition designations, and the parties' December 10, 2021 meet and confer, it appears that PM/Altria intends to feature IQOS prominently in its trial presentation, including touting IQOS's regulatory authorizations, in order to suggest to the jury that IQOS is a better/safer product than Reynolds's accused VUSE® e-cigarette products, or to establish PM/Altria (incorrectly) as better actor than Reynolds in the development of alternatives to combustible cigarettes. But the issues that the jury must decide at trial have nothing whatsoever to do with IQOS.

Because the claims brought by Reynolds as plaintiff remain stayed, the only matters that the jury will assess at trial concern (i) whether the accused VUSE products marketed and sold by Reynolds infringe one or more of the patents asserted by PM/Altria in its counterclaims; and (ii) whether PM/Altria's asserted patents are invalid. PM/Altria's own product, IQOS, has no bearing on either issue. PM/Altria cannot prove its infringement case by comparing VUSE to IQOS, for example. Not only is such a comparison impermissible as a matter of law, but there is no dispute

[1] "Reynolds" refers collectively to RAI Strategic Holdings, Inc. and R.J. Reynolds Vapor Company. "PM/Altria" refers collectively to Defendants Altria Client Services LLC ("ACS"), Philip Morris USA, Inc. ("PM USA"), and Philip Morris Products S.A. ("PMP").

in this case that [redacted]. Nor can PM/Altria prove infringement (or defend validity) by presenting evidence of the resources it expended in the development and/or regulatory approval of IQOS. Such evidence is purely self-congratulatory; it does not tend to make any issue that the jury must decide more or less likely to be true. It is, quintessentially, irrelevant.

Moreover, allowing PM/Altria to introduce evidence about IQOS can only complicate this case and confuse the jury. For example, if PM/Altria is permitted to present evidence touting the virtues of the IQOS product, then for the sake of fairness and completeness, Reynolds would need to share with the jury the ample evidence showing that whatever positive qualities IQOS may have originated with *Reynolds*; that PM/Altria copied Reynolds's own patented technologies in the development of IQOS; and that, for this reason, IQOS has been banned from the US marketplace by the International Trade Commission ("ITC"). A collateral mini-trial would inexorably ensue on these issues, distracting the jury from the actual matters they will be called upon to decide.

To prevent a waste of resources, prejudice to Reynolds, and confusion of the jury, the Court should enter an Order barring PM/Altria from introducing any argument or evidence relating to the IQOS products at trial.

BACKGROUND

A. THE ASSERTED PATENTS AND ACCUSED PRODUCTS

The patents asserted by Plaintiff Reynolds in this case actually *do* relate to the IQOS products. But Reynolds's claims were stayed by the Court in view of parallel proceedings before the ITC and the Patent Trial and Appeal Board ("PTAB") involving the same patents. (*See* Dkt. Nos. 27, 426, 432.) Reynolds's claims directed to the IQOS products remain stayed to this day, and thus will not be a part of the upcoming trial. (Dkt. No. 456.)

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