

**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

**COUNTERCLAIM PLAINTIFFS' OPPOSITION TO REYNOLDS'
MOTION TO DISMISS INEQUITABLE CONDUCT COUNTERCLAIM AND
AFFIRMATIVE DEFENSES AND MEMORANDUM IN SUPPORT OF THEIR
CROSS-MOTION FOR ATTORNEYS' FEES AND COSTS**

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I. INTRODUCTION

RJR asserts that the Court should treat its motion to dismiss its inequitable conduct counterclaim and Affirmative Defenses as a routine procedural issue. RJR hopes to avoid adverse judgment and the Court's scrutiny of its litigation conduct. The Court should enter judgment in PMP/Altria's favor pursuant to Rule 56 and deny RJR's motion to dismiss as moot.

First, RJR's bad faith conduct culminating in this motion compels its denial. Initially, to obtain leave to amend its Answer, RJR represented to the Court that it had "*discovered the true facts*" to support its inequitable conduct counterclaim. Dkt. 137 at 2. As confirmed by RJR's contention interrogatory response and its concession of *all 45* material facts in PMP/Altria's motion for summary of no inequitable conduct, RJR affirmatively misled the Court because it had no such facts and no intention to take discovery on even the most basic aspects of its claim, let alone actually litigate it to trial. Likewise, with the Affirmative Defenses RJR now seeks to dismiss, RJR has never identified any factual basis to substantiate them and never pursued them in discovery.

The Court should view with a gimlet eye RJR's eleventh-hour "offer" to dismiss its legally deficient claims; it justifies judgment, not dismissal. After failing to pursue basic discovery on its counterclaim and Affirmative Defenses, RJR waited until *well after* it knew PMP/Altria would have incurred the expense of drafting a summary judgment motion to seek their dismissal. If RJR had offered to dismiss its deficient claim and defenses in April or after discovery closed, its motion may have made more sense. But RJR first offered to "withdraw" its claims after business hours the evening before the Court's summary judgment deadline. RJR's experienced counsel knows there is no justification to wait until 6:46 P.M. on the eve of the Court's deadline to make that offer. Indeed, RJR's counsel knew that PMP/Altria would have already incurred the expense of preparing a summary judgment motion for filing the next day.

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