**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

**ORAL ARGUMENT REQUESTED**

[redacted]

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

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## CASES

## I. INTRODUCTION

RJR's experts should be precluded from relying on rejected claim constructions. During the claim construction process, RJR argued that several claim terms in the Asserted Patents should ***not*** be given their plain and ordinary meaning, and proposed constructions of the terms based on purported limitations and disclaimers from the specifications and file histories. *See generally* Dkt. 223. In its November 24, 2020 claim construction order, the Court rejected RJR's proposals, finding that the disputed terms "are all well known common English words" that should be "given their common meaning." Dkt. 360. RJR's technical experts, however, continue to rely on RJR's rejected constructions under the pretext that RJR's rejected constructions now ***are*** somehow the plain meaning. That is plainly false, contradicts what RJR argued during claim construction, and is an impermissible end run around the Court's claim construction order. As the Federal Circuit has held, "[o]nce a district court has construed the relevant claim terms, and unless altered by the district court, then that legal determination governs for purposes of trial. No 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). The Court should follow this controlling law and preclude RJR's technical experts from misapplying the Court's claim construction order to rely on RJR's rejected constructions at trial.

## II. FACTUAL BACKGROUND

During the claim construction process, RJR argued that the following terms required construction and, because of alleged disclaimers from the prosecution history and in the specification, should not be given their plain meaning:

- "dimensions substantially as a cross-section of a cigarette or a cigar" ('265 Patent)
- "provided in a vicinity of the opening of the housing" ('556 Patent)

- "second capillary material . . . spaced apart from the opening by the first capillary material" ('556 Patent)
- "detect a blowing action" ('374 Patent)
- "capacitor consisting essentially of a flexible conductive membrane and a rigid conductive plate spaced apart by an insulating ring spacer . . . and an air dielectric between the flexible conductive membrane and the rigid conductive plate" ('374 Patent)
- "at least one cavity in a wall of the aerosol-forming chamber" ('911 Patent)
- "recessed in the wall of the aerosol-forming chamber" ('911 Patent)

Dkt. 223 at 12-15, 19-21, 26-31, 33-40.

The Court rejected RJR's proposed constructions, holding that none of the disputed terms from the '265, '556, '374, and '911 Patents were subject to disclaimers or other restrictions on claim scope. Dkt. 360. As shown below, however, RJR continues to rely on its rejected constructions. The Court also declined to construe those terms, affording them their plain and ordinary meaning. *See id.*

**A. '265 Patent**

The '265 Patent discloses a novel vaporizer device with a heater in the shape of a dual coil and/or sinuous line. *See, e.g.*, Dkt. 199-1, '265 Patent at cl. 1. During claim construction, RJR argued that the term "dimensions substantially as a cross-section of a cigarette or a cigar" should not be construed according to its plain meaning and is either indefinite or limited to "an essentially circular shape." Dkt. 223 at 19. The Court rejected RJR's proposed construction. Dkt. 360. Yet Dr. Suhling seeks to testify that "a POSITA would understand 'dimensions substantially the same as a cross-section of a cigarette or cigar' to define an essentially circular shape"—the very limitation that RJR tried to import and the Court rejected. Ex. 1 (Suhling Rbt.) ¶ 82; *see also id.* at ¶ 81 (opining that "'dimensions substantially the same as a cross-section of a cigarette or cigar' are dimensions of a circle.").

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