

EXHIBIT 5

From: Michalik, John M. <jmichalik@JonesDay.com>
Sent: Tuesday, May 18, 2021 10:50 PM
To: Koh, Jennifer (SD); #C-M PMIEDVA - LW TEAM
Cc: RJREDVA; Charles Molster
Subject: RE: RAI Strategic Holdings v. Altria Client Services (EDVa) - Affirmative Defenses

Jennifer - -

We disagree with your characterizations below. Nonetheless, we are still considering your request and will get back to you.

Regarding Defendants' claims, please let us know by noon ET on Thursday if Defendants intend to drop any of their asserted claims.

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From: Jennifer.Koh@lw.com <Jennifer.Koh@lw.com>
Sent: Friday, May 14, 2021 6:17 PM
To: RJREDVA <RJREDVA@jonesday.com>
Cc: pmiedva.lwteam@lw.com
Subject: RAI Strategic Holdings v. Altria Client Services (EDVa) - Affirmative Defenses

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Counsel,

Reynolds has raised nearly a dozen affirmative defenses against Altria, PM USA, and PMP's Counterclaims, in addition to those raised against individual entities. Reynolds appears to have effectively abandoned several of these defenses throughout the course of discovery. For example, in response to PMP/Altria's Interrogatory No. 21, which sought the factual bases for and documents to be used in support of Reynolds' affirmative defenses, Reynolds provided boilerplate responses for several of its defenses. Despite serving a supplemental response on April 12 updating the support for two of its affirmative defenses, Reynolds' responses to several others remain cursory. In order to streamline the case, please confirm that Reynolds will not be pursuing the following affirmative defenses at trial.

1. Fifth Affirmative Defense: Equitable Defenses

In its October 29, 2020 Response to Interrog. No. 21, Reynolds stated that enforcement of the patents-in-suit was "barred by one or more of the equitable doctrines, such as estoppel, acquiescence, waiver, and unclean hands." Reynolds' Third Suppl. Resp. to Defs.' Third Set of

Interrog. (No. 21) at 5 (“Rog. Response”). Although Reynolds stated that it would further supplement its response as discovery progressed, it has not yet done so. *See id.*

2. Sixth Affirmative Defense: Limitation on Damages Under 35 U.S.C. § 287

For the PMP Asserted Patents, Reynolds has not identified any product it believes is subject to the marking requirements of Section 287. Reynolds therefore has failed to carry its initial burden of production under *Arctic Cat*.

3. Eighth Affirmative Defense: Ensnarement

In its initial Rog Response, Reynolds complained that PMP/Altria had “provided no more than boilerplate statements regarding infringement . . . under the doctrine of equivalents,” and it was “therefore not able, at this time, to fully respond” and explain the basis for its defense of ensnarement. Rog. Response at 6. The parties have since addressed infringement under the doctrine of equivalents extensively in expert reports. Yet Reynolds still has not supplemented its response.

4. Eleventh Affirmative Defense: Extraterritorial Claims

Reynolds did not identify any extraterritorial activities that Counterclaim Plaintiffs purportedly rely on for their infringement claims in its initial Response, and to date has not supplemented its response. *See* Rog. Response at 7, 10-11.

Please let us know by Tuesday, May 18 whether Reynolds agrees to drop these affirmative defenses. If Reynolds does not agree, we intend to seek summary judgment on the affirmative defenses identified above.

Regards,
Jennifer

Jennifer Koh

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