UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD
IPR2024-01458
Patent 9,538,788 B2

R.J. REYNOLDS VAPOR COMPANY,
Petitioner,

-vs-

HEALTHIER CHOICES MANAGEMENT CORP.,
Patent Owner.

REMOTE DEPOSITION OF
CHARLES A. GARRIS, JR., PH.D., P.E.
9:21 a.m. to 1:03 p.m.
August 29, 2025

Job No. 7540748
REPORTED BY: Rhonda D. Tuck, RPR, CRR

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I N D E X

WITNESS: CHARLES A. GARRIS, JR., PH.D., P.E.
Examination by Attorney Nightingale.....4

E X H I B I T S

(None)

* * * * *

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(9:21 a.m., August 29, 2025)

(Witness sworn.)

CHARLES A. GARRIS, JR., PH.D., P.E.,

having been duly sworn, testified as follows:

E X A M I N A T I O N

BY ATTORNEY NIGHTINGALE:

Q. Good morning, Dr. Garris. Can you hear me okay?

A. Yes, sir. Good morning.

Q. Good morning. My name is Josh Nightingale. I represent the petitioner in this inter partes review proceeding. I'll be asking you some questions today.

Can you please state your name for the record?

A. Charles Alexander Garris, Jr.

Q. Dr. Garris, is it okay if I refer to you as Dr. Garris today?

A. Certainly.

Q. Dr. Garris, you've had your deposition taken before; is that correct?

A. I have.

Q. About how many times have you been deposed?

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A. Well, I don't keep track of it, but I'm sure at least 100 times.

Q. So you understand the basic process. I'm going to be asking you a series of questions today, and I'm sure you've had depositions taken remotely via Zoom before, so you know that it's important that we don't talk over each other, so that the court reporter can accurately record your testimony.

So if you'd be so kind, please let me finish my question before you answer, and I'll try to do the same. I'll try to not ask any questions until you've finished your answer completely.

Does that sound fair?

A. It certainly does.

Q. Dr. Garris, have you ever testified at a trial or arbitration proceeding?

A. I have.

Q. Do you recall about how many times you've testified at a trial or arbitration proceeding?

A. Again, I don't keep track, but I would say at least 25 times, maybe more.

Q. Has your testimony ever been criticized or rejected by a court or other tribunal?

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A. Not by the court. By opposing counsel, certainly, but not by the court.

Q. Prior to this IPR matter, have you ever submitted an expert declaration in a PTAB matter before?

A. Yes, I have.

Q. Again, do you recall about how many PTAB matters that you have submitted expert testimony in?

A. Well, there have been a certain number of cases, and some of those cases involved several patents, and each patent is created as a separate PTAB matter. If you count all of the patents that were before PTAB, probably there's an awful lot of them. Maybe, I don't know, 50 or more. I've been in cases where there were 10, 15 patents involved in just one case.

I think I've been in maybe 15 or 20 PTAB cases, and if you multiply that by the number of patents in each case, it comes up to, and you can do the math, maybe 50, 60.

Q. Okay.

A. But they were all -- generally speaking, the cases were related. In each particular case, the PTAB matters were on different patents, and they were treated separately, but they were on very

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similar matters.

Q. You understand that the testimony you are providing today is under oath; is that correct?

A. Yes, sir.

Q. Do you agree, Dr. Garris, not to discuss the substance of your testimony during any breaks that we take today?

A. I do.

Q. Is there anything that would prevent you from giving truthful and accurate testimony today?

A. No, sir.

Q. Today we're discussing the IPR proceeding for U.S. Patent Number 9,538,788. Is it okay if we refer to that patent as the '788 Patent?

A. Yes, sir.

Q. Dr. Garris, you analyzed the '788 Patent in preparing your declaration; is that correct?

A. Yes, sir.

ATTORNEY NIGHTINGALE: Can we go off the record.

(Discussion off the record.)

BY ATTORNEY NIGHTINGALE:

Q. Dr. Garris, before the break, we discussed that you have copies of at least some of the PTAB documents stored on your computer, and you

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said that you also have some printouts of at least some of the documents from this IPR proceeding in front of you; is that correct?

A. Yes, sir.

Q. Dr. Garris, can you please pull up I guess the file for the '788 Patent?

A. Certainly. I'll pull it up on my end.

Okay. I have it.

