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

PHILIP MORRIS' RESPONSE TO REYNOLDS' MOTION *IN LIMINE* REGARDING MENTHOL PRODUCTS AND ALLEGATIONS AGAINST REYNOLDS IN PRODUCT-LIABILITY CASES

Dr. Figlar was re-deposed on Friday June 3 on Judge O'Grady's order because in the *weeks* preceding trial, Reynolds produced 23,000 pages of documents and disclosed that the retired Dr. Figlar had conducted a series of "conversations" with Reynolds employees[1] on five "topics" that he was purportedly going to testify about at trial. Judge O'Grady ruled that Dr. Figlar would not be permitted to either (i) be a mouthpiece for hearsay from others, or (ii) testify about any matters on which he lacked personal knowledge. May 20, 2022 Hearing Tr. at 22:19-23:6, 25:10-15; Dkt. 1184 at 12 (Court limiting Dr. Figlar to only testimony "based on Dr. Figlar's personal knowledge or perceptions"). So that Philip Morris and the Court could police the new information Dr. Figlar obtained about which he could not testify, Judge O'Grady *sua sponte* directed Reynolds to submit him to a deposition by Philip Morris prior to trial. May 20, 2022 Hearing Tr. at 25:10-15 (Court ordering deposition in lieu of Plaintiffs' request for proffer).

In ordering the deposition, Judge O'Grady noted to Reynolds that "the time to have Dr. Figlar speak to these people was before he was deposed." *Id.* at 15:10-12. At the same hearing, Judge O'Grady rejected Reynolds' effort to inject irrelevant testimony ***through Dr. Figlar*** related to Reynolds' purported work of trying to grow COVID-19 vaccines in the tobacco plants they use to make cigarettes.[2] Judge O'Grady precluded them from doing this, stating "we're far afield. I'm not going to allow COVID testimony," but Reynolds' late disclosure of its intention to elicit facially irrelevant testimony provides important context for the scope of Dr. Figlar's June 3 discovery deposition, about which Reynolds complains. 5/20/2022 Hearing Tr. 50:23-24.

The court-ordered deposition covered topics *belatedly disclosed by Reynolds* as purported

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[1] Not one of the five employees was on Reynolds' trial witness list or even listed on its Rule 26 initial disclosures (including supplementations).

[2] This is particularly hard to credit in light of Reynolds' objections to the Court's requirement for vaccinated jurors, followed by Reynolds' June 3 effort to delay the trial because of COVID concerns.

topics for Dr. Figlar's trial testimony, including the marketing and sales of the accused VUSE products and the status of VUSE PMTAs before the FDA, which specifically include requests related to menthol. Dkt. 1273-3. Reynolds is the market leader in sales of combustible menthol tobacco products, and Dr. Figlar has testified in over 100 product liability cases. Thus, to prepare for Dr. Figlar's cross examination, Philip Morris explored the specified topics, including Dr. Figlar's prior testifying experience so Philip Morris would be prepared to rebut a playbook commonly used by Reynolds in other trials where Reynolds seeks to present itself in a favorable, but inaccurate light.

After the deposition, Reynolds threatened to file a motion to preclude Philip Morris from raising these topics at trial. Ex. 1 at 3 (6/5/2022 Email from J. Michalik). In response, Philip Morris represented unequivocally that it did not intend to affirmatively raise any of these issues and only sought the testimony for cross examination if Reynolds opened the door during Dr. Figlar's direct examination. ***Philip Morris proposed a stipulation stating that neither party would raise these issues***. Ex. 2. Reynolds rejected Philip Morris' even-handed proposal and filed this motion. Ex. 1 at 1. Disappointingly, Reynolds' briefing omits the Philip Morris proposed stipulation and fails to inform the Court that Philip Morris proposed a stipulation barring both sides from raising the topics about which Reynolds complains.

