

**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

**REDACTED**

**MEMORANDUM IN SUPPORT OF COUNTERCLAIM PLAINTIFFS' MOTION FOR  
LEAVE TO SERVE SUPPLEMENTAL EXPERT REPORTS**

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. FACTUAL BACKGROUND.....	2
A. Reynolds Initially Misrepresented <b>REDACTED</b> .....	2
B. PMP/Altria Serves Expert Reports On Available Opinions And Evidence .....	4
III. LEGAL STANDARD.....	5
A. Federal Rule Of Civil Procedure 16(b).....	5
B. Federal Rule Of Civil Procedure 26(e).....	5
C. Federal Rule Of Civil Procedure 37(c)(1) .....	5
IV. ARGUMENT.....	6
A. Good Cause Supports Granting PMP/Altria Leave .....	6
B. PMP/Altria’s Supplementation Is Substantially Justified And Harmless.....	11
V. CONCLUSION.....	14

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Ace Am. Ins. Co. v. McDonald's Corp.</i> , No. 11-cv-3150, 2012 WL 2523883 (D. Md. June 28, 2012).....	13
<i>Columbia Gas Transmission, LLC v. Grove Ave. Developers, Inc.</i> , No. 17-cv-483, 2018 WL 10483888 (E.D. Va. May 22, 2018).....	10
<i>Diehl v. Blaw-Knox, No. 01-cv-770</i> , 2004 WL 5509085 (M.D. Penn. Sept. 14, 2004).....	9, 11
<i>Jaguar Land Rover Ltd. v. Bentley Motors Ltd.</i> , No. 18-cv-320, 2020 WL 6817060 (E.D. Va. Nov. 3, 2020) .....	7, 11
<i>Lineras v. Inspiration Plumbing LLC</i> , No. 10-cv-324, 2010 WL 4623940 (E.D. Va. Nov. 3, 2010) .....	5, 7
<i>N.O. v. Alembik</i> , No. 15-cv-868, 2016 WL 1388777 (E.D. Va. Jan. 15, 2016).....	5
<i>OmniSource Corp. v. Heat Wave Metal Processing, Inc.</i> , No. 13-cv-772, 2015 WL 3452918 (E.D.N.C. May 29, 2015).....	6, 9, 13
<i>Pascoe v. Furniture Brands Int'l, Inc.</i> , No. 10-cv-193, 2011 WL 475003 (W.D.N.C. Feb. 4, 2011).....	12
<i>Prusin v. Canton's Pearls, LLC</i> , No. 16-cv-605, 2018 WL 620473 (D. Md. Jan. 29, 2018).....	11, 12, 13
<i>United States ex rel. Skibo v. Greer Lab'ys, Inc.</i> , No. 13-cv-110, 2019 WL 1992139 (W.D.N.C. May 6, 2019).....	5, 7, 9, 12
<i>United States v. 1.604 Acres</i> , 2011 U.S. Dist. LEXIS 51021 (E.D. Va. May 11, 2011) .....	14
<i>United States v. 1.604 Acres of Land</i> , No. 10-cv-320, 2011 WL 1810594 (E.D. Va. May 11, 2011).....	5

## I. INTRODUCTION

Counterclaim Plaintiffs Altria Client Services LLC, Philip Morris USA Inc., and Philip Morris Products S.A. (“PMP/Altria”) respectfully seek leave to supplement the opening expert reports of Paul Meyer and Dr. John Abraham. Leave is warranted for these minimal yet probative additions because their inclusion is supported by good cause and PMP/Altria acted diligently to disclose the additions and seek leave.

*First*, good cause exists to allow Paul Meyer, damages expert for PMP/Altria, to supplement his report with information from the April 16, 2021 deposition of Reynolds’ financial employee Scott Peddycord. Mr. Peddycord, REDACTED

Mr. Meyer used this previously unavailable testimony to further inform his opinions REDACTED

. This new information goes to the heart of a damages dispute identified by both PMP/Altria and Reynolds.

*Second*, good cause exists to allow Dr. John Abraham, technical expert for PMP/Altria, to address new non-infringement opinions that Reynolds’ expert, Kelly Kodama, disclosed for the time in his March 31, 2021 report. Mr. Kodama’s new opinions were not disclosed in Reynolds’ interrogatory responses or his earlier reports, and thus Dr. Abraham could not have addressed them sooner. Dr. Abraham’s opinions are also necessitated by REDACTED

In total, the discrete supplementation PMP/Altria requests amount to the following:  
(1) ¶¶ 18-21, 30-36, 44-47, 55-57, 59-61, and 71 of Dr. Abraham’s supplemental report; and  
(2) ¶ 268 fn. 409 and Attachments 22-26 of Mr. Meyer’s supplemental report.

## II. FACTUAL BACKGROUND

After Reynolds sued, PMP/Altria filed Counterclaims on June 29, 2020. Dkts. 39, 40. The parties conducted fact discovery through December 4, 2020, when the Court temporarily stayed the case pending PMP/Altria’s PTAB challenges to Reynold’s asserted patents, based on the PTAB finding that the merits of one challenges was “particularly strong.” Ex. 1 (’268 Institution Decision) at 26. On February 16, 2021, the Court lifted the stay on PMP/Altria’s counterclaim patents (Dkt. 456) and promptly set a schedule, with fact and expert discovery closing on April 12, 2021. Dkts. 460, 461. The schedule was modified to allow expert depositions to conclude by May 12, 2021. Dkts. 534, 535.

### A. Reynolds Initially Misrepresented The Design Of The VUSE Alto Product

On November 5, 2020, PMP/Altria asked Reynolds to confirm that: REDACTED

. Ex. 2 (11/5/20 Koh Email). Reynolds confirmed REDACTED

. Ex. 2 (11/9/20 Michalik Email). Reynolds’ representations were corroborated  
by REDACTED

. Ex. 3  
(RJREDVA\_001449123) at -132; Ex. 4 (RJREDVA\_001450878) at -914-15. Reynolds’ 30(b)(6)

witness REDACTED

. *See, e.g.*, Ex. 5 (Hunt Dep.) at 81:12-82:1, 98:11-15.

Reynolds’ representations were false. On February 19, 2021, five days before the February  
24th due date for opening reports, Reynolds REDACTED

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.