

**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. )  
\_\_\_\_\_ )

Civil No. 1:20-cv-00393-LO-TCB

**REYNOLDS'S OPPOSITION TO COUNTERCLAIM PLAINTIFFS' MOTION FOR  
SCHEDULING ORDER SETTING IN LIMINE/DAUBERT MOTION DATES**

## INTRODUCTION

PMP/Altria's proposal to schedule all proceedings on *Daubert* challenges and motions *in limine* in August and September 2021 is admittedly based on nothing more than their hope for a trial date that is different from, and far earlier than, the April 4, 2022, date actually set by this Court. Moreover, their hoped-for schedule fails to account for the fact that there are several events anticipated over the next three to four months that could have profound impact on the issues remaining for trial and the evidence relevant to those issues, including: (i) this Court's ruling on the parties' pending cross motions for summary judgment; (ii) the Final Determination of the International Trade Commission regarding whether PMP/Altria should be barred from importing the IQOS products into the United States; and (iii) the PTAB's decisions on whether to institute Reynolds's IPRs against the patents asserted here by PMP/Altria. PMP/Altria's Motion would require the parties to brief their respective *Daubert* and *in limine* challenges without the benefit of these critical decisions, any one of which could significantly change the evidentiary landscape and thus require this pretrial work to be redone. There is no reason for it.

To account for changes that might be brought about by those events, and in keeping with the trial date set by this Court, Reynolds respectfully submits that PMP/Altria's Motion should be denied. The Court instead should enter Reynolds's schedule as proposed below:

<b>Event</b>	<b>Deadline</b>
Exchange MIL topics	December 3, 2021
Meet and confer on MIL topics	December 10, 2021
Opening MILs and Daubert motions	January 14, 2022
Oppositions to MIL and Daubert motions	January 28, 2022
Replies to MILs and Daubert motions	February 3, 2022
Trial begins per Court's Order	April 4, 2022

## ARGUMENT

The Court's Scheduling Order anticipates that the parties will file *Daubert* motions and motions *in limine* close to trial. See Dkt. 97 at 24 (*Daubert* motions and motions *in limine* to be filed "in time to be heard at least two weeks before the applicable trial"). At the final pretrial conference held on May 21, 2021, the Court set trial on PMP/Altria's asserted patents for April 4, 2022. PMP/Altria state that the Court offered some sort of indication that it might move the trial forward, possibly into Fall 2021, if a slot becomes available on the Court's calendar, and thus they insist that all *Daubert* challenges and motions *in limine* must be fully briefed and submitted to the Court for decision in the next two months. Dkt. 771 at 1. None of the counsel for Reynolds who were present for the final pretrial conference recall any such suggestion by the Court; to the contrary, the Court indicated numerous times that, due to the backlog of trials caused by COVID-19 restrictions, April 2022 was the very first available date for trial of this matter. Regardless, April 4, 2022, is the date that the Court set for trial, and it should control over the non-existent earlier date hoped for by PMP/Altria. Moreover, there are several events in the coming months that will likely significantly impact the issues and associated evidence for trial, and thus shape the parties' respective *Daubert* challenges and motions *in limine*.

Summary Judgment. Both sides have moved for summary judgment on certain claims and issues in the case. Briefing on the parties' cross motions is complete, and the Court has scheduled oral argument for July 16. The Court's resolution of these motions will plainly impact the *Daubert* and other evidentiary motions that the parties may choose to bring before the Court. For example, if the Court grants Reynolds's motion for summary judgment of invalidity of the '374 patent, that would obviate the need for Reynolds to file (and the Court to rule on) *Daubert* motions directed to the expert opinions offered by PMP/Altria on that patent. So too with respect to Reynolds's motion for summary judgment of noninfringement of the asserted '911 patent, which likewise may obviate

the need for Reynolds to file a motion *in limine* or *Daubert* challenge seeking exclusion of evidence regarding the doctrine of equivalents. Under the schedule proposed by PMP/Altria, however, any such motions would need to be filed by August 20—barely a month after the cross motions for summary judgment are even argued. Even considering this Court’s dedication and quick decisions in this case, it is unlikely that the parties will have sufficient time to receive, digest, and make changes based on a summary judgment ruling in the few weeks that PMP/Altria’s schedule would afford.

*ITC Final Determination.* As the Court is well aware, Judge Cheney recently issued an Initial Determination in the parallel ITC Investigation that (i) finds that the IQOS products infringe eight valid claims of two Reynolds patents; and (ii) recommends an exclusion order that would bar the future importation of the IQOS products into the United States. This Court has correctly recognized that the Initial Determination, if upheld by the full Commission, “undercuts the irreparable harm undergirding PMP’s claim for injunctive relief.” Dkt. 702. The decision of the full Commission is expected in September 2021. Understanding the potential significance of that ruling, this Court has stayed any expert discovery around PMP’s claim for injunctive relief. *Id.* Those same considerations weigh in favor of scheduling expert-related *Daubert* challenges, and motions *in limine* directed to the evidence around PMP’s injunction claims (which will change dramatically if the Initial Determination is upheld), until an appreciable period has elapsed after the Commission’s Final Determination. This will not be possible under the schedule proposed by PMP/Altria.

*IPR Institution Decisions.* Finally, Reynolds has filed IPR petitions before the PTAB, challenging the validity of each of the five patents asserted by PMP/Altria in this case. The PTAB is set to rule on institution in September, October, and November of 2021. If the PTAB institutes

*inter partes* review of any or all of the asserted patents, Reynolds expects the parties may have to brief the admissibility of evidence from the ongoing IPR proceedings at trial.

\*\*\*\*\*

In short, all three of these key decisions that are anticipated in the next three to four months are likely to affect the *Daubert* and other evidentiary issues as to which the parties will likely move, as well as the substance of their arguments. The Court's original timeline—*i.e.*, briefing *Daubert* motions and motions *in limine* to be heard approximately two weeks before trial—allows the parties to continue to narrow their claims as trial nears, and also will permit the parties to focus their *Daubert* motions and motions *in limine* on their remaining contentions after these intervening rulings are made. If the parties were instead to complete motion practice on *Daubert* and motions *in limine* now, as PMP/Altria propose, they and the Court may well be required to revisit some the same issues prior to trial in April 2022, including through re-briefing. Accordingly, because PMP/Altria's proposed schedule has the clear potential to create inefficiencies and duplication of work, the Court should deny the instant Motion and instead adopt the schedule proposed by Reynolds.

### CONCLUSION

For the foregoing reasons, Reynolds respectfully requests that the Court enter an Order denying PMP/Altria's Motion and establishing the following schedule for *Daubert* motions and motions *in limine*:

Event	Deadline
Exchange MIL topics	December 3, 2021
Meet and confer on MIL topics	December 10, 2021
Opening MILs and <i>Daubert</i> motions	January 14, 2022
Oppositions to MIL and <i>Daubert</i> motions	January 28, 2022
Replies to MILs and <i>Daubert</i> motions	February 3, 2022

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.