

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN VAPORIZER DEVICES, CARTRIDGES
USED THEREWITH, AND COMPONENTS
THEREOF**

Inv. No. 337-TA-1368

**INITIAL DETERMINATION ON VIOLATION OF SECTION 337 AND
RECOMMENDED DETERMINATION ON REMEDY AND BOND**

Administrative Law Judge Doris Johnson Hines

(August 23, 2024)

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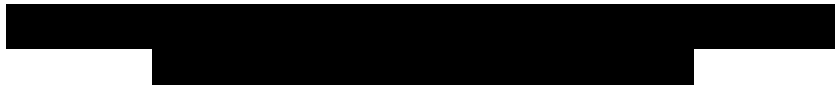
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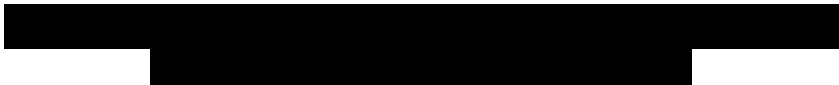
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This is the final initial determination in *Certain Vaporizer Devices, Cartridges Used Therewith, And Components Thereof*, United States International Trade Commission Investigation No. 337-TA-1368.

I. INTRODUCTION

A. Procedural History

JUUL Labs, Inc. and VMR Products LLC, collectively JLI, filed a complaint on June 30, 2023, alleging violations of section 337 based on the importation into the United States, the sale for importation, and the sale within the United States after importation of certain vaporizer devices, cartridges used therewith, and components thereof. *See* Notice of Investigation, 88 Fed. Reg. 52207 (Aug. 7, 2023) (EDIS Doc. ID 801887). The Commission instituted this investigation to determine:

[W]hether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1, 5–7, 29, 30, 36, 43, 44, 76, 77, 80, 81, 86, 89, and 93 of [U.S. Patent No. RE49,114]; claims 14, 16, 18, 27, 29, 31, and 32 of [U.S. Patent No. 10,130,123]; claims 1–4, 6, 7, 15, 16, 18–25, 28, and 30 of [U.S. Patent No. 10,709,173]; claims 1, 3, 5, and 7–21 of [U.S. Patent No. 11,134,722]; and claims 1, 2, 5, 6, 8–11, and 13–18 of [U.S. Patent No. 11,606,981], and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

Notice of Investigation.

The plain language description of the accused products in the complaint defines the scope of the investigation. 19 C.F.R. § 210.10(b)(1). The products are described as: “vaporizer devices (ENDS [Electronic Nicotine Delivery Systems] devices), cartridges used therewith (sometimes referred to as ‘pods’), and components thereof (cartridge housings, atomizers, atomizer subassemblies, device subassemblies).” Notice of Investigation.

[REDACTED]

explains that the connector is “detachably connected with the power rod,” Liu ’783 at ¶ 4, to “decrease manufacturing and use cost of the electronics cigarette,” *id.* at Abstract, and “to facilitate the installation, detachment and replacement of the atomizing means and the connecting means of the sucking rod,” *id.* at ¶ 2.

I agree with JLI that this is dispositive of NJOY’s validity challenge based on the combination Liu ’783 and Liu ’438. JLI Reply at 45. NJOY does not rely on Liu ’438 as making up for this deficiency in Liu ’783. *See* NJOY Br. at 73 (relying on Liu ’438 only for the claimed translucent material of the cartomizer body). The evidence does not support that claims 1 and 8 are invalid as obvious based on the combination of Liu ’783 and Liu ’438.

4. Secondary Considerations

JLI contends that multiple secondary considerations of nonobviousness support the validity of claims 1 and 15 of the ’722 patent and claims 1 and 8 of the ’981 patent. JLI Br. at 41–51 (’722 patent) and 57 (’981 patent). “Objective indicia of nonobviousness must be considered in every case where present.” *Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1048 (Fed. Cir. 2016). Evidence of such indicia “may often be the most probative and cogent evidence in the record,” *id.* at 1052, *quoting Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538 (Fed. Cir. 1983), and “guard against slipping into use of hindsight.” *Id.*, *quoting Graham v. John Deere Co.*, 383 U.S. 1, 36 (1966). Such evidence can include “commercial success enjoyed by devices practicing the patented invention, industry praise for the patented invention, copying by others, and the existence of a long-felt but unsatisfied need for the invention.” *Id.*

a) Nexus

To accord substantial weight to secondary considerations, the evidence must have a nexus to the claims. That is, there must be a legally and factually sufficient connection between the

[REDACTED]

evidence and the patented invention. The patentee bears the burden of showing that a nexus exists. *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373 (Fed. Cir. 2019). “A showing of nexus can be made in two ways: (1) via a presumption of nexus, or (2) via a showing that the evidence [of secondary considerations] is a direct result of the unique characteristics of the claimed invention.” *Volvo Penta of the Americas, LLC v. Brunswick Corp.*, 81 F.4th 1202, 1210 (Fed. Cir. 2023).

