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

REYNOLDS'S MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM STIPULATION ON DEPOSITION DATES IN LIGHT OF NEW INJUNCTION-RELATED CONTENTIONS FROM PHILIP MORRIS PRODUCTS S.A.

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INTRODUCTION

Reynolds respectfully seeks relief from the parties' stipulation (Dkt. 668) setting the date for the deposition of Dr. James Figlar, Reynolds's Rule 30(b)(6) designee on matters relating to PMP's request for a permanent injunction, because—after that stipulation was entered, after the parties' agreed date to complete injunction-related document productions, and after this Court partially denied Reynolds's motion to stay injunction-related discovery—PMP once again moved the goalposts on this issue in a way that will require yet more discovery before Dr. Figlar's deposition can take place. As the Court is well aware by now, PMP added its claim for injunctive relief nearly nine months after first asserting its counterclaims, and then made clear in its response to contention interrogatories that its claim of "irreparable harm" was exclusively based on the notion that sales of the IQOS product in the United States were being, and would continue to be, adversely impacted by sales of Reynolds's VUSE products, which are alleged to infringe PMP's patents. After those contentions were set, however, Judge Cheney of the ITC issued an Initial Determination finding that the IQOS products infringe *Reynolds's* patents, and that IQOS should be excluded from the U.S. market. As this Court recognized, that decision, if upheld by the Commission, whose decision is expected in September 2021, "undercuts the irreparable harm undergirding PMP's claim for injunctive relief." (Dkt. 702.)

PMP knows this, too. So, immediately after convincing this Court to allow fact discovery on its claim for injunctive relief to proceed—and after expressly assuring the Court that the parties "are within weeks of" completing it (Dkt. 666 at 1)—PMP amended its contention interrogatory responses to add completely new assertions of irreparable harm based on *an entirely different product*. PMP now claims that its VEEV product (which is a vaping product, not a heat-not-burn product like IQOS) will be adversely impacted by continuing sales of Reynolds's VUSE products, and so a permanent injunction barring VUSE from the U.S. market is warranted, even if the

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Commission upholds Judge Cheney's Initial Determination on IQOS. Setting aside for the moment that VEEV is a poor candidate to serve as the basis for injunctive relief because *it has never been sold in the United States*, the mere fact that PMP has chosen to add VEEV to this case opens an entirely new area of fact discovery that must now be completed.

VEEV has never been the subject of discovery in this case, which to this point has focused exclusively on PMP's IQOS and Reynolds's VUSE. If VEEV is now to be added to this case as a basis for excluding Reynolds's VUSE products from the market, then Reynolds has to conduct discovery on VEEV, including written discovery and document requests. Reynolds also needs to review and produce its own documents relating to VEEV. Reynolds will then have to amend its contentions on the injunction issue, to respond specifically to the new allegations from PMP around VEEV. And all of this has to happen before Dr. Figlar, Reynolds's Rule 30(b)(6) designee on "[t]he factual bases underlying [Reynolds's] contention, including [Reynolds's] response to Interrogatory No. 30 . . . that PMP has not suffered irreparable injury," can testify.

After receiving PMP's new disclosures concerning VEEV, Reynolds suggested that the injunction witnesses for both sides be postponed until the necessary written and document discovery relating to VEEV could be conducted. PMP refused, insisting that all of the depositions go forward as scheduled. This is unreasonable. If it proceeds on June 24, Dr. Figlar's deposition likely will need to be re-done after completion of the additional discovery stemming from PMP's latest shift in contentions. Dr. Figlar should not be forced to sit for two depositions simply because PMP opted, late in the game, to alter the fundamental premise of its claim for injunctive relief.

FACTUAL BACKGROUND

In June 2020, PMP asserted three patents against Reynolds's VUSE line of vaping products. (Dkt. 40.) Nine months later, PMP sought leave to add a claim for injunctive relief to exclude the VUSE products from the U.S. market if PMP prevails on liability. (Dkt. 463.) The

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Court granted PMP's request for leave to amend its pleadings to add a claim for injunctive relief on March 12. (Dkt. 483.) Thereafter, the parties engaged in fact discovery on PMP's newly-requested remedy consistent with the Court's order and ensuing scheduling orders. The discovery included PMP's April 9 response to Reynolds's Interrogatory No. 23 in which PMP confirmed its request to add a claim for injunctive relief was based entirely on the alleged loss of future sales of IQOS in the U.S. market if Reynolds's VUSE products are not enjoined. (Ex. 1 [PMP's Apr. 9, 2021, Response to Six Set of Interrogatories].) Reynolds then provided its own comprehensive response to PMP's Interrogatory No. 30, explaining in detail why PMP is not entitled to injunctive relief. (Ex. 2 [Reynolds's Apr. 20, 2021, Response to Interrogatory No. 30].) The parties' discovery efforts also included, after some wrangling, agreeing to complete injunction-related document productions by June 7. It also included finalizing the deposition dates for the parties' Rule 30(b)(6) designees on injunction-related deposition topics. (Dkt. 668.) For his part, Dr. Figlar is designated to testify on, among other topics,

> 79. The factual bases underlying [Reynolds's] contention, including [Reynolds's] response to Interrogatory No. 30 and all supplements thereto, (i) that PMP has not suffered irreparable injury, (ii) that remedies available at law, such as monetary damages, are adequate to compensate for that injury, (iii) that considering the balance of hardships between [Reynolds] and PMP, a remedy in equity is unwarranted, and (iv) that the public interest would be disserved by a permanent injunction.

(Ex. 3 [PMP's Third Rule 30(b)(6) Notice].)

In the interim, on May 14, 2021, the presiding Administrative Law Judge in a parallel proceeding before the International Trade Commission issued an Initial Determination finding that IQOS infringes two Reynolds patents, finding Reynolds's patents are not invalid, and recommending a limited exclusion order prohibiting importation of IQOS products into the United States.

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