

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

Before the Honorable Doris Johnson Hines
Administrative Law Judge

In the Matter of

CERTAIN VAPORIZER DEVICES,
CARTRIDGES USED THEREWITH, AND
COMPONENTS THEREOF

Investigation No. 337-TA-1372

RESPONDENT JUUL LABS, INC.'S RESPONSIVE POST-HEARING BRIEF

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. JUUL1	6
A. Housing	8
1. The “Claimed ‘Housing’ Must Include The Mouthpiece”	10
a. Correct Construction	10
b. Dr. Vallee’s Test	12
c. [REDACTED]	12
2. Dr. Vallee’s Purported Housing Fails	14
a. Outside Structure	15
b. Cartridge Internals	16
c. Cartridge End	17
d. Prior Art	17
B. Electrically Coupling Housing Limitations	19
1. Conductive Housing End	20
2. Electrically Conductive Portion	23
a. No Portion Adapted To Both Mechanically and Electrically Couple	25
b. The [REDACTED] Are Not Electrically Conductive	26
C. Central and Axial Airflow Passageway	27
1. Dr. Dahm	28
2. Dr. Vallee	30
D. Central and Axial Airflow Path Portions	32
1. Dr. Vallee’s Conclusions Are Unsupported	33
2. Dr. Vallee Contradicts Basic Fluid Mechanics	34
3. NJOY’s Attorney Argument	37
E. Airflow Passageway Extending From the First Aperture	40
F. Extending Across the Airflow Passageway	42
G. Vaporize for Oral Provision	43
H. Heating Element Obstructing Airflow	43
III. [REDACTED]	44
A. Adjudication	45

B.	Additional Reasons the [REDACTED] Do Not Infringe.....	46
1.	[REDACTED]	46
2.	[REDACTED]	46
3.	[REDACTED]	50
IV.	JUUL2.....	52
A.	Conductive Housing End.....	54
B.	Central and Axial Airflow Passageway	57
1.	JUUL2's [REDACTED]	58
2.	JUUL2's [REDACTED]	59
a.	[REDACTED]	60
b.	NJOY's Excuse For Ignoring [REDACTED] Is Baseless	62
C.	Central and Axial Airflow Path Portions	66
1.	JUUL2 First Airflow Path Portion	67
2.	JUUL2 Second Airflow Path Portion.....	69
D.	Airflow Passageway Extending From the First Aperture	71
E.	Vaporize for Oral Provision.....	72
V.	INDIRECT INFRINGEMENT	72
VI.	DOMESTIC INDUSTRY TECHNICAL PRONG.....	72
A.	RJR Solo Products	73
1.	Central and Axial Airflow Passageway.....	74
2.	Mechanically and Electrically Coupling Housing End.....	77
3.	Extending Transversely Across the Airflow Passageway	79
4.	Solution Holding Medium Surrounding the Airflow Passageway and the Heating Element.....	80
5.	Vaporize for Oral Provision	81
B.	ACE/ACE 2.0 and Alto.....	82
1.	Substantially Central and Axial Airflow Path Portions.....	85
2.	Electrically Coupling Housing.....	87
3.	Vaporize for Oral Provision	89
VII.	DOMESTIC INDUSTRY ECONOMIC PRONG.....	89
A.	'864 Patent: NJOY Failed To Establish an NJOY-Based Existing Domestic Industry	90

1.	NJOY Relied on Voluminous Expenditures Outside Relevant Time Period	90
2.	NJOY Applied Flawed and Unreliable Allocation Methodologies.....	93
3.	NJOY Has Claimed Numerous Expenditures Not Shown To Be Creditable.....	94
4.	NJOY Failed To Establish Significance or Substantiality of Its Already Inflated Expenditures Under Any Statutory Prong	98
B.	'864 Patent: NJOY Failed To Establish An NJOY-Based Domestic Industry in the Process of Being Established	99
1.	NJOY Did Not Prove Necessary Tangible Steps	100
2.	NJOY Did Not Establish a Significant Likelihood That the Domestic Industry Requirement Will Be Satisfied in the Future.....	100
C.	'881 and '864 Patent: NJOY Failed To Establish an RJR-Based Domestic Industry	101
1.	NJOY Utterly Failed To Establish a Domestic Industry for Vuse Alto	102
2.	NJOY Similarly Failed To Establish a Domestic Industry for Vuse Solo	103
3.	NJOY Should Not Be Permitted To Rely on Information Obtained after Fact Discovery and Record Closure, <i>e.g.</i> , RJR's Late Production	103
VIII.	REMEDY.....	104
A.	Bond.....	104
B.	Public Interest	105
IX.	CONCLUSION.....	107

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Certain Bone Cements, Components Thereof and Products Containing the Same,</i> Inv. No. 337-TA-1153, Comm’n Op. (Jan. 25, 2021)	95
<i>Certain Collapsible Sockets for Mobile Elec. Devices and Components Thereof,</i> Inv. No. 337-TA-1056, Comm’n Op. (July 9, 2018).....	92, 97
<i>Certain Composite Aerogel Insulation Materials and Methods for Manufacturing the Same,</i> Inv. No. 337-TA-1003, Comm’n Op. (Feb. 22, 2018)	105
<i>Certain Devices for Connecting Computer via Telephone Lines,</i> Inv. No. 337-TA-360, Comm’n Op. (Nov. 18, 1994).....	105
<i>Certain Fluidized Supporting Apparatus and Components Thereof,</i> Inv. No. 337-TA-182/188, Comm’n Op. (Oct. 5, 1984).....	91
<i>Certain Integrated Circuit Chips and Products Containing the Same,</i> Inv. No. 337-TA-859, Comm’n Op. (Aug. 22, 2014).....	99
<i>Certain Magnetic Data Storage Tapes and Cartridges Containing the Same (II),</i> Inv. No. 337-TA-1076, Comm’n Op. (June 20, 2019).....	106
<i>Certain Magnetic Data Storage Tapes and Cartridges,</i> Inv. No. 337-TA-1012, Comm’n Op. (Apr. 2, 2018)	105
<i>Certain Magnetic Tape Cartridges and Components Thereof,</i> Inv. No. 337-TA-1058, Comm’n Op. (Apr. 9, 2019)	105, 106
<i>Certain Oil-Vaping Cartridges, Components Thereof, and Products Containing the Same,</i> Inv. No. 337-TA-1286, Final ID (Feb. 1, 2023)	96
<i>Certain Power Semiconductors, and Mobile Devices and Computer Containing Same,</i> Inv. No. 337-TA-1308, Final ID (May 18, 2023).....	91
<i>Certain Replacement Automotive Lamps (II),</i> Inv. No. 337-TA-1292, Comm’n Op. (Mar. 22, 2024).....	104
<i>Certain RF Capable Integrated Circuits and Products Containing the Same,</i> Inv. No. 337-TA-982, Order No. 23 (Mar. 9, 2017).....	103

<i>Certain Road Milling Machines,</i> Inv. No. 337-TA-1067, Final ID (Oct. 31, 2018)	92
<i>Certain Soft Projectile Launching Devices,</i> Inv. No. 337-TA-1325, Final ID (Oct. 25, 2023)	92
<i>Certain Stringed Musical Instruments and Components Thereof,</i> Inv. No. 337-TA-586, Comm’n Op. (May 16, 2008)	100
<i>Certain Strontium-Rubidium, Radiosotope Infusion Systems, and Components Thereof Including Generators,</i> Inv. No. 337-TA-1110, Comm’n Op. (Dec. 11, 2019)	97
<i>Certain Video Game Systems and Controllers,</i> Inv. No. 337-TA-743, Comm’n Op. (Apr. 14, 2011)	92
<i>Certain Video Processing Devices and Components Thereof,</i> Inv. No. 337-TA-1343, Order No. 51 (Dec. 8, 2023)	102
<i>Certain Wearable Monitoring Devices,</i> Inv. No. 337-TA-1190, Final ID (Feb. 4, 2021)	92
<i>Printing and Imaging Devices,</i> Inv. No. 337-TA-690, Comm’n Op. (2011).....	100
<i>Fuma Int’l LLC v. Altria Group, Inc.,</i> No. 2:23-cv-00231-EWH-RJK, Dkt. No. 18 (E.D. Va. June 8, 2023)	67, 91
<i>Lelo Inc. v. ITC,</i> 786 F.3d 879 (Fed. Cir. 2015).....	97
<i>Schaper Mfg. Co. v. ITC,</i> 717 F.2d 1368 (Fed. Cir. 1983).....	96
<i>Suprema, Inc. v. ITC,</i> 796 F.3d 1338 (Fed. Cir. 2015) (en banc).....	74
<i>Unwired Planet, LLC v. Apple Inc.,</i> 829 F.3d 1353 (Fed. Cir. 2016).....	73
<i>Zircon Corp. v. ITC,</i> 101 F.4th 817 (Fed. Cir. 2024)	103
Federal Statutes	
19 U.S.C. § 1337(a)(2).....	92

TABLE OF ABBREVIATIONS

Abbreviation	Meaning
'881 Patent	U.S. Patent No. 10,334,881
'864 Patent	U.S. Patent No. 11,497,864
Asserted Patents	'881 and '864 Patents
Asserted Claims	'881 patent, claims 1 (DI only), 19 (infringement only) and 26 (infringement only) and '864 patent, claims 2, 9, 10, 12, 13, 15, 16, 20, 26
JLI or Respondent	JUUL Labs, Inc.
NJOY or Complainant	NJOY, LLC
RJR	R.J. Reynolds Vapor Company
NJOY Products	NJOY's ACE and ACE 2.0 Systems
Solo Products	RJR's Vuse Solo G1 and G2 Systems
Alto Products	RJR's Vuse Alto Systems
CPHB	Complainant NJOY's Pre-Hearing Brief
CIB	Complainant NJOY's Initial Post-Hearing Brief
RIB	Respondent JLI's Initial Post-Hearing Brief
SIB	Staff's Initial Post-Hearing Brief

I. INTRODUCTION

As Staff correctly summarized in its Initial Post-Hearing Brief, for every asserted claim, NJOY failed to prove infringement, technical domestic industry, and economic domestic industry. NJOY thus failed to prove any violation of Section 337. In addition, NJOY has failed to show that any remedy is proper, or that any asserted claim is valid.¹

Infringement: Prior to the hearing, NJOY framed its infringement case as “a battle of the experts.” EDIS Doc. 818851, 1. NJOY decisively lost that battle.

JLI’s expert, Dr. Dahm, testified in detail why the accused JUUL1, [REDACTED], and JUUL2 products do not infringe. As Staff summarized, Dr. Dahm is “one of extraordinary skill in the art,” Tr. 1150:11-13, and he provided well-founded reasons for his conclusions, which were consistent with the evidence, the relevant testimony, the ALJ’s claim constructions, the asserted patents, a POSITA, and the applicable basic fluid mechanics science.

In contrast, Dr. Vallee’s testimony was conclusory and inconsistent with the evidence, including his own admissions and limited analysis. Rather than explaining his conclusions, Dr. Vallee merely repeatedly agreed with leading questions, concluding claim limitations were met without explaining how or why. Nor could he, because his approach was one of expediency, not rigor and science—time and time again, Dr. Vallee altered his approach depending on the result he sought, consistently changing the standard and construction he applied to the accused products, alleged DI products, and prior art to support the desired outcome. When Dr. Vallee wanted a feature to meet a limitation, he would apply one standard. When he did not want a feature to meet a limitation, he would ignore that standard and apply a different, inconsistent one. Dr. Vallee never

¹ As discussed in Sections III of JLI’s Initial Brief (“RIB”), NJOY’s claims are invalid, and NJOY has failed to prove secondary considerations, including commercial success and nexus thereto.

acknowledged or tried to justify his haphazard approach and when confronted with some of his inconsistent positions, he offered no explanation and simply persisted with his blatantly contradictory conclusions.

For example, every asserted JUUL1 infringement theory hinges on excluding the JUUL1 mouthpiece from the claimed “housing” of the cartridge—if the mouthpiece is considered part of that housing, then JUUL1 does not infringe any asserted claim. Tr. (Vallee) 573:1-5. But when testifying that the mouthpiece is not part of the claimed housing, Dr. Vallee merely concluded that the JUUL1 “cartridge is the housing plus the mouthpiece,” without explaining why. *Id.* 313:12-22.

Nor could he reasonably explain this conclusion because it contradicts all the evidence, including his own admissions and analysis. To illustrate, when Dr. Vallee’s infringement theory needed the JUUL1 cartridge’s [REDACTED] to be part of the claimed housing, he concluded they were because [REDACTED] *Id.* 630:17-23. But when confronted with his own admission (and the indisputable fact) that [REDACTED], Dr. Vallee simply refused to consistently apply his own test, insisting that the mouthpiece was not part of the housing, without explanation and contrary to his own stated test. *Id.* 634:19-635:3.

Dr. Vallee likewise ignored his other admissions on “housing” and the JUUL1 mouthpiece. For example, Dr. Vallee conceded that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* 573:7-575:7, 611:4-614:24.

[REDACTED]

RX-1081C.

But:

- although Dr. Vallee admitted that the claimed housing should be construed as the outside structure of the cartridge containing the cartridge internals, he did not apply that constructure to the mouthpiece, [REDACTED], Tr. 611:4-9, 614:21-24;

- although Dr. Vallee admitted that the claimed housing should be construed as the outside structure of the cartridge containing the cartridge internals, his purported housing is not an outside structure [REDACTED], *id.* 612:18-613:16; and
- although Dr. Vallee admitted that the claimed housing cannot include components that are internal to the cartridge, his purported “housing” does just that, [REDACTED], *id.*

Dr. Vallee’s exclusion of the mouthpiece is also inconsistent with his analysis of the prior art. For example, when trying to distinguish the Xia reference, Dr. Vallee testified that Xia’s mouthpiece end (his alleged Xia “first cartridge”) could not be excluded from the claimed “housing” because it and the remaining cartridge components (his alleged Xia “second cartridge”) are “used together” and “because no one would use it that way. Lips would get burned.” Tr. 1523:2-6, 1527:7-18. But that is exactly what Dr. Vallee does for JUUL1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Tr. (Bowen) 808:20-24. Yet in direct contradiction of his Xia analysis, in Dr. Vallee’s infringement analysis, he baselessly tore off and ignored the [REDACTED] mouthpiece so that he could instead wrongly rely on [REDACTED].

Dr. Vallee’s conclusory and contradictory testimony is not limited to the housing issue, but infects and negates almost his entire analysis. For example, although he admitted that the claimed “electrically conductive portion adapted to mechanically and electrically couple” must actually be

electrically conductive, the only mechanically coupling portion he identified is [REDACTED]. *Id.* 530:6-533:8. Dr. Vallee offered no basis for his conclusion that this somehow does not matter, nor did he address his contradictory admissions that, consistent with the ALJ's construction, the claimed portion must be electrically conductive. *Id.*

Yet another example is Dr. Vallee's testimony that [REDACTED], a conclusion for which he (again) identified no basis. Dr. Vallee provided no evidence whatsoever of how air actually flows through the accused products, but instead simply pointed to an annotated straight and central line without giving any reason why it somehow accurately depicted the actual airflow. *Id.* 337:1-13. And although Dr. Dahm explained in detail why basic fluid mechanic concepts (concepts well known even to undergraduates) clearly established that [REDACTED], Dr. Vallee simply contradicted this rudimentary science without explanation. *Id.* He did not address these concepts or explain how basic physics somehow does not apply to the accused products. *Id.* Instead, Dr. Vallee simply ignored these concepts and provided his conclusory opinion to the contrary. *Id.*

These and more conclusory and contradictory opinions from Dr. Vallee are addressed in detail below and confirm that, as Staff has already stated, NJOY has failed to prove any infringement by any accused product.

Technical DI: As established below and confirmed by Staff, the alleged DI products do not satisfy any of the asserted claims for reasons similar to why the accused products do not infringe.

Dr. Vallee's inconsistent and conclusory testimony also carried over into his DI testimony. For example, when attempting to distinguish prior art, Dr. Vallee opined that if a portion of an airflow passageway occupies the entire width of the housing, that airflow passageway cannot be

central and axial as claimed. *Id.* 563:6-14, 672:15-673:2. But Dr. Vallee took the opposite position when trying to identify a central and axial airflow passageway in a DI product, arguing that the exact same type of airflow passageway (one that included a portion occupying the entire width of the housing) did satisfy the central and axial requirement. *Id.* 448:14-449:13. When confronted with these inconsistencies during cross by JLI and Staff, Dr. Vallee was unable to justify them and instead just repeatedly contradicted his prior testimony. *Id.* 563:6-14, 672:15-673:2.

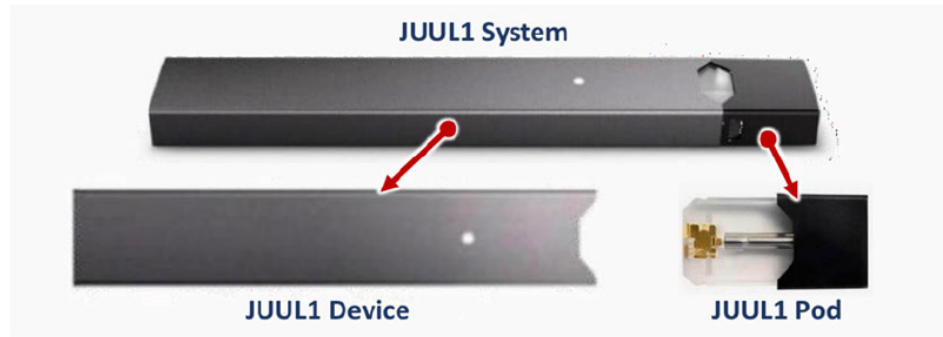
Economic DI: NJOY, by its own election, limited its domestic industry to the eleven days from acquisition to assertion of the Asserted Patents. Even if NJOY’s investments were properly allocated and supported (and they are not)—they are unsupported by any analysis of quantitative and qualitative significance.

As to RJR, NJOY similarly fails to quantify investments to specific products, and most identified investments pre-date the filing of the complaint or RJR’s license. NJOY’s expert also conceded he performed no analysis of any underlying data produced by RJR, and offered no opinion on the significance of RJR’s investments.

Remedy: Finally, neither an LEO, CDO, nor bond are appropriate, as there is no Section 337 violation, including because JLI does not directly or indirectly infringe the Asserted Patents. Should any remedy issue, it should contain a standard certification provision e.g., for products are not subject to the remedial orders, including e.g. for ultimate sales overseas (e.g. for JUUL2 in the U.K.). Furthermore, NJOY’s and Staff’s arguments on public interest do not show that remedies should issue or should not be delayed.

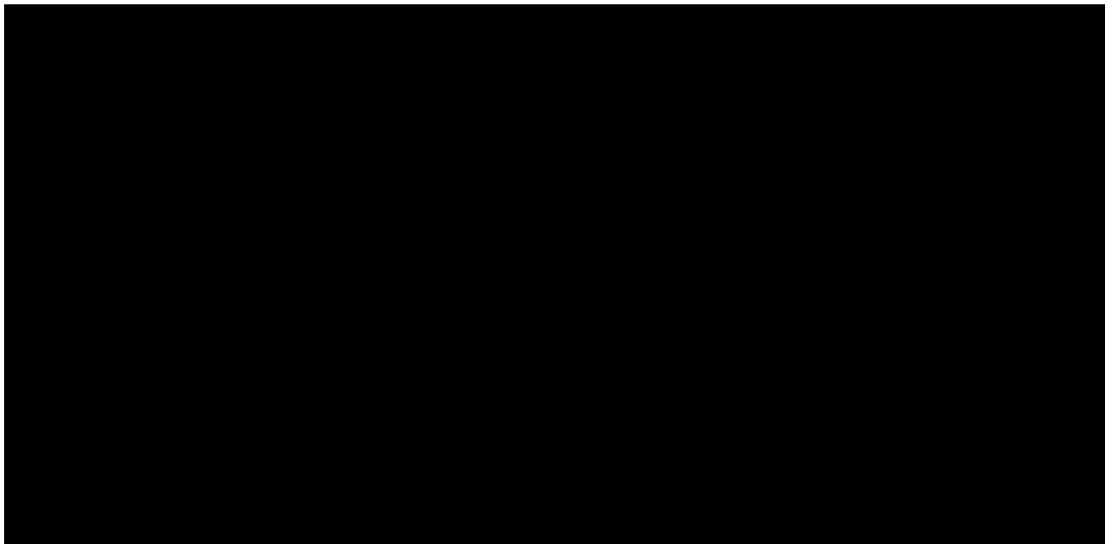
II. JUUL1

The JUUL1 system includes a JUUL1 device that can be connected to a JUUL1 “pod”:



JX-0519C.9-11; JX-0541C.

NJOY asserts the entire JUUL1 pod is the claimed “cartridge” and comprises the following components, including the mouthpiece and absorbent pads:



JX-0541C; Tr. (Vallee) 614:8-24.

NJOY asserts that this JUUL1 cartridge (either alone or in combination with the JUUL1 device) infringes '881 Patent claims 19 and 26 and '864 Patent claims 2, 9, 10, 12, 13, 15, 16, 20, and 26.

But NJOY does not assert that JUUL1 infringes any claims if its mouthpiece is part of the “housing.” CIB, 21-51, 115-124. Therefore, there can be no infringement here because as

established at the Hearing and below, and in Staff’s own words, “the claimed ‘housing must include the ‘mouthpiece.’” SIB, 61.

