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

JOINT PROPOSED DISCOVERY PLAN PURSUANT TO RULE 26(f)

Pursuant to Federal Rule of Civil Procedure 26(f) and this Court's Order dated August 10, 2020 (Dkt. 79), Plaintiffs RAI Strategic Holdings, Inc. ("RAI") and R.J. Reynolds Vapor Company ("RJRV") (collectively, "Reynolds" or "Plaintiffs-Counterclaim Defendants"), and Defendants Altria Client Services LLC ("ACS"), Philip Morris USA, Inc. ("PM USA"), and Philip Morris Products S.A. ("PMP") (collectively, "Defendants," or "Defendants-Counterclaim Plaintiffs"), hereby submit this Joint Proposed Discovery Plan Pursuant to Rule 26(f) in advance of the Rule 16(b) Pretrial Conference on Wednesday, **September 9, 2020 at 11:00 a.m.** The parties conferred on August 19, 2020 and August 31, 2020, where they considered the nature and basis of the claims, defenses, possibility of prompt settlement or resolution of this case, trial before a magistrate judge, disclosures under Rule 26(a)(1), and development of a discovery plan.

I. SCHEDULE

A. **Reynolds's Position:** Plaintiff RJRV has moved to sever and transfer Defendants' infringement counterclaims (Dkt. 65, Counterclaims I-III; Dkt. 66, Counterclaims I-II) (collectively, claims relating to the "Defendants' Patents"). *See* Dkt. 67. Should Defendants' infringement

counterclaims not be severed and not be transferred, Reynolds plans to move for a separate trial on those claims under Rule 42(b), which provides that "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims."

Reynolds requests that the schedule for trial and pre-trial matters on Defendants' infringement counterclaims (*i.e.*, claims relating to the Defendants' Patents) be adjusted to give Reynolds a fair and adequate time to respond to those claims. In particular, due to the difference in time between when Reynolds asserted its patent infringement claims (on **April 9, 2020**), and when Defendants asserted their five patent infringement counterclaims (on **June 29, 2020**, about 12 weeks later), Reynolds requests that the schedule for trial and pre-trial matters on Defendants' infringement counterclaims be adjusted accordingly, with the pre-trial conference and trial set for a time approximately 12 weeks later than the claims relating to the Reynolds Patents (*i.e.*, Reynolds un-stayed claims (Dkt. 52, Counts one and five), and Defendants' declaratory judgment counterclaims (Dkt. 65, Counterclaims IV-VII; Dkt. 66, Counterclaims III-VI)). Defendants' arguments below regarding the timing of various amendments of pleadings are confusing, irrelevant, and contrary to the facts. *First*, the important dates to consider are the dates when each side was first put on notice of the other side's infringement claims. Those dates are **April 9, 2020**, when Reynolds first asserted its patents, and **June 29, 2020**, when Defendants first asserted their counterclaim patents. That is when each side was able to begin its investigation and defense of the other side's claims. *Second,* the later amendments to the pleadings by each party (i.e., Reynolds's amended complaint on July 13, 2020 (Dkt. 52) and Defendants' amended answer and counterclaims on July 27, 2020 (Dkts. 65 and 66)), did not assert any new patents, and are irrelevant to the date when each side was first put on notice of the other side's claims. *Finally*, Defendants' argument below regarding when the pleadings on each sides claims "closed" is similarly irrelevant to the fundamental issue of notice of the patent

infringement claims. But in any event, it is Reynolds's pleadings that "closed" first. Defendants answered Reynolds's claims on July 27, 2020 (Dkts. 65 and 66), "closing" the pleadings on Reynolds's claims. Reynolds answered Defendants' counterclaims on August 3, 2020 (Dkts. 69 and 70), "closing" the pleadings on Defendants' counterclaims.

Furthermore, Reynolds does not believe that it is feasible to complete the additional fact and expert discovery necessary for Defendants' five additional patent infringement claims in the timeframe currently set by the Court (by January 8, 2021), and believes it would be impossible to complete it in the arbitrarily shortened timeframe for fact discovery proposed by Defendants (November 13, 2020). For instance, Reynolds was only able to begin its investigation and search for experts when it learned of the Defendants' infringement claims on June 29, 2020. That each side's claims accuse different potentially reduced-risk smoke-free alternatives to smoking does not alleviate the prejudice to Reynolds of having to litigate on a 12 week shorter schedule than Defendants, nor does it prohibit trying such claims on separate schedules. *See Samsung Elecs. Co. v. Nvidia Corp.*, No. 3:14CV757, 2015 WL 13723075, at *1 (E.D. Va. May 19, 2015) (severing defendant's infringement counterclaims brought 5 months later than plaintiff's claims in spite of defendant's argument that: (i) both sides' infringement claims "relate to the same type of products" and (ii) plaintiff was on notice of defendant's asserted patents for over a year (No. 3:14-cv-00757-REP-DJN, Dkt. 135, 5)). For judicial economy, efficient case management, and to achieve justice in these matters, Reynolds's respectfully requests that this Court ensure that it have the same fair opportunity to defend itself that Defendants seek. *See Samsung Elecs. Co.,* 2015 WL 13723075, at *1 (where Judge R. Payne found that severance of each side's infringement claims would "serve the interest of justice and judicial efficiency; will avoid the prejudice to the Plaintiff that is almost certain to occur by trying unrelated patent issues to a jury; will make case management more effective, thereby

