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LATHAM & WATKINS LLP

May 19, 2022

VIA ECF FILING

The Honorable Liam O'Grady
United States District Judge
Albert V. Bryan U.S. Courthouse
401 Courthouse Square
Alexandria, VA 22314

Re: *RAI Strategic Holdings, Inc. et al. v. Altria Client Services LLC, et al.*, No. 1:20-cv-393-LO-TCB (E.D. Va.)

Dear Judge O'Grady:

We write on behalf of Plaintiffs Altria Client Services LLC, Philip Morris USA Inc., and Philip Morris Products S.A. ("Philip Morris") regarding two issues that recently arose and that we are compelled to bring to the Court's attention before the May 20, 2022 hearing. First, on May 6, just one month before trial, Reynolds produced over 1,000 documents spanning nearly 23,000 pages. Second, on April 28, Reynolds disclosed five purported recent "conversations" on which Reynolds intends to rely at trial between Dr. James Figlar, Reynolds' retired Executive Vice President and 30(b)(6) designee on various topics, and other Reynolds' employees, presumably by having Dr. Figlar contend he has personal knowledge based on these hearsay discussions. These documents and the substance of Dr. Figlar's hearsay "conversations" with individuals absent from Reynold's initial disclosures and trial witness list should be excluded.

First, on May 6, 2022, Reynolds produced over 1,000 documents spanning nearly 23,000 pages. The production included a Premarket Tobacco Product Application ("PMTA") concerning the accused VUSE Alto product, which Reynolds submitted to the FDA on April 12, 2022. This is now the second Alto PMTA submission that Reynolds produced ***after*** fact discovery closed nearly a year ago.[1] Consequently, Reynolds' technical 30(b)(6) witness, Eric Hunt, was never deposed on these two late-produced PMTA submissions. Nor have the parties' technical experts opined about them. Instead, the parties and their technical experts all relied on the original Alto PMTA dated September 2020—which Mr. Hunt testified on behalf of Reynolds "is an accurate reflection of the [Alto] product that we sell in the market." Hunt 11/16/20 Dep. at 22:21-23:16.

[1] In April 2021, after the close of fact discovery, Reynolds produced its first set of amendments to the original Alto PMTA.

Philip Morris asked Reynolds to explain the timing of its last-minute production and confirm that it will not rely on the late produced documents at trial. Reynolds refused without explanation. To date, with limited exception, Reynolds has not sought to amend its exhibit list to include the tardily-produced documents.[2]

Given the timing of Reynolds' recent production, Philip Morris respectfully requests that the Court preclude Reynolds from using the documents produced in May 2022—including these PMTA submissions—for any purpose at trial. For example, Reynolds should not be permitted to suggest, whether through attorney arguments, its witnesses, or cross-examination, that the September 2020 PMTA is irrelevant, outdated, or otherwise unreliable to establish infringement or damages. FED. R. CIV. P. 37(c)(1). Should the Court permit Reynolds to address these untimely PMTA submissions, Philip Morris requests leave to serve supplemental expert report(s) to address them.

Second, on April 28, 2022, Reynolds disclosed new "conversations" between its Rule 30(b)(6) designee, Dr. James Figlar, and five other Reynolds' employees that allegedly occurred in April 2022, that Reynolds plans to have Dr. Figlar testify about at trial. These individuals are:

(i) Aaron Williams (Senior VP Scientific & Regulatory Affairs),
(ii) Elaine Round (Senior Director, Scientific & Regulatory Affairs)
(iii) Jorge Araya (Executive VP & Chief Commercial Officer)
(iv) Patrick Doyle (position unknown), and
(v) Barry Bratcher (position unknown).

According to Reynolds, the subject matter of these conversations relates to "the status of FDA's review of Reynolds' other pending PMTAs," "marketing of VUSE products," "financial information related to the VUSE products," and "a vaccine project."[3] Reynolds seeks to rely on these conversations at trial, but provides no explanation for these belated adjustments to the factual record developed in discovery. What is plain is that Reynolds is now either trying to cure a lack of preparation of its 30(b)(6) witness—or otherwise trying to "back door" into evidence hearsay from these five individuals—none of whom were (i) disclosed in Reynold's Rule 26 Disclosures,

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[2] Reynolds added several newly-produced documents to its exhibit list. Philip Morris does not object to their inclusion, subject to the Court's *in limine* rulings and evidentiary objections at trial.