Additionally, even if the mouthpiece could somehow be ignored, JUUL1’s cartridge still lacks multiple elements from every asserted claim, including:

- conductive housing end;
- electrically conductive portion;
- central and axial airflow passageway;
- substantially central and axial airflow path portions;
- airflow passageway extending from the first aperture;
- heating element extending transversely across the airflow passageway;
- oral provision of vapor; and
- only the heating element obstructing the airflow passageway.

A. Housing

The parties agree the JUUL1 mouthpiece is part of the accused “cartridge” and that the

[REDACTED]. Tr. (Vallee) 565:17-25, (Dahm)

1000:5-1001:1. [REDACTED]

[REDACTED]

[REDACTED] Tr. 615:21-616:3, 617:16-22.

When the mouthpiece is properly considered part of the cartridge and its housing, JUUL1 indisputably does not infringe any asserted claims. [REDACTED]

[REDACTED]

[REDACTED]

JX-0497C.2.

Because all asserted claims require one of the foregoing central and axial limitations, when the mouthpiece is correctly considered part of the housing, there can be no infringement. NJOY and Dr. Vallee do not contend otherwise.

Instead, they simply pretend, contrary to all evidence and admissions, that the JUUL1 cartridge does not include the mouthpiece, is not imported and sold with the mouthpiece, is not used with the mouthpiece, and would somehow “function properly” without the mouthpiece. Tr. 313:20-22, 566:4-19. Put simply, for their infringement theories, they pried off [REDACTED] components from the accused cartridge (its mouthpiece and associated absorbent pads) and call [REDACTED] the claimed “housing.”

NJOY is wrong. First, as Staff determined, the mouthpiece “must” be part of the claimed “housing.” Second, the [REDACTED] cartridge parts relied on by NJOY and Dr. Vallee are not the claimed “housing” even under their own constructions and tests. For either of these reasons, JUUL1 does not infringe any asserted claims.

1. The “Claimed ‘Housing’ Must Include The Mouthpiece”

a. Correct Construction

Dr. Vallee provided no basis or explanation for his conclusion that the JUUL1 “housing” does not include the mouthpiece. Tr. 313:12-22. For example, he did not identify or apply any “housing” construction when offering his conclusion. *Id.*, 313:12-315:10. To the contrary, his conclusion contradicted the constructions he eventually identified during cross.

As established in JLI’s initial Post-Hearing Brief, the proper construction of “housing” is the outside structure of the cartridge containing its internals. RIB, §II.B.1. Dr. Vallee agreed, testifying at the hearing that:

- the proper construction of housing is “outside structure containing the device internals,” Tr. 610:23-611:14;
- the “housing is the housing of the cartridge,” *id.*, 570:9-11;
- the internals that the claimed housing protects are “the internals of the cartridge,” *id.*, 1506:2-19;
- “everything inside the cartridge is the interior of the housing,” *id.*, 1509:17-20;
- “the housing is what protects the interior of the cartridge,” *id.*, 1509:2-5; and
- the “end of the housing” is the “end of the cartridge,” *id.*, 1505:25-1507:3.

Applying this construction to the JUUL1 cartridge, there is no dispute that the mouthpiece is part of the claimed housing because NJOY and Dr. Vallee admit that [REDACTED]

[REDACTED]

[REDACTED].

For example, Dr. Vallee and Dr. Dahm both testified that [REDACTED]

[REDACTED]. RX-1081; Tr. (Vallee) 573:7-574:13, 611:25-612:8,

[REDACTED]

(Dahm) 998:21-25. [REDACTED]

[REDACTED]

[REDACTED]

JX-0541C.

And both Dr. Dahm and Dr. Vallee testified that [REDACTED]

[REDACTED]

[REDACTED]. Tr. (Dahm) 1000:10-1002:5, (Vallee) 614:21-616:17, 619:1-620:2.

[REDACTED]

JX-0541C.

[REDACTED]

[REDACTED]

[REDACTED] Tr. (Vallee) 619:1-620:2623:18-626:10. As the JUUL1 designer and JLI co-founder, Mr. Bowen, testified, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Tr. 809:4-9.

For these reasons alone, Staff correctly concluded that “the claimed ‘housing must include the ‘mouthpiece’” and JUUL1 does not infringe any asserted claim. SIB, 61.

b. Dr. Vallee’s Test

The mouthpiece also meets Dr. Vallee’s alternative “housing” definition—that “anything connected to the housing should be part of the housing.” Tr. 631:17-633:25. Dr. Vallee offered this new definition of “housing” as the only support for his incorrect claim that JUUL1’s [REDACTED] [REDACTED] are part of the cartridge’s “housing.” *Id.* But Dr. Vallee also admitted that [REDACTED] [REDACTED]. *Id.*, 634:5-25. Therefore, under Dr. Vallee’s alternative “housing” definition, the mouthpiece must be part of the claimed housing.

c. [REDACTED]

Another reason the mouthpiece cannot be simply pried off and ignored in the “housing” analysis is that [REDACTED]

[REDACTED]

For example, Dr. Dahm’s unrebutted testimony established that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED] Tr. 1001:22-1002:25. Mr. Bowen confirmed that [REDACTED]
[REDACTED]

[REDACTED] *Id.* 802:17-805:22.

In addition, all the witnesses agreed that that [REDACTED]

[REDACTED]. Tr.
(Bowen) 807:10-808:19, (Dahm) 1000:10-1002:5, (Vallee) 614:21-616:17, 617:15-18. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Dr. Vallee's anecdotal testimony that he was able to use the JUUL1 cartridge after prying off its mouthpiece (Tr. 617:24-618:5) not only contradicts his own testimony that such a configuration "wouldn't function properly" and "would not be suitable for oral provision to an individual," it also defies common sense and the evidence of record. Tr. 617:15-22. Directly contradicting Dr. Vallee's undocumented and undemonstrated "experiment," Mr. Bowen testified that [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Tr. 808:20-24. [REDACTED]
[REDACTED]

[REDACTED] *Id.*, 808:6-

12.

Finally, regardless of Dr. Vallee’s “experiment” (mentioned nowhere in his expert report), he admitted that [REDACTED], and the un rebutted evidence at the hearing established that [REDACTED]. Tr. 676:18-677:3; RX-0428C.7-8.

2. Dr. Vallee’s Purported Housing Fails

Because there is no infringement when the JUUL1 cartridge mouthpiece is correctly considered as part of its “housing,” Dr. Vallee identified a different alleged housing, one that is not the exterior of the housing, but which instead is defined [REDACTED]

[REDACTED]

[REDACTED]

RDX-0006C.39.

NJOY and Dr. Vallee allege [REDACTED] to be part of the claimed “housing,” and rely on it to satisfy the “housing” limitation and other associated limitations, including the second end of the housing and the second aperture on or proximate that second end. But all these limitations are missing because [REDACTED] cannot be part of the claimed housing. As Staff explained, because NJOY’s infringement theories all rely on a purported “housing” that is in fact not the claimed

housing, JUUL1 “does not even have a ‘housing’ (much less a “housing’ having a ... ‘second end’ or other related requirements recited in subsequent claim limitations.)” SIB, 59.

a. Outside Structure

NJOY and Dr. Vallee admit that the claimed housing must be an “outside structure.” RX-1088.5; Tr. (Vallee) 610:10-612:4. But their alleged JUUL1 housing is not an “outside structure.”

As Dr. Vallee admitted, [REDACTED]

[REDACTED]

[REDACTED]

Tr. (Vallee) 574:14-575:7, 613:9-16, 618:17-620:2, (Dahm) 1004:10-22; JX-0541C.

Dr. Vallee also admitted that an “internal structure” of the cartridge is not the claimed “housing.” Tr. 568:22-569:12, 570:6-8, 571:23-572:10, 622:23-624:2. He further admitted that “he has seen nothing to indicate that the housing can be internal to the cartridge.” *Id.*

But contrary to these admissions and their own construction, NJOY and Dr. Vallee wrongly identify a purported housing that comprises an “internal structure” and is “internal to the

[REDACTED]

cartridge.” As Dr. Dahm and Dr. Vallee both testified (and illustrated above), [REDACTED]
[REDACTED]. Tr. (Vallee)
613:9-16, 618:17-620:2, (Dahm) 1004:2-22.

b. Cartridge Internals

Dr. Vallee testified that the claimed “housing” must contain and protect the “device
internals.” Tr. 610:23-611:14, 1506:2-19. As established in JLI’s Initial Post-Hearing Brief and
admitted by Dr. Vallee, the device in question is the “cartridge” and those internals are (in Dr.
Vallee’s words) “the internals of the cartridge.” *Id.*, Tr. 570:9-11, 1509:2-5, 1509:17-20; RIB,
§II.B.1.

But Dr. Vallee’s alleged “housing” does not contain and protect the internals of the
cartridge. Rather, as he admitted, [REDACTED]
[REDACTED]. Tr.
614:15-20, 618:6-620:2. [REDACTED]

[REDACTED]

[REDACTED]

Id.; (Dahm) 1000:10-1001:1; JX-0541C.

c. Cartridge End

Dr. Vallee also admitted that the claimed “end of the housing” is the “end of the cartridge.”

Tr. 626:17-21. But again, his conclusory opinions contradict his admission—that [REDACTED]

[REDACTED]

[REDACTED]

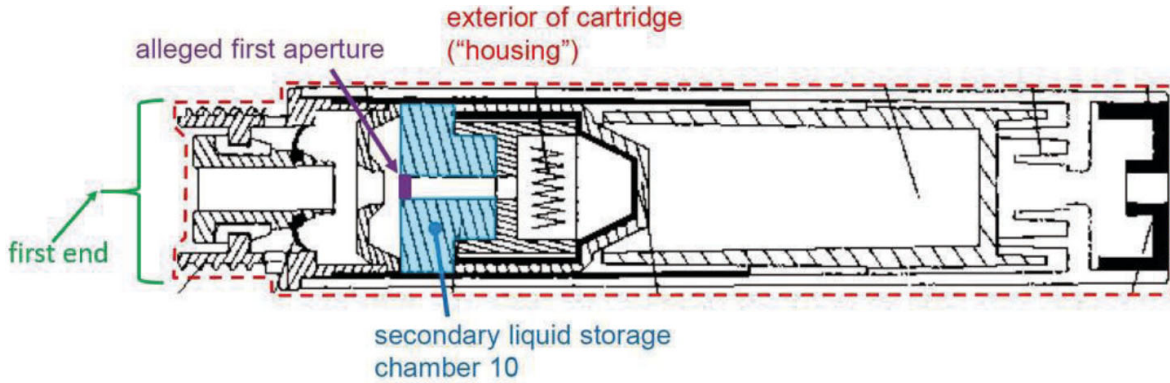
[REDACTED]

Tr. (Vallee) 573:7-574:13, 611:17-612:17, 619:23-620:26, 625:14-626:10; RX-1081; JX-0541C.

d. Prior Art

Dr. Vallee’s identification of [REDACTED] as the second end of the housing is also inconsistent with his prior art analysis.

For example, in his annotated Xia figure, Dr. Vallee identified the exterior of the Xia cartridge as the “housing” and identified the cartridge’s left exterior end using a red dotted line (see below). CPHB, 564; Tr. (Vallee) 621:5-622:6. He testified that a Xia cartridge component (the secondary liquid storage chamber 10 identified in blue by himself) cannot be a part or end of the claimed housing because chamber 10 is an interior component of the cartridge, as confirmed by the fact that there are other cartridge components between chamber 10 and the cartridge’s exterior left end:



JX-0596 (Xia 610) at Fig. 2 (partial, annotated)

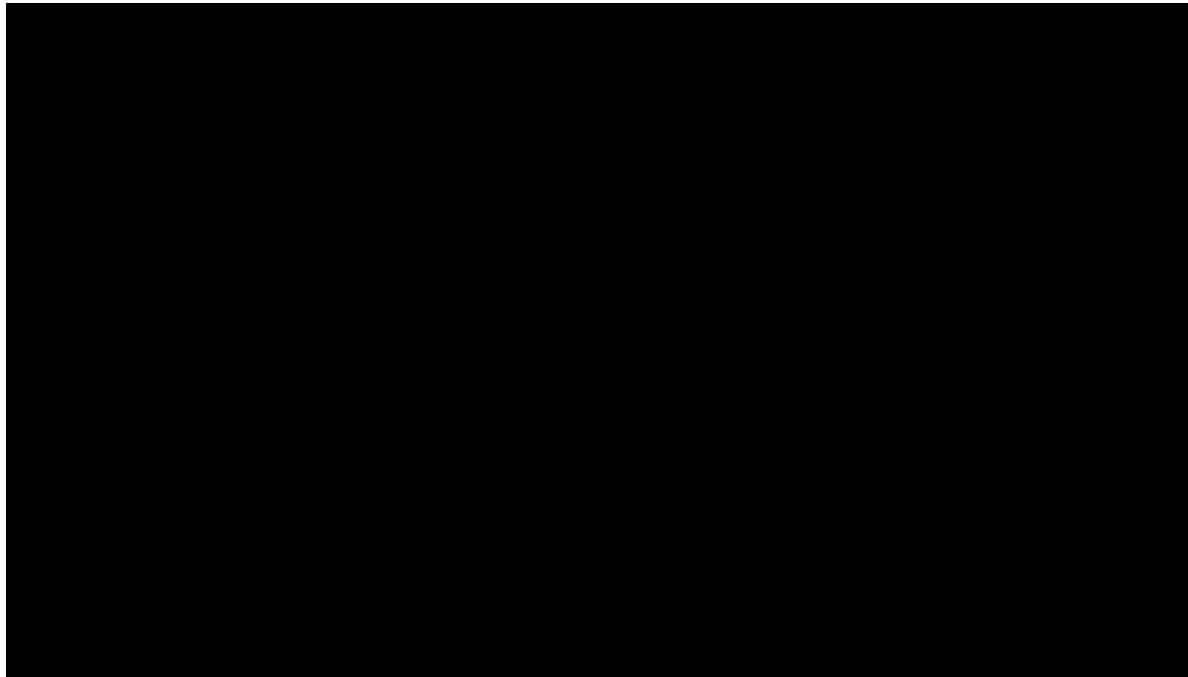
Id.; Tr. 623:18-625:13.

This analysis directly contradicts Dr. Vallee's purported JUUL1 housing. Specifically, he asserted that [REDACTED]

[REDACTED]

[REDACTED] . RX-1081; Tr.

(Vallee) 613:9-16, 618:17-620:2, 625:14-626:10.



RX-1081C. Dr. Vallee ignored and provided no basis for this inconsistency.

Dr. Vallee also testified that Xia's mouthpiece end (his alleged Xia "first cartridge") could not be excluded from the claimed "housing" because it and the remaining cartridge components (his alleged Xia "second cartridge") are "used together" and "because no one would use it that way. Lips would get burned." Tr. 1523:6, 1527:16-17. But that is exactly what Dr. Vallee does for JUUL1, tearing off and ignoring the mouthpiece (which is admittedly part of the cartridge [REDACTED] [REDACTED]) so that he can instead wrongly rely on [REDACTED] [REDACTED].

B. Electrically Coupling Housing Limitations

Every asserted claim requires that part of the claimed "housing" be adapted to electrically couple to the power source. In the asserted '864 claims, the first end of the housing must be so adapted: "the first end of the housing being adapted to electrically couple to the power source." JX-0001, Claims 1, 9, 25. In the '881 claims, it is an electrically conductive portion of the first end of the housing: "the first end of the housing having an electrically conductive portion adapted to mechanically and electrically couple to an electrically conductive portion of the power source." JX-0005, Claim 16.

According to NJOY and Dr. Vallee, the end of JUUL1's cartridge meets these limitations because [REDACTED]:

[REDACTED]

Tr. (Vallee) 628:25-629:1, 630:4-9, 319:22-320:9; CDX-0002C.31.

But contrary to the asserted claims, [REDACTED]

[REDACTED] are not part of the “housing” at all, much less its first end.

Throughout the Investigation, Dr. Vallee has asserted that “anything connected to the exterior of the housing should be part of the housing.” Tr. 631:17-633:25. Thus, according to his theory, [REDACTED] must be part of the housing because [REDACTED]

[REDACTED]. But Dr. Vallee’s infringement theory is wrong for two reasons.

First, [REDACTED]

Second, NJOY and Dr. Vallee cannot have it both ways—if [REDACTED] are part of the claimed housing because [REDACTED], then the mouthpiece must also be part of the housing because [REDACTED]:

Q: In your opinion, anything connected to the exterior of the housing should be part of the housing, right? Yes or no?

A: Yes. I answered that yes.

Q: [REDACTED]

A: [REDACTED]

Tr. (Vallee) 634:19-25.

Either way, NJOY loses—if Dr. Vallee’s rule does not apply, [REDACTED] are not part of the housing and none of the asserted claims are infringed; but if his rule does apply, then the mouthpiece is part of the housing and again, none of the asserted claims are infringed.

1. Conductive Housing End

The asserted ’864 claims require the “first end of the housing” be “adapted to electrically couple to the power source.” JX-0001, Claims [1.3], [9.3], and [25.3]. But contrary to this

requirement, JUUL1's [REDACTED]

[REDACTED] are not part of the housing at all, much less its first end.

When asserting that [REDACTED] are part of the "housing," Dr. Vallee did not apply NJOY's "housing" construction: "outside structure containing the device internals." Tr. 318:22-320:6. Nor could he successfully apply that construction to [REDACTED] he relies on here, because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

CDX-0002C.21; Tr. 630:10-14.

Dr. Vallee accordingly ignored this construction and asserted at his deposition and the Hearing that [REDACTED] are part of the claimed housing solely because [REDACTED] [REDACTED]. Tr. 320:1-9. According to Dr. Vallee's test, "anything connected to the housing is part of the housing, has to be part of the housing." Tr. 631:17-633:25. Thus, according to his theory, [REDACTED] must be part of the housing because [REDACTED] [REDACTED]. Tr. 633:14-25. Dr. Vallee's infringement theory only confirms that JUUL1 does not infringe.

First, [REDACTED]

[REDACTED]. Indeed, Dr. Vallee never gave any basis or evidence supporting his presumption that [REDACTED]

[REDACTED]. And as Dr. Dahm explained, [REDACTED]

[REDACTED]. Tr. 1015:3-1016:14; JX-0541C; RX-1539C.17-26. Instead, as illustrated below but not addressed by Dr. Vallee, [REDACTED]

Id.

[REDACTED]

RX-1539C.22, 25.

Second, if [REDACTED] are part of the claimed housing because [REDACTED]

[REDACTED], then the mouthpiece must also be part of the housing because [REDACTED]

JX-0541C; Tr. (Vallee) 634:1-25.

Either way, JUUL1 cannot infringe these claims. If Dr. Vallee's "anything connected to the housing is part of the housing, has to be part of the housing" rule does not apply, [REDACTED] are not part of the housing and none of the asserted claims are infringed. If his rule does apply, then the mouthpiece is part of the housing and again, none of the claims are infringed.²

2. Electrically Conductive Portion

Each asserted '881 Patent claim requires "the first end of the housing having an electrically conductive portion adapted to mechanically and electrically couple to an electrically conductive

² At the hearing, Dr. Vallee initially tried to contradict his deposition testimony and argued for the first time that [REDACTED] are also part of the housing because [REDACTED]. Tr. 320:10-16, 630:17-632:22. When confronted with his deposition testimony, he eventually admitted that [REDACTED] were, in his opinion, part of the housing merely because [REDACTED]. Tr. 633:13-25. In any event, Dr. Vallee offered no proof of [REDACTED] and again, applying that same 'attached and protecting' test requires that the JUUL1 mouthpiece must also be part of the housing; [REDACTED]

portion of the power source.” JX-0005, Claim [16.5]. But the first end of the JUUL1 cartridge housing has no such electrically conductive portion that can both mechanically and electrically couple.

In JUUL1, Dr. Vallee identified this claimed “electrically conductive portion” as [REDACTED]

[REDACTED]

[REDACTED]

Tr. (Vallee) 527:14-528:15, 531:5-532:2; JX-0541C.

As claimed, it is the “first end of the housing” that must have the claimed “electrically conductive portion.” But as established above, [REDACTED] are not part of the claimed “housing” and, therefore cannot satisfy the requirement of “the first end of the housing having an electrically conductive portion.” Section II.B.1 *supra*.

But even ignoring this fatal flaw in Dr. Vallee’s infringement theory, he still has not identified an “electrically conductive portion adapted to mechanically and electrically couple” because:

(1) although the claims require that the same “electrically conductive portion” be adapted to both mechanically and electrically couple, Dr. Vallee points to [REDACTED]

[REDACTED]; and

(2) even ignoring that limitation (as Dr. Vallee does without explanation or basis), it is undisputed that the claimed portion adapted to mechanically couple must be an “electrically conductive portion,” and Dr. Vallee admitted that [REDACTED]

[REDACTED].

Tr. 530:6-532:2. For either of these additional reasons, NJOY has failed to prove that JUUL1 infringes the asserted ’881 claims.

a. No Portion Adapted To Both Mechanically and Electrically Couple

The claims unequivocally require “an electrically conductive portion” having two characteristics: it must be adapted to both electrically couple and to mechanically couple the cartridge to an electrically conductive portion of the power source. JX-0005, Claim 16; Tr. (Dahm) 1018:25-1019:10, (Vallee) 522:15-21.

JUUL1 includes no such portion, so Dr. Vallee ignores the claim requirements and instead points to [REDACTED]

[REDACTED]

[REDACTED]

Tr. 527:14-528:15, 531:5-532:2; CDX-0002C.155-156. But these are not the same portion adapted to both mechanically and electrically couple as required by the claims; [REDACTED]

[REDACTED]. Tr. 531:5-532:2.

