

**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

**REDACTED**

**DEFENDANTS' OPPOSITION TO PLAINTIFFS'  
MOTION TO STRIKE INFRINGEMENT CONTENTIONS**

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## I. INTRODUCTION

Defendants Altria Client Services LLC and Philip Morris Products USA Inc. (“Defendants”) diligently informed Reynolds of their intention to assert U.S. Patent No. 10,420,374 (“the ’374 patent”) claims 16 – 25 *within days* of Reynolds’ producing the discovery necessary to support assertion of those claims, and served their detailed supplemental infringement contentions directed to those claims three days later. In a baseless attempt to try to avoid facing Defendants’ infringement claims on the merits, Reynolds seeks to strike them based on a gross misrepresentation of the discovery record. What is clear—based upon the actual and undistorted record—is that the timing of Defendants’ supplementation was dictated by Reynolds’ own continuing discovery failures and delays. Reynolds’ motion is another instance of the “gamesmanship” for which Reynolds has already been admonished by this Court (and should be once again now on this motion).

Reynolds cites no authority for the extraordinary exclusion relief it seeks on its motion—none. Defendants are aware of no case in this Court or elsewhere in which supplementation of contentions under Federal Rule of Civil Procedure 26(e) has been found untimely and stricken where, as here, a party diligently supplemented within days of receiving new information supporting the supplementation, the delay (if any) in receiving such new information was of the other side’s own making, two months remain in discovery at the time of supplementation, expert discovery has not yet commenced, and no trial date has been set.

Regardless, even if Defendants’ supplementation were somehow deemed untimely (it is not), Reynolds falls far short of meeting any of the five factors enumerated in *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003) that Courts look to in considering whether such supplementation is “substantially justified or harmless” under Federal Rule of Civil Procedure 37(c)(1).

*First*, Reynolds cannot claim surprise under *Southern States* Factor 1 by the newly asserted claims where, as here, the facts giving rise to assertion of claims 16 – 25 were possessed by Reynolds alone. Reynolds’ feigned surprise cannot be squared with Reynolds’ own pleadings in this case. Defendants’ counterclaim was not limited to specific claims of the ’374 patent, and Reynolds’ answers to that counterclaim pled affirmative defenses of invalidity and non-infringement directed to all of the ’374 patent claims. (Dkt. 70 at 17; Dkt. 274 at 18.) Reynolds was no doubt aware of the pressure sensor oscillation circuitry and its operation in its own products that ultimately provided the basis for Defendants’ assertion of claims 16 – 25 in its supplemental infringement contentions. Reynolds was also aware that Defendants were actively pursuing this information through discovery. Both sides have repeatedly supplemented their discovery responses in this case. Defendants’ supplementation—after Reynolds belatedly produced its pressure sensor oscillation circuitry—could not have been a surprise to Reynolds.

*Second*, Reynolds cannot credibly claim an inability to cure, or disruption of trial, under *Southern States* Factors 2 and 3, with two months remaining in discovery and no trial date. Expert discovery has yet to begin and both sides are actively immersed in fact discovery. Although complaining that *Markman* proceedings have already concluded (in which the Court rejected all 13 of Reynolds’ proposed claim constructions), Reynolds fails to identify even a single term in the newly-asserted claims that requires construction. And even if Reynolds’ hypothetical claim construction concern were to materialize, there is ample time before the yet unscheduled trial for the Court to address it.

*Third*, Reynolds cannot credibly claim that the assertion of claims 16 – 25 is unimportant under *Southern States* Factor 4. To do so would gut its contrived claim of prejudice. If the newly-asserted claims are unimportant and redundant, as Reynolds contends, there should be no new

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