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

CONFIDENTIAL
FILED UNDER SEAL

REPLY TO RESPONDENTS' OPPOSITION TO PLAINTIFFS' PARTIAL MOTION TO STAY FURTHER PROCEEDINGS ON THE CLAIM OF PHILIP MORRIS PRODUCTS S.A. SEEKING INJUNCTIVE RELIEF

I. INTRODUCTION

After Reynolds filed this Motion to Stay, the parties learned that trial in this matter will not take place until April 2022 (Dkt. No. 657), roughly seven months after the International Trade Commission ("ITC") is due to issue its Final Determination on whether to uphold Judge Cheney's Initial Determination ("ID"), set the ruling aside, or modify it in some fashion. This timeline further underscores the wisdom of a brief stay of proceedings on PMP's claim for injunctive relief in this case pending the Commission's decision, [redacted]

If the Commission upholds Judge Cheney's ID, as it should, [redacted]. Despite the protestations in its Opposition, PMP has not articulated any colorable theory of irreparable harm [redacted], which PMP attributes to the infringement of its patents by Reynolds's VUSE products. [redacted]

Even if PMP could articulate a colorable theory of irreparable harm [redacted], there can be no doubt that the Commission's Final Determination will significantly impact the playing field around PMP's claim for injunctive relief. If the ID is upheld, [redacted]. In the unlikely event that the ID is set aside or modified in some way [redacted] then PMP can either move forward on its injunctive relief claims as currently articulated, or else it can amend them, if possible, to address whatever modified order the Commission may issue. In any event, given that Judge Cheney's ID

finds that the IQOS products infringe [redacted], the parties and their respective experts cannot properly join issue on the *eBay* factors relevant to injunctive relief without a final resolution from the Commission.

Moving forward to complete injunction-related discovery now is just shadow boxing, and raises the clear possibility that the tremendous resources expended on these issues will either be for naught, or will at least have to be revisited and revised after the Commission's decision, thus duplicating work. Even PMP appears to concede that at least *expert* discovery on injunction issues should be delayed until after the ITC Final Determination—indeed, it suggests that this work need not even take place until after trial. (*See* Opp. at 5.) There is no sensible reason why *fact* discovery on the very same injunctive relief issues must be completed now, while the experts (even according to PMP) can wait; the identical uncertainties around the ITC outcome apply equally to both.

A brief stay pending the Commission's decision in September 2021 is warranted. Depending on the Commission's Final Determination, the parties will have ample time (roughly seven months) to complete the remaining discovery on injunction issues. Or, as PMP suggests, those issues can be taken up after trial, and only if PMP prevails on the merits of its infringement claims.

II. ARGUMENT

A. The Final Decision Of The ITC Will Significantly Impact, [redacted] PMP's Claim For Injunctive Relief In This Case.

As detailed in Reynolds's opening brief, PMP's claim for injunctive relief—as articulated in its response to Interrogatory 23 (*see* Ex. B to Motion)—[redacted]. (Mot. at 2-4.) In his 132-page ID, however, Judge Cheney finds that the IQOS products infringe [redacted]

[redacted] two patents owned by Reynolds, [redacted] (*See* Mot., Ex. A, at 25-64, 92-97, 99-100, 125-26, 131.) If the ID is upheld, PMP's stated grounds for injunctive relief in this case will be eliminated. If PMP proves that the VUSE products infringe its asserted counterclaim patents, then PMP may be able to collect money damages, [redacted]. There can be no doubt that the ITC Final Determination will have a significant, [redacted], impact on PMP's claims, and thus it makes sense to give the Commission time to rule. PMP disagrees, but none of the arguments it offers to oppose a brief stay holds up.

1. Significant Fact And Expert Discovery On Injunction Issues Remains.

First, PMP suggests that very little discovery remains on the injunctive relief issues, and thus it would be "inefficient" and "unproductive" to delay its completion. (*See* Opp. at 5.) Yet PMP's own arguments are inconsistent. PMP acknowledges that the parties have completed no expert discovery on injunction issues whatsoever, but there is (in PMP's view) no problem with delaying *that* work until after the ITC Final Determination, or even after the trial.[1] (*Id.*) It is only fact discovery that PMP insists on completing now, and for no reason other than its own say-so. And notwithstanding PMP's characterization, the parties are nowhere near "the tail-end of their injunction-related discovery." (*Id.*) For example, the parties have not yet completed their

[1] PMP equivocates in its Opposition about the need for experts on injunctive relief issues (*id.*), but just last week stated it *did* intend to offer "expert testimony, analysis, and opinions" on these matters (*see* Dkt. No. 624 at 7). Regardless of PMP's intentions, Reynolds *does* believe that expert reports and depositions are essential to its defense against PMP's claim for equitable relief, and *does* intend to offer them. At this point, however, neither side's experts could properly join issue on the central dispute [redacted]. Doing so would require guesswork, which neither side wants, and which would be obviated by a brief stay to get final guidance from the Commission.

respective productions of documents in response to injunction-specific requests, and it appears that additional motion practice on that issue will be necessary because Defendants have either refused to produce numerous categories of documents requested by Reynolds (PMP), or else refused to produce any documents at all (Altria and PM USA). (*See* May 24, 2021 letter from J. Michalik to J. Koh regarding outstanding document requests, attached as Ex. C.) It is hardly appropriate for Defendants to oppose a stay on the ground that discovery is near complete, while at the same time imposing a *de facto* stay of their own by refusing to produce relevant documents. If necessary, the Court will address Defendants' intransigence in due course, but the fact remains that much remains to be done on this issue, and the need for it may be eliminated (or at least reduced) depending on the ITC Final Determination.

Similarly, the parties have not yet deposed a single fact witness on injunction issues. It is true that both sides have identified their respective corporate designees (two of whom live abroad) and have identified dates when they are available for deposition, but—for all of the reasons discussed above—it makes no sense to proceed with those depositions at this time. Just as the experts could not properly join issue on factors like irreparable harm at this time, PMP's designees cannot be expected to credibly articulate the factual support for PMP's theories on *eBay* factors [redacted] Nor can Reynolds's designee possibly respond to those contentions in a comprehensive way. Moreover, depending on the ITC's Final Determination, PMP may well amend its contentions, putting the parties back to square one.

PMP argues that two of the witnesses designated under Rule 30(b)(6) on injunction issues will also have to testify in their individual capacities on liability and damages issues. (Opp. at 5.)

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