

**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

PMI/ALTRIA'S OPPOSITION TO RJR'S MOTION *IN LIMINE* NO. 7

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RJR’S MIL #7: RJR MAY NOT EXCLUDE REFERENCE TO ITS EXPRESS ADMISSIONS THAT THIRD PARTY PRODUCTS FROM JUUL AND NU MARK PRACTICE THE ’545 PATENT

During discovery, RJR expressly admitted—in no fewer than four separate requests for admission, an interrogatory response, a letter, and an expert report—that third parties JUUL and Nu Mark “practice[] the ’545 patent as [PMI/Altria] construe and assert the claims.”¹ Dkt. 846-5 at 7-8; Dkt. 846-1 at 4-7; Dkt. 846-3 ¶¶ 159-160; Ex. A (Nov. 20, 2020 Ltr. From J. Michalik). RJR made these admissions to support its defense that pre-suit damages for the ’545 Patent should be limited under the marking statute, 35 U.S.C. § 287. Dkt. 846-5 at 7-8. Relying on these admissions, PM USA in turn reasonably stipulated to drop pre-suit damages on the ’545 Patent to narrow the issues for trial. Dkt. 549.

RJR now wants to effectively withdraw its (repeated) admissions and preclude PMI/Altria’s experts from relying those admissions at trial. First, RJR argues PMI/Altria’s experts supposedly rely on these admissions to opine on infringement of the ’545 patent. That is a strawman. PMI/Altria and its experts have never used RJR’s admissions that way. Second, RJR argues that PMI/Altria’s experts misrepresent these admissions when citing them to opine on non-obviousness and damages, rendering their opinions irrelevant. The opposite is true. PMI/Altria’s experts accurately quote and cite RJR’s own admissions as relevant evidence supporting their respective opinions.

RJR’s request directly contradicts its express admissions. It would be fundamentally unfair to permit RJR to benefit from these statements to prevail on its marking defense then preclude

¹ An exemplary RJR admission states: “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.” Dkt. 846-1 at 4.

PMI/Altria from using the same admissions to at trial when they are probative of validity and damages. RJR's motion should be denied.

A. PMI/Altria's Experts Do Not Cite RJR's Admissions To Prove Infringement

RJR contends the Court should preclude PMI/Altria from offering evidence “that *any VUSE products allegedly infringe* any claim of the '545 patent on the basis that JUUL and/or Nu Mark allegedly practice that patent.”² Mot. at Title. But PMI/Altria has never argued that the accused products “infringe” the '545 Patent based on JUUL or Nu Mark's use of that patent. RJR identifies nothing suggesting otherwise. That should be dispositive and renders RJR's baseless MIL moot. *See In re Namenda Direct Purchaser Antitrust Litig.*, No. 15-cv-7488, 2019 WL 6242128, at *6 (S.D.N.Y. Aug. 2, 2019) (denying MIL as moot based on opposing party representation).

B. PMI/Altria's Experts Accurately Represent RJR's Own Admissions To Support Their Opinions On Validity And Damages

RJR contends that PMI/Altria's experts “misrepresent[ed]” RJR's position by omitting “key qualifications” from its discovery responses. Mot. at 5, 8. That is false. PMI/Altria's experts *quoted directly* from RJR's discovery responses and expressly included the “key qualifier” language—“as those claims are construed and asserted by Defendants”—that RJR wrongly contends is missing. *See* Ex. B (Meyer Op.) ¶¶ 422, 458; Ex. C (McAlexander Op.) ¶ 680.³ PMI/Altria's experts did not mischaracterize RJR's position; they simply quoted it. In any event, RJR's emphasis on the words “PMI/Altria construe and assert the claims” is a red herring. PMI/Altria did not seek to construe any term of the '545 Patent. It has always relied on plain and

² All emphasis added, and internal citations and quotations omitted, unless otherwise noted.

³ To the extent there is any ambiguity in his opinions (and there is not), Mr. McAlexander clarified this at his deposition by referencing RJR's “qualification.” Ex. D (McAlexander Dep.) at 277:20-278:22.

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