

**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. 10

TABLE OF CONTENTS

	Page
RJR’S MIL #10: PMI/Altria Should Be Allowed to Present Argument, Evidence, and Testimony Regarding the Fontem Litigation and Fontem-RJR Settlement Agreement on Which RJR’s Own Damages Expert Relies.....	1

TABLE OF AUTHORITIES

CASES

Digital Reg of Texas, LLC v. Adobe Sys., Inc.,
No. 12-cv-1971, 2014 WL 4090550 (N.D. Cal. Aug. 19, 2014)..... 2

In re Namenda Direct Purchaser Antitrust Litig.,
No. 15-cv- 7488, 2019 WL 6242128 (S.D.N.Y. Aug. 2, 2019) 1

Novartis Pharms. Corp. v. Teva Pharms. USA, Inc.,
No. 05-cv-1887, 2009 WL 3754170 (D.N.J. Nov. 5, 2009)..... 3

TecSec, Inc. v. Adobe Inc.,
No. 10-cv-115, 2018 WL 11388472 (E.D. Va. Nov. 21, 2018) 1

United States v. Mickens,
53 F.3d 329 (4th Cir. 1995)..... 3

RULES

FED. R. EVID. 703..... 3

FED. R. EVID. 801(c) 3

RJR’S MIL #10: PMI/Altria Should Be Allowed to Present Argument, Evidence, and Testimony Regarding the Fontem Litigation and Fontem-RJR Settlement Agreement on Which RJR’s Own Damages Expert Relies

RJR contends that the Court should bar PMI/Altria from referencing third-party infringement allegations against RJR or suggesting that RJR “is a serial infringer.” Mot. at 1. PMI/Altria agreed to do neither during the meet and confer process. PMI/Altria also sought to make clear that the parties could reference the infringement allegations that Fontem made against RJR, which resulted in RJR taking a license that RJR’s damages expert opines is comparable to the hypothetical negotiations in this case. *Id.* at 2. RJR refused to agree and filed this motion.

After RJR filed its motion, PMI/Altria proposed the stipulation below to resolve the issue:

No party will present argument, evidence, or testimony that Reynolds infringed or has been accused of infringing a patent owned by a third-party, other than a Fontem entity. For clarity, this agreement does not preclude any party from presenting argument, evidence, or testimony relating to PMI/Altria’s infringement allegations in this case or Fontem’s infringement[] allegations against Reynolds in their prior litigations.

Ex. A (1/26/21 Schubert Email). RJR rejected it, admitting that it actually wants to bar “testimony about Fontem’s infringement[] allegations against [RJR].” Ex. B (1/27/21 Michalik Email). There is no basis for excluding such evidence. RJR’s motion should be denied for four reasons.

First, PMI/Altria agreed not to reference third-party infringement allegations against RJR (other than Fontem’s allegations) or suggest that RJR is a serial infringer. Ex. A. The Court should accept PMI/Altria’s representation, enter PMI/Altria’s proposed stipulation, and deny RJR’s MIL No. 10 as moot. *See TecSec, Inc. v. Adobe Inc.*, No. 10-cv-115, 2018 WL 11388472, at *4 (E.D. Va. Nov. 21, 2018) (adopting Adobe’s proposed MIL stipulation “as binding” where Adobe proposed the stipulation, “but rather than agree to jointly file the stipulation, TecSec instead brought [a] Motion *in Limine*”); *In re Namenda Direct Purchaser Antitrust Litig.*, No. 15-cv- 7488, 2019 WL 6242128, at *6 (S.D.N.Y. Aug. 2, 2019) (same).

Second, RJR’s request to exclude Fontem’s infringement allegations against RJR is baseless and invites legal error. Mot. at 1. RJR admits that “[the Fontem-RJR] agreement and the underlying litigation may be referenced” for damages. *Id.* That is dispositive. RJR also admits that both parties have “proffered expert opinions on damages that discuss th[at] agreement.” *Id.* at 6. Indeed, RJR’s expert relies on that agreement to form his royalty opinions for *four* asserted patents and, as the law requires, discusses the underlying litigations. Ex. C (Sullivan Rbt.) ¶¶ 169, 220, 263-66; *Digital Reg of Texas, LLC v. Adobe Sys., Inc.*, No. 12-cv-1971, 2014 WL 4090550, at *12 (N.D. Cal. Aug. 19, 2014) (explaining that, when relying on settlement agreements, experts must consider the underlying litigation to ensure the consideration paid reflects the value of the licensed technology, not the cost of avoiding further litigation); *see also* Ex. D (Meyer Op.) ¶¶ 192-242. The Court should not exclude this highly probative evidence.

RJR’s proposed “carve out” to allow the parties “to discuss the [Fontem-RJR] Agreement” for “the sole purpose of damages” should be rejected. Mot. at 2, 6. There is no basis for limiting evidence about the Fontem-RJR Agreement or the underlying litigation to “the scope of the disclosed expert opinions.” *Id.* at 6. PMI/Altria can examine any competent witnesses on the license in the Fontem-RJR Agreement and the underlying litigation, including RJR’s corporate witness on this topic (Nick Gilley) who is identified on RJR’s trial witness list. Ex. E (RJR’s Trial Witness List) at 3; Ex. F (12/3/20 Gilley Dep.) at 210:3-223:22. Moreover, there is no basis for barring “lawyers []or witnesses” from “expound[ing] on any of the facts [about the Fontem-RJR Agreement or underlying litigation] in any of the expert reports.” *Id.* Counsel for PMI/Altria may properly “expound on” those topics during opening statements and closing argument, consistent with the rules of evidence. RJR cites no case suggesting otherwise.

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