[3] Reynolds appears to plan to inject non-relevant facts about a COVID vaccine that Dr. Figlar purportedly worked on in 2020, prior to his depositions in this case. Setting aside Reynolds' improper attempt to belatedly augment the factual record, evidence about Reynolds' purported COVID vaccine efforts are inadmissible and should be excluded. They are irrelevant to the issues at trial. *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, 2020 WL 6450290, at *9 (N.D. Ohio Nov. 3, 2020) (excluding evidence of "good deeds" related to COVID-19 as irrelevant); *Ocasio v. C.R. Bard, Inc.*, No. 13-cv-1962, 2021 WL 2787993, at *4 (M.D. Fla. July 5, 2021) (similar). Even if there were some marginal probative value (there is not), it is substantially outweighed by the risk of misleading the jury and unfairly prejudicing Philip Morris.

(ii) consulted previously by Dr. Figlar in preparation for his corporate deposition, or (iii) are on Reynolds' trial witness list.

These curated eleventh hour conversations should be excluded. First, they are inadmissible hearsay. Reynolds attempts to sidestep the prohibitions against hearsay by asserting these recent conversations pertain to one of the corporate topics for which Dr. Figlar was designated over a year ago, i.e., "facts and circumstances relating to Plaintiffs' planned or actual submissions of RJR PMTAs for any of the RJR Accused Products." But Reynolds cannot use Dr. Figlar's status as a corporate witness at his ***deposition*** to flout the Federal Rules of Evidence and adduce impermissible hearsay testimony from him at ***trial*** on topics for which Dr. Figlar—admittedly, since he had to obtain this information from others—lacks personal knowledge.

Second, Dr. Figlar is not competent to testify at trial as to information conveyed to him by other individuals after his retirement from Reynolds. He is no longer an executive and he no longer is in a position to rely on Reynolds' employees to provide him information in the scope of his corporate responsibilities—he has none. And, to the extent Reynolds claims such information was already known to Dr. Figlar, no further deposition is required and Dr. Figlar has no need to rely on information obtained from others.

Third, the conversations with these individuals occurred nearly a year after Dr. Figlar's last 30(b)(6) deposition, in June 2021.[4] Dr. Figlar did not disclose or rely on conversations with these individuals at any of his prior depositions. Nor did Reynolds disclose any of these employees on its initial disclosures or trial witness list. Fact and expert discovery closed long ago, and the parties are in the midst of final trial preparations. Reynolds should not be permitted to elicit testimony from non-witnesses, voiced through Dr. Figlar, frustrating Philip Morris' ability to both conduct discovery on them during the discovery period or to effectively cross-examine Dr. Figlar about such testimony at trial. Permitting Reynolds to now cure whatever deficiencies they are attempting to cure in Dr. Figlar's 30(b)(6) testimony would severely prejudice Philip Morris.

Reynolds contends that Philip Morris can simply re-depose Dr. Figlar to cure any potential prejudice.[5] That is nonsense. Such new testimony could not be fairly presented without deposing the five individuals and Dr. Figlar, and probably also supplementation or amendment of expert reports, and new expert depositions. That is infeasible at this eleventh hour.[6]

Reynolds next contends that the hearsay communicated to Dr. Figlar "has[s] not substantively changed [Dr. Figlar's] testimony on behalf of the company." 4/28/2022 E-mail from

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[4] A deposition that Reynolds tried repeatedly to delay and avoid, which only occurred after Philip Morris moved to compel it. *See* Dkt. 614.

[5] The Court may recall that Dr. Figlar, a ***retired*** Reynolds executive, was the witness whose three-week vacation – taking a trip to Italy – conflicted with the Court's proposed alternative trial dates and needlessly complicated setting a new trial date. *See, e.g.*, Dkt. 1135 (2/7/22 Hr'g Tr.) at 5:1-8.

[6] Reynolds has refused to identify the substance of the new information received by Dr. Figlar from others, except in the broadest possible listing of general "topics."

J. Michalik. That is hard to believe, but if so, only confirms that the subject information is not required and, at best, cumulative of Dr. Figlar's prior testimony. FED. R. EVID. 401, 403. Taking Reynolds' representation at face value, there is no harm from barring Dr. Figlar from testifying regarding any information provided in these five April 2022 conversations at trial.

In a context where the purpose of the discovery rules in civil cases is to prevent trial by ambush, the Court can come to its own conclusions about Reynolds' attempt to inject nearly 23,000 pages of documents and unspecified hearsay into this case one month before trial. Philip Morris respectfully requests that the Court preclude (i) Reynolds from relying on or using these documents at trial and (ii) Dr. Figlar (and any other Reynolds trial witness) from testifying about any information supposedly learned from the "recent," conversations that Dr. Figlar had with the five Reynolds employees identified above. The Court should also require Reynolds to make a written proffer about the substance of these conversations so that the Court and Philip Morris can properly police the scope of Dr. Figlar's pre-April 2022 personal knowledge.

Sincerely,

/s/ Maximilian A. Grant

Maximilian A. Grant
of LATHAM & WATKINS LLP