

**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**

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

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## I. INTRODUCTION

The thrust of Reynolds' opposition is that it should be permitted to misrepresent, conceal, or withhold critical discovery with impunity, and that Altria Client Services LLC, Philip Morris USA Inc., and Philip Morris Products S.A.'s (together, "PMP/Altria") experts should be prevented from addressing or utilizing such late produced discovery once revealed—even if doing so inflicts no prejudice whatsoever on Reynolds. Good cause for leave to supplement exists, and Reynolds, by its own admission, will not be prejudiced by such supplementation.<sup>1</sup>

*First*, good cause exists to allow Dr. Abraham's supplementation. Although refusing to agree on supplementation for 22 paragraphs from Dr. Abraham's report before this motion, Reynolds' opposition abandons without explanation its objections on all but a single paragraph, namely paragraph 34 addressing infringement under the doctrine of equivalents. Dkt. 591 at 4 ("Reynolds is only objecting to a single paragraph in Dr. Abraham's report (¶ 34)"). And even as to this single disputed paragraph, Reynolds itself necessitated Dr. Abraham's supplementation by (i) first misrepresenting REDACTED until after Dr. Abraham's opening expert report, and (ii) then concealing its detailed non-infringement contentions as to the "cavity" limitations of the '911 Patent until after Dr. Abraham's March 12th supplemental report addressing Reynolds' corrected<sup>REDACTED</sup> structure.

Reynolds' assertion that Dr. Abraham should have supplemented his report earlier, on March 12th, because Reynolds served an interrogatory response on non-infringement on March

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<sup>1</sup> PMP/Altria notes that since the Court lifted the stay on the Counterclaim patents, Reynolds has stalled, delayed, and done everything tactically possible to frustrate the Court's schedule and needlessly complicate the parties' trial preparations. It is Reynolds' continuing belated factual disclosures, apparently timed to occur right *after* PMP/Altria's experts reports were served, that give rise to the supplementations sought by this motion. This pattern of delayed factual disclosures, set and withdrawn depositions dates, withheld expert opinions and overall gamesmanship should end.

5th, is disingenuous at best. As Reynolds knows, that interrogatory response provides no bases for asserting that the <sup>REDACTED</sup> does not meet the “cavity” limitation of the ’911 Patent. Instead, after misrepresenting **REDACTED**, Reynolds “sandbagged” PMP/Altria by withholding its detailed new contentions until Dr. Kodama’s March 31 supplemental report, thereby preventing Dr. Abraham from having any opportunity to respond.

Reynolds next argues that Dr. Abraham should have supplemented his report earlier because documents **REDACTED** were purportedly available to Dr. Abraham. The Court should reject Reynolds’ attempt to distract from the undisputed fact that Reynolds—including in sworn deposition testimony—misrepresented **REDACTED** and then failed to timely disclose its new non-infringement theories. That some documents **REDACTED**

may have been available is irrelevant because PMP/Altria justifiably relied on Reynolds’ representations and sworn corporate testimony regarding **REDACTED**

. Reynolds’ argument is also contradicted by the parties’ agreement that, because of Reynolds’ misrepresentations, Dr. Abraham could supplement his opinions to address <sup>REDACTED</sup>. Dr. Abraham should have a full and fair opportunity to address Reynolds’ untimely non-infringement contentions and corrected factual representations regarding **REDACTED**, and which undisputedly were not previously available to Dr. Abraham and give rise to his supplemental doctrine of equivalents opinion.

**Second**, good cause exists to allow Mr. Meyer’s supplementation of a single footnote and corresponding attachments that disclose **REDACTED** that confirms his previously-disclosed damages opinions. Reynolds does not dispute that Mr. Meyer’s supplementation is based on testimony from a Reynolds witness, **REDACTED**, not available before Mr. Meyer’s report. Reynolds admits that **REDACTED** could not have been deposed earlier because Reynolds

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