

**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



**PMI/ALTRIA'S REPLY IN SUPPORT OF MOTION TO EXCLUDE OPINIONS OF
RJR'S EXPERTS BASED ON REJECTED CLAIM CONSTRUCTIONS**

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I. INTRODUCTION

RJR does not dispute that its technical experts intend to apply the *same* claim constructions and advance the *same* arguments that RJR proposed at *Markman* and that the Court expressly rejected. This is dispositive as a matter of law because “[n]o party may contradict the court’s construction to a jury.” *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1321 (Fed. Cir. 2009). RJR devotes 25 pages—in response to PMI/Altria’s nine-page motion—to justifying why its experts should be permitted to revive those rejected claim constructions. That fails for three fundamental reasons.

First, RJR’s argument hinges on the incorrect premise that the Court’s *rejection* of the restrictions RJR sought to import into the claims during *Markman* somehow authorizes its experts to tell the jury at trial that the claims contain those same *rejected* limitations. That pretext for a second bite at the claim construction apple is legal error and would make the parties’ and Court’s efforts at *Markman* meaningless. *Second*, RJR’s assertion that its experts are applying the plain meaning when they rely on the very same purported limitations and disclaimers that the Court rejected at *Markman* is plainly wrong. Importing limitations and applying prosecution history disclaimer is the opposite of applying the plain meaning. *Third*, RJR’s assertion that its experts are merely considering the file history is a red herring. As the cases RJR cites confirm, experts may not rely on the file history to opine on disclaimer to the jury. That is especially true here because RJR’s experts simply repeat the same arguments citing the same portions of the file history that RJR already advanced at *Markman* and the Court rejected. [REDACTED]

[REDACTED]

[REDACTED]

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