Q. This document, Dr. Garris, bears the label RJRV Exhibit 1001. Is that what you've looking at?

A. Yes, RJRV Exhibit 1001.

Q. Do you recognize Exhibit 1001 as the '788 Patent at issue in this IPR?

A. Yes, sir, I do.

Q. Did you analyze the '788 Patent in preparing your declaration?

A. I did.

Q. Dr. Garris, you're being compensated at the rate of $495 per hour; is that correct?

A. Yes, sir.

Q. You're being paid that hourly rate for all work performed in connection with this matter; is that correct?

A. Yes, sir.

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Q. Does that include today's testimony?
A. Yes, sir.
Q. About how many hours have you billed to this IPR proceeding so far?
A. Well, I have actually been working on the case for over a year, and... oh, boy, I haven't looked at it recently, but I would say something on the order of $7,000 or $8,000 maybe, more or less. Now, that's just from memory, and I'm not really -- I haven't looked at it, so I might be a bit off.
Q. So that would be around 14 to 16 hours, ballpark?
A. Actually, I think I spent more than that, you know, probably more like 25 or 30 hours. I think I've clearly spent more than 30 hours on it. There's an awful lot of documentation I've read, going through each and every patent that's at issue, going through Mr. Kodama's deposition, his expert reports, going through -- preparing my own expert report. So I've spent probably closer to 50 hours, I think.
Q. Dr. Garris, who retained you in this litigation?
A. Mr. Tom Fisher, from the law firm of Cozen O'Connor, and he was representing Healthier

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Choices at that time.

Q. In this case, you're acting as a retained expert for Healthier Choices Management Corporation; is that correct?

A. That is the case, yes.

Q. Is it okay if I refer to Healthier Choices Management Corporation as HCMC?

A. Yes, certainly.

Q. Before this IPR, you previously served as an expert witness for HCMC in another PTAB matter; is that correct?

A. Yes.

Q. That prior PTAB matter was also an inter partes review that was challenging one of HCMC's patents; is that correct?

A. Yes.

Q. You provided sworn testimony in that earlier PTAB proceeding; is that correct?

A. Yes.

Q. Were you compensated by HCMC or its counsel for that prior representation?

A. Yes.

Q. Do you recall if your hourly rate in that prior matter was the same $495-per-hour rate that you are charging for this IPR matter?

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A. Yes, I believe it was. I haven't changed my fees in a long time.

Q. Dr. Garris, do you have a copy of your CV handy, in particular Exhibit 2002, the CV that was submitted in this IPR proceeding?

A. Yes. Let me pull that up. Let me see. I guess it would be under Garris declaration. It's one of the exhibits in that. I want to be sure I have the right version. I can bring up -- let me look in one other place.

ATTORNEY COLLS: Josh, can you email us the documents? Would that be faster?

ATTORNEY NIGHTINGALE: Sure. I'd be happy to.

THE WITNESS: I have my resume, and it's pretty much the same. I periodically make changes. So I'm trying to be precise to make sure that I'm looking at the same version of my resume that you are, you know.

ATTORNEY NIGHTINGALE: Rhonda, let's go off the record.

(Break in proceedings.)

BY ATTORNEY NIGHTINGALE:

Q. Dr. Garris, do you have a copy of Exhibit 2002 from this IPR proceeding?

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A. Yes, I do.
Q. Do you recognize Exhibit 2002 as your CV that was submitted in this proceeding?
A. I do, yes.
Q. Starting on Page 18 of your CV, there's a section entitled "Expert Testimony in Patent and Product Liability Lawsuits."
Is that correct?
A. Yes.
Q. You agree that the purpose of this section is to disclose the litigation and PTAB matters in which you have provided expert testimony; is that correct?
A. Yes, sir.
Q. Your CV lists more than 80 cases in which you've provided expert testimony; is that correct?
A. Yes, sir. Yeah, I should say that the list I have here usually only includes cases where something substantial happened, like I prepared a declaration, I was deposed, or I appeared in a hearing or something. There have been a lot of other cases which were settled before anything much happened. So I didn't include those cases.
Q. Dr. Garris, you believed this list to be

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an accurate and complete list of all the matters in which you submitted some type of testimony; is that correct?

A. Prior to my declaration. There are additional cases I could put -- since then that I could put on there.

Q. Would you be willing to provide us with an updated copy of your CV that lists any new matters that may have started after submitting your declaration?