enabling the pretrial and trial process to achieve justice in this complex matter; and finding that severance will work no prejudice to the defendants.").

For the convenience of the Court, Reynolds's proposed deadlines for the claims relating to the Reynolds Patents and the claims relating to the Defendants' Patents (to the extent that they are not severed or transferred) are set forth in **Exhibit A**.

B. **Defendants' Position:** Defendants' proposed schedule follows the Court's order (Dkt. 79) that all discovery, including discovery on Defendants' counterclaims, is completed by January 8, 2021. Accordingly, Defendants propose one schedule for all claims in the case, as set forth in **Exhibit B**.

Further, a single schedule (per the Court's order) will serve judicial economy. All of the claims at issue are patent infringement claims, and all involve patents directed to potentially reduced-risk smoke-free alternatives to smoking. A single schedule with a single deadline for fact discovery, expert discovery, and claim construction briefing will (1) facilitate an orderly and streamlined discovery process on these technologically related claims and (2) conserve the Court's resources because the Court will only need to conduct a single claim construction hearing, a single pretrial conference, and a single trial. Plaintiffs' proposal will force the parties and Court to contend with arbitrarily staggered deadlines, and participate in two claim construction hearings, two pretrial conferences, and two trials. *See Broadcom Corp. v. Sony Corp.*, No. 16-1052 JVS (JCGx), 2016 WL 9108039, at *4 (C.D. Cal. Dec. 20, 2016) (separate case deadlines "hinders judicial economy" and forces court to "spend twice the amount of judicial resources to resolve a dispute between the same parties, who are represented by the same attorneys").

Plaintiffs contend that their patent claims are entitled to proceed first because they purportedly filed their complaint first. But Plaintiffs conceded that their initial complaint was deficient, and voluntarily amended their complaint without opposing Defendants' motion to dismiss. Plaintiffs

therefore filed their operative complaint ***after*** Defendants' complaint. *See* Dkt. 39, 40, 52. Accordingly, if anything, Defendants' claims should proceed first. Indeed, Defendants filed their counterclaims as soon as their response to the complaint was due—before any scheduling order issued, and before discovery began.

Plaintiffs also contend that it is not "feasible" to complete fact and expect discovery on Defendants' counterclaims in the current timeframe provided by the Court's order. But Plaintiffs filed suit in this Court, and should not be permitted to re-write the Court's order that discovery be complete by January 8, 2020 because of its complaint that the Court's timeline is not "feasible." Moreover, Plaintiffs' complaint that they had 12 fewer weeks to investigate and search for experts is irrelevant. First, expert reports are months away. Second, Plaintiffs appear to have had no problem finding experts as they have already stated that they will be filing IPRs in the "near future." Third, Plaintiffs' assertion is suspect given that the parties have been litigating each other in multiple U.S. and foreign jurisdictions. Finally, discovery began on the same date for all claims and is already proceeding in parallel on all claims. Both Plaintiffs and Defendants have served discovery covering all claims, confirming that a single schedule for discovery is feasible and practical.

At bottom, Plaintiffs' proposal is a request that the Court sever ***and delay*** Defendants' counterclaims—even if the Court denies Plaintiffs' pending motion to sever Defendants' counterclaims. Tellingly, the only case Plaintiffs cite (*Samsung*) concerns severance, confirming that Plaintiffs' schedule is nothing more than another request for severance. Regardless, *Samsung* is easily distinguishable. There, the court severed counterclaims filed more than five months after the complaint was filed, alleging infringement of over 200 accused products, after a scheduling order was already entered. And, unlike here, the technologies between the claimant's and counterclaimant's patents were markedly different (semiconductor manufacturing, computer cases and circuit design on the one hand and graphics processing on the other). *Samsung Elecs. Co. v.*

DOCKET ALARM

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.