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

REDACTED

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO SERVE SUPPLEMENTAL EXPERT REPORTS

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INTRODUCTION

This Court's Scheduling Order permitted only opening and responsive expert reports. (Dkt. 461.) It did not permit a third round of rebuttal expert reports. On March 31, 2021, the Court granted the parties' Joint Motion to Modify the Scheduling Order which permitted the parties a narrow exception to serve updated expert reports on April 26 to "identify citations to fact testimony to support already-disclosed opinions," (Dkts. 534 at 3; 535). While Reynolds is not opposing the majority of additions Defendants introduced in their seven supplemental expert reports served on April 26, Defendants abused the provision in two instances by injecting new theories and opinion testimony into the case that they could (and should) have included in their opening expert reports. Specifically, on April 26, after the close of fact discovery, Dr. Abraham introduced, for the first time, a brand new theory of infringement under the doctrine of equivalents even though as of at least June 2020 Defendants had all the information necessary to offer such an opinion then. On the same day, Defendants served a supplemental report from Mr. Meyer offering a new damages opinion, calculating a reasonable royalty rate for the [redacted] for the first time based on documents that Reynolds produced to Defendants last fall.

Defendants have no excuse for these belated disclosures. Their Motion should be denied under Rule 16's "good cause" standard for amendment of the Scheduling Order. Their actions have been anything but diligent. Nonetheless, Defendants attempt to distract from their lack of diligence in two ways. *First*, they characterize their experts' brand new opinions as mere "supplementation." Not so. Both Dr. Abraham and Mr. Meyer offered new theories and opinions that go far beyond merely correcting their previous reports or identifying citations to fact testimony. *Second*, even though Defendants concede that Rule 37 has nothing to do with this dispute, they seek to backfill their lack of diligence by expounding on the factors that would inform whether to strike their improper and belated disclosures. Indeed, Defendants appear to argue that

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