

**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

**REPLY IN SUPPORT OF COUNTERCLAIM PLAINTIFFS'
CROSS-MOTION FOR ATTORNEYS' FEES AND COSTS**

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I. INTRODUCTION

RJR concedes the key facts compelling the grant of PMP/Altria's cross-motion for reasonable fees and costs. First, RJR does not dispute that it waited until 6:46 P.M., after business hours, the evening before the Court's summary judgment deadline to "withdraw" its inequitable conduct counterclaim. Dkt. 775 at 5-6. Second, RJR does not genuinely dispute that there *never* were any newly discovered "true facts" supporting its amendment in the first place, contrary to its (mis)representations to this Court. Third, RJR does not dispute that it failed to make even a rudimentary effort in discovery to support its inflammatory pleadings, and that its inequitable conduct contentions merely parroted its bare pleading—without any citations to documents, testimony, expert analysis, or any "discovery." *Id.* at 4-6. Fourth, RJR's opposition now reveals, in a lapse of candor, that it decided to drop its inequitable conduct *by February 24, 2021*—months before summary judgment briefing and before RJR had even deposed the accused inventors. *Id.* at 22. Yet RJR waited nearly four months to inform PMP/Altria of its intent to drop its inequitable conduct counterclaim. Even then, RJR only did so when prompted and through an attempt to extract a facially unreasonable stipulation. Reynolds provides the Court with no excuse for its refusal to acknowledge its planned withdrawal sooner, other than its hollow assertion that PMP/Altria "should have known."

Instead, RJR shamelessly doubles-down on its misconduct, indeed going so far as to suggest it made a laudable decision to streamline issues, and nothing more. Dkt. 775 at 18-19. Far from laudable, RJR's conduct is vexatious and sanctionable, and should neither be condoned nor excused. RJR (i) misled the Court regarding the "true facts" it possessed to inject inequitable conduct in this case in the first instance, (ii) failed to substantiate its counterclaim with discovery, (iii) waited until the eleventh hour to declare its intent to drop this counterclaim, (iv) knowingly proposed an untimely and facially unreasonable stipulation of dismissal, and (v) multiplied the

proceedings by opposing PMP/Altria's summary judgment motion on procedural grounds despite conceding each of PMP/Altria's material facts and controlling law. RJR cites no facts or authority that exonerate its conduct.

Based on the undisputed (and undisputable) facts, this Court should permit PMP/Altria to recover their reasonable fees and costs.

II. ARGUMENT

A. RJR's Vexatious Conduct Warrants An Award Of Reasonable Attorneys' Fees And Costs

RJR does not dispute the key facts compelling the grant of PMP/Altria's cross-motion for reasonable fees and costs. *See* Dkt. 775 at 2-6, 18-26. That should be dispositive. Instead, RJR asserts that its conduct does not amount to sanctionable bad faith. *Id.* at 18-26. RJR is wrong for five reasons.

First, RJR's brief confirms that its representation to the Court in its motion for leave to amend that it had "*discovered true facts*" to support its inequitable conduct counterclaim was misleading at best. Dkt. 775 at 23. RJR now attempts to walk back that representation of purported "true facts" to a single sentence—"i.e., the '545 patent relies on Brooks and McCafferty, but they were not disclosed as prior art despite the '545 inventors' awareness of those patents[.]" Dkt. 775 at 23. But this is not what RJR told the Court when it sought leave to add its inequitable conduct counterclaim.¹ Nor could this lone, purported new "true fact" prevail, even at the pleadings stage, as PMP/Altria stressed in its opposition to RJR's motion for leave to add inequitable conduct. *See*,

¹ Indeed, RJR's reply brief in support of its motion for leave to add inequitable conduct comprised eight pages briefing detailing the purported "true facts" that RJR argued showed the materiality of the inequitable conduct references as well as facts that evidence the inventors' specific intent. Dkt. 137 at 1-8. And as discussed below, RJR never attempted to substantiate any of these "[un]true facts."

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