

**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

ORAL ARGUMENT REQUESTED



**BRIEF IN SUPPORT OF PMI/ALTRIA'S *DAUBERT* MOTION TO EXCLUDE THE
OPINIONS OF RJR'S DAMAGES EXPERT, DR. RYAN SULLIVAN**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTUAL BACKGROUND.....	3
A. [REDACTED]	3
1. [REDACTED]	4
2. [REDACTED]	5
B. The Opinions Of PMI/Altria’s Damages Expert, Paul Meyer	5
1. Mr. Meyer’s Reasonable Royalty Opinions.....	5
2. Mr. Meyer’s Opinions On RJR’s Theoretical Design Arounds.....	6
C. Dr. Sullivan’s Rebuttal Damages Opinions	7
1. Dr. Sullivan’s Opinions For The ’545, ’911, ’265, And ’374 Patents	7
2. Dr. Sullivan’s Design Around Opinions	9
III. LEGAL STANDARDS	10
A. Admissibility Of Expert Testimony	10
B. Expert Testimony On Reasonable Royalty Damages Must Be “Tied To The Facts” Of The Case	11
IV. ARGUMENT	11
A. Dr. Sullivan’s Reliance On A [REDACTED] [REDACTED] Renders His Opinions For The ’545, ’911, ’265, And ’374 Patents Unreliable	11
B. Dr. Sullivan’s [REDACTED] [REDACTED] And The Facts Of This Case.....	18
C. Dr. Sullivan’s Design-Around Opinions Are Based On Flawed Assumptions.....	19
V. CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

Acceleration Bay LLC v. Activision Blizzard Inc.,
No. 16-cv-453, 2019 WL 4194060 (D. Del. Sep. 4, 2019) 20

Aqua Shield v. Inter Pool Cover Team,
774 F.3d 766 (Fed. Cir. 2014) 11, 20

AstraZeneca AB v. Apotex Corp.,
782 F.3d 1324 (Fed. Cir. 2015) 23

Baltimore Aircoil Co., Inc. v. SPX Cooling Techs. Inc.,
No. 13-cv-2053, 2016 WL 4426681 (D. Md. Aug. 22, 2016),
aff'd, 721 F. App'x 983 (Fed. Cir. 2018) 12, 13, 18

Bayer HealthCare LLC v. Baxalta Inc.,
No. 16-cv-1122, 2019 WL 330149 (D. Del. Jan. 25, 2019) 1, 12

Cooper v. Smith & Nephew, Inc.,
259 F.3d 194 (4th Cir. 2001) 10, 11

Datascope Corp. v. SMEC, Inc.,
879 F.2d 820 (Fed. Cir. 1989) 21

Daubert v. Merrell Dow Pharms.,
509 U.S. 579 (1993) 11

DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.,
567 F.3d 1314 (Fed. Cir. 2009) 20

DUSA Pharms., Inc. v. Biofrontera Inc.,
495 F. Supp. 3d 21 (D. Mass. 2020) 3, 20, 22

ePlus, Inc. v. Lawson Software, Inc.,
764 F. Supp. 2d 807 (E.D. Va. 2011), *aff'd*, 700 F.3d 509 (Fed. Cir. 2012) passim

Exmark Mfg. Co. v. Briggs & Stratton Power Prods. Grp., LLC,
879 F.3d 1332 (Fed. Cir. 2018) 11, 18, 19

In re Lipitor (Atorvastin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.,
174 F. Supp. 3d 911 (D.S.C. 2016) 15

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999) 10, 17

LaserDynamics, Inc. v. Quanta Computer, Inc.,
 No. 06-cv-348, 2011 WL 197869 (E.D. Tex. Jan. 20, 2011) 20, 21, 22, 23

Lucent Techs., Inc. v. Gateway, Inc.,
 580 F.3d 1301 (Fed. Cir. 2009) 12

Mars, Inc. v. Coin Acceptors, Inc.,
 527 F.3d 1359 (Fed. Cir. 2008) 20

Pavo Sols. LLC v. Kingston Tech. Co.,
 No. 14-cv-1352, 2019 WL 8138163 (C.D. Cal. Nov. 20, 2019)..... 12, 13, 14

ResQNet.com, Inc. v. Lansa, Inc.,
 594 F.3d 860 (Fed. Cir. 2010) 14

Sherwin-Williams Co. v. PPG Indus., Inc.,
 No. 17-1023, 2020 WL 1283465 (W.D. Pa. 2020) 24

Smart Skins LLC v. Microsoft Corp.,
 No. 15-cv-544, 2016 WL 4148091 (W.D. Wash. July 1, 2016) 20

Sound View Innovations, LLC v. Hulu, LLC,
 No. 17-cv-4146, 2019 WL 9047211 (C.D. Cal. Nov. 18, 2019)..... 21

SPEX Techs. v. Apricorn, Inc.,
 No. 16-cv-7349, 2020 WL 1289546 (C.D. Cal. Jan. 21, 2020) 20

SynQor, Inc. v. Artesyn Tech., Inc.,
 709 F.3d 1365 (Fed. Cir. 2013) 23

TecSec, Inc. v. Adobe Sys., Inc.,
 No. 10-cv-115, Dkt. 1152 (E.D. Va. June 8. 2018)..... 18

Trudell Med. Int’l v. D R Burton Healthcare, LLC,
 No. 18-cv-9, 2021 WL 684200 (E.D.N.C. Feb. 22, 2021) 14

Uniloc USA, Inc. v. Microsoft Corp.,
 632 F.3d 1292 (Fed. Cir. 2011) 11, 18

Webasto Thermo & Comfort N. Am., Inc. v. BesTop, Inc.,
 No. 16-cv-13456, 2019 WL 3334563 (E.D. Mich. July 25, 2019)..... 21

Whitserve, LLC v. Computer Packages, Inc.,
 694 F.3d 10 (Fed. Cir. 2012) 12

STATUTES

35 U.S.C. § 284..... 11

RULES

FED. R. EVID. 403 24

FED. R. EVID. 702 11

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.