A. Certainly. Sure.

Q. Looking at exhibit --

A. The only exception is I know that if I haven't been deposed or I haven't been declared as the expert to the opposite side, sometimes the attorneys are sensitive to me disclosing that I'm involved in the case, you know. So I may not want to do the latest ones, but I think most of them, where I've done something substantial, following the rules that I've applied here, I'd be happy to.

ATTORNEY COLLS: Josh, I'm going to object to that to the extent that Charles may be listed as an expert but the issue is not ripe, so he would have no necessity to be listed on the case.

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ATTORNEY NIGHTINGALE: Okay.
Understood.
BY ATTORNEY NIGHTINGALE:
Q. Dr. Garris, looking at Exhibit 2002, can you confirm that there is no entry in the list identifying your prior expert engagement for HCMC before the PTAB?
A. Yeah. That's probably an oversight. Definitely an oversight. Yes, I can confirm that.
Q. So the earlier PTAB case for HCMC is missing from the CV that you submitted in this proceeding; is that correct?
A. Yes, sir, it is.
Q. Was the omission of that prior HCMC PTAB matter engagement intentional?
A. Absolutely not. Absolutely not. It was just an oversight.
Q. Did you prepare this CV?
A. I did.
Q. Are you the person responsible for ensuring that the CV is complete and accurate?
A. I am.
Q. Do you agree that transparency regarding prior testimony or work is important for the PTAB's assessment of your credibility and possible bias?

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A. Yes, sir.

Q. Do you know if there are any other cases missing from your CV?

A. There might have been. There might have been. I think what actually happened was, again, a glitch, because I think I have -- I definitely have more cases than 87, but I had to -- at the university, we're going through accreditation, so I think I truncated it, and then I reput these files in. So in transferring the files, I might have accidentally omitted a page or something. I think something like that happened, because I remember I had a prior, a prior -- a resume that had something like 91 or 92 cases, and this one only has 87.

I think probably in truncating it for academic purposes and reinserting the litigation experience, I might have screwed up.

What I will do, though, in response to your request is after this deposition, I will go back into my records and make sure it is completely accurate. And I apologize for any inaccuracy that might be there, but I can assure you that it was unintentional.

Q. Thank you. If you just want to send that updated CV to David or another attorney from

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HCMC, they can get it to us. Does that sound okay?

A. It sounds fine.

Q. Dr. Garris, do you have a copy of Exhibit 2001, the declaration that you submitted in this proceeding?

A. I do, yes.

Q. Can you turn to Paragraph 9, please?

A. Okay. Let me pull it up here. Okay. Paragraph 9. Okay. Yes.

Q. In Paragraph 9, you state that you have been an expert in other cases of patent litigation involving electric smoking devices; is that correct?

A. Yes.

Q. Can you identify each case in which you served as an expert in patent litigation involving electric smoking devices?

And for each case, if you could give me the party you worked for, the opposing party, the court or forum, and the approximate year, that would be great.

A. I don't know if -- let's see. Let me go back to my resume here. My records are pretty much what you see here. I could go back to my files and try to dig out that information, but --

Q. If you're confident, Dr. Garris, that

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the updated CV will include all such matters, then that would be okay.

A. Well, I can try to get it. I usually don't keep track of the dates much, other than, for example, in this case I wrote when I was deposed, so that will give you a rough idea, but I don't usually keep track of the court.

What I keep track of is the subject, the technical subject of the case, the law firm that I worked with and the key, the lead, or one of the attorneys that I worked with.

So for example, in this case I worked with Nixon & Vanderhye, and specifically I worked with Larry Nixon on the Schick versus American Razor case, and I say it was a jury trial. And I usually put down what I did in the case, if I wrote a declaration, if I was deposed, if I appeared at trial.

This particular case, I appeared at a jury trial. I wrote down the date of the trial, but I didn't write down the court. As I recall, the court was in Washington.

Then I write down a little blurb here on what the case involved, but I usually -- I don't have the information on the court, the case number

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and all of that. That would require a lot of research for me to dig it out. I'd have to go back to all of my files for 91 cases. You're asking me a lot, you know. It's not that it's a secret or anything, but I'm sure that you can find this information out, I don't know what other means, but if there's a particular case you want me to find, I'd be glad to do that. But it would really be difficult for me to do all cases.

Q. Just to confirm, Dr. Garris, the updated CV that you're going to provide to us will list all of the different patent litigations involving electric smoking devices?

