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]

COUNTERCLAIM PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL REYNOLDS' 30(b)(6) DEPOSITION ON TOPICS 28, 54, AND 78

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I. INTRODUCTION

Reynolds' Opposition confirms that the testimony sought is relevant, and that the Court should compel Reynolds to provide witnesses on Topics 28, 54, and 78, as well as the recent private discussions between Nicholas Gilley and Reynolds' damages expert, Dr. Sullivan.

First, Reynolds should be compelled to provide a fully prepared witness on Topic 28 directed to the [redacted]. Reynolds ***admits*** that the [redacted] is relevant to damages and that both parties' damages experts rely on that agreement to calculate a reasonable royalty for certain Asserted Patents. Dkt. 555 at 1, 4. Yet Reynolds steadfastly refuses to provide a fully-educated witness on Topic 28 because "the negotiations" of that agreement are allegedly irrelevant (according to Reynolds) since both experts purportedly only "relied on the terms." *Id.* at 5-6. Reynolds' opposition is based on an overly narrow, contrived construct of the discovery sought. Counterclaim Plaintiffs are entitled to explore through a properly prepared Rule 30(b)(6) witness the financial and other considerations, including contemporaneous projections, discount rates, and any other facts that went into Reynolds' consideration of the agreement. This includes any actual consideration of effective royalty rates based on information and projections known at the time, or the absence of any such consideration. That both damages experts allegedly relied on "the terms" of the [redacted] does not somehow preclude discovery of additional ***facts*** relating to that agreement. And Reynolds cannot genuinely contend that Mr. Gilley was sufficiently prepared on the ***full scope*** of the Topic 28, as required, when he admittedly never reviewed its terms and never conferred with or reviewed any communications from the non-lawyers involved in the settlement.

Second, Reynolds should be ordered to make Mr. Gilley available for a one-hour personal fact deposition on the subject matter of his recent discussions with Reynolds' damages expert. Reynolds does ***not*** dispute that this discussion occurred months after Mr. Gilley's December 2020

deposition. Reynolds also does ***not*** dispute that, during that discussion, Mr. Gilley provided information about a [redacted] Dkt. 547, Ex. 2 (Sullivan Rbt. Rpt.) at Attachment A-8. And Reynolds does ***not*** dispute that Counterclaim Plaintiffs have had no opportunity to depose Mr. Gilley on his discussion with Dr. Sullivan or the purported '[redacted] he told Dr. Sullivan about. Instead, Reynolds distorts the facts to claim that Counterclaim Plaintiffs should have had notice to depose Mr. Gilley on this single document, which undisputedly was never identified during discovery. Counterclaim Plaintiffs should be able to explore Mr. Gilley's knowledge on these ([redacted], which go to the heart of Reynolds' damages theories and did not become a disputed issue until months after his deposition.

Third, Reynolds does ***not*** dispute that its experts opine on various [redacted]. Nor does Reynolds dispute that its expert, Mr. Kodama, opines that [redacted] to the accused products than others. And Reynolds does not dispute that Mr. Kodama's opinion, which Reynolds intends to present to the jury, is predicated on facts about these products. Reynolds nevertheless maintains that it need not produce a knowledgeable corporate witness so that Counterclaim Plaintiffs can explore the underlying factual premise of Reynolds' expert's assumptions regarding the purported acceptability and comparability of its alleged non-infringing alternatives. This is not technical expert subject matter—it is factual testimony directed to company knowledge regarding the comparison and acceptability of these [redacted] from a commercial, technical, financial, and marketplace perspective. Counterclaim Plaintiffs are entitled to a Rule 30(b)(6) witness on this topic. Reynolds' assertion that this is purely expert

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