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**

REYNOLDS'S REPLY 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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I. INTRODUCTION

Reynolds's motion is simple, and should not be controversial. Dr. James Figlar, who is retired and lives abroad, has been designated under Rule 30(b)(6) to testify on behalf of Reynolds relating to its contentions about why PMP is not entitled to injunctive relief. By stipulation (Dkt. 668), Dr. Figlar is scheduled to testify about these issues on June 24. After that stipulation was entered, however, PMP altered and materially expanded its injunction contentions—adding claims around an entirely new product (VEEV) that has never before featured in its contentions, or in this case generally. Indeed, PMP waited to lodge its new VEEV contentions until *the day after* this Court partially denied Reynolds's motion to stay injunction-related discovery, which motion PMP had resisted by assuring the Court that fact discovery on these issues was "within weeks of" completion. (Dkt. 666 at 1.)

To the extent that PMP's statement to the Court was ever true, it is certainly not true now. PMP's introduction of the VEEV product as a new basis for injunctive relief required Reynolds to serve discovery requests related to that product, which it did promptly on June 11, just three days after receiving PMP's new contentions. Reynolds must digest the information that PMP produces in response and then amend its own counter-contentions accordingly (right now, Reynolds's counter-contentions only address IQOS). Only once all of this work is complete can Dr. Figlar offer complete testimony about Reynolds's injunction-related contentions. The discovery cannot be completed by June 24—indeed, PMP's responses are not even due until June 25, and PMP apparently has no intention of complying by that date, or any other (Dkt. 724 at 13, n.7)—and so Reynolds respectfully requests relief from the stipulation (Dkt. 668), so that Dr. Figlar is only deposed one time, at a mutually convenient date after the parties complete the written and document discovery occasioned by PMP's new claims.

PMP's opposition to this eminently reasonable request lacks merit, especially given that

trial in this matter is not scheduled until April 2022. Unable to defend its own actions, PMP levels various accusations at Reynolds, and seeks to place blame on Reynolds for supposedly "delay[ing]" Dr. Figlar's deposition. (Dkt. 724 at 4.) But none of that can detract from the issue, which is simple. Reynolds had nothing to do with PMP's decision to add injunction-related contentions about VEEV to this case for the first time on June 8. PMP did that, and its decision to do so has ordinary and predictable consequences—including that Reynolds now has to conduct additional discovery about those new contentions. Dr. Figlar should not have to sit for deposition until that discovery is complete, else PMP will surely demand that he be deposed twice. PMP's opposition is groundless, and Reynolds's motion should be granted.

II. ARGUMENT

A. There is no question that PMP added its injunction-related contentions around VEEV for the first time on June 8, after the Court entered the stipulation setting Dr. Figlar's deposition.

The stipulation fixing Dr. Figlar's June 24 deposition date was submitted to the Court on May 27, 2021. (Dkt. 668.) The parties agreed to complete their respective productions of documents in response to injunction-related requests by June 7. (Dkt. 668.) After both of those dates passed, however, PMP amended its contentions on June 8, setting out for the first time the claim that an injunction barring Reynolds's VUSE products from the U.S. market was justified not only by the supposed "irreparable harm" the VUSE products were causing to PMP's IQOS products in the U.S., but also the *future* harm that VUSE *might someday* cause to a *different* PMP product (VEEV) that is not—and never has been—sold here. (*See* Dkt. 709-4.) June 8 is the very first time that the word VEEV appeared in PMP's injunction contentions. Those are the facts. And those facts entitle Reynolds to relief from Dr. Figlar's stipulated deposition date. (*See* Dkt. 716 at 2-5.)

PMP's assertion that Reynolds "had full knowledge" that its claim for injunctive relief was

in fact grounded on the VEEV product as early as April 9, when PMP served its initial injunction contentions, strains credulity. (Dkt. 721 at 3.) Reynolds attached PMP's April 9 contentions as Exhibit 1 to its Motion. (Dkt. 709-1.) As the Court can see for itself, PMP never mentioned the VEEV product. Not once. Instead, the only PMP product discussed in all 36 pages of those contentions as providing a basis for injunctive relief was *IQOS*. (Dkt. 709-1.) PMP nevertheless claims that Reynolds should have known that PMP's injunction request was somehow tied to VEEV because—in addition to extensively discussing IQOS—the April 9 contentions also vaguely alluded to PMP's other "past, present, and future non-combustible product offerings in the United States." (Dkt. 721 at 8.) If it were true that Reynolds should have discerned from that hazy phrase that PMP planned to pin its injunction case on VEEV—indeed, if PMP even *thought* it were true—then one wonders why PMP felt any need to issue new contentions on June 8 that specifically spelled out PMP's arguments around VEEV.

The answer, of course, is that PMP's assertion that it "disclosed its reliance" on VEEV on April 9 is not true. Reynolds did *not* know that PMP was putting forward the VEEV product as a basis for injunctive relief until PMP served contentions saying so, which it did for the first time on June 8.[1] Indeed, after reviewing the April 9 contentions from PMP (which included only the vague reference to "future" PMP product "offerings"), Reynolds gave its responses to certain Requests for Admission that PMP had served, purportedly as part of discovery related to the claim for injunction relief. These included, for example, requests to "Admit that Reynolds is developing a product to compete against the VEEV e-cigarette"; and to "Admit that Reynolds has conducted

[1] PMP notes that it referenced possible arguments around VEEV in its opposition to Reynolds's motion to stay (*see* Dkt. 666 at 11-12). That is true, and Reynolds replied the very next day that, if PMP went forward to actually add injunction-related contentions around VEEV—as opposed to merely threatening it in a brief, then Reynolds would have to serve new discovery requests relating to that product. (Dkt. 675 at 9.)

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