A. It certainly will, yeah.

Q. Switching gears, Dr. Garris, what did you do to prepare for your deposition today?

A. Well, in preparing for the deposition, first of all, I reviewed my declaration. That was the first thing I did. The second thing is I reviewed the court's decision and looked at the issues that were brought up by the PTAB. Then I looked at all of the patents that were identified for institution. So all of the patents involved in the institution were -- I reviewed those.

I also took a look, not in great detail,

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but I did take a look at Mr. Kodama's declaration, and I took a look, I skimmed through some of his deposition testimony, not that I looked at it particularly carefully, but I did go through it.

Let's see. I did have a meeting with counsel, and we discussed --

ATTORNEY COLLS: Don't go into anything we discussed.

THE WITNESS: Okay. We discussed -- okay. I won't say anything about that, but I did have a meeting with counsel. Let's see. I think that's mostly it. In preparation for the deposition, I can't think of anything else that I did.

BY ATTORNEY NIGHTINGALE:

Q. You referred to the patents involved in this case. Does that include the '788 Patent?

A. Certainly.

Q. Does it also include the prior art patents and patent publications involved in this proceeding?

A. Yes, sir.

Q. You mentioned that you met with counsel to prepare for this deposition, correct?

A. Well, on video we met. Not in person.

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Q. When was that meeting?
A. Yesterday.
Q. Do you recall about how long you met for?
A. Yes. Probably about two hours.
Q. In preparing for this deposition, did you have any discussions with individuals that are not lawyers?
A. No, sir.
Q. Turning back to your declaration, Dr. Garris, can you please look at Page 43?
A. Page 43?
Q. Yes.
A. Let's see. Page 43. Yes, sir.
Q. Is that your signature on Page 43?
A. Yes, sir, it is.
Q. You intended to be truthful and honest in providing the opinions in your declaration; is that correct?
A. Yes, sir, I certainly did.
Q. And you told me that you may have spent somewhere between maybe 30 to 50 hours in reviewing materials and preparing this declaration. Is that accurate?
A. I would say so. I mean, it's as

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accurate as I can say by memory, but I think to the best of my recollection, that's correct.

Q. Can you take a look now at Paragraphs 13 and 14 of your declaration?

A. Okay. 13 and 14. I'm looking at it now.

Q. In those paragraphs, you list the materials that you reviewed in forming your opinions; is that correct?

A. That is correct, sir. Yes.

Q. Is the list of materials in Paragraphs 13 and 14 along with Appendix A intended to be a complete and accurate list of all the documents and materials you reviewed in preparing your declaration?

A. Well, I think it is. I think it is. There may have been some other things that I looked at, but I really didn't consider it in forming my opinions. So there might have been other things that I looked at that weren't on the list. I don't have the list in front of me, so I'm not sure exactly what I wrote. But I think that's a fair list of what I used to form my opinions.

Q. Appendix A goes from Pages 44 to 45 of your declaration, if you'd like to take a look.

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A. Okay. 44 to 45. Okay. I'm reviewing it now.

Yes, sir. I think it's fairly comprehensive.

Q. You mentioned --

A. I mean, I can't think of anything that I reviewed that I used to form my opinions that is outside of this.

Q. So other than the materials listed in Paragraphs 13 and 14 and in Appendix A, you did not review any other documents, references, or materials in forming the opinions of this declaration; is that correct?

A. Well, the materials that I used in forming my opinions, there may have been other materials that I looked at, but I don't believe they weighed in forming my opinions.

Q. Do you recall any of those other materials that you looked at?

A. I guess one thing that I'm thinking about, I have surfed the web, you know, looking at smoking devices and things like that, what the products are. But in this case, it doesn't -- the case doesn't really involve the specific products, but just as a matter of interest, you know, I wanted

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to see what the actual commercial products looked like, and I might have looked at that.

And I might have looked at some of the technical literature out there on e-cigarettes in general. It's basically just surfing the web. I made no record of it, and it didn't have any weight in forming my opinion, and it may not have been relevant to this case because the commercial products are not specifically relevant to anything in my testimony.

Q. Do you recall any of the search strings that you may have used in surfing the web?

A. I don't recall them, no. But, I mean, what I typically might have done was just go to the RJR website, the Healthier Choices websites, see what they're posting there and what the models are. I probably did that.