Moreover, although the claim requires the “portion” be adapted to mechanically couple to the power source’s “electrically conductive portion,” [REDACTED]

[REDACTED], and NJOY and Dr. Vallee do not contend otherwise. Tr. (Dahm) 1016:15-1018:24, (Vallee) 376:11-377:4. Instead, according to Dr. Vallee, the “electrically conductive portion of the power source” are [REDACTED]

[REDACTED]. Tr. 376:24-377:1, 527:14-528:21.

b. The [REDACTED] Are Not Electrically Conductive

The claimed portion must not only be adapted to both electrically and mechanically couple, it must also be an “electrically conductive” portion, that is, “a portion that is electrically conductive.” Order No. 36, 5. But although Dr. Vallee identifies [REDACTED] as the “electrically

conductive portion,” he admitted that [REDACTED]

[REDACTED] Tr. 530:6-532:2. Accordingly, [REDACTED]

[REDACTED] cannot be the claimed “electrically conductive portion.”

C. Central and Axial Airflow Passageway

The asserted '881 Patent claims and asserted claims 2 and 26 of the '864 Patent require a claimed central and axial airflow passageway. As construed, this central and axial passageway must extend in “a straight path through the center of the housing from a first opening on the first end to second opening on the opposite end of the housing.” Order No. 36, 5.

Even if the mouthpiece is improperly ignored and [REDACTED] is improperly considered the second end of the “housing,” JUUL1 does not meet this limitation because its airflow passageway [REDACTED], and thus does not extend in the required straight center path. Indeed, when addressing other limitations, Dr. Vallee himself admitted and demonstrated

[REDACTED]

[REDACTED]

CDX-0002C.99; Tr. (Vallee) 350:2-4.

1. Dr. Dahm

Dr. Dahm testified the JUUL1 cartridge does not have a central and axial airflow passageway because [REDACTED]. Tr.

1005:24-1007:21. In particular, he explained [REDACTED]

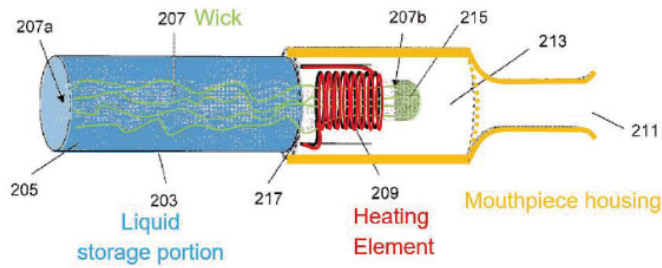
[REDACTED] *Id.*

That [REDACTED] is undisputed. Yet Dr. Vallee failed to address [REDACTED]

[REDACTED] Tr. 324:3-326:5. Based on this argument, Dr. Vallee presumably believes (but never opined) that [REDACTED]

But as Dr. Dahm explained, [REDACTED]

[REDACTED]. Tr. 1006:14-1007:14. First, in the prosecution history, Applicant expressly stated that where a heating coil is wrapped around a wick, that wick is not part of the claimed heating element. RX-0530.126. Specifically, during the prosecution of the '628 Patent (from which the Asserted Patents claim priority), Applicant successfully distinguished a claim drawn toward a “heating element compris[ing] a wicking material ...” from the heating element in the *Thorens* reference (shown below), which disclosed a separate “wick” being surrounded by a heating coil. *Id.*; RX-0527. The Applicant successfully represented that “while *Thorens* teaches a wick in proximity to its heating element, the heating element of *Thorens* does not include any form of wicking material.” *Id.*



RX-0002, Fig. 2, 6:44-50. As Dr. Dahm’s testimony confirmed, a POSITA would therefore understand that the only disclosure in the Asserted Patents relied on by Dr. Vallee (“The heating element 222 can comprise wicking material ...”) does not allow or contemplate the claimed heating element to include a separate, non-heating wick. Tr. (Vallee) 325:3-11, (Dahm) 1006:12-23; RX-0530.126. Rather, as disclosed and prosecuted, when the specification refers to a heating element that “can comprise wicking material,” the specification is referring to a heating element that itself is made from and includes the wicking material, such as a conductive ceramic. RX-0530.126; JX-0001, 7:14-18.

Second, Dr. Dahm also explained that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED] *Id.*; JX-0515C.5.

[REDACTED]

RDX-0006C.45.

Thus, [REDACTED] Dr. Vallee identified no basis for ignoring that JUUL1 lacks the claimed central and axial passageways [REDACTED].

2. Dr. Vallee

The only analysis Dr. Vallee offered supporting his opinion that the JUUL1 cartridge practices the central and axial airflow passageway limitation were conclusory descriptions of misleading figures, in which Dr. Vallee simply drew a straight line to represent a passageway allegedly in “a straight path through the center of the housing.” CDX-0002C.50, 98; Tr. 331:12-332:4, 349:5-18. But in each instance, Dr. Vallee’s straight line simply ignored [REDACTED]. *Id.*

In some instances, Dr. Vallee simply omitted [REDACTED] from his figures altogether so that he could draw an incorrect and straight line and passageway:

[REDACTED]

Id.; Tr. (Dahm) 1005:24-1006:7.

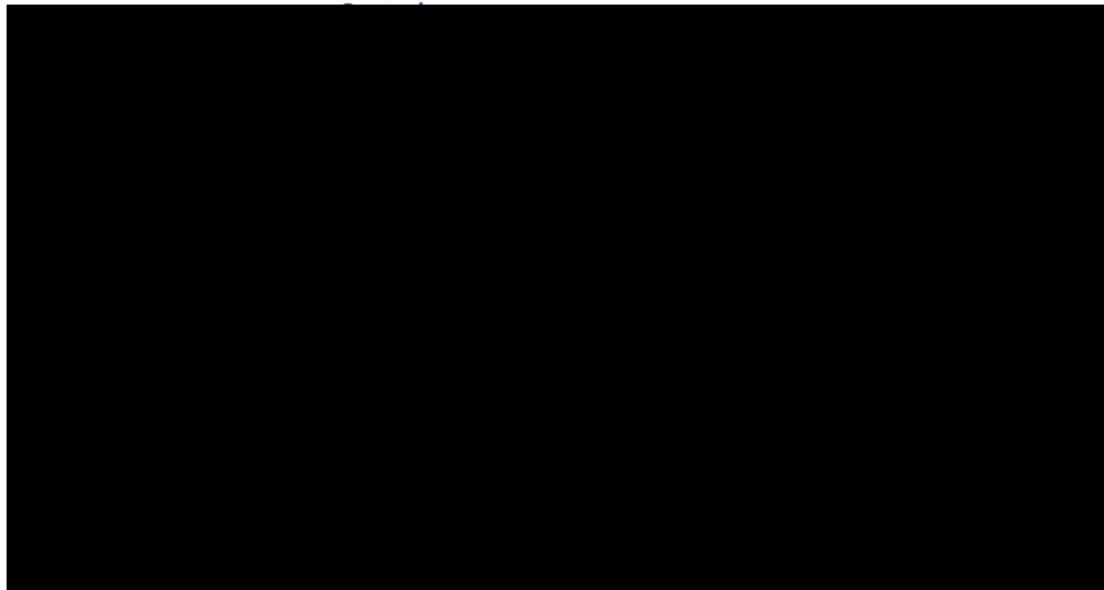
In other instances, Dr. Vallee

[REDACTED]

[REDACTED]

Id.

Each approach contradicts Dr. Vallee's analysis of other limitations, where he admitted and demonstrated that [REDACTED]



CDX-0002C.99; Tr. (Vallee) 349:19-350:4, (Dahm) 1005:24-1006:7.

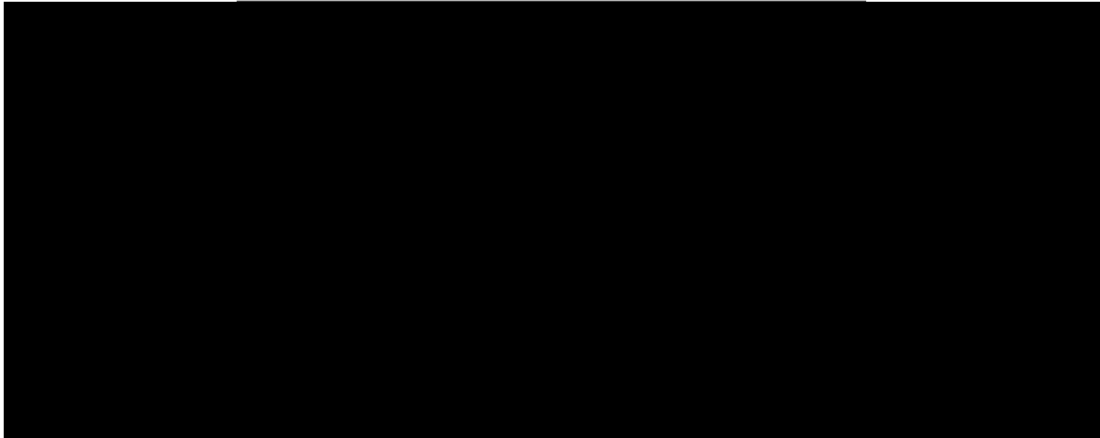
D. Central and Axial Airflow Path Portions

Claim 9 of the '864 Patent (and its asserted dependent claims) requires "a [first/second] portion of the airflow path proximate the [first/second] aperture being defined substantially centrally and axially with respect to the central longitudinal axis of the housing." JX-0001, Claim [9.7].

Dr. Vallee and NJOY do not assert that JUUL1 meets this limitation if its mouthpiece is part of the "housing." Nor could they reasonably do so because [REDACTED]

[REDACTED]

[REDACTED]

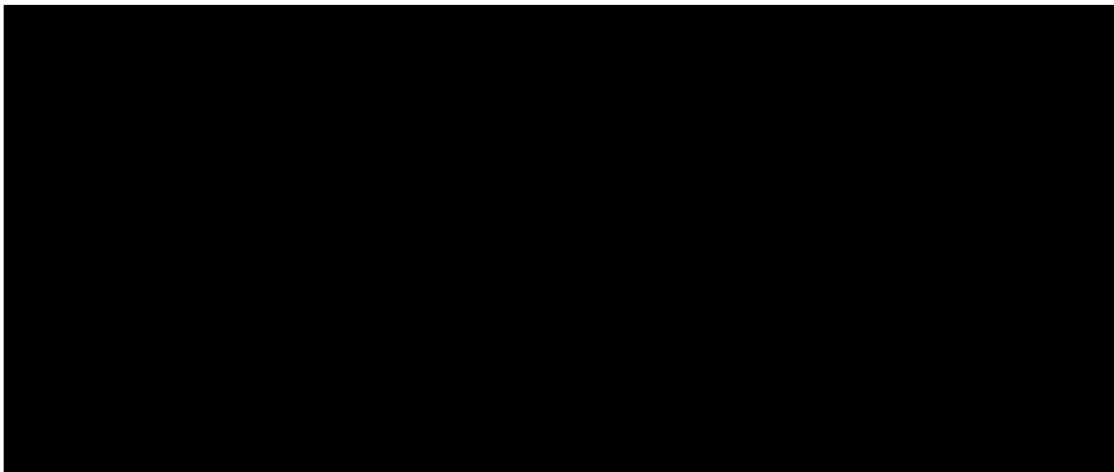


Tr. (Dahm) 999:12-1000:4; JX-0497C.2.

But even ignoring the mouthpiece, NJOY still has not proven that JUUL1 meets this limitation. First, Dr. Vallee’s testimony is wholly conclusory and unsupported. Second, it ignores and contradicts basic (and unrefuted) science.

1. Dr. Vallee’s Conclusions Are Unsupported

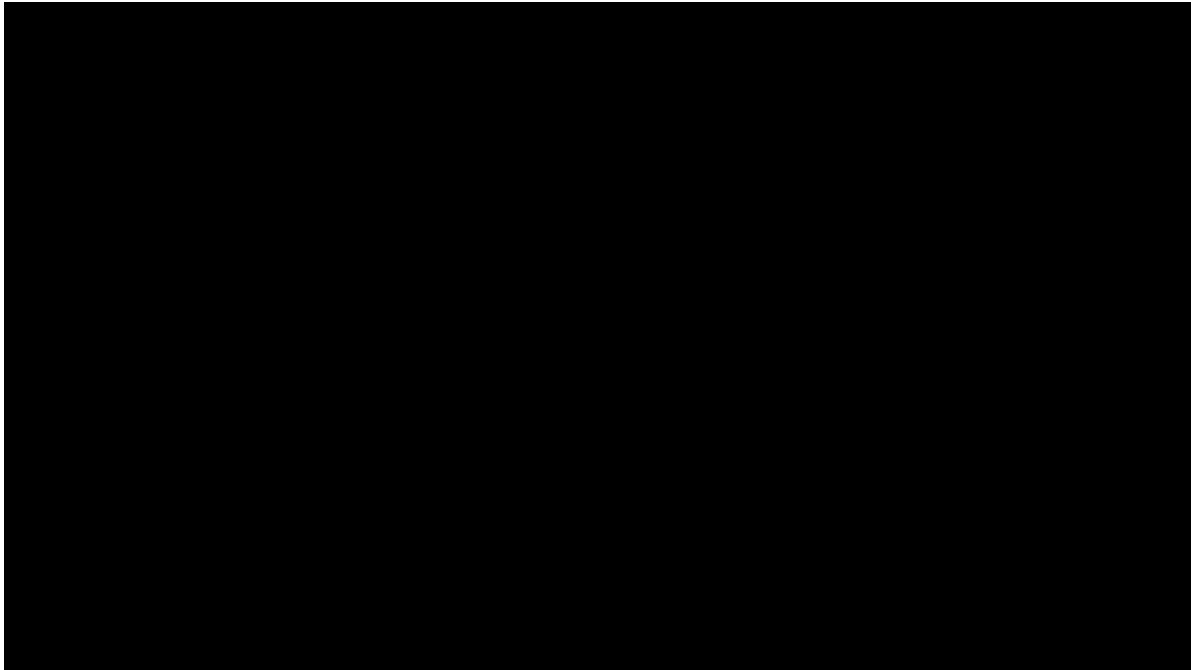
Dr. Vallee testified that the “blue line” in two figures he created of the JUUL1 cartridge (shown below) “indicates the airflow path, which is – is located centrally and axially in the housing, goes from the first aperture to that second aperture.” Tr. 337:1-13



CDX-0002C.068.

That was the sum total of Dr. Vallee’s analysis. He provided no evidence of how air actually flows through the JUUL1 cartridge, and no evidence or explanation supporting his opinion that his “blue line” accurately depicts the airflow path in the cartridge. For this failure alone, NJOY did not prove that JUUL1 has the claimed the airflow path portions.

But even Dr. Vallee’s unsupported “blue line” contradicts his conclusions. As demonstrated below, the blue airflow path drawn by Dr. Vallee



Tr. (Dahm) 1043:21-1044:8; CDX-0002C.68. Thus, even as baselessly identified by Dr. Vallee, the first airflow path portion is not defined substantially centrally and axially. *Id.*

2. Dr. Vallee Contradicts Basic Fluid Mechanics

Dr. Vallee’s conclusions are not only unsupported by the evidence, they are also contrary to it. As Dr. Dahm explained, Dr. Vallee’s opinion about the airflow path “completely ignores” the “well-known flow phenomena in fluid dynamics” that Dr. Dahm established at the beginning of

his testimony—phenomena that “any undergraduate fluid mechanics course, introductory fluid mechanics course at any engineering college would teach.” Tr. 979:9-982:16, 1046:8-16. Such phenomena include:

- Flow separation from structural elements in a device, Tr. 1045:12-1046:7; and
- Flow reversal in naturally-occurring recirculation zones, *id.*, 1044:11-1045:8.

As Dr. Dahm established in detail, an undergraduate would understand the importance of these fluid mechanics phenomena here because even small geometric features in a vaping device will have large effects on how air actually flows through the device, including airflow in a passageway, airflow through apertures, and airflow around internal structures. Tr. 979:15-983:20.

Dr. Vallee never responded to or refuted these critical phenomena. Indeed, Dr. Vallee never even mentioned these introductory fluid mechanics phenomena. Nor did he try explaining why these basic physics principles allegedly did not apply here, or how his conclusory opinions contrary to these basic physics principles were somehow nonetheless correct. Instead, Dr. Vallee simply ignored these fundamental scientific principles.

[REDACTED] For example, Dr. Vallee ignored that basic fluid mechanics means that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Tr. 1044:11-1045:8; RX-0916.5; JX-0541C.

[REDACTED] Dr. Vallee also ignored that, as shown below, [REDACTED]

[REDACTED]

[REDACTED], as Dr. Vallee depicted and assumed without evidence or explanation. Tr.

(Dahm) 1046:8-16. As Dr. Dahm testified, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Tr. 1045:9-1046:7.

JX-0541C; CPX-0005C.

As a result of these basic, well-known airflow phenomena which Dr. Vallee “completely ignored,” [REDACTED]

[REDACTED] Tr. (Dahm) 1046:17:23.

3. NJOY’s Attorney Argument

Because Dr. Vallee did not support his conclusions or even attempt to address the basic fluid mechanics phenomena refuting those conclusions, NJOY resorts to attorney argument concerning [REDACTED]. CIB, 39-40. Dr. Vallee did not address or support any of this attorney argument, which is contrary to the evidence and Dr. Dahm’s unopposed and unrefuted expert testimony.

[REDACTED] NJOY presents attorney argument that [REDACTED]

[REDACTED] *Id.* This attorney argument is baseless and (tellingly) wholly unsupported or asserted by Dr. Vallee, who made no such argument. NJOY’s attorneys try pointing to Dr. Dahm for

support, but he testified that [REDACTED]
[REDACTED]. Tr. 1132:23-1133:2. And contrary to NJOY's attorney argument,
Dr. Dahm explained that [REDACTED]
[REDACTED]. *Id.*; CX-2988C.006. [REDACTED]
[REDACTED]
[REDACTED] *Id.*, 1046:17:23.

[REDACTED] While Dr. Dahm's opinion that the airflow path in Dr. Vallee's "first portion"
of the JUUL1 cartridge is not substantially central or axial was based upon well-known airflow
phenomena, he also testified that [REDACTED]
[REDACTED] provided addition support for his conclusion. *Id.*, 1049:25-1054:12; CX-2839C.

NJOY presents attorney argument that [REDACTED] somehow show the necessary
central and axial airflow, CIB, 40-42, but Dr. Vallee provided no testimony in support of this
argument. Moreover, NJOY's argument is contrary to the testimony of Dr. Dahm, who noted that
he has worked with "mean flow" simulations for the past forty years and explained that they
"average flow over a sufficient long time so that you average out all of the fluctuations, then you're
left with a mean flow. [REDACTED]" Tr. 1049:25-
1050:14. Dr. Dahm also explained that [REDACTED]
[REDACTED]. *Id.*

[REDACTED]

CX-2839C.004.

Dr. Dahm cautioned (and there is no evidence refuting) that [REDACTED]

[REDACTED]

[REDACTED]

Tr.

1051:3-22, 1053:7-10.

Dr. Dahm also explained that [REDACTED] only reinforced his opinion that the airflow path in Dr. Vallee's "first portion" of the JUUL1 cartridge is not substantially axial or central. This is because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] *Id.*

Dr. Vallee addressed none of this un rebutted expert testimony.

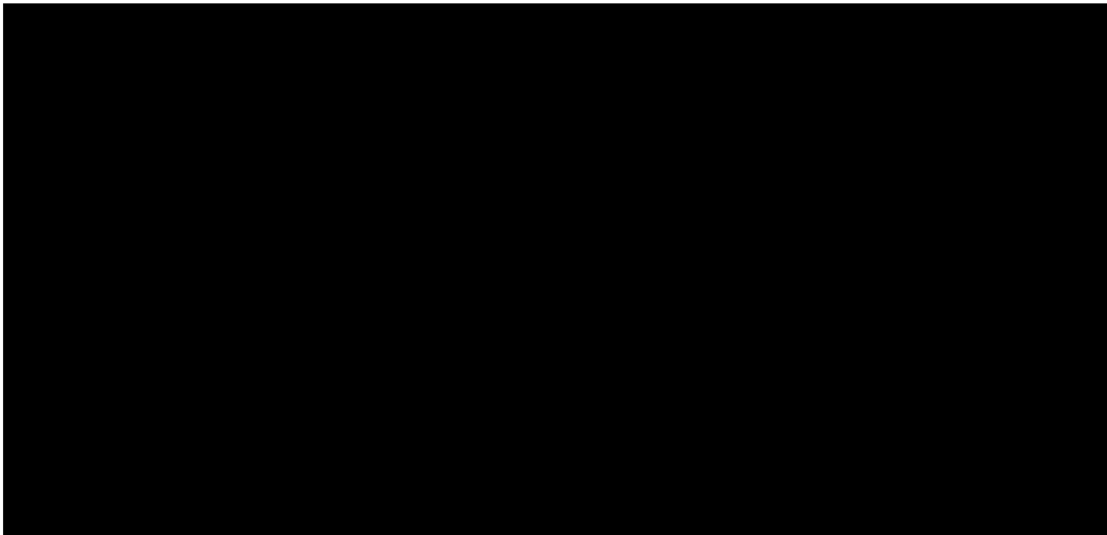
E. Airflow Passageway Extending From the First Aperture

The “airflow passageway” of the asserted ’881 Patent claims and asserted ’864 Patent claims 2 and 26 is not only “central and axial” (as addressed above), it must also “extend[] . . . from the first aperture.” JUUL1 includes no such airflow passageway.

