UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PHILIP MORRIS PRODUCTS S.A. Plaintiff, v. R.J. REYNOLDS VAPOR COMPANY Defendant.	Case No. 1:20-cv-00393-LO-TCB

MEMORANDUM IN SUPPORT OF PHILIP MORRIS' MOTION *IN LIMINE TO* PRECLUDE REYNOLDS FROM CONTRADICTING THE COURT'S CONSTRUCTION OF "BLIND HOLE"

Philip Morris respectfully moves the Court *in limine* to preclude Reynolds from presenting arguments that contradict Judge O'Grady's prior claim construction and *Daubert* orders. *See* Dkt. 360 at 1; Dkt. 1184 at 23. Specifically, the Court should bar Reynolds from arguing that the claim term "blind hole" recited in the '911 patent cannot contain additional spaces or cavities.

"Once a district court has construed the relevant claim terms … that legal determination governs for purposes of trial," and "[n]o party may contradict the court's construction." *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1321 (Fed. Cir. 2009). For example, in *LifeNet Health v. LifeCell Corp.*, the court granted a motion *in limine* barring the plaintiff from making "arguments contrary to the Court's claim construction." No. 13-cv-486, 2014 WL 5529679, at *6 (E.D. Va. Oct. 31, 2014). Likewise, in *BMC Software, Inc. v. Servicenow, Inc.*, the court excluded any opinions that "contradict or deviate from this Court's Claim Construction Memorandum." No. 14-cv-903, 2016 WL 367251, at *2 (E.D. Tex. Jan. 29, 2016). The same result follows here.

Reynolds intends to argue that the spaces Philip Morris' expert, Dr. Abraham, identifies in the Alto are not "blind holes" because they have openings around the side. Ex. 1 (Trial Tr. 6/10/22 a.m.) at 42:8-10. In particular, Reynolds' expert, Mr. Kodama, testified that statements in the prosecution history about the Rose '975 patent supposedly "defin[e] what blind means," i.e., "a space that has -- that is not open around the side." *Id.* at 20:22-21:11.

Mr. Kodama is conducting claim construction, which is reserved exclusively for the Court. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970-71 (Fed. Cir. 1995). Worse, his improper testimony contradicts Judge O'Grady's express holdings that:

- "The Court finds that the criticism of the '975 patent [Rose] has not led to the disavowal of any 'blind hole' that contains spaces or cavities," and
- "The discussion of the '975 patent during the prosecution history was mere criticism and did not expressly disclaim the subject matter of any blind-hole that also contained additional spaces or cavities." Dkt. 1184 at 23.

Thus, Judge O'Grady expressly ruled that the plain meaning of "blind hole" ***includes*** "any blind-hole that also contained additional spaces or cavities." *Id.*

As this Court already told Reynolds, Judge O'Grady's orders are law of the case. Ex. 2 (6/2/22 Hr'g Tr.) at 10:3-23 ("My understanding also is that basically the claim construction has been done, and he basically found that the words that are at issue or the claims that are at issue use language that is pretty much plain English and doesn't need any kind of special construing by the Court. … I'm not going to undo anything that Judge O'Grady has done. So, whatever he has done, as far as I'm concerned, is the law of the case.").

Moreover, because it contradicts Judge O'Grady's prior holdings, Reynolds' argument about the meaning of "blind hole" is "irrelevant to the question of infringement" and only risks "confusing the jury."[1] *MarcTec, LLC v. Johnson & Johnson*, 664 F.3d 907, 913 (Fed. Cir. 2012) (citation omitted). Indeed, "[t]he risk of confusing the jury is high" where a party presents claim construction arguments "before the jury even when, as here, the district court makes it clear to the jury that the district court's claim constructions control." *Cytologix Corp. v. Ventana Med. Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005). The Court should thus also exclude Reynolds' arguments under Federal Rules of Evidence 401 and 403.

For these reasons, the Court should preclude Reynolds from arguing or suggesting that the term "blind hole" excludes additional spaces or cavities, such as openings on the side of the cavity.

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[1] Reynolds' argument invites legal error because it contradicts Federal Circuit law holding that "the words of a claim are generally given their ordinary and customary meaning" in view of the intrinsic record, absent "lexicography" (which Reynolds has not alleged) or (2) disavowal (which Judge O'Grady twice held does not apply). *Thorner v. Sony Comput. Entm't Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012). Judge O'Grady expressly ruled that the plain meaning of "blind hole" *includes* "any blind-hole that also contained additional spaces or cavities." Dkt. 1184 at 23.

Dated: June 13, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2022, a true and correct copy of the foregoing was served using the Court's CM/ECF system, with electronic notification of such filing to all counsel of record.

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