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-1372**

ORDER NO. 36: CONSTRUING DISPUTED CLAIM TERMS

(April 5, 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. 11,497,864 and U.S. Patent No. 10,334,881. 88 Fed. Reg. 66050 (Sept. 26, 2023). The complainant is NJOY, LLC. The respondent is JUUL Labs, Inc. The Commission Investigative Staff is a party to the investigation.

The parties filed a joint claim construction chart and claim construction briefs, after which a claim construction hearing was held. Joint Chart (EDIS Doc. ID 810346); NJOY Br. (EDIS Doc. ID 810485); JLI Br. (EDIS Doc. ID 810484); Staff Br. (EDIS Doc. ID 811140); NJOY Reply (EDIS Doc. ID 811511); JLI Reply (EDIS Doc. ID 811375); and Tr. (EDIS Doc. ID 811746). The parties filed a revised joint chart after the hearing. Revised Joint Chart (EDIS Doc. ID 812427).

During the claim construction hearing, I requested additional briefing regarding the claim term, "heating element," which the parties filed. NJOY Supp. (EDIS Doc. ID 812388); JLI Supp. (EDIS Doc. ID 812386); Staff Supp. (EDIS Doc. ID 812827); NJOY Supp. Reply (EDIS Doc. ID 813390); and JLI Supp. Reply (EDIS Doc. ID 813369). This order addresses the claim

construction issues raised by the parties.

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. 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).

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.*

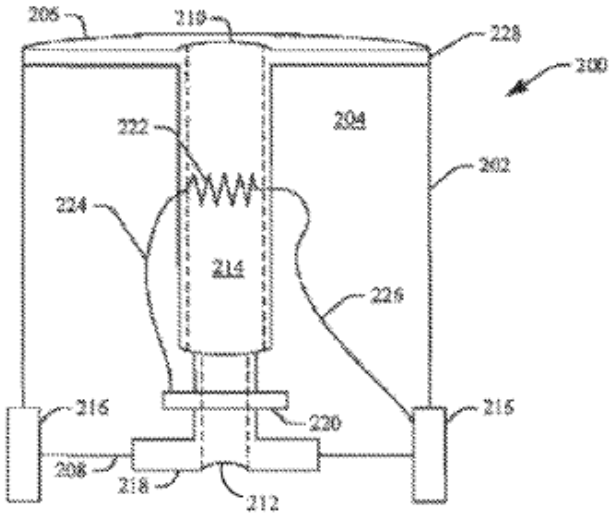
In some situations, a "court will need to look beyond the patent's intrinsic evidence and to

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 1318–19. Further, while extrinsic evidence may be 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*. 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. THE '881 AND '864 PATENTS

The '881 and the '864 patents both claim priority to an application filed on July 27, 2010, and provisional applications filed on July 27, 2009, July 31, 2009, and August 25, 2011. '881 patent, at cover; and '864 patent, at cover. The '881 and the '864 patents share the same specification.

Both patents are titled "Electronic Vaporizer" and relate to "electronic vaporizers, and more particularly . . . to cartridges that comprise heating elements configured to vaporize a solution." '881 patent at 1:39–41. One embodiment includes a cartridge 200 comprising a heating element 222, as shown below:



'881 patent at Fig. 2.

According to the '881 patent, a circuit is closed when a user draws a breath by way of airflow passageway 214, thereby providing current to the heating element 222. *Id.* at 6:51–54. The heating element 222 in turn vaporizes a solution held in absorbent material 204 and the resulting vapor is received by the user. *Id.* at 6:54–56.

IV. LEVEL OF ORDINARY SKILL IN THE ART

JLI contends that 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 with relevant electro-mechanical technologies or an advanced degree in mechanical engineering, electrical engineering, or an equivalent field, and at least one year of similar experience." JLI Br. at 1, n.2. NJOY's expert, Dr. Vallee, applied this level of skill and NJOY agreed with it. CMX-0003 (Vallee Decl.) at ¶ 9; and Tr. at 75:21–76:5. The Staff agrees with JLI's proposal. Tr. at 46:23–47:15. For purposes of claim construction, I adopt JLI's proposed level of skill in the art.

V. AGREED CONSTRUCTIONS

The parties agree on the following constructions:

Claim Term and Asserted Claims	Agreed Construction
an airflow passageway that extends centrally and axially with respect to the housing intermediate of the first aperture on the first end of the housing and the second aperture on the second end of the housing, wherein the airflow passageway is configured to allow an airflow through the cartridge from the first aperture to the second aperture of the housing '881 patent, claim 1 an airflow passageway in the interior of the housing extending centrally and axially with respect to the housing intermediate of the first aperture on the first end of the housing and the second aperture on the second end of the housing, the airflow passageway being configured to allow an airflow through the cartridge from the first aperture to the second aperture of the housing '881 patent, claim 8 an airflow passageway in the interior of the housing, the airflow passageway having a length extending centrally and axially with respect to the housing intermediate of the first aperture on the first end of the housing and the second aperture on the second end of the housing, the airflow passageway being configured to allow an airflow through the cartridge from the first aperture to the second aperture of the housing '881 patent, claim 16	The airflow passageway extends in a straight path through the center of the housing from a first opening on the first end to a second opening on the opposite end of the housing
electrically conductive portion '881 patent, claims 1, 8, 16	a portion that is electrically conductive

Revised Joint Chart at 8–10.

For purposes of this investigation, the agreed constructions are adopted.

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