UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RAI STRATEGIC HOLDINGS, INC. and R.J. REYNOLDS VAPOR COMPANY, **Plaintiffs,** **v.** **ALTRIA CLIENT SERVICES LLC; PHILIP MORRIS USA INC.; and PHILIP MORRIS PRODUCTS S.A.** **Defendants.**	**Civil Action No. 1:20-cv-393**

MEMORANDUM IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR PATENT INFRINGEMENT

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I. INTRODUCTION

Defendants Altria Client Services LLC ("ACS"), Philip Morris USA Inc. ("PM USA"), and Philip Morris Products S.A. ("PMP") (collectively, "Defendants") move to dismiss the direct infringement claims of Counts One and Two of the Complaint filed by RAI Strategic Holdings, Inc. and R.J. Reynolds Vapor Company (collectively, "Plaintiffs") under Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs appear to have brought this action in the hopes of stopping PMP's innovative IQOS heated tobacco system, which has a proven track record of switching smokers away from combustible cigarettes, from disrupting its core business in combustible cigarettes and overtaking its secondary line of e-vapor products. Having failed to develop a competing offering in the heated tobacco space, Plaintiffs apparently now seek to block that space in its entirety by bringing this meritless litigation. But in their haste to do so, Plaintiffs have failed to meet this Court's minimum pleading requirements.

PMP is the global leader and pioneer in reduced-risk products ("RRPs"), having invested over seven billion dollars since 2008 to develop reduced-risk alternatives to combustible cigarettes. IQOS, the product accused of infringement here, is PMP's flagship RRP. IQOS heats rather than burns tobacco to produce an aerosol instead of smoke (known as a "Heat-Not-Burn" or "HNB"), thereby avoiding many of the harmful chemicals generated by the combustion process. To date, over 10.6 million smokers have switched to IQOS and given up smoking for good. This number grows daily.

In 2019, after a lengthy review, the United States Food and Drug Administration ("FDA") granted PMP's request for a pre-market authorization to commercialize IQOS (through its distributor, Altria) in the United States. In granting that request, the FDA determined that marketing IQOS "would be appropriate for the protection of the public health." *See, e.g., FDA*

permits sale of IQOS Tobacco Heating System through premarket tobacco product application pathway, FDA (Apr. 30, 2019), https://www.fda.gov/news-events/press-announcements/fda-permits-sale-iqos-tobacco-heating-system-through-premarket-tobacco-product-application-pathway ("FDA Apr. PA"). To date, no other HNB or e-vapor product (including the Vuse e-vapor products sold by Plaintiffs) has received such an authorization.

Apparently concerned by the commercial threat posed by IQOS, Plaintiffs rushed to bring this case.[1] *See, e.g.*, Dkt. 1 ¶¶ 25-39. While Plaintiffs seek to avail themselves of this Court's typical short time to trial schedule, they have failed to satisfy their minimum pleading requirements for doing so. Indeed, properly putting a defendant on notice of the basic facts underlying a plaintiff's allegations is the *quid pro quo* necessary for plaintiffs to avail themselves of the Court's jurisdiction. There is no excuse for Plaintiffs' failure to do so here, which needlessly prejudices Defendants, because Plaintiffs have access to all the facts to properly plead. The Asserted Patents are public records and the accused products are commercially available. Plaintiffs also possess all the information necessary to show how each and every element of at least one claim from each asserted patent are allegedly practiced by the accused products. Instead, Plaintiffs' Complaint makes bald, conclusory assertions without any supporting factual allegations. Because Plaintiffs have failed to identify the factual bases for their infringement claims, the direct infringement claims of Counts One and Two should be dismissed.

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[1] The patents-in-suit are U.S. Patent No. 8,314,591 (the "'591 patent"); U.S. Patent No. 9,814,268 (the "'268 patent"); U.S. Patent No. 9,839,238 (the "'238 patent"); U.S. Patent No. 9,901,123 (the "'123 patent"); U.S. Patent No. 9,930,915 (the "'915 patent"); U.S. Patent No. 10,492,542 (the "'542 patent") (collectively, the "Asserted Patents"). On June 19, 2020, the Court stayed all proceedings relating to the '238, '123, and '915 patents pursuant to 28 U.S.C. § 1659. *See* Dkt. 27.

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