As established in JLI’s Initial Post-Hearing Brief, the intrinsic and extrinsic evidence establishes (and the parties agree) that, correctly construed, the “airflow passageway” must be a physical structure. Tr. (Dahm) 993:2-995:8; CPHB, 119; Tr. (Bonet) 205:22-206:3; RX-1120C, 119:17-25. But as Dr. Dahm established, JUUL1 includes no such airflow passageway extending from the first aperture. Tr. 1008:10-23. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] *Id.*; JX-0541C. Using the below figures, Dr. Dahm testified that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Tr. 1008:10-23.



JX-0541C; JX-0005, Fig. 2.

[REDACTED]

[REDACTED]

[REDACTED]. *Id.* Indeed, NJOY itself admitted

[REDACTED] Tr. (Bonet) 223:3-13 Specifically,

NJOY's Senior Director of Product Design and corporate representative, Jose Bonet, testified that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RX-1120C, 154:17-25 (objections omitted).

F. Extending Across the Airflow Passageway

In the asserted '881 claims, the heating element must be more than transverse to the airflow passageway; it must also extend across that airflow passageway: “a heating element ... extending transversely across the airflow passageway.” JX-0005, Claim [16.8]. JUUL1 does not infringe these claims because its [REDACTED] does not extend across the alleged airflow passageway, and Dr. Vallee did not assert otherwise.

Instead, Dr. Vallee tried to cure this deficiency by alleging that the heating element also includes [REDACTED]. Tr. 324:3-21. But as established above (§II.C.1), [REDACTED] cannot be part of the claimed heating element.

[REDACTED]
[REDACTED] The only evidence is, therefore, Dr. Dahm’s un rebutted testimony that [REDACTED]
[REDACTED]

[REDACTED] Tr. 1020:24-1021:10. Rather, as illustrated below, [REDACTED]
[REDACTED]
[REDACTED]

JX-0541C. [REDACTED]

[REDACTED] *Id.*

G. Vaporize for Oral Provision

Each asserted claim requires the heating element be “configured to vaporize” solution “for oral provision to an individual.” JX-0001, Claims [1.6], [9.6], and [25.6]; JX-0005, Claim [16.10].

JUUL1 does not meet this requirement because [REDACTED]

[REDACTED]. Indeed, both Dr. Dahm and Dr. Vallee agree—and the evidence confirms—that [REDACTED].
[REDACTED]. Tr. (Vallee) 329:25-330:19; Tr. (Dahm) 1022:8-17; JX-0519C.11.

Further, as Dr. Dahm testified (and Dr. Vallee agreed), vapor and [REDACTED] are two completely different concepts – vapor is a gas that consisting of the “mixture of individual solution molecules and air molecules,” while [REDACTED].
[REDACTED]. Tr. (Dahm) 1022:18-1023:6, (Vallee) 615:11-20; RX-0920; RX-0922. The Asserted Patents show the applicants understood the differences between [REDACTED] and “vapor”—applicants described “vapor” in some instances and [REDACTED] in others, but chose to claim only “vapor[.]” as the substance provided to an individual. JX-0001, 5:5-8, 8:5-7, Claims 1, 9, 25; JX-0005, Claim 16.

H. Heating Element Obstructing Airflow

Asserted '864 Patent claim 26 requires that only the heating element obstructs airflow through the airflow passageway. JX-0001, Claim [25.7]. But Dr. Vallee admitted (and Dr. Dahm confirmed) that [REDACTED]
[REDACTED]

[REDACTED]

CDX-0002C.99; JX-0541C; Tr. (Vallee) 349:19-350:4, (Dahm) 1068:7-11.

Dr. Vallee attempted to find this limitation by alleging that the heating element also includes [REDACTED]. But as established above (§II.C.1), [REDACTED] cannot be part of the claimed heating element.

III.

[REDACTED]

[REDACTED]

[REDACTED]

I [REDACTED]

I [REDACTED]

I [REDACTED]

[REDACTED]

[REDACTED]

JX-0412C-JX-0418C; JX-0522C-JX-0538C; RPX-0022C-RPX-0041C; Tr. (White) 885:18-888:10.

Because [REDACTED], it is undisputed that each of the foregoing reasons that JUUL1 does not infringe applies equally to [REDACTED]. As discussed below, however, [REDACTED] provide additional reasons why [REDACTED] do not meet certain limitations.

A. Adjudication

NJOY tries to avoid adjudication of whether [REDACTED] infringe, but Staff correctly concluded that “[c]ontrary to Complainant’s contention, the evidence supports adjudicating the [REDACTED] in this investigation.” SIB, 18-19.

In support of adjudication, Staff detailed that:

- “Complainant does not dispute that the [REDACTED] are products that fall within the scope of the investigation;”

- “Complainant does not dispute that [REDACTED] . . . have been imported into the United States;”
- “Complainant does not dispute [REDACTED], which are apparently limited in scope and sufficiently fixed in design;” and
- “Complainant does not require further discovery regarding [REDACTED], because Complainant’s expert (Dr. Vallee) was able to provide opinions about their alleged infringement.”

Id.

B. Additional Reasons [REDACTED] Do Not Infringe

1. [REDACTED]

[REDACTED] JX-0529C; JX-0533C-JX-0535C; JX-0537C-JX-0538C. This eliminates Dr. Vallee’s excuse for excluding the mouthpiece from the claimed “housing” (that he could pry off the JUUL1 mouthpiece and analyze the remaining cartridge pieces); as Dr. Dahm testified, [REDACTED]

[REDACTED]

[REDACTED] Tr. 1010:3-18.

[REDACTED]

[REDACTED]

2. [REDACTED]

As illustrated below, the JUUL1 cartridge [REDACTED]

[REDACTED]

[REDACTED]

JX-0541C.

[REDACTED]

JX-0532C; JX-0535C-JX-0538C.

As illustrated below,

[REDACTED]

[REDACTED]

[REDACTED]

RDX-0005C.3.

[REDACTED]

[REDACTED]

[REDACTED]

Central and Axial Passageway: Dr. Vallee’s own demonstratives illustrate that [REDACTED]

[REDACTED] does not have a claimed central and axial airflow passageway required by the asserted ’881 Patent claims and asserted claims 2 and 26 of the ’864 Patent, [REDACTED]

[REDACTED]

[REDACTED]

CDX-0002C.193.

Dr. Vallee nonetheless testified that his JUUL1 analysis somehow still applies, but he offered no explanation or evidence supporting this conclusion. Tr. 398:11-399:21. He could not because, as Dr. Dahm testified, [REDACTED]

[REDACTED] Tr. (Dahm) 1010:19-1011:6; JX-0532C; JX-0535C-JX-0538C. Thus, [REDACTED] cannot infringe the central and axial airflow passageway limitation.

Second Central and Axial Airflow Path Portion: ’864 Patent claim 9 (and its asserted dependent claims) requires “a second portion of the airflow path ... being defined substantially centrally and axially” JX-0001, Claim [9.7]. [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] JX-0532C; JX-0535C-JX-0538C.
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

CDX-0002C.68, 193.

When asked whether [REDACTED] have a second portion that infringes the substantially central and axial airflow path portion, Dr. Vallee simply responded, “It does [sic],” without any analysis or explanation. Tr. 399:18-22.

In contrast, Dr. Dahm actually addressed the issue, explaining that [REDACTED]

[REDACTED] cannot meet the substantially central and axial airflow path portions limitation because
[REDACTED]
[REDACTED]

[REDACTED] *Id.* 1010:19-
1011:6.

No Obstructions Other Than the Heating Element: Asserted '864 Patent claim 26 requires that only the heating element obstruct airflow through the airflow passageway. JX-0001, Claim [25.7]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

CDX-0002C.193; Tr. (Dahm) 1069:3-12; Tr. (White): 886:18-887:3; JX-0532C; JX-0535C-JX-0538C.

3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] JX-0530C-JX-0531C; JX-0533C-JX-0534C;
JX-0536C- JX-0538C.

JX-0522C-JX-0523C.

Neither NJOY nor Dr. Vallee identified or accused [REDACTED] [REDACTED] as the “first aperture” required by each asserted claim. CIB §VI.A.3.b); Tr. 395:13-22. Nor could they because, for example, ’881 Patent claim 19 requires that “the first aperture on the first end is located centrally and axially with respect to the housing.” JX-0005, Claim 19.

Moreover, this lack of any central and axial “first aperture” provide additional reasons [REDACTED] [REDACTED] do not meet the following limitations.

Airflow Passageway Extending From First Aperture: The “airflow passageway” of the asserted ’881 Patent claims and asserted ’864 Patent claims 2 and 26 is not only “central and axial” (as addressed above), it must also “extend[] . . . from the first aperture.” Order No. 36, 5; JX-0001, Claims 2, 26; JX-0005, Claim 16. Dr. Vallee argued that [REDACTED] [REDACTED] had the claimed passageways because [REDACTED] [REDACTED] Tr. 394:20-395:22.

[REDACTED]

CDX-0002C.191.

But as Dr. Dahm explained, [REDACTED]

[REDACTED] And where lacking that first aperture, there can't be a central and axial airflow passageway extending from the first aperture." Tr. 1011:7-1012-6.

First Central and Axial Airflow Path Portion: '864 Patent claim 9 (and its asserted dependent claims) requires "a first portion of the airflow path ... being defined substantially centrally and axially" JX-0001, Claim [9.7].

Dr. Dahm testified that [REDACTED] cannot possibly have a first portion with a substantially central or axial airflow path because [REDACTED]

[REDACTED] So, lacking that first aperture that Dr. Vallee identifies, there can be no central and axial airflow path portion in his first identified portion." Tr. 1055:15-23.

IV. JUUL2

The JUUL2 system includes a JUUL2 device that may be connected to a JUUL2 "pod":

[REDACTED]

[REDACTED]

RX-0930C.11; JX-0188C.

NJOY and Dr. Vallee assert the entire JUUL2 pod is the claimed “cartridge” and comprises

[REDACTED]:

[REDACTED]

JX-0188C; Tr. (Vallee) 352:8-17.

NJOY does not assert the '881 Patent against JUUL2, but alleges that the JUUL2 cartridge infringes '864 Patent claims 2, 9, 10, 12, 13, 15, and 20.

But the JUUL2 cartridge lacks multiple required elements from every asserted claim, including:

- conductive housing end;
- central and axial airflow passageway;
- substantially central and axial airflow path portions;
- airflow passageway extending from the first aperture; and
- oral provision of vapor.

A. Conductive Housing End

The asserted '864 claims require the “first end of the housing” be “adapted to electrically couple to the power source.” JX-0001, Claims [1.3]. [9.3], [25.3]. The JUUL2 cartridge does not meet this limitation because [REDACTED] are not part of the first end of the housing. Indeed, they are not even part of “first end of housing” identified by Dr. Vallee.

[REDACTED]

[REDACTED]

[REDACTED]

JX-0188C; Tr. (Dahm) 988:20-989:5.

[REDACTED]

CDX-0002C.108.

According to Dr. Vallee, [REDACTED]

[REDACTED] Tr. 540:4-7.

[REDACTED]

JX-0188C.

But [REDACTED] relied on by Dr. Vallee and NJOY are not part of this housing or its first end. As Dr. Vallee admitted, [REDACTED]

[REDACTED] Tr. 543:1-5.

[REDACTED]

CDX-0002C.112.

Instead of being part of the housing, Dr. Vallee admitted that [REDACTED]

[REDACTED] Tr. 545:15-19.

[REDACTED]

JX-0179C.1.

Dr. Vallee's own admissions are enough to establish that [REDACTED] are not part of the JUUL2 housing, much less its first end. But Dr. Dahm confirmed this limitation is not met, explaining that [REDACTED] are not part of the cartridge "housing" because [REDACTED]

[REDACTED] Tr. 1064:5-9;

JX-0188C. The [REDACTED] are not an “outside structure containing the device internals,” and Dr. Vallee never argued otherwise. *Id.*

B. Central and Axial Airflow Passageway

Asserted ’864 Patent claims 2 and 26 require a central and axial airflow passageway, which must extend in “a straight path through the center of the housing from a first opening on the first end to second opening on the opposite end of the housing.” Order 36, 5.

As Dr. Dahm established, JUUL2 does not meet this limitation because (like JUUL1), [REDACTED]

[REDACTED] Tr. 1038:16-5.

Dr. Dahm identified a second reason the central and axial limitation is not met: [REDACTED]

[REDACTED] As Dr. Dahm established in detail, [REDACTED]

[REDACTED] Tr. 1039:15-1042:11.

In contrast to Dr. Dahm, Dr. Vallee (again) offered almost no analysis in support of his opinion that JUUL2 meets this “central and axial” requirement. Instead, he created and relied on the following figures, each of which omits and ignores [REDACTED]. Tr. 360:13-361:6. Based on the misleading figures, Dr. Vallee claimed that “the airflow passageway[] is located centrally and axially, because it is along the purple central longitudinal axis line of the housing and out of the second aperture.” *Id.* But as explained below, if Dr. Vallee’s images were complete, [REDACTED].

JX-0188C.

CDX-0002C.118.

1. JUUL2's [REDACTED]

The analysis (and Dr. Vallee's omissions and baseless conclusions) for the JUUL2 [REDACTED] is substantively the same as that for the JUUL1 [REDACTED] discussed above, §II.C.1.

As with the JUUL1 [REDACTED], Dr. Dahm established [REDACTED]

[REDACTED] Tr. 1038:16-

5. He then explained [REDACTED]

[REDACTED] Tr. (Dahm) 1039:1-3, 1038:18-1039:1.

[REDACTED]

JX-0188C.

Like JUUL1, Dr. Vallee ignored [REDACTED]

[REDACTED]

[REDACTED] Tr. 360:13-361:6. But Dr. Dahm explained that for the same reason that the JUUL1 [REDACTED] cannot be part of the claimed JUUL1 heating element, the JUUL2 [REDACTED] likewise cannot be part of the claimed JUUL2 heating element; not only does the prosecution history explicitly disclaim [REDACTED] a wick from being part of the claimed heating element, but (unlike the claimed heating element) [REDACTED]

[REDACTED]. Tr. 1039:6-14.

2. JUUL2's [REDACTED]

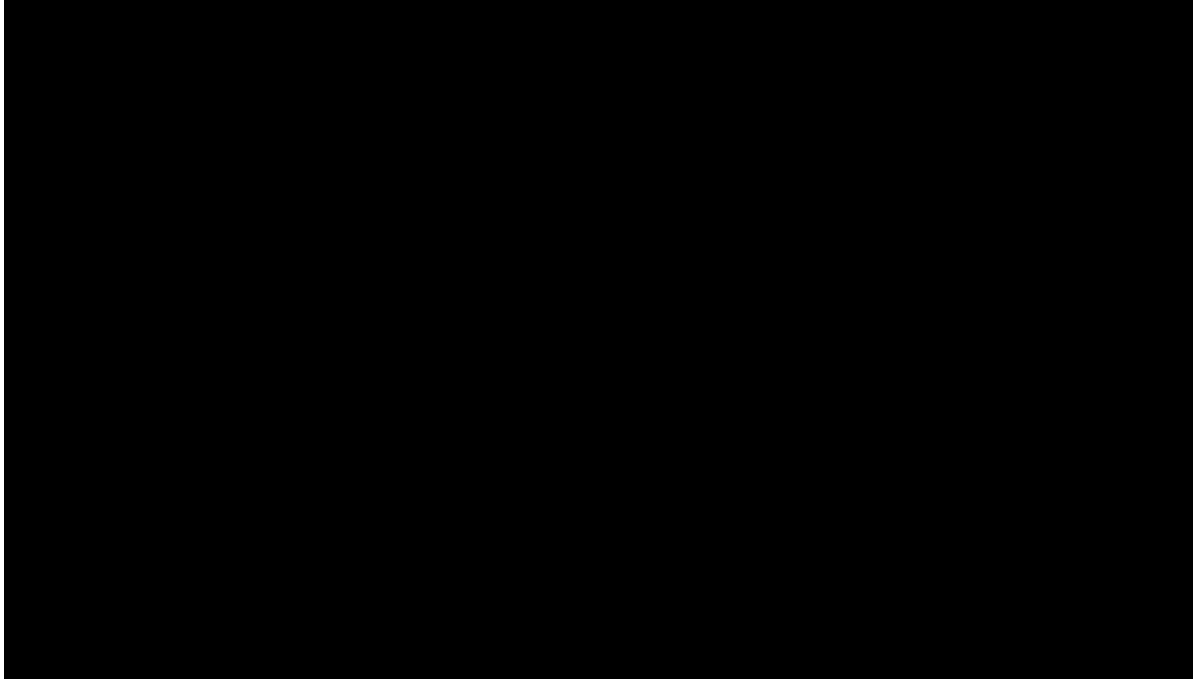
[REDACTED]

[REDACTED] NJOY's attempts to ignore [REDACTED] are both factually and legally baseless.

a. [REDACTED]

As the below figure shows, [REDACTED]

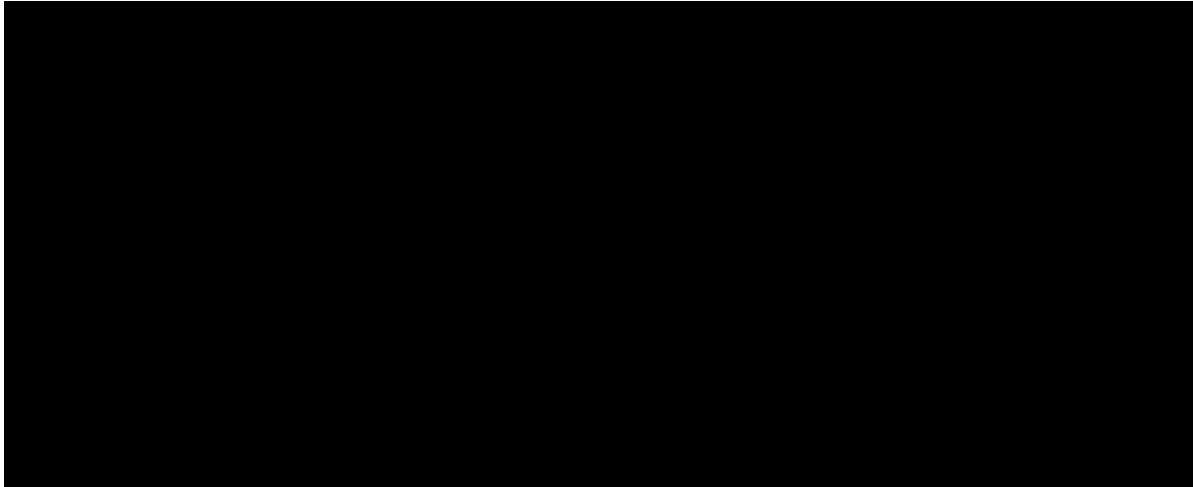
[REDACTED]



JX-0188C.

As Dr. Dahm established, [REDACTED]

[REDACTED]



JX-0188C; Tr. 1039:15-1042:11.

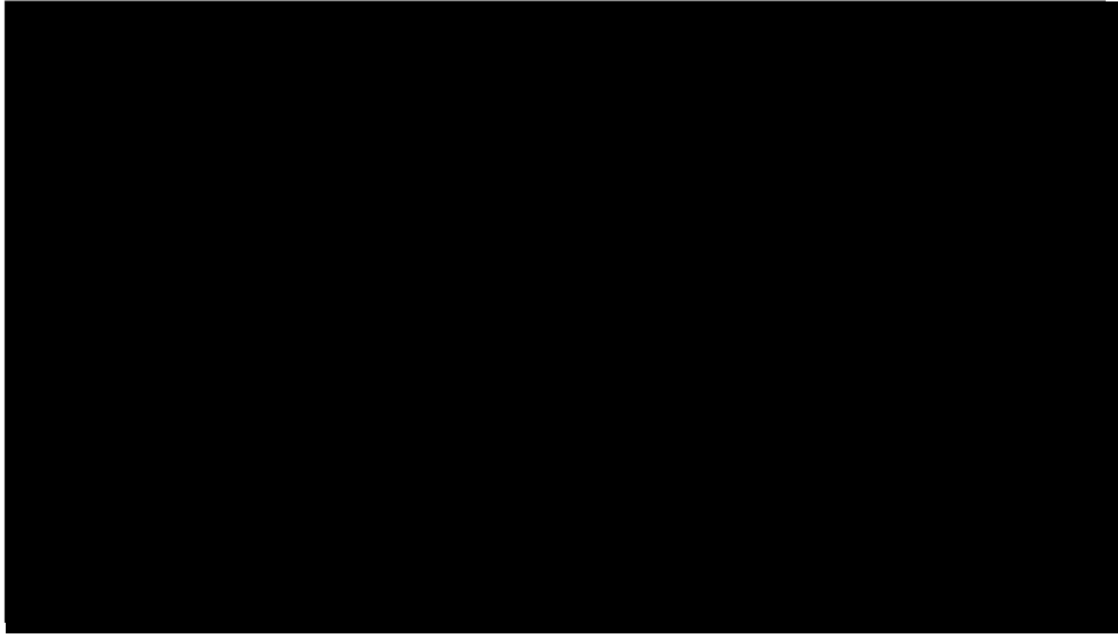
Id.

Id.; JX-0518C.

It is undisputed that

Id. As Dr. Dahm explained,

Tr. 1041:12-1042:11. Dr. Dahm also described



JX-0518C.36; Tr. (Dahm) 1039:19-1040:12.

Thus, Dr. Dahm and the evidence of record established that [REDACTED]

[REDACTED] and thus does not satisfy the central and axial passageway limitation. *id.*;

Tr. 1039:15-1042:11.

b. NJOY's Excuse For Ignoring [REDACTED] Is Baseless

NJOY argues that [REDACTED]

[REDACTED] should be ignored because [REDACTED]

CIB, 59-60. This excuse has no basis in fact or law.