JLI contends that “[a] presumptive nexus is appropriate here for the JUUL and the claimed invention of the ’722 Patent” because (1) “[t]he ’722 Patent’s claims are directed toward rechargeable cigarettes or vaporizers comprised of two segments: a ‘battery portion’ and a ‘cartomizer,’” and (2) the asserted claims are ‘coextensive with the JUUL, including the JUULpod (a cartridge) and the JUUL Device (a vaporizer), in addition to having a battery portion and a cartomizer.” JLI Br. at 41–42.²² JLI argues that “[e]ach of the indicia [] regarding the JUUL has a presumptive nexus to the asserted claims of the ’722 Patent because the JUUL is coextensive with the asserted claims of the ’722 Patent” and that “JLI’s domestic industry products embody the inventions claimed by the ’722 Patent.” *Id.* at 42. The Staff agrees that there is a presumption of nexus where the claims cover a JLI device. Staff Br. at 91, *citing Volvo Penta*, 81 F.4th at 1210 (“A patent owner is entitled to a presumption of nexus when it shows the asserted objective evidence is tied to a specific product that ‘embodies’ the claimed features, and is coextensive with them.”).

NJOY argues that JLI is “not entitled to a presumption of nexus because the asserted claims of the Asserted Patents are not co-extensive with the JUUL system,” that “[e]vidence at the hearing

²² JLI does not assert secondary considerations with respect to JUUL2. JLI Br. at 41–51.

[REDACTED]

showed that the JUUL System comprises critical unclaimed features—including nicotine salts, flavors, and the overall appearance of the JUUL System,” and that “none of the asserted secondary considerations are actually the “direct result of the unique characteristics [*sic*] of the claimed invention.” NJOY Br. at 144 and 147; *see id.* at 144–45 (contending “JLI has at least another patent claiming the use of nicotine salts”), 145–46 (discussing “rectangular, sleek, USB-like shape of JUUL”), and 146–47 (discussing “approximately fifty flavors”).

JLI responds that “[t]he nexus analysis looks at the claims as a whole and ‘proof of nexus is not limited to only when objective evidence is tied to the supposedly new features,’” and that ““the purpose of the coextensiveness requirement is to ensure that nexus is only presumed when the product tied to the evidence of secondary considerations ‘*is* the invention disclosed and claimed,’” and contends that it has “met its burden.” JLI Reply at 78–79.

NJOY’s arguments regarding nexus are unpersuasive. The Federal Circuit has “never held that the existence of one or more unclaimed features, standing alone, means nexus may not be presumed” because “there is rarely a perfect correspondence between the claimed invention and the product.” *Fox Factory*, 944 F.3d at 1374; *Teva Pharms. Int’l GmbH v. Eli Lilly & Co.*, 8 F.4th 1349, 1360–61 (Fed. Cir. 2021) (same). JLI is entitled to a presumption of nexus to the extent that its objective evidence is tied to a specific product that embodies the claimed features, and is coextensive with them. *Volvo Penta*, 81 F.4th at 1210. As detailed above, JLI has demonstrated that the JUUL embodies the claimed features of the ’722 and ’981 patents. I conclude that JLI is entitled to a presumption of nexus.

b) Commercial Success

JLI contends that “[t]he JUUL enjoyed and enjoys significant commercial success, which further evidences the non-obviousness of the asserted claims.” JLI Br. at 46. The evidence supports

[REDACTED]

that the JUUL essentially created a new category of products that was commercially successful. JX-0094.002 (CNBC newsletter) (“Juul’s sales surged 882 percent in the most recent four-week period, boosting its market share to 68 percent.”); CX-0211.002 (Business Insider article) (“Juul is the best-selling e-cigarette on the market, with 32% of the market share of the total e-cigarette category, according to Nielsen data”); CX-0307 (Wired.com article); CX-0317 (Tech Crunch article); CX-0397 (Cowen article); Bowen Tr. at 114:19–116:18; Alarcon Tr. at 579:21–581:22.

