

**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**

**REYNOLDS'S OPPOSITION TO PM/ALTRIA'S DAUBERT MOTION TO  
EXCLUDE THE DESIGN-AROUND TESTIMONY OF DAVID CLISSOLD**

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## INTRODUCTION

Altria Client Services LLC, Philip Morris USA, Inc., and Philip Morris Products S.A.’s (collectively, “PM/Altria”) motion to exclude the design-around opinions of David Clissold should be denied because it is untimely, is not the proper subject of a Daubert motion, and mischaracterizes the law and Mr. Clissold’s opinions.

First, PM/Altria’s motion seeks a ruling on the merits that RAI Strategic Holdings, Inc. and R.J. Reynolds Vapor Company’s (collectively, “Reynolds”) design-arounds are not available non-infringing alternatives, and therefore cannot be taken into account in the reasonable royalty analysis. PM/Altria could have raised this issue in a summary judgment motion, but did not do so. PM/Altria’s belated attempt to summarily dispose of Reynolds’s design-arounds is untimely and should be denied.

Second, this issue is not the proper subject of a Daubert motion as the parties dispute whether the design-arounds are viable non-infringing alternatives that the parties could have considered during the hypothetical negotiation. This is a fact question for the jury.

Third, PM/Altria’s motion is based entirely on its argument that a non-infringing alternative is not “available,” and therefore cannot be considered in a reasonable royalty analysis, unless it was on the market or had regulatory approval before the hypothetical negotiation date. The law does not support imposing such an absolute bar, and this Court should not do so. It is proper to consider non-infringing alternatives in a reasonable royalty analysis, even alternatives that are not on sale at the hypothetical negotiation date and that are only potentially available during the remaining life of the patents. Of course, it makes perfect sense for hypothetical negotiators to take into account the possibility that a non-infringing alternative will obtain regulatory approval during the remaining life of the patents, just as it makes perfect sense to

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