No Basis In Fact: NJOY and Dr. Vallee provided no evidence that [REDACTED]

[REDACTED]. Dr. Vallee provided only conclusory testimony on this issue—he offered no evidence or testing and, for example, did not offer any

PUBLIC VERSION

measurements [REDACTED] in support of his claim that

[REDACTED] Tr. (Dahm) 1041:5-11.

And Dr. Vallee's conclusory opinion did not even [REDACTED].

[REDACTED]
[REDACTED] Tr. 358:4-7. But as
established, [REDACTED] is not part of the JUUL2 heating element, which is limited to the JUUL2

[REDACTED] Tr. (Dahm) 1039:6-14. Dr. Vallee provided no testimony or evidence [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

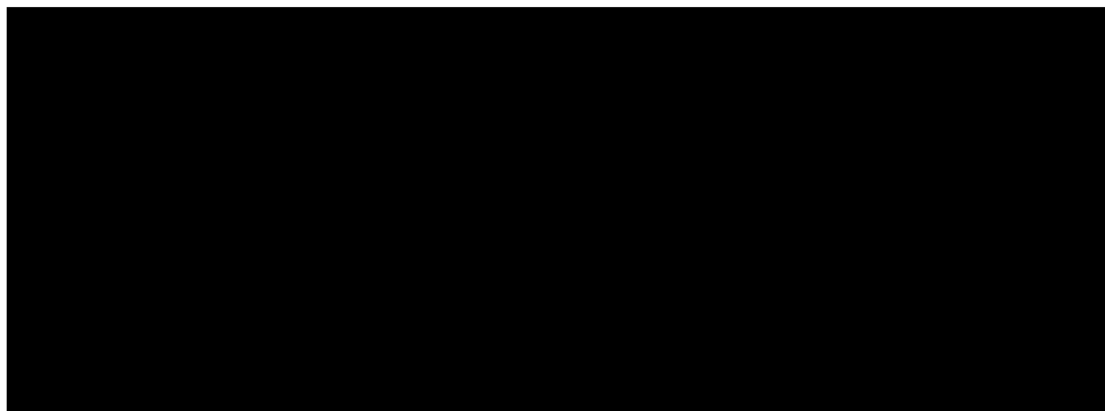
JX-0188C; Tr. (Dahm), 1040:16-1042:11.

Indeed, in its Initial Post-Hearing Brief, NJOY's only argument for its assertion that [REDACTED]
[REDACTED]



JX-0518C.0036

CIB, 59-60. But this figure shows no such thing, and NJOY provided no explanation or annotations to support this alleged “clear” showing. It could not because if anything, this figure shows that [REDACTED]



JX-0518C.0036

JX-0518C.36.

No Basis In Law: NJOY also did not establish that [REDACTED]
[REDACTED] legally matters. NJOY points to nothing in the intrinsic evidence stating or suggesting that [REDACTED] meet the central and axial

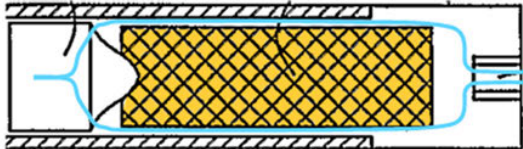
requirement [REDACTED].

They cannot, because it is the exact opposite.

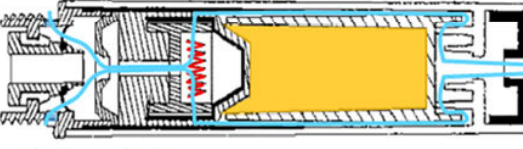
Dr. Vallee argued that that the Xia and NPRO prior art does not disclose a central axial passageway because they include a component in the middle of the housing forcing airflow around the component and away from the central axis. Tr. 1426:22-1427:2. In support of this argument, Dr. Vallee cited and relied on the '864 prosecution history, in which the applicant successfully overcame the Han art by arguing its cartridge lacked a central passageway because a perforated component forced airflow away from the center. Tr. 1428:12-17. Dr. Vallee provided the following demonstrative to support his testimony:

Overcame Han Rejection – Substantially Similar Airflow Passageway To Xia/NPRO

Prior Art Basis For USPTO Rejection



Han 311 at Fig. 1
(JX-0544)



Xia 610 at Fig. 2
(JX-0596)

However, the structure of Han cannot meet the limitations of dependent claims 49, 63, and 75 for two reasons. First, Han's shell (b) does not include a central airflow passageway and instead places the perforated component for liquid storage (9) in the middle of shell (b), thereby forcing the airflow around the peripheral surface of perforated component for liquid storage (9) as described in paragraph [0070] of Han and shown in FIG. 3.

864 Patent File History, Applicant's Response to Rejection
(JX-0008.9008 - .9009)

Applicant's arguments with respect to Hon[sic] as previously applied under 35 U.S.C. 102, have been fully considered and are persuasive.

864 Patent File History, Examiner's Response
(JX-0008.9016)

CDX-0004C.033

CDX-0004C.33.

Conspicuously absent from this prosecution history response and the intrinsic evidence in general is anything discussing an obstruction's size, relative to the heating element or otherwise, as being relevant to whether the disclosed device has a central and axial airflow passageway. JX-

0008.9008-9009. Applicant obtained allowance over Han based on arguing that there is no central passageway when the air is diverted away from the center of the cartridge by a component, not based on how big or small the component is, either in general or relative to the heating element. *Id.*

The *Fuma* decision relied on by NJOY and Dr. Vallee is not intrinsic evidence or controlling precedent. It also does not hold that non-central and non-axial passageways still meet the central and axial requirement if they are formed by something that diverts airflow less than the heating element, nor does it cite to or identify any intrinsic evidence clearly and unambiguously supporting such a rewriting of “central and axial.” CX-2277.14-18.

C. Central and Axial Airflow Path Portions

’864 Patent claim 9 (and its asserted dependent claims) requires “a [first/second] portion of the airflow path ... being defined substantially centrally and axially with respect to the central longitudinal axis of the housing.” JX-0001, Claim [9.7].

As Dr. Dahm’s testimony established, the evidence and basic fluid mechanics show that the alleged first and second airflow path portions are not substantially central and axial with respect to the housing’s central axis. Tr. 1057:3-1060:12.

But as with JUUL1, Dr. Vallee simply ignores this evidence and basic science. Instead, he again added his own light blue lines to figures below and concluded his lines show the “airflow” in the JUUL2 cartridge. Tr. 365:24-366:25.

CDX-0002C.130; JX-0188C. But Dr. Vallee again failed to offer any evidence supporting his opinion that his light blue lines accurately depict the actual airflow path in the cartridge.

1. JUUL2 [REDACTED] Airflow Path Portion

Dr. Dahm established that the airflow path in Dr. Vallee’s alleged first portion is not substantially central and axial. Tr. 1057:3-1058:21.

For example, Dr. Dahm explained that because [REDACTED]

[REDACTED]. *Id.*, 1057:12-18. Indeed, even as drawn (without any support) by Dr. Vallee, the “light blue” airflow path through the purported first portion is not substantially straight and central. Rather, as Dr. Dahm explained (and as shown below),

[REDACTED] *Id.*

[REDACTED]

[REDACTED]

CDX-0002C.130.

Dr. Vallee's invented blue line also ignores other basic fluid mechanics phenomena, including, for example, [REDACTED] As Dr. Dahm explained (and an undergraduate would know) [REDACTED]

[REDACTED]

[REDACTED] Tr. 1057:3-1058:21.

[REDACTED]

RX-0916.5; JX-0188C.

[REDACTED]

In addition, Dr. Vallee's unexplained presumption that [REDACTED]
[REDACTED] is not accurate. As Dr. Dahm established, [REDACTED]
[REDACTED]
[REDACTED] Tr. 1057:19-
1058:11. Again, this would result in airflow that is not substantially straight or axial, contrary to
Dr. Vallee's fictitious straight blue lines.

[REDACTED]

JX-0930C.29.

Thus, [REDACTED]
[REDACTED], and taking into account the well-known flow phenomenon
that Dr. Dahm considered (which Dr. Vallee entirely ignored), Dr. Dahm testified that [REDACTED]
[REDACTED]
[REDACTED] Tr. 1058:12-21. Dr. Vallee and NJOY provided no
evidence challenging this conclusion.

2. JUUL2 [REDACTED] Airflow Path Portion

Dr. Vallee's alleged second airflow path portion is not remotely straight and axial, [REDACTED]
[REDACTED]

[REDACTED]

JX-0518C.36; Tr. (Dahm) 1058;25-1060:12.

Dr. Vallee's conclusion that [REDACTED] somehow supports his straight blue line through the alleged second portion is contrary to [REDACTED], the evidence, and basic science. Tr. 367:1-12. Dr. Dahm explained that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Tr. 1058:22-1059:24.

Dr. Dahm also showed that [REDACTED]

[REDACTED]

[REDACTED] *Id.* Thus, far

from supporting Dr. Vallee's opinion, Dr. Dahm stated [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*

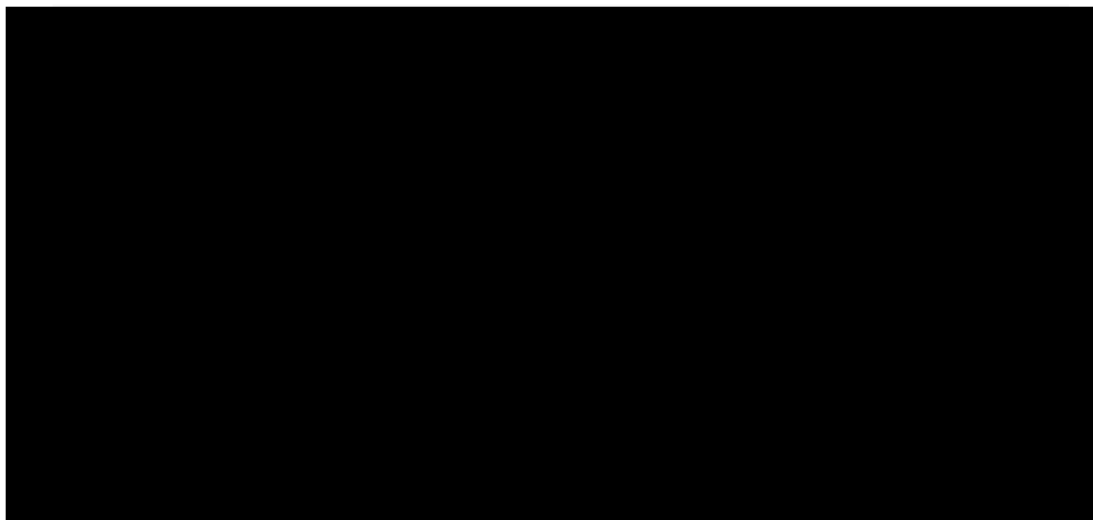
D. Airflow Passageway Extending From the First Aperture

In addition to being “central and axial,” the “airflow passageway” of asserted ’864 Patent claims 2 and 26 must also “extend[] . . . from the first aperture.” JX-0001, Claims 1, 25. JUUL2 includes no such airflow passageway.

The intrinsic and extrinsic evidence establishes (and the parties agree) that, correctly construed, the “airflow passageway” must be a physical structure. Tr. (Dahm) 993:2-995:8; CPHB, 119. But as Dr. Dahm established, JUUL2 includes no such airflow passageway extending from the first aperture. Tr. 1038:3-15.

[REDACTED]

[REDACTED] *Id.*; JX-0188C. Using the below figures for reference, Dr. Dahm testified that “there is no structure having any axial character to it that extends at all from [Dr. Vallee’s] alleged first aperture.” *Id.*



JX-0188C.

E. Vaporize for Oral Provision

Each '864 Patent claim requires the heating element be “configured to vaporize” solution “for oral provision to an individual.” *E.g.*, JX-0001, claim [1.6]. Like JUUL1, JUUL2 does not meet this requirement because [REDACTED]. RX-0930C.25; Section II.G *supra*. Indeed, it is undisputed that [REDACTED] *Id.*; Tr. (Vallee) 359:6-360:1; Tr. (Dahm) 1066:13-1067:19.

V. INDIRECT INFRINGEMENT

NJOY did not establish indirect infringement. CIB, 70-72, 124. First, NJOY alleged that JLI was “aware” of the Asserted Patents as early as May 2023. *Id.* However, NJOY offered no proof regarding how, beyond general awareness of the patents, JLI intentionally aided and abetted any third party to infringe. *Id.*; *Unwired Planet, LLC v. Apple Inc.*, 829 F.3d 1353, 1364 (Fed. Cir. 2016) (“[I]ndirect infringement requires knowledge of the underlying direct infringement—not merely the knowledge of the existence of the patent.”).

Second, NJOY identified no indirect infringement theory encompassing products as they are imported (as opposed to merely identifying post-importation conduct). *Cf.*, *Suprema, Inc. v. ITC*, 796 F.3d 1338 (Fed. Cir. 2015) (en banc) (relying on the now-overturned *Chevron* doctrine in ruling that the Commission may find violation based on importation of articles that do not infringe as imported if the respondent has induced post-importation infringement).

VI. DOMESTIC INDUSTRY TECHNICAL PRONG

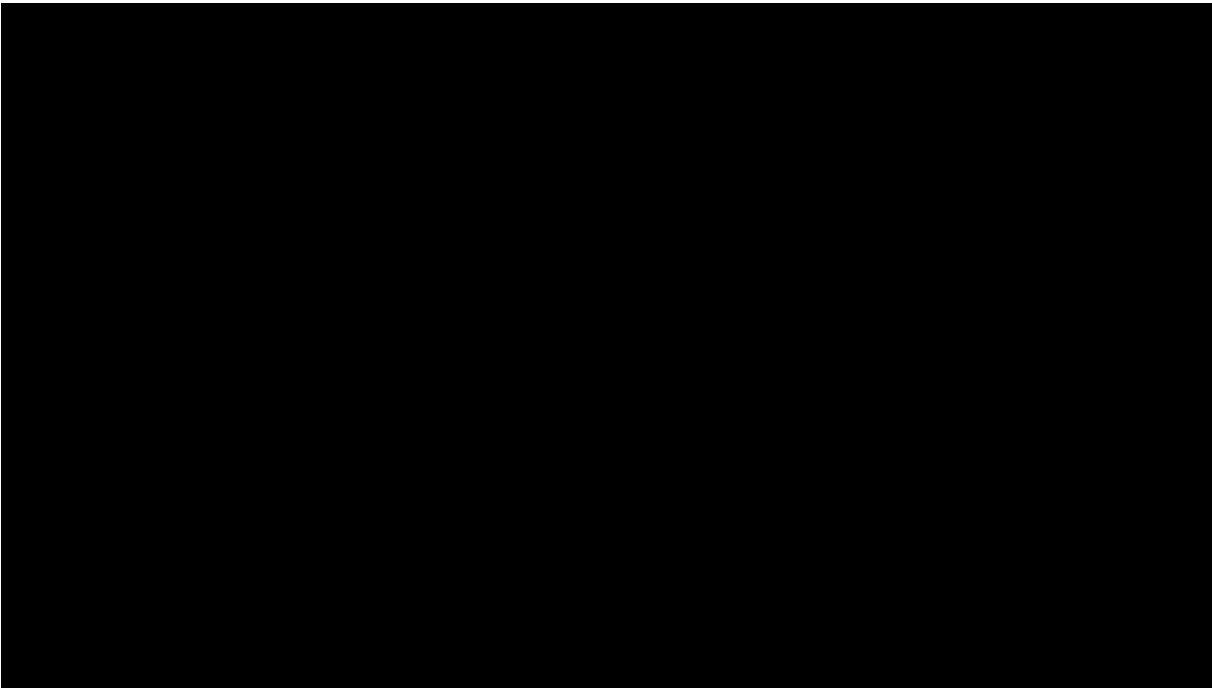
The evidence has established that none of the DI products practice any asserted claims of the Asserted Patents. More specifically, the RJR Vuse Solo and Alto products, and the NJOY ACE and ACE 2.0 products, lack some or all of the following required elements from the asserted claims:

- central and axial airflow passageway;

- substantially central and axial airflow path portions;
- electrically conductive portion;
- heating element extending transversely across the airflow passageway;
- solution holding medium surrounding the airflow passageway and heating element; and
- oral provision of vapor.

A. RJR Solo Products

The RJR Solo products include the G1 and G2 cartridges (the “Solo cartridges”), which comprise the following components. Tr. (Dahm) 990:16-992:3.

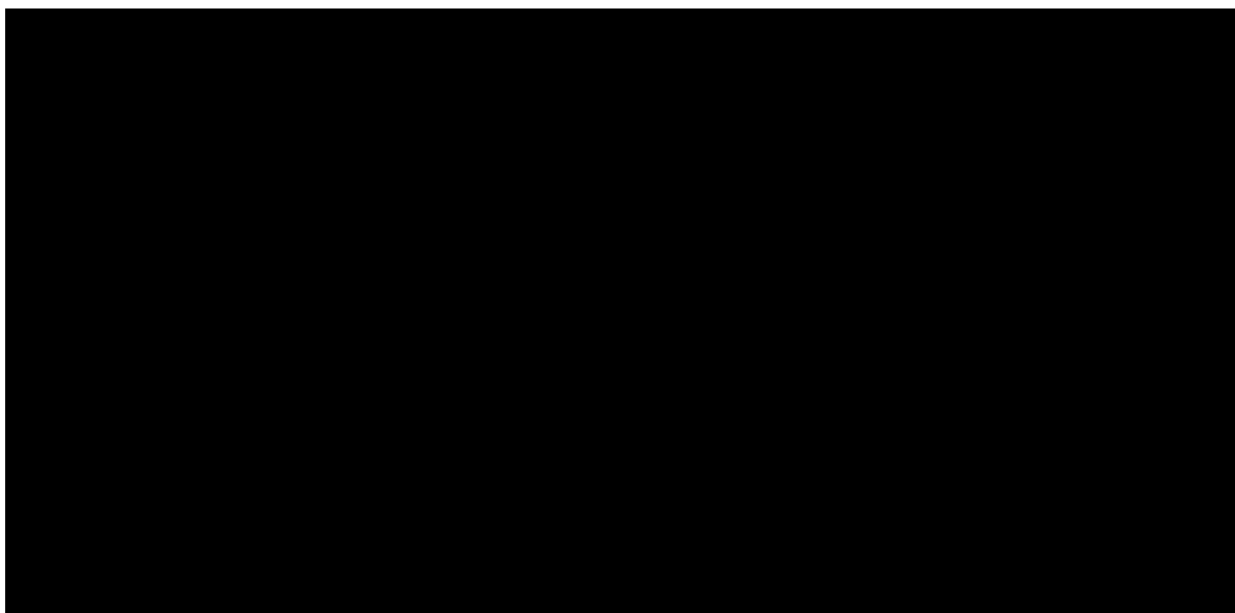


JX-0577C.26, 35. The Solo cartridges are generally similar to each other, with the exception of the highlighted components above. For the reasons below, the Solo cartridges do not practice the asserted claim 1 of the '881 Patent.

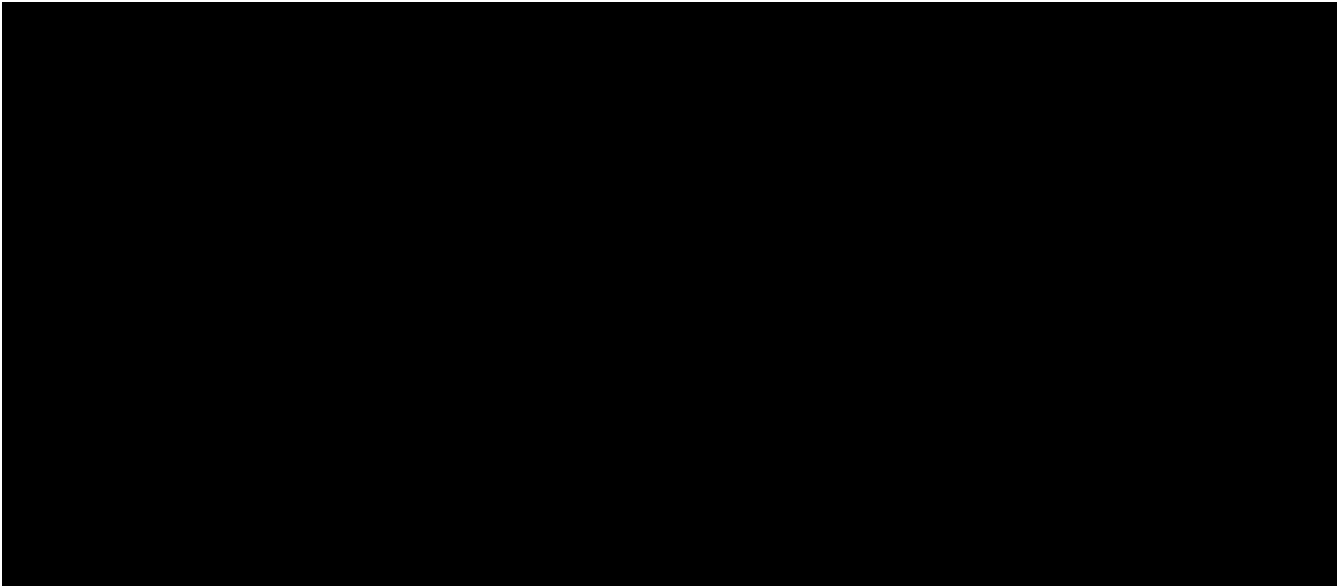
1. Central and Axial Airflow Passageway

Claim 1 of the '881 Patent requires a central and axial “airflow passageway” which, as explained, must have a physical structure extending in a straight path along a central axis from the first aperture of the cartridge housing. JX-0005, Claim [1.7]; RIB, §II.B.2. At the hearing, Dr. Vallee once again provided no explanation whatsoever for his opinion that the Solo cartridges practice the “airflow passageway” limitation. Instead, he simply agreed with NJOY’s counsel’s leading question about whether the cartridges include such a claimed passageway. Tr. 448:14-450:9. In contrast, Dr. Dahm provided detailed analysis as to why both Solo cartridges do not include the claimed central and axial airflow passageway. Tr. (Dahm) 1026:3-1028:4; JX-0509C.14-24; JX-0577C.32, 40.

