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

OPPOSITION TO MOTION TO EXCLUDE IMPROPER TESTIMONY BY JAMES FIGLAR PREVIOUSLY EXCLUDED BY THE COURT

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INTRODUCTION

Dr. James Figlar is Reynolds's corporate representative and 30(b)(6) witness, and is expected to testify at trial. Reynolds is not offering Dr. Figlar as an expert witness in this case. Dr. Figlar does possess technical knowledge—he was head of Research and Development at RAI, holds a Ph.D in Chemistry, and was responsible for evaluating new technologies like the accused VUSE products. On April 7, 2022, the Court ordered, in resolving Philip Morris's motion *in limine* 7, that "Dr. Figlar can offer testimony on the relevant technology to an extent that there is an established foundation for that testimony and the testimony is based on Dr. Figlar's personal knowledge or perceptions from his work and experience at" Reynolds. Dkt. 1184 at 12. The Court further ordered that Dr. Figlar may not testify on three topics: "theories of infringement, theories of invalidity, or the patent claims." *Id.* Those rulings are not in dispute, and Reynolds will not draw testimony from Dr. Figlar on those three topics.

Reynolds repeatedly made that clear to Philip Morris's counsel, both by telephone and writing: "***we confirm we will not elicit testimony from Dr. Figlar regarding theories of infringement, theories of invalidity, or the patent claims, consistent with the Court's ruling on PM's MIL 7***." Ex. 1, June 6, 2022 Michalik email to counsel. The Court's order does indeed "settle the issue" that Philip Morris has raised (Dkt. 1287 at 2), which is an unnecessary objection to testimony that Philip Morris itself elicited from Dr. Figlar at his deposition. Indeed, *both* pending motions before the Court related to Dr. Figlar's deposition testimony concern testimony that *Philip Morris* prompted, despite the Court's orders. Philip Morris's remaining arguments seek to relitigate their motion *in limine* 7 to prohibit any of Dr. Figlar's testimony on details of the components or functionality of the accused products, but that testimony is plainly permitted under the Court's Order of April 7, 2022 (Dkt. 1184 at 12). Philip Morris's motion should be denied.

BACKGROUND

Reynolds offered an update deposition of Dr. Figlar to give Philip Morris an opportunity to inquire about information Dr. Figlar learned from discussions with former colleagues after his two original depositions.[1] Reynolds's counsel explained that Dr. Figlar discussed regulatory matters with those colleagues following the recent PMTA authorization of Reynolds's Ciro and Vibe products. May 20, 2022 Hr'g Tr. at 17:19-21. In denying Philip Morris's request for a written proffer of Dr. Figlar's testimony, Judge O'Grady ruled that Philip Morris should take Dr. Figlar's deposition, as offered by Reynolds, and explained Judge O'Grady's expectation for the deposition: "What I expect your deposition will be is, 'What have you learned from these gentlemen that you believe will affect your testimony as you prepare to testify in this case?" (May 20, 2022 Hr'g Tr. 25:10-26:4.)[2]

Judge O'Grady had previously ruled that "Dr. Figlar can offer testimony on the relevant technology to the extent that there is an established foundation for that testimony and the testimony is based on Dr. Figlar's personal knowledge or perceptions from his work and experience at" Reynolds. Dkt. 1184 at 12. However, Dr. Figlar may not testify on "theories of infringement,

[1] Philip Morris's assertion that the Judge O'Grady "*sua sponte* directed Reynolds to submit him to a deposition by Philip Morris prior to trial" "[s]o that Philip Morris and the Court could police" his testimony is incorrect—Reynolds voluntarily offered an update deposition of Dr. Figlar. *See* Dkt. 1273-3 at 2 (April 28, 2022 email of J. Michalik to counsel); May 20, 2022 Hr'g Tr. 21:11-13 (Philip Morris counsel acknowledging that Reynolds "offer[ed] a deposition").

[2] At the same hearing, the parties addressed Reynolds's production of documents "based on the submission that Reynolds made to the FDA" that Reynolds "ha[s] no intention of using" but nonetheless, "out of an abundance of caution," produced in this litigation. Ex. 2, May 20, 2022 Hr'g Tr. 13:1-19. Philip Morris's counsel confirmed that "I don't think we have any dispute" as to that production of documents, and Judge O'Grady confirmed that "I think we're in good shape there." *Id.* at 19:1-12. Philip Morris's attempt to re-inject this settled issue in its brief (at 2) by alluding to "23,000 pages of documents" is misleading, misguided, and unrelated to its objections to Dr. Figlar's deposition testimony, and should be disregarded.

theories of invalidity, or the patent claims." Dkt. 1184 at 12. Judge O'Grady did not alter these rulings at the May 20, 2022 Motions Hearing.

ARGUMENT

I. REYNOLDS AND DR. FIGLAR WILL ABIDE BY THE COURT'S RULING ON PHILIP MORRIS'S MIL 7

As Reynolds repeatedly explained to Philip Morris when attempting to resolve this dispute without burdening the Court, Reynolds will not elicit testimony from Dr. Figlar regarding theories of infringement, theories of invalidity, or the patent claims, consistent with the Court's ruling on Philip Morris's MIL 7. That should be the end of this matter.

II. IT IS PHILIP MORRIS THAT HAS ATTEMPTED TO ELICIT TESTIMONY EXCLUDED BY THE COURT'S ORDER

As with its own conduct necessitating Reynolds's pending motion *in limine* to exclude Philip Morris's newly added references to menthol products and allegations against Reynolds in product-liability cases (*see* Dkt. 1273), Philip Morris's complaint is again self-inflicted. Philip Morris repeatedly asked Dr. Figlar questions intended to elicit testimony precluded by the Court's Order, and Dr. Figlar responded appropriately each time:[3]

> Q: Are you intending -- sorry. ***Are you intending to offer an opinion that the accused products do not practice a particular limitation in any of the patents?***
>
> A: I'll be prepared to answer questions that are asked of me around the technology in the patents and the technology that are in our products. I'm prepared to do that, and that's what I will do. . . . I can only offer up my opinion and what I know about the technology and the technologies that are in – that are in our products.
>
> Q: ***You're not going to offer any opinions on noninfringement, correct?***
>
> A: Not unless you ask me.
>
> . . . .

[3] Reynolds's counsel objected to each of these questions, but those objections are omitted for ease of reading the exchange.

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