NJOY criticizes evidence JLI cites because it references product design, “pleasing aesthetics,” nicotine salts, and different flavors. NJOY Br. at 149. While that is true, the evidence supports that the introduction and adoption of the JUUL created a new device category that was commercially successful.

c) Long-Felt Need

JLI also contends that a long-felt but unmet need to convert smokers of combustible cigarettes was met by “[t]he JUUL’s inventive design” because it “provided the user with a fundamentally different user experience, including with respect to vapor production and nicotine delivery that satisfied smokers’ cravings and that were enabled only through practice of the inventions of the asserted patents.” JLI Br. at 42–43. The evidence supports that the JUUL was unique and abandoned the industry norms of emulating the shape of conventional cigarettes. Alarcon Tr. at 570:20–578:6; CX-0307 (Wired.com article); CX-0317 (Tech Crunch article); CX-1062 (Time article re Adam Bowen and James Monsees). NJOY does not substantively dispute this. *See* NJOY Br. at 147–48. The evidence supports long-felt need.

d) Unexpected Results

JLI also contends that “[a]chieving a reliable, user-satisfying ENDS system, while departing from industry design norms, providing sufficient vapor production and nicotine delivery,

[REDACTED]

and using a relatively small form factor, as JLI's did, was unexpected." JLI Br. at 43–45. "Unexpected results are useful to show the improved properties provided by the claimed [invention] are much greater than would have been predicted. Nonobviousness may be established when an invention yielded more than predictable results. When unexpected results are used as evidence of nonobviousness, the results must be shown to be unexpected compared with the closest prior art." *Millennium Pharmaceuticals, Inc. v. Sandoz Inc.*, 862 F.3d 1356, 1368 (Fed. Cir. 2017) (internal citations and quotations omitted). While the evidence cited by JLI shows that when introduced, the JUUL was different from other products on the market, JLI does not provide evidence comparing the closest prior art to show any unexpected result.

e) Industry Praise

JLI contends that "JLI's patented features have received widespread recognition from its customers and others in the industry." JLI Br. at 45. NJOY disputes industry praise, contending that any praise for the JUUL was directed to unclaimed features. *See* NJOY Br. at 149 ("evidence cited by Mr. Alarcon confirm that any acclaims, praises, and successes are driven by unclaimed features of the JUUL System").

The evidence supports that the JUUL received industry praise. *See* JX-0091C at 2 (Bloomberg article) ("Since launching in 2015, the Juul has been a runaway success. Vapers appreciate the flat rectangular product design, discreet size and powerful pre-filled nicotine pods."); JX-0106 at 2 (Piper Jaffray industry note) ("JUUL is the leader in US vapor by a wide margin, with sequential monthly sales growth regularly over 20%."). The evidence supports that JLI received praise from others in the industry. Altria described the JUUL as "an innovative breakthrough," JX-0123 at ¶¶ 213–14, and acknowledged that while "most of the major players in the e-vapor industry acquired their products, JLI 'is one of the few companies that is responsible

[REDACTED]

for the design and manufacturing of its own products.” *Id.* at ¶ 214. Altria acknowledged that JUUL was “really the first pod product in the marketplace” and that “within the context of the classic three-part structure, JUUL offered a number of signature features that resonated with adult consumers, including ‘the unique form-factor body, the liquid-level viewing window, the reversible pod with locking gaps, the fresh air flow design, and the simple user operation.’” *Id.* at ¶ 214 and ¶ 219. The evidence supports industry praise.

f) Failure of Others

JLI contends that there is “evidence of the failure of others” citing Altria as an example of a company that tried but failed to develop alternatives to combustible cigarettes. JLI Br. at 49–50. JLI details the extensive, but ultimately unsuccessful, efforts by Altria from 2012 through at least 2018 to develop combustible cigarette alternatives, including pod-based alternatives. JX-0123 at ¶¶ 190, 191, 192, 301–03, 305–08, 324, 567, 570–73, and 653–54 and Alarcon Tr. at 575:18–21 (“Altria invested billions in attempting to internally develop these sort of alternatives to traditional combustible cigarettes, and they self-describe as ‘each of them failed.’”). NJOY does not address the failure of Altria. *See* NJOY Br. at 144–50 and NJOY Reply at 86–87. The evidence supports failure of others in designing and developing the features of the asserted patents.