First, Dr. Dahm testified that the airflow passageways in the Solo cartridge bases, shown in yellow below, are asymmetrical. Tr. 1026:17-22, 1027:22-1028:1. This asymmetry “caus[es] the airflow passageway in the cartridge base not to be central and axial.” *Id.*



Second, Dr. Dahm testified that the Solo cartridges do not have central and axial airflow passageways because their passageways are diverted from a central straight line by their respective wicks. Tr. 1027:11-1028:1. Much like the wicks in the accused products (Section II.C.1 *supra*) the wicks in the Solo cartridges are impermeable and therefore define the boundaries of two separate non-central and non-axial airflow passageways around the wicks in each cartridge. *Id.*



JX-0577C.32, 40. And for the same reasons discussed in Section II.C.1 *supra*, the wicks in the Solo cartridges cannot be part of the “heating elements” of those cartridges, as Dr. Vallee alleges. Tr. 453:20-454:7.

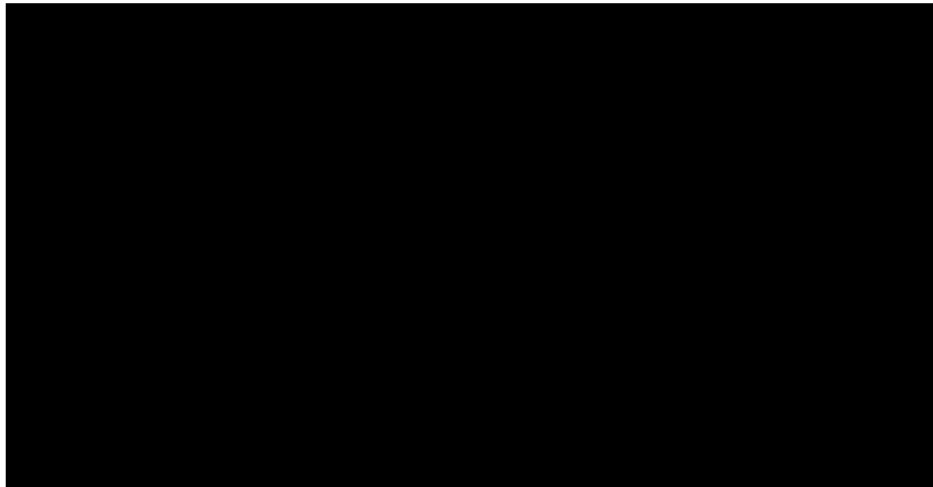
Third, as shown below, a portion of the alleged airflow passageway in the G1 cartridge spans the entire width of the housing. JX-0577C.32. But at both the hearing and in his deposition, Dr. Vallee took the position that such an airflow passageway cannot be central or axial as claimed. Tr. 563:6-14, 672:15-673:2.



JX-0577C.32.

Fourth, Dr. Dahm explained that the G1 cartridge does not include a central and axial airflow passageway around its printed circuit board (PCB) assembly, shown in green below. Tr.

1026:23-1027:4; JX-0577C.32.



JX-0509C.19. Specifically, because the PCB assembly is an impermeable barrier that air cannot flow through, it too defines the boundaries of two non-central and non-axial passageways on each side of the PCB assembly, as shown above. *Id.*; Tr. 1026:23-1027:4.

Fifth, Dr. Dahm testified that the G1 cartridge also does not include a central and axial airflow passageway in its flow tube (shown in gray above), which channels air through the middle

portion of the cartridge. Tr. 1027:5-10. This is because “the top part of the otherwise cylindrical flow tube is cut off in the G1. That’s so that you can put the printed circuit board in there. And that asymmetry also causes the airflow passageway to not be central and axial.” *Id.*; JX-0577C.29, 32; JX-0509C.19.

2. Mechanically and Electrically Coupling Housing End

As explained in Section II.B.2 *supra*, claim 1 of the ’881 Patent further requires that an “electrically conductive portion” of the first end of the claimed “housing” be adapted to “mechanically and electrically couple” to the power source. JX-0005, Claim [1.8]. At the hearing, Dr. Vallee argued that electrical contacts of the Solo cartridges are the claimed “electrically conductive portion” of the first end of each cartridges’ housing, without any explanation or analysis as to why the contacts are allegedly part of the cartridges’ housings, or how those contacts are allegedly adapted to mechanically couple to the Solo cartridges’ power sources. Tr. 450:10-451:13.

But as Dr. Dahm explained, the contacts in each of the Solo cartridges cannot be part of the cartridge’s housing because they are not outside structures of the cartridges containing those cartridges’ internals, and thus do not meet the correct construction of “housing.” Tr. 1029:12-1030:5; RIB, §II.B.1. Instead, as shown below, the contacts are internal cartridge components “that are fed through the cartridge base” and “not part of the [cartridge] base.” *Id.*

JX-0577C.28, 37.

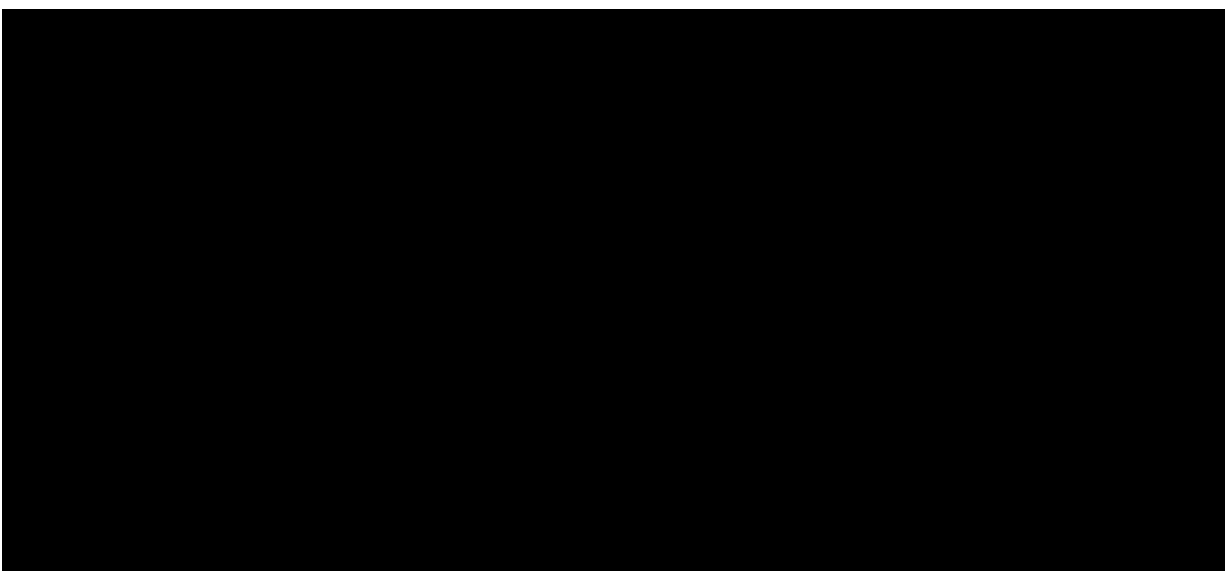
Even if the contacts were somehow part of the Solo cartridges' housings (which they are not), Dr. Dahm explained that the cartridges still do not practice claim 1 because they are not adapted to mechanically couple to Solo's power source/device. Instead, the contacts simply "touch the mating contact in the device. They only touch. There's no mechanical coupling that happens there." Tr. 1030:6-15. The only portion of the Solo cartridges' housings that mechanically couple the cartridges to their power sources are "the threads in the threaded portion of the cartridge base" shown below. *Id.* 1030:16-20. But as Dr. Dahm testified and as demonstrated below, the threads and the cartridge bases themselves are "[REDACTED]", which is a plastic and that is not electrically conductive." *Id.*; Tr. (Dahm) 1032:21-25.

JX-0577C.28, 36.

3. Extending Transversely Across the Airflow Passageway

NJOY also failed to demonstrate that the Solo cartridges include “a heating element ... extending transversely across the airflow passageway”. JX-0005, Claim [1.10]. Dr. Vallee provided no explanation whatsoever for his conclusory opinion that in each of the Solo cartridges, “the heating element does pass transversely across the airflow passageway.” Tr. 453:20-454:7. In fact, Dr. Vallee failed even to identify what his alleged “heating element” in the Solo cartridges consisted of—the heating coil, the portion of the wick inside the coil, or some combination of both. *Id.*

But regardless of whether Dr. Vallee’s alleged “heating element” includes only the coil or a combination of the wick and the coil, the Solo cartridges still do not practice the “transversely across” limitation. As Dr. Dahm testified (and as shown below), the coil itself in the Solo cartridges “doesn’t extend all the way across from one end to the other end of the passageway,” which is required by the limitation. Tr. 1031:11-1031:1; Order No. 36, 17. Rather, the coil floats in the middle of the alleged airflow passageways and does not touch the passageways’ sides. *Id.*

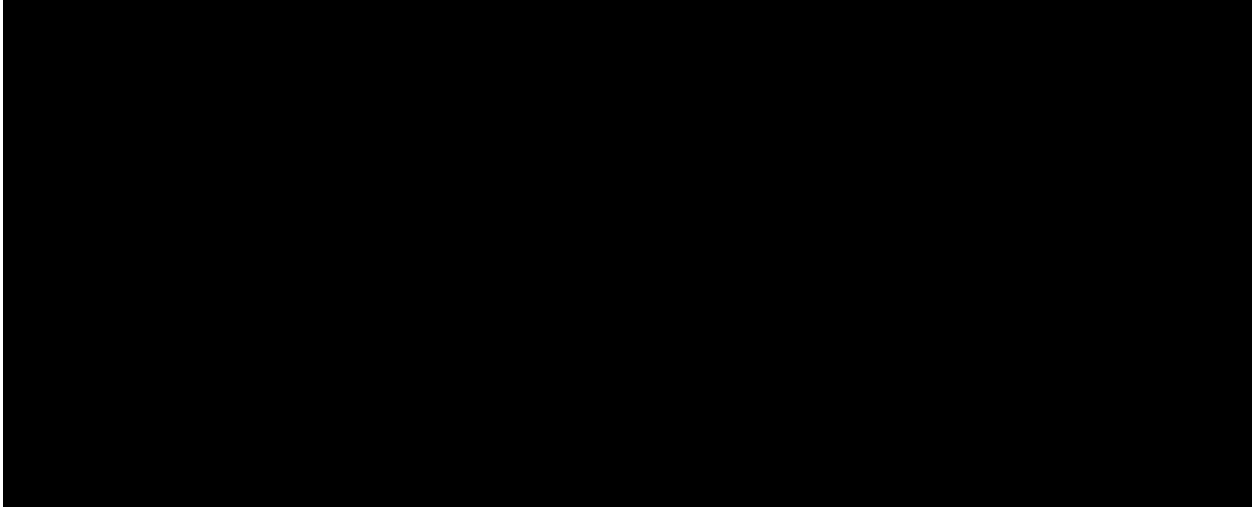


JX-0509C.17.

Even if Dr. Vallee’s alleged “heating element” in each Solo cartridge could include a wick (it cannot for the reasons discussed above in §II.C.1), the only portion of the wick that NJOY has ever accused of being part of the “heating element” in a Solo cartridge is the portion contained within each cartridge’s coil. CPHB, §VII.C.1.a)(9). And because this accused portion of the wick does not extend any further than the coil does, such a “heating element” does not practice this limitation for the same reason that the coil alone does not practice this limitation.

4. Solution Holding Medium Surrounding the Airflow Passageway and the Heating Element

Relying on the figures below, Dr. Vallee concluded—again, without any explanation—that the solution holding medium in each of the Solo cartridges (shown in green below) surrounds both the alleged airflow passageway (shown in yellow) and the alleged heating element (shown in red), as required by claim 1 of the ’881 Patent. Tr. 455:12-24; JX-0005, Claim [1.12].



CDX-0002C.298.

But as Dr. Dahm explained, a person of ordinary skill would understand that when claim 1 requires a solution holding medium to “surround” the airflow passageway and the heating element, “[i]t means all the way around the airflow passageway and the heating element and for the entire lengths of the airflow passageway and the heating element.” Tr. 1032:12-18. He further explained that Dr. Vallee’s own diagrams show that “there are major parts of the yellow airflow passageway,” including the portions close to the alleged first and second apertures of both the G1 and G2 cartridges “that clearly are not surrounded by the solution holding medium.” *Id.* 1032:19-1033:4; JX-0577C.30, 38. Dr. Dahm also pointed out that in the G1 cartridge, “there are even parts of the heating element that aren’t surrounded” by the alleged solution holding medium. *Id.*; JX-0577C.28.

5. Vaporize for Oral Provision

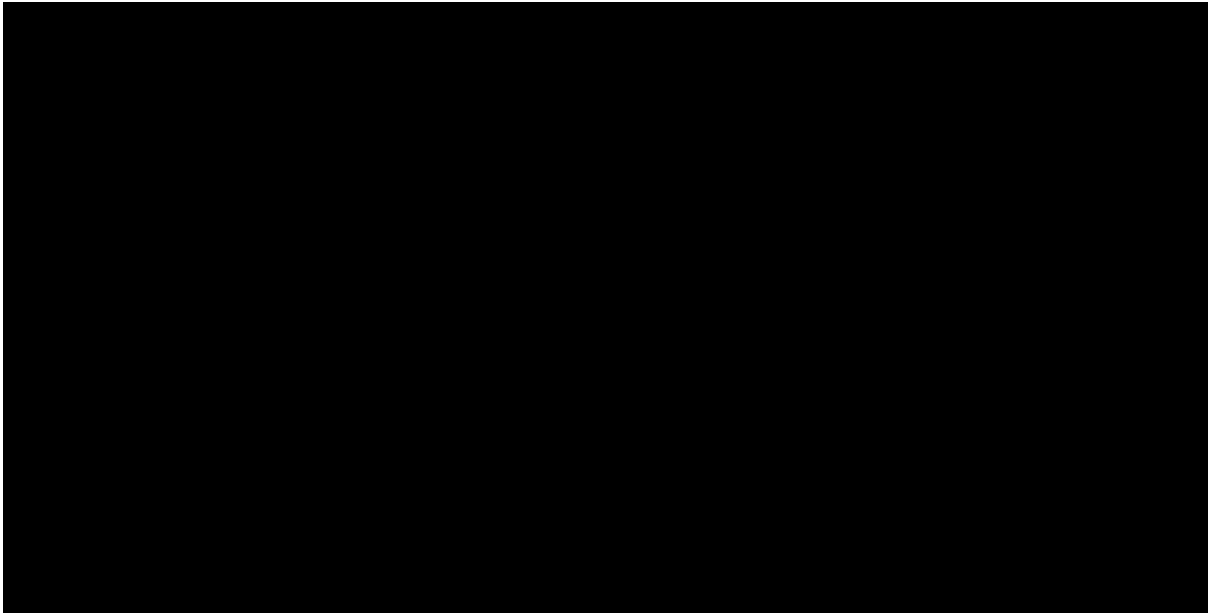
The Solo cartridges do not include a heating element that is “configured to vaporize” solution “for oral provision to an individual” because the alleged heating elements in those cartridges are configured to orally provide aerosol, not vapor, to their users. JX-0005, Claim [1.13]; Section II.G *supra*; JX-0577C.100. Indeed, Dr. Vallee’s testimony and the other evidence

introduced at the hearing confirm that both Solo cartridges provide only aerosol to a user. *Id.*; Tr. 456:14-457:23.

B. ACE/ACE 2.0 and Alto

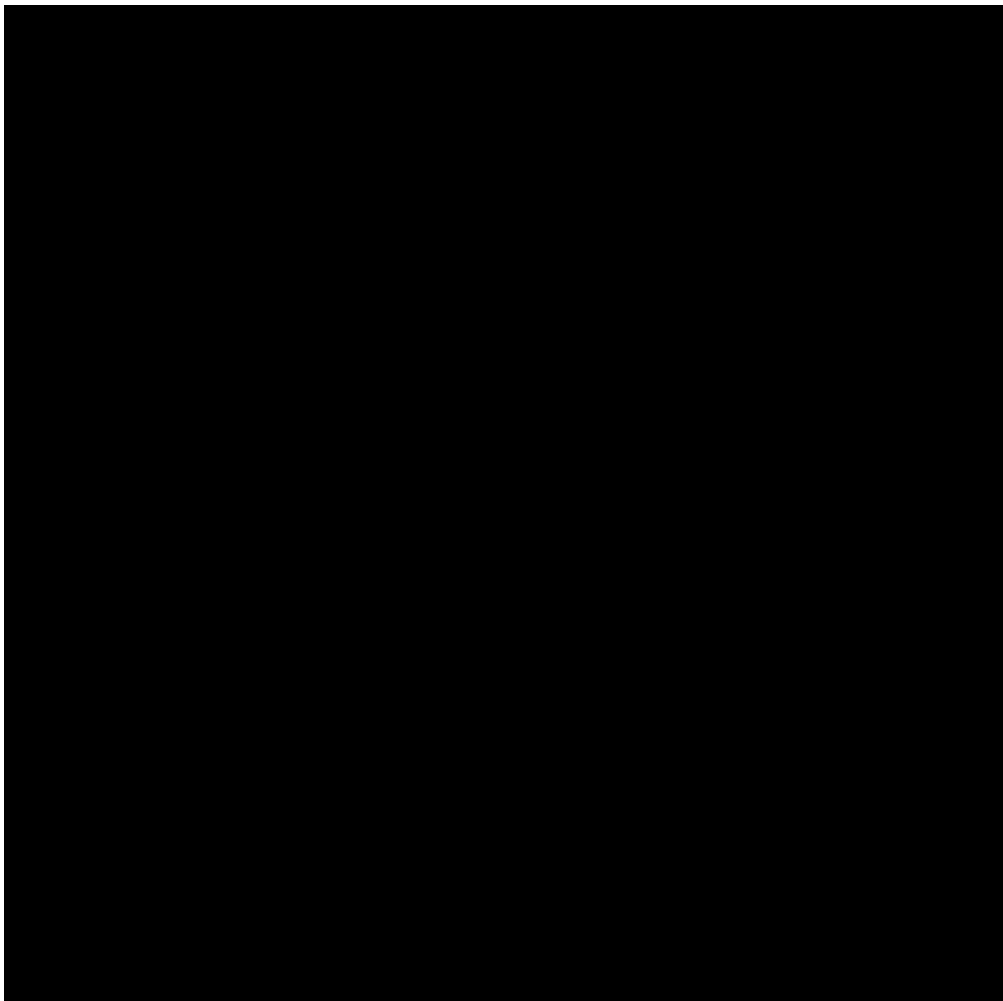
The NJOY ACE/ACE 2.0, and the RJR Alto products all include cartridges comprising the following components, respectively:

- ACE/ACE 2.0 Cartridges:



JX-0562; RX-0934C.

- Alto Cartridges:



JX-0580C.30.

The evidence at the hearing demonstrated—and Dr. Vallee and Dr. Dahm agree—that the ACE, ACE 2.0, and Alto products all have similar structures. Tr. (Vallee) 420:13-421:15, 426:18-427:4; Tr. (Dahm) 989:6-990:5, 1074:15-21, 1076:1-8, 1076:22-1077:3; JX-0557C.18; JX-0558C; JX-0498C; JX-0580C.

[REDACTED]

[REDACTED]

CDX-0002C.229, 238. In fact, the only meaningful difference between the ACE, ACE 2.0, and Alto cartridges that Dr. Vallee identified was the difference between the [REDACTED]

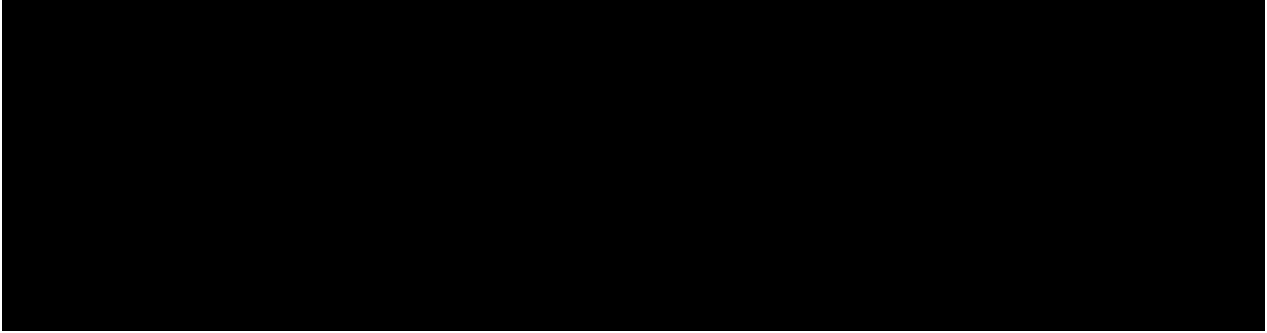
[REDACTED]

[REDACTED]. *Id.*

As discussed below, the ACE/ACE 2.0 and Alto cartridges do not practice any of the asserted claims 9, 10, 12, 13, 15, and 20 of the '864 Patent.

