UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of **CERTAIN VAPORIZER DEVICES, CARTRIDGES USED THEREWITH, AND COMPONENTS THEREOF**	**Inv. No. 337-TA-1368**

ORDER NO. 19: CONSTRUING DISPUTED CLAIM TERMS

(March 19, 2024)

I. BACKGROUND

The Commission instituted this investigation to determine whether certain vaporizer devices, cartridges used therewith, and components thereof infringe certain claims of U.S. Patent No. RE49,114; U.S. Patent No. 10,130,123; U.S. Patent No. 10,709,173; U.S. Patent No. 11,134,722; and U.S. Patent No. 11,606,981. 88 Fed. Reg. 52207 (Aug. 7, 2023). The complainants are Juul Labs, Inc and VMR Products LLC, collectively JLI. The respondents are NJOY, LLC, NJOY Holdings, Inc., Altria Group, Inc., Altria Group Distribution Company, and Altria Client Services LLC, collectively NJOY. The Commission investigative staff is a party to the investigation.

The parties filed a joint claim construction chart identifying agreed and disputed claim terms, Joint Chart (EDIS Doc. ID 808018), and filed claim construction briefs. JLI Br. (EDIS Doc. ID 808809); NJOY Br. (EDIS Doc. ID 808792); Staff Br. (EDIS Doc. ID 808742); JLI Reply (EDIS Doc. ID 809820); NJOY Reply (EDIS Doc. ID 809816); and Staff Reply (EDIS Doc. ID 809764). The private parties submitted expert declarations with their initial claim construction briefs. JLI Br., CMX-002 (Alarcon Decl.) and CMX-0005 (Collins Decl.); and NJOY Br., RMX-

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0004 (Janet Decl.). A claim construction hearing was held. 12/18/2023 Tr. (EDIS Doc. ID 810933). The private parties filed the demonstrative exhibits they used at the claim construction hearing. CDMX-0001 (JLI) (EDIS Doc. ID 811385); and RDMX-0001 (NJOY) (EDIS Doc. ID 811137). After the hearing, the parties filed an amended joint chart of agreed and disputed terms. Amended Joint Chart (EDIS Doc. ID 810957).

JLI subsequently terminated certain claims from the investigation. Motion No. 1368-011 (EDIS Doc. ID 815544); and Order No. 18 (Mar. 6, 2024) (EDIS Doc. ID 815605). This order addresses the asserted claims after that termination.

II. RELEVANT LAW

It is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to exclude. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005). "[T]here is no magic formula or catechism for conducting claim construction." *Id.* at 1324. Instead, weight may be attached to appropriate sources "in light of the statutes and policies that inform patent law." *Id.*

The terms of a claim are generally given their ordinary and customary meaning, which is the meaning that the term would have to one of skill in the art at the time of the invention. *Id.* at 1312–13. The ordinary meaning of a claim term is its meaning to one of skill in the art after reading the entire patent. *Id.* at 1321. "There are only two exceptions to this general rule: 1) when a patentee sets out a definition and acts as his own lexicographer, or 2) when the patentee disavows the full scope of a claim term either in the specification or during prosecution." *Thorner v. Sony Computer Ent. Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012).

The patent specification "is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996).

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In addition to the specification, a court "should also consider the patent's prosecution history, if it is in evidence." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 980 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996). The prosecution history, which is intrinsic evidence, is "the complete record of the proceedings before the PTO and includes the prior art cited during the examination of the patent." *Phillips*, 415 F.3d at 1317. "[T]he prosecution history can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." *Id*. "[B]ecause the prosecution history represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation, it often lacks the clarity of the specification and thus is less useful for claim construction purposes." *Id.*

In some situations, a "court will need to look beyond the patent's intrinsic evidence and to consult extrinsic evidence in order to understand, for example, the background science or the meaning of a term in the relevant art during the relevant time period." *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 331 (2015). Extrinsic evidence is "all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises." *Markman*, 52 F.3d at 980.

While expert testimony can be useful "to ensure that the court's understanding of the technical aspects of the patent is consistent with that of a person of skill in the art," such testimony is "generated at the time of and for the purpose of litigation and thus can suffer from bias that is not present in intrinsic evidence." *Phillips*, 415 F.3d at 1318. "The effect of that bias can be exacerbated if the expert is not one of skill in the relevant art or if the expert's opinion is offered in a form that is not subject to cross-examination." *Id*. Further, while extrinsic evidence may be

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useful, it is less reliable than intrinsic evidence, and its consideration "is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence." *Id.* at 1319. Where the intrinsic record unambiguously describes the scope of the patented invention, reliance on extrinsic evidence is improper. *See Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1308 (Fed. Cir. 1999) (citing *Vitronics*, 90 F.3d at 1583).

III. LEVEL OF ORDINARY SKILL IN THE ART

JLI contends that for all asserted patents, one of ordinary skill in the art:

> would have had a B.S. in mechanical engineering, electrical engineering, or an equivalent degree, and either at least two years of experience designing electro-mechanical consumer products or an advanced degree in mechanical engineering, electrical engineering, or an equivalent field.

JLI Br. at 3 (citing Alarcon Decl. ¶ 26 and Collins Decl. ¶ 25).

NJOY does not address the level of ordinary skill in its briefs. *See generally* NJOY Br.; and NJOY Reply. The Staff contends that one of ordinary skill in the art would have "a bachelor's degree in mechanical engineering, electrical engineering, chemistry, physics, or a related field, and three to four years of industry experience." Staff Br. at 2–3.

The proposals of JLI and the Staff do not appear to materially differ. Nor does any party contend that the level of ordinary skill in the art affects any of the claim construction issues. For purposes of claim construction, I adopt JLI's proposal.

IV. AGREED CONSTRUCTION

The parties agree on the following construction:

Claim Term and Asserted Claims	Agreed Construction
sealably separated '114 patent, claims 43 and 44	separated by a barrier to prevent flooding while also allowing liquid to pass from the liquid reservoir to the atomizing chamber by capillary action of the wick

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Amended Joint Chart at 2.

For purposes of this investigation, the agreed construction is adopted.

V. CONSTRUCTION OF DISPUTED CLAIM TERMS

The parties' disputed constructions are addressed below.

A. The '114 Patent

1. The '114 Patent Specification

The '114 patent is a reissue of U.S. Patent No. 9,596,887, which issued on March 21, 2017, and is titled "Electronic Cigarette with Liquid Reservoir." The reissue application was filed on March 20, 2019, within the two-year window for broadening reissue claims. 35 U.S.C. § 251(d). The specification states that the "present invention relates to electronic cigarettes" and in particular to "an electronic cigarette with an internal liquid reservoir." '114 patent at 1:15–17. The specification also states that the "present invention teaches an electronic cigarette apparatus including an elongated housing that has a mouthpiece with an aerosol outlet, and an atomizer disposed within an atomizing chamber." *Id*. at 1:58–61.

According to the specification, "[t]he atomizer selectively generates an aerosol of the liquid in response to suction pressure at the aerosol outlet. The atomizing chamber has an air inlet, an atomizer outlet coupled to the aerosol outlet, and a first wick aperture. A liquid reservoir is disposed within the elongated housing, which is sealably separated from the atomizing chamber. A wick disposed through the first wick aperture between the liquid reservoir and the atomizing chamber and it is configured to transfer the liquid by capillarity from the liquid reservoir to the atomizer." *Id*. at 1:61–2:3.

The '114 patent describes features of specific embodiments, including one in which "the atomizer has a tubular form defining an open central passage" and a "refinement to this embodiment" in which "the wick passes through the open central passage." *Id*. at 2:19–22. In

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