When you're searching the web, you go fast and furious. I can't tell you exactly what I saw, but I'm interested in learning about the industry. When you're working on a case like this, you have a natural curiosity. But there is nothing -- there is nothing that formed my opinions in my declaration that I garnered from any of that surfing that supersedes the references that I

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included in my Appendix A.

Q. You mentioned looking at information on products. Can you tell me which products that you looked at?

A. Not at this time, no. If I did any searching of the web, it was many months ago. I've been in this case for over a year, and probably most of my searching was done, you know, when I was working with Cozen, with Tom Fisher, when I started on the case, so it's probably over a year old.

So I don't have any recollection of it, of what specific products and all.

Q. You mentioned going to the RJR website. So did you look at product offerings from RJR, perhaps?

A. I probably did. Yeah, I probably did.

Q. You also mentioned going to the HCMC website; is that correct?

A. Yes.

Q. Did you --

A. I mean, I probably did. Like I say, it's a long time ago, and I did some web searching, and I would think that I would have gone to those websites.

Q. Did you look at products from HCMC?

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A. Like I say, I don't have a vivid memory of what I looked at, but I would think I did, yeah. I believe I did. That's what I would be interested in, to see what the products look like, just to get a feeling for the subject matter, to better inform myself. But as I said, I don't believe that any of that was relevant to my testimony in my expert report.

Q. Dr. Garris, you understand that we're entitled to understand what materials you looked at in forming your opinions in your declaration?

A. Yes, I do.

Q. You mentioned looking at technical literature; is that correct?

A. Well, again, it's a little bit of a blur because I have worked on a few cases in this area, you know, and they're all -- they all have similarities. So whether or not I was working on one case or another case or specifically this case, I'm not exactly sure, but I have -- I have to say that I have done web searching. I can't say for sure that it was specifically relevant to this case, you know, because I might have been on another case. Again, we're talking about over a year ago. It might have been two years ago, in which case I was

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on a different case.

But even if it was while I was working on this case, I don't believe that that was really relevant to me forming my opinions as expressed in the declaration.

Q. Generally speaking, and I understand the different caveats you're providing, do you recall what type of technical literature you looked at?

A. Well, again, in reference to this case, I'm not -- I mean, I have read an awful lot of technical literature relative to e-cigarettes in connection with other cases, but I don't want to merge other cases into this, you know. So I've read a lot of technical literature on tobacco, tobacco products in general. I've done a lot of searching on the patent literature on this but in other cases.

In other cases, I was asked to do searching. So I've done quite a bit of searching on e-cigarettes, going way, way back to probably the early 1900s or even earlier. But I didn't do it in reference to this case, as best I can recollect, because I wasn't asked to opine on those things.

I've looked at the health literature, the effects of comparisons of health issues with e-cigarettes as compared to regular cigarettes. And

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in fact, that is described in the '788 Patent. That is an issue that was there. So I have looked at literature similar to that, but it's basically of the same vein as what appears in the '788 Patent. It's cumulative, anything that I discovered.

So relative to this case, I'm pretty sure that I did not do any searching or review of literature that was relevant to my opinions in this case.

Q. So your testimony is that you may have done a literature search, but ultimately it wasn't relevant to your opinions in this case?

A. Well, I don't think I ever did a literature search for this case. You know, I've done literature searches for other cases involving e-cigarettes. But for this case, I was not asked to do a literature search.

Already the assertions of the petitioner were out there, so the relevant prior art from my role in this case were already laid out by the petitioner. So my role was to look at the prior art cited by the -- so in this particular case, I did not do any additional prior art searches.

Q. Okay. So you did not do any type of literature search in connection with this particular

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case. Do I have that right?

A. I think you do. I think you do.

Q. And same thing, you didn't conduct any independent research specifically in connection with this case?

A. I did not, no.

Q. Dr. Garris, can you please take a look at Claim 1 of the '788 Patent?

A. Okay. Okay. I have it here. I am looking at my sheet here which has Claim 1 but identified with the subcharacters 1a, 1b that were utilized by the court.

Q. Dr. Garris, you just held up a copy -- excuse me, you just held up the sheet that you were referring to. I saw some handwriting at the top. Can you just tell me what that handwriting says?

A. Well, that handwriting, that handwriting says "'788 Claims." This was in my binder just to make it easy for me to identify what the document is. So it's basically '788 claims. I believe I copied this from the court's decision. So this is right out of the court's decision as to the challenged claims.