1. Substantially Central and Axial Airflow Path Portions

To support its claim that the ACE/ACE 2.0 and Alto cartridges include the substantially central and axial airflow path portions required by claim 9 of the '864 Patent, NJOY relied solely on Dr. Vallee's conclusory testimony that the "arrows" in the figures below demonstrate that the airflow in his identified "portions" of the ACE/ACE 2.0 and Alto cartridges are substantially central and axial. Tr. 414:18-415:12, 436:20-437. But Dr. Vallee failed to provide any evidence of how air actually flows through these cartridges, let alone any evidence supporting his opinion that the below arrows accurately depict the actual airflow paths in the cartridges. *Id.*

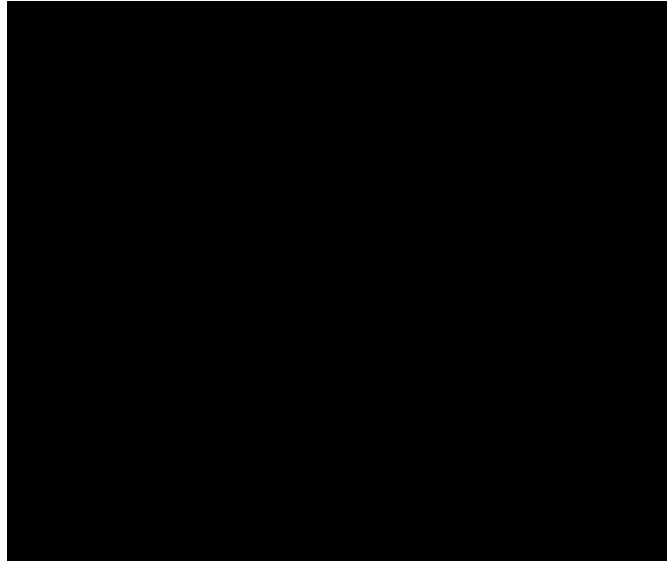


CDX-0002C.216, 256.

However, as Dr. Dahm explained, it was inappropriate for Dr. Vallee to rely solely on these arrows to show the airflow paths in the ACE/ACE 2.0 and Alto cartridges because the arrows "are highly simplistic representations of what the actual airflow path would look like." Tr. 1072:2-1074:21. NJOY's own corporate representative concurred, repeatedly testifying that these arrows are "just a very simple, crude representation of" airflow and positioned "[w]ithout much science." Tr. (Bonet) 216:20-217:14; RX-1120C, 197:1-22, 201:23-202:11.

And even the "crude" arrows Dr. Vallee relied on contradict his own opinion. For example, as shown below in the yellow ellipses, four out of the six arrows in Dr. Vallee's alleged first portion

of the ACE/ACE 2.0 airflow path are “substantially non-central and non-axial.” Tr. (Dahm) 1073:5-13.



JX-0558C.19.

Dr. Vallee’s conclusory opinions about the airflow paths in the ACE/ACE 2.0 and Alto cartridge also once again ignored the “well-known flow phenomena in fluid dynamics” that Dr. Dahm explained during his testimony and applied in his analysis. Based on these phenomena, Dr. Dahm testified that a person of ordinary skill would know that the first portion of the airflow path identified by Dr. Vallee in ACE/ACE 2.0 and Alto “would be far more unsteady, three-dimensional, and non-axial compared to the simple arrows [Dr. Vallee] has shown there.” Tr. 1072:22-1074:21.

As shown below, because



cannot possibly be substantially central and axial with respect to the central longitudinal axis of the alleged housing. *Id.*; JX-0558C.19. Further, Dr. Dahm explained that “the vapor flow coming from [the] atomizer ... impinges on those blue arrows. And that forces them to be substantially non-central and non-axial.” *Id.*

JX-0558C.19; JX-0580C.37.

2. Electrically Coupling Housing

The ACE/ACE 2.0 and Alto cartridges also do not include a first portion of the cartridge housing that is adapted to electrically couple to the power source. JX-0001, Claim [9.3]; Section II.B.1 *supra*.

Dr. Vallee asserted that the electrical contacts in the ACE/ACE 2.0 and Alto cartridges are adapted to electrically couple to their power sources, but he provided no opinion whatsoever that those electrical contacts are part of “the first end of the housing,” which is the minimum requirement of claim [9.3] of the ’864 Patent. Tr. 407:13-408:14, 431:25-433:21. For this reason alone, NJOY has not met its burden of demonstrating that the ACE/ACE 2.0 and Alto cartridges practice this limitation.

Further, as Dr. Dahm explained (and shown below), the

Tr. 1075:7-1076:8.

[REDACTED]

[REDACTED]

JX-0558C.18.

[REDACTED]

JX-0557C.18.

[REDACTED]

JX-0580C.34; JX-0509C.11.

3. Vaporize for Oral Provision

The ACE/ACE 2.0 and Alto cartridges do not include a heating element “configured to vaporize” some solution “for oral provision to an individual” as required by every asserted claim of the ’864 Patent. JX-0001, Claim [9.6]; Section II.G *supra*. Indeed, Dr. Vallee agreed with Dr. Dahm that all of the [REDACTED]. Tr. (Vallee) 412:14-413:8 (ACE/ACE2.0), 435:18- 436:5(Alto); Tr. (Dahm) 1076:20-1077:3; JX-0558C.7; JX-0498C.13; JX-0580C.15, 37.

VII. DOMESTIC INDUSTRY ECONOMIC PRONG

NJOY did not, and cannot, meet its burden of showing that the economic domestic industry exists or is in the process of being established, for any alleged basis in ACE, ACE 2.0, Vuse Alto, Vuse Solo G1, or Vuse Solo G2. Tr. (Thomas) 1307:23-1308:18:

NJOY-Based DI			
Flawed & Unreliable; Not Significant	Subsection (A) Plant and Equipment	Subsection (B) Labor or Capital	Subsection (C) Exploitation of Patents
'864 Patent	NJOY ACE / ACE 2.0	NJOY ACE / ACE 2.0	NJOY ACE / ACE 2.0
RJR-Based DI			
Flawed & Unreliable; Not Significant	Subsection (A) Plant and Equipment	Subsection (B) Labor or Capital	Subsection (C) Exploitation of Patents
'881 Patent	VUSE Solo G1 & G2	VUSE Solo G1 & G2	N/A
'864 Patent	VUSE Alto	VUSE Alto	N/A

RDX-0007C.5; CIB at 90-91, 95-96, 105, 135-136.

Having rushed to file its complaint against JLI less than 11 days after buying the Asserted Patents, NJOY by its own election limited its DI to that time period. CX-2987C.27-28.

Setting aside NJOY’s failure to show significance (including for the reality of NJOY’s own operations, the marketplace, and the industry), NJOY’s claimed investments suffer from fundamental flaws, including failure to specify the relevant time period, failure to present a proper and reliable allocation including quantifying investments on a product-specific basis, and failure

to exclude various ineligible expenditures.

As to RJR, NJOY failed to meet its burden as discussed in Section VII.C, *infra*.

A. '864 Patent: NJOY Failed To Establish an NJOY-Based Existing Domestic Industry

1. NJOY Relied on Voluminous Expenditures Outside Relevant Time Period

To obfuscate its insignificant expenditures in the eleven-day period, NJOY asserts investments going back to January 1, 2018. CIB at 92.

From both legal and economic perspectives, such over-inclusion is improper. As Mr. Thomas explained: “the assessment of domestic industry is for articles protected by the patents [*i.e.*, since August 11, 2023] ... and as of the date of the complaint.” Tr. (Thomas) 1322:18-1325:1; *Certain Power Semiconductors, and Mobile Devices and Computer Containing Same*, Inv. No. 337-TA-1308, FID at 116-117 (May 18, 2023) (collecting cases excluding pre-license expenditures); *Certain Fluidized Supporting Apparatus and Components Thereof*, Inv. No. 337-TA-182/188, Comm’n Op. at 14 (Oct. 5, 1984) (finding that absent a license, a company “is nothing more than an infringer, which cannot be part of the industry”).

NJOY’s attempt to distinguish its situation from 337-TA-182/188 is unavailing. Even in terms of that case, unlike the former licensee there, NJOY was in an even worse position as it never had any right to the Asserted Patents before August 11, 2023 at all. Indeed, NJOY was sued for infringing both Asserted Patents by Fuma in June 2023. *See Fuma Int’l LLC v. Altria Group, Inc.*, No. 2:23-cv-00231-EWH-RJK, Dkt. No. 18 (E.D. Va. June 8, 2023).

None of NJOY’s cited cases support its position that an infringer’s pre-acquisition expenses are creditable for the DI (which must, by definition, be protected by the patents asserted). 19 U.S.C. § 1337(a)(2); *Certain Soft Projectile Launching Devices*, Inv. No. 337-TA-1325, FID at 100-101 (Oct. 25, 2023) (finding economic DI, pending Commission review where—unlike here (where

[REDACTED]

Smooore developed ACE)—the complainant Hasbro had developed the DI products, and heavy redactions over the factual details and time period considered); *Certain Wearable Monitoring Devices*, Inv. No. 337-TA-1190, FID at 133 (Feb. 4, 2021) (discussing only pre-patent issuance investments, not pre-patent acquisition investments—unlike here (where Fuma, not NJOY, prosecuted the patents and then sued NJOY for infringing)); *Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Comm’n Op. (Apr. 14, 2011) (same); *Certain Road Milling Machines*, Inv. No. 337-TA-1067, FID at 5 (Oct. 31, 2018) (noting that complainant had been authorized to use the asserted patents owned by a corporate affiliate—unlike here (where Fuma is not NJOY’s corporate affiliate)).

Even if NJOY had shown that investments prior to its patent purchase and settlement with Fuma could be included, NJOY has only provided “an incomplete analysis to show those historical investments” because, *e.g.*, NJOY’s claimed historical investments fail to take into account that it was Smooore, not NJOY, who developed ACE overseas; it was Fuma, not NJOY, who prosecuted the patents; and it was [REDACTED]

[REDACTED] Tr. (Thomas) 1323:24-1325:1.

As to investments after the complaint, NJOY also identified zero “significant and unusual development[s] after the complaint has been filed” to justify post-Complaint expenditures and activities. *See, e.g., Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Comm’n Op. at 5 (Jan. 20, 2012); *Certain Collapsible Sockets for Mobile Elec. Devices and Components Thereof*, Inv. No. 337-TA-1056, Comm’n Op. at 14-15; Tr. (Vander Veen) 778:19-779:11; Tr. (Winch) 156:4-7 (testifying that NJOY projected its expenditures for second half of 2023 and year 2024 by merely copying and pasting expenditure totals from the first half of 2023).

Finally, setting aside that even Dr. Vander Veen resisted providing any aggregate total of

[REDACTED]

DI investments (Tr. (Vander Veen) 772:21-773:8)), NJOY also made no showing of what its employees were actually doing in the 11-day period in August 2023—far from meeting its burden of proof. This is true particularly here, where there were no design changes to ACE after 2018, and

[REDACTED]. Tr. (Vander Veen) 751:19-20 (NJOY’s expert testifying that “a lot happened prior to August 11 to develop that product.”), 762:8-763:22 (NJOY’s expert testifying that there were [REDACTED]

[REDACTED] Tr. (Thomas) 1312:7-24.

[REDACTED]

RDX-0007C.11 (citing JX-0588C); RX-1123C (Unangst) at 135:2-16) (highlights showing of [REDACTED] [REDACTED]).

Similarly, there does not appear to have been any [REDACTED]

[REDACTED]

CX-2335C.0006 (showing [REDACTED]

[REDACTED]); Tr. (Thomas) 1314:6-10.

2. NJOY Applied Flawed and Unreliable Allocation Methodologies

NJOY did not break out any claimed expenditure between ACE and ACE 2.0. Tr. (Vander Veen) 758:5-7, 759:18-22, 760:22-761:11, 762:20-25; Tr. (Winch) 156:8-157:13. NJOY has conceded that for many investments, such as development work, regulatory work, e-liquid purchases, and one-year financial forecasts, they related specifically to either ACE 1.0 or ACE 2.0, but even then, NJOY did not attempt to allocate to specific products. Tr. (Winch) 157:1-6, 158:23-159:10, 161:1-19; (Bonet) 182:15-20; (Vander Veen) 748:7-16, 758:2-759:22, 760:22-761:11. NJOY attempted in vain to downplay its failure to break out expenses between ACE and ACE 2.0, which are different products requiring divergent investments. Tr. (Leistra) 99:10-100:5; Tr. (Vander Veen) 758:11-21; Tr. (Thomas) 1321:14-22. Such improper aggregation masks the activities respective to ACE and ACE 2.0, thereby thwarting any meaningful evaluation of whether a DI exists (or is in process of being established) for either.

To allocate to ACE and ACE 2.0 together, NJOY applied unit-based sales allocation and individual-estimate-based allocations—both flawed and unreliable. Tr. (Thomas) 1321:10-1322:17 (discussing RDX-0007C.22). As Mr. Thomas explained, a sales allocation cannot properly reflect the pertinent investments for ACE 2.0, which awaits commercialization, or

exclude spending for any other yet-to-be-sold products. *Id.* 1322:6-10; Tr. (Leistra) 110:15-17. The sales allocation is also unreliable as NJOY does not have complete sales data. Tr. (Leistra) 116:14-17.

3. NJOY Has Claimed Numerous Expenditures Not Shown To Be Creditable

To assert an existing DI, NJOY's expert Dr. Vander Veen exclusively relied on a single spreadsheet prepared per counsel's requests, JX-0588C, without performing any further analysis, and on testimony by an employee who was not NJOY's 30(b)(6) witness on DI (Ms. Silverman), but rather joined the company in June 2023, and had no access to NJOY's records prior to June 2023. Tr. (Winch) 135:21-136:1, 152:7-23, 164:15-20; Tr. (Thomas) 1309:2-9, 1310:3-15. Yet NJOY swept in [REDACTED] of expenses without showing that they are creditable for DI in this case. Tr. (Thomas) 1310:3-1321:9; *Certain Bone Cements, Components Thereof and Products Containing the Same*, Inv. No. 337-TA-1153, Comm'n Op. at 22 (Jan. 25, 2021).

For plant and equipment,³ NJOY claimed rent for [REDACTED] for which it failed to provide basic information such as address and square footage. Tr. (Vander Veen) 764:3-10, 766:2-8. Simple Google searches cast significant doubt as to the relevance and reliability of these [REDACTED] [REDACTED] Tr. (Thomas) 1311:3-1312:6; RX-0962 – RX-0967. For "Wisconsin Lab equipment," [REDACTED] [REDACTED] " JX-0588C; RX-1123C (Unangst) 135:2-16; Tr. (Thomas) 1312:7-24.

For labor, NJOY has claimed expenses from six departments: R&D, Regulatory, Supply Chain, Quality, Policy & Enforcement, and Customer Service. CIB at 96. However, NJOY failed to even specify the corresponding employee activities and for what points in time. Tr. (Thomas)

³ NJOY abandoned subprong (A). CIB at 95.

1312:25-1317:16. The limited information available casts doubt on their reliability. For example, part of “Regulatory” labor (and capital) expenses are [REDACTED] [REDACTED]. JX-0588C; RX-0968; Tr. (Winch) 138:7-13; Tr. (Thomas) 1315:3-10. Also, given that there has been no design changes to the ACE since NJOY bought it from Smoore in 2018, there is no clarity as to what eligible “R&D” work there could have been since 2018 (except adding Bluetooth in ACE 2.0). Tr. (Leistra) 99:10-18, 128:5-13; Tr. (Bonet) 182:21-183:5, 183:12-18, 200:19-201:15; Tr. (Vander Veen) 758:22-759:11; Tr. (Thomas) 1313:20-1314:13; RX-1120C (Bonet) 10:22-12:6, 204:11-18; RX-0980C.1.

Indeed, NJOY obtains finished products solely from its foreign contractors Smoore and [REDACTED] and thus NJOY resembles a mere importer. Tr. (Winch) 162:5-12; Tr. (Bonet) 174:25-175:3; Tr. (Vander Veen) 764:11-23; RX-1123C (Unangst) 31:1-33:21, 44:16-46:19, 48:13-49:18, 50:1-12; *Certain Oil-Vaping Cartridges, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-1286, FID at 97 (Feb. 1, 2023) (not crediting expenses by Smoore’s U.S. distributors where the subject products “are developed and manufactured entirely in China” and “are saleable in the United States in the condition in which they are imported”).

Similarly, without manufacturing or assembly operations of NJOY Ace in the U.S., NJOY’s “Supply Chain,” “Quality,” “Policy & Enforcement,” and “Customer Service” activities—i.e. warehousing duties, sampling, and transcript-based calls—and “Fulfillment,” “Storage Costs,” and “Product Rekitting,” capital, are no different from what a mere importer would do. Tr. (Thomas) 1315:11-1317:16; Tr. (Vander Veen) 711:11-15; JX-0588C; RX-1123C (Unangst) 20:22-21:16, 32:17-34:2, 36:18-20; RX-0949; RX-0975; RX-0977; *Schaper Mfg. Co. v. ITC*, 717 F.2d 1368, 1372-73 (Fed. Cir. 1983).

NJOY also inadequately relies on three alternative costs related to GoodCat.

First, NJOY relied on “E-Liquid Acquisition,” purchases. However, NJOY’s payments to GoodCat include profit and “do not reflect the magnitude of labor expended to produce the components, or the amount the suppliers invested in their equipment to fulfill [complainant’s] orders.” *Lelo Inc. v. ITC*, 786 F.3d 879, 884 (Fed. Cir. 2015); *Certain Strontium-Rubidium, Radiosotope Infusion Systems, and Components Thereof Including Generators*, Inv. No. 337-TA-1110, Comm’n Op. at 40-41 (Dec. 11, 2019); *Collapsible Sockets*, Inv. No. 337-TA-1056, Comm’n Op. at 18-19 (July 9, 2018). For August 11-21, 2023, per NJOY, its e-liquid purchase payment was [REDACTED] of what, according to Dr. Vander Veen, GoodCat allegedly spent, to make the e-liquid [REDACTED]. CIB at 101, 103. This further indicates the unreliability of NJOY’s e-liquid purchases, especially when there can be [REDACTED] [REDACTED] in the 11-day period. Tr. (Vander Veen) 775:17-776:7, 719:14-24.

Second, NJOY makes no showing for how [REDACTED] [REDACTED] is a cognizable DI investment, particularly where there is no showing that it ever was used to invest in qualifying DI activities in the U.S. Tr. (Thomas) 1318:2-1320:20.

Third, NJOY relied on portions of GoodCat’s allegedly allocated expenses, but these are foundationally unreliable. Tr. (Thomas) 1318:2-1320:20. For example, GoodCat’s allocated totals (“X”) were allegedly arrived at by GoodCat multiplying its overall company expense totals (“A”), times a percentage of GoodCat’s NJOY-based annual revenue (“B”), as compared against GoodCat’s overall company annual revenue (“C”). But for the equation $X = (A) \times (B/C)$, GoodCat did not provide A, B, or C, *i.e.*, any underlying data for GoodCat’s black-box allocations. Tr. (Thomas) 1319:16-23; Tr. (Vander Veen) 768:1-16 (testifying that he “did not know” what the annual percentages of GoodCat’s revenue were that formed the basis of GoodCat’s investment

allocations for ACE between 2018-2023); RX-1112C (Feist) 46:8-24, 57:3-19, 60:8-61:6 (GoodCat “ha[s] not provided” the “source data ... used to create [JX-0570C]” and when asked why, stated that it was at “the wishes of [its] owner and CEO”), 109:21-23, 123:23-124:9 (unable to provide “GoodCat’s total annual income” for 2018-2023), 126:2-6 (unable to provide allocation percentages used for 2018, 2020, 2022, or 2023), 150:17-25, 151:11-152:1.

NJOY also claimed ineligible costs for imported goods such as nicotine and menthol crystal. JX-0570C; RX-0815; RX-1010C; RX-1112C (Feist) 32:21-33:2, 66:11-18; Tr. (Thomas) 1319:24-1320:5. GoodCat’s [REDACTED] [REDACTED]. Tr. (Thomas) 1320:6-20; Tr. (Vander Veen) 771:9-772:12.

[REDACTED]

CX-2336C.7-8 (highlights added); Tr. (Vander Veen) 771:22-772:1. Under NJOY’s reasoning, a company paying, say, merely [REDACTED] for U.S. labor would be able to claim [REDACTED] in an economic DI, by purchasing goods manufactured overseas (*e.g.*, nicotine) costing [REDACTED] that were made in Switzerland.

Also, NJOY has improperly included foreign costs in its analysis. Tr. (Thomas) 1320:22-1321:9. NJOY’s own criteria for determining investments as “U.S.” or “foreign” is based on vendor location (Tr. (Winch) 136:1-5). NJOY’s counter that the “Location” of the foreign swept-in costs in JX-0588C refers to a warehouse location, is unavailing and in any event is supported by no evidence (*see* CIB at 104-105) and is contradicted by the aforementioned testimony by Ms. Winch and Mr. Thomas.

In addition, for subprong (C), NJOY hand-picked certain line items related to engineering

and R&D but failed to demonstrate that a nexus exists, particularly where no investments are allocated between ACE and ACE 2.0, and features such as Bluetooth are not in the patent claims. Tr. (Thomas) 1325:2-8; *Certain Integrated Circuit Chips and Products Containing the Same*, Inv. No. 337-TA-859, Comm’n Op. at 49 (Aug. 22, 2014) (“[A]n investment in the article is not automatically an investment in the asserted patent.”); Tr. (Leistra) 99:10-18, 128:5-13; Tr. (Bonet) 182:21-183:5, 183:12-18, 200:19-201:15.