g) Copying

JLI also contends that “after the substantial success of the JUUL, there has been numerous copycat entrants into the market who mimicked JLI’s designs” and that “[c]opying is further evidenced by competitor marketing material that touts the fact that their products are compatible with the JUUL Device.” JLI Br. at 47–48. NJOY argues that “NJOY ACE is not a copy of the JUUL System at least because it has a different shape and uses fundamentally different atomizer technology.” NJOY Br. at 150. The copying inquiry involves a comparison of the competitor’s

[REDACTED]

product with the allegedly copied patented product, rather than the patent’s claims, lest the “separate infringement and copying inquiries [collapse] into a single analysis.” *Medtronic, Inc. v. Teleflex Innovations S.a.r.l.*, 70 F.4th 1331, 1340 (Fed. Cir. 2023). The evidence does not support copying by NJOY.

h) Licensing

JLI contends that [REDACTED]

[REDACTED] JLI Br. at 50–51. NJOY does not address licensing. *See* NJOY Br. at 144–50 and NJOY Reply at 86–87. JLI’s [REDACTED] is not especially relevant. JLI Br. at 50–51 ([REDACTED]). The evidence does not support licensing as an objective indicia of nonobviousness.

i) Conclusion as to Secondary Considerations

The evidence supports secondary considerations of commercial success, long-felt need, industry praise, and failure of others tied to the features of the asserted patents, supporting non-obviousness.

VII. THE ’123 PATENT

The ’123 patent is titled “Vaporizer Devices With Blow Discrimination” and relates generally to discriminating between blowing (inhaling) and drawing (exhaling) in vaporizer devices. ’123 patent (JX-0002) at 2:15–19.²³

The patent states that prior art vaporizer devices can falsely detect a draw (inhale) and mistakenly turn on the heating element in response to a blow (exhale). *Id.* at 2:41–58. “This failure

²³ The AIA version of 35 U.S.C. § 102 applies because the applications resulting in the ’123 patent were filed after March 16, 2013.

b) Claim 4

NJOY argues that dependent claim 4 is obvious over Verleur in view of the knowledge of one of skill. NJOY Br. at 132–37. Because Verleur in view of the knowledge of one of skill does not render claim 1 obvious, that combination does not render dependent claims 3 or 4 obvious.

3. Verleur in View of Plojoux

NJOY argues that claim 4 is obvious over Verleur in view of Plojoux. NJOY Br. at 137–43. Because Verleur in view of the knowledge of one of skill does not disclose claim 1 and because Plojoux is not asserted to make up for those deficiencies, the evidence does not support that claim 4 is invalid as obvious over Verleur in view of Plojoux.

4. Secondary Considerations

JLI contends that “[t]here is strong and indisputable objective evidence of non-obviousness for the ’173 Patent.” JLI Br. at 126–128 (addressing secondary considerations for the ’173 patent). JLI contends that “[s]econdary considerations support the non-obviousness of the Asserted Claims of the ’173 Patent for the same reasons discussed [with respect to the ’722 patent].” JLI Br. at 127; 41–51 (addressing secondary considerations for the ’722 patent) and JLI Reply at 78–82.

NJOY disagrees. NJOY Br. at 144–150 (disputing secondary considerations for the ’173, ’722 and ’981 patents); NJOY Reply at 86–87 (disputing industry praise for the ’173 patent). The Staff did not address secondary considerations for the ’173 patent. *See* Staff Br. at 218–25 and Staff Reply at 28–32 and 35–36. For the reasons discussed with respect to the ’722 and ’981 patents, the evidence supports a presumption of nexus and demonstrates commercial success, long-felt need, industry praise, and failure of others tied to the features of claims 1 and 4 of the ’173 patent, supporting non-obviousness.

[REDACTED]

Under 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review under 19 C.F.R. § 210.43(a) or the Commission orders on its own motion a review of the Initial Determination or certain issues therein under 19 C.F.R. § 210.44. 19 C.F.R. § 210.42(d).

XIV. ORDER

Within seven days of the date of this document, the parties shall jointly submit a single proposed public version of this document with any proposed redactions indicated in red. If the parties submit excessive redactions, they may be required to provide declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in 19 C.F.R. § 201.6(a). To the extent possible, the proposed redactions should be made electronically in a single PDF file with the proposed redactions submitted as “marked” but not yet “applied.” The proposed redactions should be submitted via email to JohnsonHines1368@usitc.gov and not filed on EDIS.

SO ORDERED.


Doris Johnson Hines
Administrative Law Judge