Q. Claim 1 of the '788 Patent refers to a first chamber and a second chamber; is that correct?

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A. Yes, sir.
Q. In forming your opinions for this IPR, did you apply any particular claim construction to the term "chamber" as it's used in the '788 Patent?
A. Well, no. I think I used the common and ordinary meaning of the word "chamber."
Q. What is the common and ordinary meaning of the word "chamber" that you applied?
A. Well, it's basically an enclosure. It's basically an enclosure which can be used to store various things. A chamber is an enclosure.
Q. Is it your opinion that a chamber in the context of the '788 Patent is simply an enclosed space?
A. Well, in the context of the '788 Patent, the term "chamber" is basically an enclosure to hold critical elements, specific critical elements of the invention. In other words, the first chamber includes certain specific components of the invention. The second chamber includes -- encloses other specific components of the invention.
So my understanding is that in the context of the '788 Patent, there are chambers which are dedicated to holding certain components.
Q. You testified that the chamber is an

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enclosure for holding specific components; is that correct?

A. Yes.

Q. Does the enclosure need to be enclosed on all sides?

A. Well, in the context of this patent, the enclosure itself or the chambers are -- the patents are very precise, and patents basically show entities, basically show what they're calling the chambers.

And if you look at Figure 2 of the patent, the first chamber, I believe -- I don't have the -- I'm just looking at a clean copy of the patent, so I don't have the labels exactly there, but I believe that the first chamber is identified in Figure 2 as 20, and the second chamber is identified as Figure 25. The enclosure -- the chamber does not necessarily have to be enclosed on all four sides -- I mean on all sides.

Q. Is that true for both the first chamber and the second chamber?

A. Well, as a matter of claim construction, I think to answer your first question, I don't think a chamber necessarily has to be closed on all sides. In Figure 2, it appears that it's -- it's also not

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totally enclosed either on all sides, because there are openings on both sides.

In the specification of the patent, they talk about the chambers, but there is no requirement that it be closed on both sides, not on all sides. In fact, Figure 2 shows that there's an opening toward the mouthpiece, you know, an opening 82. So it's not closed on all sides.

Q. So in the context of the '788 Patent, the first chamber does not need to be enclosed on all sides; is that correct?

A. Correct.

Q. In the context of the '788 Patent, the second chamber does not need to be enclosed on all sides; is that correct?

A. That's correct.

Q. Looking at Figure 2 of the '788 Patent, do you see the fluid container 205?

A. Yes.

Q. Is the fluid container depicted in Figure 2 a type of chamber as that term is used in the '788 Patent?

A. Again, the terminology in writing the patent is -- patent language is much more precise than generic language. In the patent, it's very

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specific that he's talking -- when he uses the word "chamber," he's talking -- chamber, if I take a look at, let's say, column 5, starting at line 13, it says that the passage of air goes from first chamber 20 to second chamber 25. So they're talking about 20 and 25 when they use the word "chamber."

On the other hand, when they talk about the container 225, they're using -- let's see, when they're talking about the container 205, I'm sorry... oh, yeah. They call it -- on column 5, lines 1 and 2, they call it a fluid container 201. So they do not -- they say the fluid container 205 is located in the second chamber. So they're saying that the fluid container 205 is located in the second chamber, which is identified by numeral 25.

In patent terminology, they have to be -- have to use the same terminology. You have to be consistent with the terminology. Otherwise, you would get the claim rejected on the basis of indefiniteness.

So in the '788 Patent, they're using the word "container" with regard to the fuel supply and they're using the word "chamber" with regard to the housing of the e-cigarette.

Q. Fluid container 205 is located in the

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first chamber -- excuse me, is located in the second chamber?

A. Okay. Let's see.

Q. Is that correct that the fluid container 205 is located in the second chamber?

A. Yes, it's the second chamber. Again, that's going back to column 3. In column 3, line 31, it says the second chamber is 25. Yeah. So the fluid container 205 is located in the second chamber, 25.

Q. Dr. Garris, can you take a look at Claim 1 again, please?

A. Yes, sir.

Q. Claim 1 of the '788 Patent recites, "A casing comprising a first chamber and a second chamber, the two chambers located sequentially within the casing." Is that correct?

