

**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

**COUNTERCLAIM PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR
SCHEDULING ORDER SETTING IN LIMINE/DAUBERT MOTION DATES**

I. INTRODUCTION

There is no dispute that the present case is trial-ready, and that the only remaining dates to be scheduled in advance of trial are dates for *in limine* and *Daubert* motions. Through no fault of the Court or the parties, this case has been delayed significantly already. Reynolds' selective recollections notwithstanding, the Court informed the parties at the pretrial conference that, should an opportunity arise for an earlier trial date, it would make that available. Reynolds' only remaining firewall to delay such earlier trial opportunity is the outstanding briefing of *in limine* and *Daubert* motions. But Reynolds provides no genuine reason why the parties should not complete this remaining briefing now. Rather Reynolds requests that this case sit idle for *seven months* based only on hypothetical and irrelevant concerns that the pending summary judgment motions, ongoing ITC proceedings on Reynolds' patents, and Reynolds' pending *inter partes* review (IPR) petitions "may" have an impact. But Reynolds fails to show how these future events necessitate postponing motions *in limine* or *Daubert* motions, and provides no reason why this remaining briefing should not proceed in an orderly and timely manner over the next few months to allow this case to go to trial this Fall if the Court's schedule permits.

II. ARGUMENT

As an initial matter, Reynolds incorrectly implies that "the Court's original timeline" provides that *in limine* and *Daubert* motions are to be postponed until shortly before trial, i.e., April 2022. Dkt. 779 at 4. The Court has set no such dates for briefing *in limine* and *Daubert* motions. Rather, the parties are to "meet and confer and submit a briefing schedule for any such motions" such that they can be heard at least two weeks before trial. Dkt. 97 at 24. PMP/Altria's proposed schedule allows *in limine* and *Daubert* motions to be fully briefed and heard in the event trial is scheduled for Fall 2021. Reynolds' proposed schedule does not. Each of Reynolds'

contrived reasons why *in limine* and *Daubert* motions should be delayed for seven months until January 2022 fall flat.

First, Reynolds contends that the parties' motions for summary judgment "will plainly impact" the evidentiary motions that the parties may choose to bring. Dkt. 779 at 2. But as Reynolds admits, briefing on summary judgment is already completed and will be heard on July 16—well before any *in limine* or *Daubert* motions are filed under PMP/Altria's proposed schedule. In any event, Reynolds fails to identify even a single evidentiary issue that would be "plainly impacted" by the pending summary judgment motions, and this Court routinely schedules *in limine* and *Daubert* briefing while summary judgment motions are under advisement. Reynolds' purported scheduling concerns as they relate to motions for summary judgment would apply in virtually all cases under this Court's typical (non-pandemic) pre-trial and trial scheduling.

Second, Reynolds contends that *in limine* and *Daubert* motions must be postponed until after the Final Determination in the corresponding ITC investigation issues in September 2021. *Id.* at 3. But the ongoing ITC proceedings are relevant, if at all, solely to injunctive remedy that will be taken up post-verdict and thus have no bearing on *in limine* and *Daubert* motions. And as Reynolds concedes, the Court has stayed any expert discovery on injunctive relief, obviating the need for any *Daubert* motions on the issue. Dkt. 702. Reynolds has not identified a single trial evidentiary issue that would be impacted by the pending ITC proceedings (let alone one that would be the subject of an *in limine* or *Daubert* motion).

Third, Reynolds contends that if the PTAB institutes Reynolds' petitions for *inter partes* review of PMP/Altria's patents in September to November 2021, Reynolds expects that the parties "may have to brief the admissibility of evidence from the ongoing IPR proceedings at trial." *Id.* at 3-4. But it is undisputed that Reynolds' IPR petitions are absent from Reynolds' exhibit list and

are not the subject of any expert reports/testimony. Any institution decisions in the pending IPRs are thus irrelevant to the *in limine* and *Daubert* motions. In any event, the admissibility of any such documents would be readily addressed through specific objections, and certainly does not warrant or justify a seven-month delay of *in limine* and *Daubert* briefing.

None of Reynolds' excuses for still further delay of this case warrant deferring *in limine* or *Daubert* motions.

III. CONCLUSION

PMP/Altria respectfully request that the Court enter a schedule that requires *in limine* and *Daubert* motion briefing to proceed in August-September 2021 in order to permit trial in Fall 2021 should such earlier trial date become available.

Dated: July 8, 2021

Respectfully submitted,

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