4. NJOY Failed To Establish Significance or Substantiality of Its Already Inflated Expenditures Under Any Statutory Prong

Even setting aside the inflated aspects of NJOY’s investments, for the investments NJOY does claim, it does not actually explain or analyze quantitative and qualitative significance (*see* CIB at 98, 103-104, 106), let alone why its investments are significant in terms of value added in the U.S., or in the contexts of NJOY’s own operations, the marketplace or the industry, for example:

- According to NJOY, ACE was released on the market in 2018. Tr. (Vander Veen) 758:15-21;
- According to NJOY, “a lot happened prior to August 11[, 2023] to develop that product [ACE].” *Id.* 751:19-20;
- Smoore, based in China, developed ACE. Tr. (Vander Veen) 758:22-759:11;
- Smoore, [REDACTED] .RX-1548C.25; Tr. (Vander Veen) 773:9-774:25.
- Altria, NJOY’s parent company, has [REDACTED] in its 2023 revenue. Tr. (Leistra) 103:21-105:5 (discussing RX-1340).
- According to NJOY, the relevant industry here is the “multi-billion dollar [ENDS] industry.” Tr. (Vander Veen) 691:7-18;
- As of 2022, the e-cigarette market was \$22 billion. *Id.* 778:3-7; JX-0566.1;
- According to NJOY, it took years to prepare, file, and receive and FDA order on a PMTA for ACE. *Id.* 692:2-15; 777:8-14;

- According to NJOY, it can take up to [REDACTED] *Id.* 776:12-777:7.

Dr. Vander Veen failed to consider any of the above contexts for his significance analyses. Tr. (Vander Veen) 773:9-14, 774:3-25, 775:21-778:7; *Printing and Imaging Devices*, Inv. No. 337-TA-690, Comm’n Op. (2011) at 31; Tr. (Thomas) 1325:2-1330:8. NJOY’s alleged “International Labor Costs” as a denominator is also misleading, as it omits foreign labor costs by ACE manufacturers Smoore and [REDACTED]. CIB at 99; Tr. (Vander Veen) 701:3-6, 718:11-20 (stating that [REDACTED] 773:9-14, 774:19-25 (stating that he does not know what portions of facilities or how many [REDACTED] or Smoore employees have engaged in manufacturing ACE).

B. ’864 Patent: NJOY Failed To Establish An NJOY-Based Domestic Industry in the Process of Being Established

NJOY again failed to meet its burden to show that it “is taking the necessary tangible steps to establish such an industry in the United States” and that there will be “a significant likelihood that the industry requirement will be satisfied in the future.” *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 16-17 (May 16, 2008).

First, the same foundational defect appears here: the failure to allocate between ACE and ACE 2.0, when the two are different products. Such improper aggregation obscures the investments specific to each product and defeats meaningful evaluation. Section VII.A.2, *supra*.

Second, NJOY provided no justification for relying on post-Complaint actual and projected expenses, having not identified any significant or unusual post-Complaint activities. Tr. (Vander Veen) 779:6-11; *see* Section VII.A.3, *supra*.

Third, NJOY failed to show that its projected expenditures support consideration of any

Further, setting aside projected expenses, as to NJOY's sales, its sales forecasts (e.g. JX-0491C), are exceptionally unreliable. For instance, the forecasted unit sale of ACE pods in the second half of 2023 was [REDACTED]. Tr. (Winch) 162:13-165:18; JX-0491C; RX-1327C.

NJOY failed to present any evidence of necessary tangible steps for ACE 2.0, and instead appears to be affirmatively delaying tangible steps, expecting a launch [REDACTED]

[REDACTED] Tr. (Leistra) 111:6-10; RX-1123C (Unangst) 40:21-41:11, 43:4-14, 62:15-21, 89:5-15, 110:11-18 (testifying that NJOY [REDACTED]

[REDACTED]

[REDACTED].

2. NJOY Did Not Establish a Significant Likelihood That the Domestic Industry Requirement Will Be Satisfied in the Future

As NJOY's CEO, Ms. Leistra, stated, [REDACTED]

[REDACTED]

[REDACTED]. Tr. (Thomas) 1331:4-12; Tr. (Leistra) 99:13-18, 110:9-14, 111:6-10. Since NJOY also [REDACTED] [REDACTED] indicates the exact opposite of a significant likelihood that a DI will exist in any foreseeable future. Tr. (Thomas) 1331:9-12.

C. '881 and '864 Patent: NJOY Failed To Establish an RJR-Based Domestic Industry

For the '864 Patent, NJOY also asserts a DI based on RJR's Vuse Alto.

For the '881 Patent, NJOY relies solely on Vuse Solo G1 and G2.

However, the information presented by NJOY is far from adequate to establish a DI on either basis.

NJOY restates investments from 337-TA-1199 and 337-TA-1381 which are outdated because most expenditures occurred prior to RJR's entry into a license with Fuma for the Asserted Patents, *i.e.*, on [REDACTED]. CX-0019C.13; Tr. (Thomas) 1323:24-1324:16 (testifying that it is not proper to consider "investments of infringing products"), 1331:15-1332:1. As discussed in Section VII.A.3, *supra*, NJOY has not shown why pre-license spending should be considered here.

Moreover, for RJR's post-2020 expenditures, NJOY relies exclusively on the Declaration of Valerie Mras, whom was neither deposed in this Investigation nor listed on any party's witness list, and whose declaration is not admitted into evidence. CIB at 109-110, 136. NJOY's attempt to further introduce declarations by its expert (to the extent it attempts to do so now) should be similarly excluded at least per Ground Rules 13.6.1 and 13.6.2 and for the reasons explained in JLI's statement on NJOY's request to reopen the record (EDIS Doc ID 825011 (July 2, 2024)). *Certain Video Processing Devices and Components Thereof*, Inv. No. 337-TA-1343, Order No. 51 at 2 (Dec. 8, 2023) ("[O]ther ALJs have [not found what] someone 'who is not part of this

investigation, and whom the ALJ has not been able to see and assess the credibility of, said in a prior investigation to be particularly probative of the matters before the Commission in this investigation[.]” (citation omitted)).

NJOY’s citation of Dr. Vander Veen’s testimony, which reads verbatim the data from the Mras Declaration, is similarly unavailing. *See* CIB at 109-110, 136; Order No. 51 at 6-8, 10; *Certain RF Capable Integrated Circuits and Products Containing the Same*, Inv. No. 337-TA-982, Order No. 23 at 5 (Mar. 9, 2017) (“experts may not ... ‘characterize’ the declarations, as that would simply amount to bringing the information in the declarations in through the back door when they were denied entrance at the front”). Beyond this, NJOY has presented zero evidence on RJR’s post-license expenditures, *i.e.*, zero evidence for an RJR-based DI for the Asserted Patents.

In any event, the Mras Declaration is also deficient as it presents only aggregate figures that cover the entire period from 2019 to 2022 and does not allocate to just the DI products asserted in this case and instead aggregates across four different products (including non-domestic-industry products Vuse Ciro and Vuse Vibe). *See* Tr. (Vander Veen) 740:17-20 (“[The Mras Declaration] did not provide an individual product-level breakdown.”), 781:10-16 (same), 781:6-9 (confirming that the Mras Declaration provides no yearly breakdown); *Zircon Corp. v. ITC*, 101 F.4th 817, 822-827 (Fed. Cir. 2024) (affirming the Commission’s finding of no DI where complainant “relied on aggregated evidence of its investments in all domestic industry products without allocating those investments among products or product groups relating to each asserted patent ...”).

Dr. Vander Veen affirmatively conceded he did not opine on whether “RJR investments are qualitatively and quantitatively significant” and did not perform any analysis of RJR’s produced underlying data. Tr. (Vander Veen) 757:7-758:1.

1. NJOY Utterly Failed To Establish a Domestic Industry for Vuse Alto

NJOY did not quantify the relevant investments specific to Vuse Alto during the relevant,

post-license period. Instead, NJOY relied on the Mras Declaration that, as explained above, does not provide any quantification of the relevant investments specific to Vuse Alto. *See* CIB at 109-110; Tr. (Vander Veen) 740:17-20. NJOY's improper reliance on an RJR's complaint fails to present any detail on RJR's product-specific U.S. investments. CIB at 110 n.19.

In any event, NJOY's cursory references to two inadmissible documents which, in any event should not be belated introduced into the record, cannot satisfy the DI requirement. *See, e.g., Certain Replacement Automotive Lamps (II)*, Inv. No. 337-TA-1292, Comm'n Op. at 29-31 (Mar. 22, 2024).

2. NJOY Similarly Failed To Establish a Domestic Industry for Vuse Solo

NJOY fares no better with Vuse Solo G1 or Vuse Solo G2, for which it relied on the Mras Declaration and 337-TA-1199. For the same reasons above, the Mras Declaration should not be considered. CIB at 136. [REDACTED]

[REDACTED]. (Thomas) 1332:2-16; RX-0945C. Dr. Vander Veen further had no definitive knowledge of any ongoing investments by RJR as of the Complaint specific to Vuse Solo (or Vuse Alto). Tr. (Vander Veen) 782:1-14.

NJOY's reliance on 337-TA-1199 is equally misplaced. First, RJR's expenditures presented there merely [REDACTED]
[REDACTED], which are outdated and irrelevant. Tr. (Vander Veen) 736:25-737:2, 780:18-20; CX-0019C.13; Section VII.A.3, *supra*.

3. NJOY Should Not Be Permitted To Rely on Information Obtained after Fact Discovery and Record Closure, e.g., RJR's Late Production

As a final attempt to salvage its plainly inviable RJR-based DI assertions, NJOY indicated an intention "to seek leave to re-open the evidentiary record should Reynolds comply before the ID." CIB at 110 n.20; EDIS Doc. ID 825011 (July 2, 2024).

For the same reasons explained by JLI and Staff in the Joint Submission, NJOY should not be permitted to have this much belated second bite at the apple, especially when NJOY chose to proceed with the hearing and present its RJR-based DI case (rather than seeking an amendment to the procedural schedule), and when NJOY should have obtained its domestic industry evidence prior to filing its complaint. *See* EDIS Doc. ID 825011 at 4-13; Tr. 597:1-4.

VIII. REMEDY

No remedy is proper because NJOY did not show any violation of Section 337 by JLI or JLI products or components thereof. Should an LEO issue, it should contain a standard certification provision. *Certain Composite Aerogel Insulation Materials and Methods for Manufacturing the Same*, Inv. No. 337-TA-1003, Comm’n Op. at 62 (Feb. 22, 2018). Moreover, the LEO should contain a certification provision allowing JLI to certify that imported products or components are only destined for sale overseas and not in the U.S (e.g., [REDACTED] [REDACTED])—which are not likely to adversely affect NJOY. JX-0012C.0002; Tr. (Seth) 956:8-9; *Certain Devices for Connecting Computer via Telephone Lines*, Inv. No. 337-TA-360, Comm’n Op. at 10 (Nov. 18, 1994). Similarly, should a CDO issue, it should include an exception for compliance verification testing necessary for sales of JLI’s products overseas (e.g., JUUL2). *Certain Magnetic Data Storage Tapes and Cartridges*, Inv. No. 337-TA-1012, Comm’n Op. at 132 (Apr. 2, 2018).

A. Bond

No bond is appropriate because NJOY did not show any Section 337 violation nor injury from which protection by bond is warranted. *See, e.g.*, Tr. (Vander Veen) 745:18-21 (opining that the competition between the non-interchangeable pods is limited, if any); *Certain Magnetic Tape Cartridges and Components Thereof*, Inv. No. 337-TA-1058, Comm’n Op. at 73-74 (Apr. 9, 2019).

Moreover, NJOY's proposed bond rates for the JUUL1 devices and pods⁴ contradict the testimony of NJOY's CEO, and Dr. Vander Veen. Tr. (Leistra) 117:10-13; Tr. (Vander Veen) 745:13-21, 756:20-22; *cf.* CIB at 138-139. First, Dr. Vander Veen's price differential analysis is itself unreliable for not adjusting for factors such as [REDACTED] reflected in JLI's price data. *See* JX-0584C; JX-0586C.

Second, the JUUL1 devices are generally priced higher than ACE. Tr. (Leistra) 117:10-13. Further, setting aside Ms. Leistra's testimony regarding the current competitive environment, and outside of Dr. Vander Veen's cherry-picked Q3 of 2023, NJOY's own analysis shows that from Q4 2021 to Q2 2023, the JUUL1 devices were consistently priced higher than ACE. CX-2339C.2; Tr. (Thomas) 1332:20-1333:7. Public data also shows that the JUUL1 devices have higher retail prices than ACE. RX-0952; RX-0955. Thus, no bond is justified for the JUUL1 devices. *Certain Magnetic Data Storage Tapes and Cartridges Containing the Same (II)*, Inv. No. 337-TA-1076, Comm'n Op. at 67 (June 20, 2019).

Third, for the JUUL1 pods, NJOY's proposal of [REDACTED]% is rejected by its own expert Dr. Vander Veen. Tr. (Vander Veen) 745:7-21, 756:20-22. Dr. Vander Veen's analysis is also unreliable for not considering [REDACTED]. Tr. (Leistra) 116:25-117:3.

Fourth, despite having abundant JLI data, NJOY failed to present reliable analysis. NJOY should not be rewarded for its own failure with a 100% bond rate. *Magnetic Tape Cartridges*, Inv. No. 337-TA-1058, Comm'n Op. at 73-74.

B. Public Interest

NJOY's and the Staff's public interest arguments are unavailing. CIB at 139-147; SIB at 120-123.

⁴ NJOY did not propose—and has waived—bond for the JUUL1 System, [REDACTED], and JUUL2 System (including devices and pods). CIB at 138-139; Tr. (Vander Veen) 740:9-13.

First, the “key public interest question” here is *not* identical to the question in 337-TA-1368. Here, the question focuses on the adverse impact of excluding the JUUL products, with superior effectiveness and switching rates, and significant market share, while the question in -1368 focuses on the impact of excluding NJOY ACE, which has inferior switch rates and low market share, having not been robustly adopted. Moreover, the JUUL System exposes users to fewer harmful toxicants than NJOY ACE. *See* RIB, Section IV.A.

Second, NJOY ACE is not “a particularly apt substitute for JUUL,” as NJOY argues. As to Section IX.A.1 of CIB, NJOY ignores the fact that NJOY’s ACE products have inferior switch rates. *See* RIB, Section IV.C.

Third, as to Section IX.A.2 of CIB, NJOY ignores the testimony of Dr. Madl, who explained that “what’s interesting is that Vuse Alto doesn’t have as good a switching rate as JUUL” despite being in the “sweet spot” of nicotine delivery. Tr. (Madl), 1379:16-21. Dr. Madl also testified, and NJOY similarly ignored, that “the JUUL [switching] numbers are far higher than what you see with NJOY ACE.” Tr. (Madl), 1362:7-11, 1379:16-21.

Fourth, as to Section IX.A.3 of CIB, and as JLI explained in its initial brief, NJOY continues to incorrectly interpret the JUUL clinical study, and erroneously argues that “ACE scored the highest on metrics...” *See* RIB at 155 n.29.

Fifth, with respect to Section IX.A.4 of CIB, NJOY has offered insufficient evidence to support its market projections and, as repeatedly pointed out by NJOY’s fact witnesses and JLI’s experts, NJOY’s sales forecasts and production demand forecasts are not reliable. RIB at 151-152; Tr. (Murillo) 926:18-927:22; RX-1123C (Unangst) at 148:17-163:3.

Sixth, as to Section IX.A.5 of CIB, again, as repeatedly pointed out by NJOY’s fact witnesses and JLI’s experts, NJOY’s production volume forecasts are not reliable. RIB at 159; Tr.

(Seth) 925:14-929:22; (Winch) 162:13-165:18 (conceding that NJOY’s sales forecast as of August 2023 [REDACTED]); JX-0491C, RX-1327C.

Seventh, the Staff cites no precedent to support its argument that the public interest question must focus on “the population as [a] whole” (SIB at 121), as opposed to just those portions of the population who would be most affected by an exclusion order. But even if the Staff were correct, Dr. Madl did consider the population as a whole, and provided unrebutted testimony that the potential risks associated with keeping JUUL on the market to non-users of cigarettes are outweighed by the benefits and “overwhelming opportunity” for risk reduction to those who may use harmful combustible cigarettes in the future. Tr. Madl 1400:8-1401:25 (emphasis added).

Finally, regarding Section IX.B of CIB, NJOY’s attorney arguments over [REDACTED] [REDACTED] should be afforded no weight, particularly given that NJOY offered no experts on public interest [REDACTED] in this case. Further, NJOY’s arguments ignore that several of the quotes it relies on [REDACTED] contradict the facts. For example, [REDACTED] [REDACTED] [REDACTED] In any event, JLI’s unrebutted expert testified that [REDACTED] [REDACTED] Tr. (Madl) 1359:7-21 (emphases added).

IX. CONCLUSION

For at least all reasons set forth above, and in RIB, JLI has not violated Section 337, and no remedies are appropriate.

Dated: July 15, 2024

Respectfully submitted,

/s/ Michael T. Renaud

Michael T. Renaud

Adam S. Rizk

William Meunier

Marguerite McConihe

Samuel Davenport

Matthew A. Karambelas

Catherine Xu

James Thomson

Courtney Herndon

Paul Weinand

Meena Seralathan

Tianyi Tan

Hannah M. Edge

MINTZ LEVIN COHN FERRIS

GLOVSKY AND POPEO PC

One Financial Center

Boston, MA 02111

Tel: (617) 542-6000

Fax: (617) 542-2241

David Hollander

MINTZ LEVIN COHN FERRIS

GLOVSKY AND POPEO PC

555 12th Street NW, Suite 1100

Washington, DC 20004

Tel: (202) 434-7300

Fax: (202) 434-7400

Reza Dokhanchy

MINTZ LEVIN COHN FERRIS

GLOVSKY AND POPEO PC

3580 Carmel Mountain Road, Suite 300

San Diego, CA 92130

Tel: (858) 314-1596

Fax: (858) 314-1501

Mintz-JUUL-ITC-2@mintz.com

Counsel for Respondent

JUUL Labs, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Order No. 2 and Ground Rules 1.7 and 7.2, the undersigned certifies that this brief contains 19,991 words, exclusive of the exempted portions of the brief, as calculated by the “Word Count” feature on Microsoft Word, the word processing program used to create it.

Dated: July 15, 2024

Respectfully submitted,

/s/ Michael T. Renaud

Michael T. Renaud

MINTZ LEVIN COHN FERRIS

GLOVSKY AND POPEO PC

One Financial Center

Boston, MA 02111

Tel: (617) 542-6000

Fax: (617) 542-2241

Counsel to Respondent

JUUL Labs, Inc.

PUBLIC VERSION

CERTIFICATE OF SERVICE

I, Megan A. De Renzis, hereby certify that on August 9, 2024, true and correct copies of the forgoing document were served on the parties as indicated below:

The Honorable Lisa R. Barton Secretary to the Commission United States International Trade Commission 500 E Street SW, Room 112 Washington, DC 20436	☒ Via EDIS ☐ Via Hand Delivery ☐ Via Federal Express (Overnight) ☐ Via Electronic Mail
The Honorable Doris Johnson Hines Administrative Law Judge United States International Trade Commission 500 E Street SW, Room 317 Washington, DC 20436 JohnsonHines1372@usitc.gov	☐ Via EDIS ☐ Via Hand Delivery ☐ Via Federal Express (Overnight) ☒ Via Electronic Mail ☒ Via Box
Vu Bui, Esq. The Office of Unfair Import Investigations United States International Trade Commission 500 E Street SW, Room 317 Washington, DC 20436 Vu.Bui@usitc.gov	☐ Via EDIS ☐ Via Hand Delivery ☐ Via Federal Express (Overnight) ☒ Via Electronic Mail
<i>Counsel for Complainant NJOY, LLC</i> Elizabeth S. Weiswasser Anish R. Desai WEIL GOTSHAL & MANGES LLP 767 5th Avenue New York, NY 10153 Telephone: (212) 310-8000 W. Sutton Ansley Christopher M. Pepe Matthew D. Sieger WEIL GOTSHAL & MANGES LLP 2001 M Street NW, Suite 600 Washington, DC 20036 Telephone: (202) 682-7000 Adrian C. Percer WEIL GOTSHAL & MANGES LLP 201 Redwood Shores Parkway Redwood Shores, CA 94065 Telephone: (650) 802-3000 Beth Wilkinson Brian L. Stekloff	☐ Via EDIS ☐ Via Hand Delivery ☐ Via Federal Express ☒ Via Electronic Mail

PUBLIC VERSION

The Honorable Lisa R. Barton Secretary to the Commission United States International Trade Commission 500 E Street SW, Room 112 Washington, DC 20436	☒ Via EDIS ☐ Via Hand Delivery ☐ Via Federal Express (Overnight) ☐ Via Electronic Mail
James Rosenthal Alysha Bohanon Wilkinson Stekloff LLP 2001 M Street N.W., 10th Floor Washington, DC 20036 Telephone: (202) 847-4000 <u>NJOY.JUUL.ITC.1372@weil.com</u> NJOY-JUUL-ITC@wilkinsonstekloff.com.	

/s/Megan A. De Renzis
Megan A. De Renzis
Legal Specialist
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
555 12th Street NW, Suite 1100,
Washington, DC 20004
+1.202.434.7406
MADeRenzis@mintz.com