A. Yes.

Q. In Claim 1, the battery must be located in the first chamber; is that correct?

A. Yes, sir.

Q. In Claim 1, a fluid-containing member must be located in the second chamber; is that correct?

A. Yes, sir.

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Q. In Claim 1, the heating assembly must be located in the second chamber; is that correct?

A. Yes, sir.

Q. Claim 1 also requires a tube element communicating between the first and second chambers with a first distal bend of the tube element located in the first chamber and a second distal end of the tube element located in the second chamber and affixed to the bulb, the element providing an air passage between the first and second chambers; is that correct?

A. Yes, sir.

Q. Claim 1 also requires a sealing element that forms a partition between the first and second chambers, correct?

A. Yes, sir.

Q. Other than the requirements that we just discussed, does Claim 1 impose any additional requirements as to the first and second chambers?

A. Not in Claim 1.

Q. Does Claim 1 include any requirement as to the size of the first or second chamber?

A. It does not.

Q. Does Claim 1 specify any particular shape for the first or second chamber?

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A. No, it does not.
Q. Claim 1 recites, "an air inlet provided on an external wall of the casing." Do you see that?
A. Yes, sir.
Q. In forming your opinions for this IPR, did you apply any particular claim construction for the term "air inlet"?
A. No. I think I applied the common and ordinary meaning of the word.
Q. What is the common and ordinary meaning of air inlet in the context of the '788 Patent?
A. Well, an air inlet is a place on the e-cigarette which allows air to enter the chambers or enter the housing or, I should say, perhaps, the casing. The casing comprises a first and second chamber. So it's an inlet where air can come into the e-cigarette.
Q. So an air inlet in the context of the '788 Patent is an opening that allows air to come into the e-cigarette?
A. Yes, sir.
Q. Does the '788 Patent impose any restrictions on the size of the air inlet?
A. No, sir. I mean, of course one of the

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requirements for a patent is that it be functional. So obviously a design engineer would find appropriate size, but it's a design element, and the patent itself does not specify any particular size.

Q. So in the '788 Patent, the air inlet needs to be on an external wall of the casing, and it's an opening that allows air to come into the e-cigarette; is that correct?

A. That's correct.

Q. The purpose of the air inlet of the '788 Patent is to allow external, ambient air to enter into the e-cigarette; is that correct?

A. Yes.

Q. Would the electronic cigarette of the '788 Patent function correctly if it lacked an air inlet?

A. No, it would not.

Q. Can you turn to Paragraph 35 of your declaration?

A. Okay. Yes. I've read it.

Q. In Paragraph 35, you refer to Figure 3 of the '788 Patent which shows the heating assembly 220; is that correct?

A. Yes, sir.

Q. The heating assembly 220 of Figure 3

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includes a glass bulb 230; is that correct?
A. Yes, sir.
Q. You have an annotated version of Figure 3 on Page 12 of your declaration, correct?
A. That's correct.
Q. In your annotated version of Figure 3, you show air entering the heating assembly via tube 55, correct?
A. Yes, sir.
Q. In your annotated drawing, you use a blue arrow to show air coming into contact with the bulb 230?
A. Correct.
Q. In your annotated drawing, is there free space or an air gap between the end of tube 55 and the bulb 230?
A. Yes.
Q. Your annotated drawing shows a fluid passageway 215; is that correct?
A. Yes, sir.
Q. The fluid passageway 215 provides solution from a fluid container; is that correct?
A. That is correct.
Q. You've labeled the fluid passageway 215 with the text "Fiber element," correct?

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A. That is correct.

Q. Fluid from the fluid passageway or fiber element comes into contact with the bulb 230; is that correct?

A. I mean, if you want to -- it does come into contact. It's basically sucked in. I guess if you look at the overall functioning of it, when a user sucks on the mouthpiece, sucks air in, it reduces the pressure inside the chamber, and that causes the air to flow in through the air inlet through the first chamber and then into the -- through the connecting tube 55, then into the heating element.

Then what happens is because of the low pressure that's created, air kind of surrounds the heating element and mixes with the fluid coming out of the fiber element, mostly by suction. It's sort of sucked out.

So there isn't exactly an impingement of the fluid onto the element. It's basically sucked in and immediately mixed with the surrounding air, and then the surrounding air has a way of exiting through the circumference through the peripheral area in the form of vapor, and that vapor is what the user breathes in.

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Q. So you said that there was an air gap between the tube element 55 and the bulb 230, correct?