Of course, it would be unfair to preclude only one side from eliciting testimony on these topics, which plainly have no place in this trial. But the preclusion should go both ways. Therefore, Philip Morris respectfully requests that the Court enter the stipulation proposed by Philip Morris yesterday, precluding both parties from offering testimony on these topics at Ex. 2.

Reynolds' remaining arguments lack merit and are addressed below.

A. Philip Morris' Questioning Of Dr. Figlar Falls Squarely Within The Topics For Which He Was Designated

The menthol related issues that Reynolds complains about fall within the scope of the topics that Judge O'Grady ordered Dr. Figlar be deposed on. Reynolds expressly identified "the status of FDA's review of Reynolds's other pending PMTAs" as one of the topics Dr. Figlar had updates on. Dkt. 1273-3 at 1. And Philip Morris learned during the deposition that of the recent PMTAs, Reynolds' VUSE PMTAs were ***not*** authorized for ***menthol*** and other flavors. Ex. 3 at 109:21-110:20. This is important. For context, Reynolds sells the best-selling menthol cigarette, Newport, and Dr. Figlar has testified in product liability cases involving menthol products. *See, e.g.*, *Izzarelli v. R.J. Reynold Tobacco Co*, 806 F. Supp. 2d 516 (D. Conn. 2011). Moreover, news reports confirm that Reynolds has engaged in significant efforts to improve its public standing related to menthol cigarettes in the African American Community:

> Reynolds American's multibillion-dollar market is under threat. About 150 cities and counties have placed some sort of restriction on the sale of menthol cigarettes, most issuing an outright ban. … The company has hired a team of Black lobbyists and consultants … and sponsored the organization led by civil rights activist and MSNBC political show host the Rev. Al Sharpton… Reynolds American for years has enlisted prominent Black personalities in its lobbying efforts. This investigation has uncovered new details about how individuals and organizations working on Reynolds' behalf have failed to properly declare their links to the company.

See, e.g., Ex. 4 at 4. Consequently, to the extent Reynolds tried to improperly elicit testimony related to its history with menthol tobacco products and the Court permitted such testimony over objection, Philip Morris needed to be prepared to cross examine Dr. Figlar on that topic.

As for the youth menthol issue, Reynolds claims that it only targets adults who already use

tobacco products with the accused vapor products and has publicly blamed third-party JUUL[3] for the "teen vaping crisis." (*See, e.g.*, Ex. 5 (citing Dr. Figlar)). Reynolds has done this despite the fact that FDA cautioned Reynolds that the sale of flavored products may attract minors. Consequently, to the extent Reynolds tried to elicit testimony that made the jury think, for example, that VUSE products were ***only*** sold to adults and third-party JUUL's products were sold to minors, Philip Morris needed to be prepared to cross examine Reynolds on that false assertion.

As for the allegations in the product liability actions, Philip Morris agreed yesterday (in writing) that it would not inquire as to the specific allegations in those cases. Regardless, the deposition inquiry was related to Dr. Figlar's personal background. Although retired for 18-months, in the years preceding his retirement from Reynolds, Dr. Figlar was essentially a full-time litigation witness, testifying over 100 times, mostly in product liability cases. To the extent Reynolds tried to portray Dr. Figlar as someone other than who he is, Philip Morris would be entitled to cross examine Dr. Figlar on the scope of his pre-retirement responsibilities, including his extensive past testifying experience.

Most importantly, and as reflected in the stipulation offered by Philip Morris (Ex. 2) but not provided to the Court by Reynolds, Philip Morris unequivocally told Reynolds that it had ***no*** intention of affirmatively raising ***any*** of these issues ***unless*** Reynolds did, and offered a joint stipulation to that effect. Reynolds refused, preferring to needlessly take up the Court's valuable time with topics that any lawyer would know are outside the bounds of permissible testimony for

[3] Testimony about third-party Juul is irrelevant to this case. Dkt. 1184-1. The corporate parent of Plaintiff Altria Client Services has a passive minority interest in Juul, but that is not probative of any issues or defenses in this trial.

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