

**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 Action No. 1:20-cv-393

**MEMORANDUM IN SUPPORT OF PMP/ALTRIA'S MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL MATERIALS IN SUPPORT OF THEIR OPPOSITION TO  
REYNOLDS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

In advance of tomorrow's summary judgment hearing, Counterclaim Plaintiffs Altria Client Services LLC, Philip Morris USA Inc., and Philip Morris Products S.A. ("PMP/Altria") respectfully submit this motion for leave to file supplemental discovery obtained *after* briefing was complete (Exs. A and B) in support of their Opposition to Counterclaim Defendants RAI Strategic Holdings, Inc., and R.J. Reynolds Vapor Company's ("Reynolds") pending motion for partial summary judgment on willful infringement (Dkt. 686).

**I. FACTUAL BACKGROUND**

PMP/Altria pled factual allegations to support its claim that Reynolds' willfully infringes each of the five asserted patents and pursued willfulness discovery. Dkt. 39 at ¶¶ 17-47, p. 42 at D; Dkt. 40 at ¶¶ 17-48, p. 44 at E; Dkt. 733-8. In its September 2020 response to PMP/Altria's interrogatories, Reynolds stated that [REDACTED]

[REDACTED]  
[REDACTED]. Dkt.  
733-8.

Reynolds subsequently moved for summary judgment of no willfulness on all five of PMP/Altria's asserted patents. Dkt. 686. In response, PMP/Altria stated they would not pursue willfulness claims on the '374 and '556 patents, relying on Reynolds' discovery representation that [REDACTED]. Dkt. 733 at 25; Dkt. 751-1.

*After* PMP/Altria filed their opposition brief, PMP/Altria took the Court-ordered deposition of Reynolds' Dr. Figlar.<sup>1</sup> In that deposition, Dr. Figlar's sworn testimony refuted Reynolds' September 2020 interrogatory response and [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Ex. A (6/24/21 Figlar Tr.) at 133:11-22 (objections omitted) (emphasis added). In addition, Dr. Figlar testified [REDACTED]

[REDACTED]  
[REDACTED] *Id.* at 134:1-140:17.

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<sup>1</sup> Dr. Figlar is Reynolds' former executive vice president of R&D and scientific and regulatory affairs. He was the corporate representative on multiple topics that were the subject of three separate motions to delay or avoid this 30(b)(6) deposition. Dkts. 547, 620, 713.

Dr. Figlar also testified [REDACTED]

[REDACTED]. *Id.* at 134:1-140:17. Based on his testimony, PMP/Altria requested that Reynolds produce the underlying documents and supplement its interrogatory response to reflect the new information regarding Reynolds' knowledge of PMP/Altria's asserted patents. Ex. A at 140:18-142:12; Ex. C (6/30/2021 J. Koh Ltr. to J. Michalik). Reynolds finally did so on Friday, July 9. Ex. B (Reynolds' Resp. to Interr. No. 3, 7/9/2021) at 3-4. Reynolds now admits for the first time that [REDACTED]

[REDACTED]. *Id.*

Although PMP/Altria previously indicated in response to Reynolds' motion for summary judgment that it would not pursue willfulness with regard to the '374 and '556 patents, the newly adduced Figlar testimony and Reynolds' newly produced documents and supplemental interrogatory response now raise a genuine fact dispute regarding willfulness of all five asserted patents. Accordingly, PMP/Altria respectfully seek leave to supplement the summary judgment record to include Dr. Figlar's testimony and Reynolds' supplemental interrogatory response (Exs. A and B) for the Court's consideration in connection with Reynolds' willfulness summary judgment motion set to be heard tomorrow morning, July 16.<sup>2</sup>

## II. ARGUMENT

PMP/Altria seek leave to file supplemental discovery materials—excerpts of Dr. Figlar's deposition transcript and Reynolds' July 9 supplemental interrogatory response—all produced after briefing on Reynolds' summary judgment motion had been completed. Exs. A and B.

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<sup>2</sup> PMP/Altria submit that, as officers of the Court, Reynolds should have moved to correct its flawed summary judgment pleadings. In the absence of Reynolds doing so, PMP/Altria files this motion.

These materials are directly relevant and highly probative both to PMP/Altria's counterclaims for willful infringement and Reynolds' motion for summary judgment of no willful infringement. *See WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1341 (Fed. Cir. 2016) (knowledge of patents is a "prerequisite to enhanced damages" and pre-suit knowledge supports a finding of willful infringement). These supplemental materials reflect new admissions by Reynolds and its corporate witness that [REDACTED] [REDACTED]. Ex. B (7/9/21 Reynolds' Supp. Resp. to Interr. No. 3) at 3-4; Ex. A (6/24/21 Figlar Tr.) at 133:11-22.

These supplemental materials establish that Reynolds' motion for summary judgment of no willful infringement is based on incorrect facts. Dkt. 686 at 28-29; Dkt. 748 at 17. The newly-admitted facts refute Reynolds's summary judgment motion of no willfulness and make false Reynolds' argument that PMP/Altria's "evidence of purported pre-suit awareness of the asserted patents ... cannot support their claim for enhanced damages." *See* Dkt. 686 at 28-29. Reynolds now admits [REDACTED] [REDACTED] Ex. B (Reynolds' Resp. to Interr. No. 3, 7/9/2021) at 3-4; Ex. A (6/24/21 Figlar Tr.) at 133:11-22.

In light of this recent discovery made available to PMP/Altria just a few days ago, PMP/Altria contend that summary judgment of no willful infringement is improper as to *all* five of the asserted patents. Dkt. 733. PMP/Altria will be prepared to address the issue at the July 16 summary judgment hearing.

### III. CONCLUSION

WHEREFORE PMP/Altria respectfully request that the Court grant this Motion and consider PMP/Altria's supplemental materials (Exhibits A and B), so that it may rule on Reynolds' Motion for Partial Summary Judgment (Dkt. 686) on a complete record.

Dated: July 15, 2021

Respectfully submitted,

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