A. Yes, sir.

Q. Is there also an air gap between the fiber element and the bulb 230?

A. Yes, most certainly.

Q. How does fluid traverse that free space between the fiber element and the glass bulb?

A. It does it -- what happens is because of the low pressure, there's a pressure differential between the pressure inside the fluid container and the pressure inside the heating element because the person is sucking.

In other words, when you smoke the cigarette, you're producing a suction which lowers the pressure in there, and that lower pressure causes the fiber -- the fiber element is porous. It's like a wick on a candle, and the wick is saturated with the fluid inside the container, which is a nicotine -- it has a lot of stuff in it, which is described in the patent.

By capillary action, the low pressure in there sucks out fluid, so it kind of comes out of the fiber element, and because the air is swirling

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around the bulb, it mixes with the bulb.

So that area between the bulb and the fiber element is basically a mixing region, and the air and the fluid -- the air swirling around the glass bulb, that basically causes mixing between the two fluids, the air and the fluid inside -- from the container. And then they mix, and there's a suction, continued suction, and the user sucks it out in the form of vapor. And that's directed toward the user.

To answer your question, the fluid comes out of the fiber element for two reasons. One is by capillary action, that there's capillarity because of the porosity of the fiber element and the fact that the air is scrubbing away the liquid. There's a gradient in the container fluid, and that causes the fluid to go through the wick the same way it does in a candle, you know, the wax in the base of a candle gets sucked up because of the gradient in liquid in the wick. And then the second reason it would tend to come through is that there's a difference in pressure.

So there's two mechanisms that would cause the fluid to come out. And then once it comes out, it mixes with the air and forms the vapor that

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the user ultimately breathes in.

Q. Dr. Garris, can you take a look now at Paragraph 37 of your declaration?

A. Certainly. Yes, sir.

Q. In Paragraph 37, you state that the glass bulb 230 contains a heating wire 225 in communication with the battery.

Is that a correct --

A. Yes, sir.

Q. Does the '788 Patent specification describe in detail how the heating wire inside the bulb is connected to the battery?

A. Let me check.

Well, what they do talk about is the pressure switch. If you take a look at column 5, starting at line 45, it says that "An air pressure switch is located at a distal end of the first chamber 20 and may be mounted on or separate from a printed circuit board."

Then, reading on, then going down to the next paragraph, starting at line 57, it says, "The printed circuit board or chip in conjunction with the air pressure switch controls the function of the electronic cigarette. According to one embodiment, outside, or ambient air is drawn into the first

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chamber through the air inlet. The air pressure switch senses the low pressure formed by a user drawing on the mouthpiece (not shown) and activates the heating element 225."

So it says that, through the pressure switch that activates it, by allowing electricity to flow from the battery to the heating element 225, so it does explain -- then I think to answer your question, the patent does explain how the heating element is actuated by the battery through the pressure switch.

ATTORNEY COLLS: Hey, Josh, are we upcoming on a quick break any time soon?

ATTORNEY NIGHTINGALE: I'm happy to take a break whenever you and Dr. Garris want.

ATTORNEY COLLS: Can we take five minutes?

ATTORNEY NIGHTINGALE: Is it okay if we make it 15, reconvene at 11:10?

ATTORNEY COLLS: That's fine.

(Break in proceedings.)

BY ATTORNEY NIGHTINGALE:

Q. Dr. Garris, before the break, we were talking about the claim limitation, the heating assembly comprising the bulb containing a heating

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wire in communication with the battery. Do you recall that?

A. Yes, sir.

Q. In the context of the '788 Patent, the heating wire is encapsulated within the bulb; is that correct?

A. Well, I think it's not shown in the diagram, but it would have to -- the wire itself would have to be -- would have to emerge from the bulb in order to have an electrical contact. So, I mean, it's not shown in Figure 3, for example, but the wire would have to emerge from the bulb and eventually be connected to the pressure switch, which would then connect it to the battery.

So it's not shown in the sketch, but it would not be -- the heating coil would not be entirely encapsulated by the bulb. The wire would have to come out of the bulb in order to have electrical continuity with the battery.

Q. And excuse me, one quick cleanup question. Dr. Garris, did you have any discussions with Mr. Colls or other counsel for HCMC during the break?

A. I did not, no. Absolutely not.

Q. So you said that the heating wire in the

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'788 Patent would have to come out of the bulb, correct?

A. Come out of the bulb or have -- the bulb would have to have an electrical contact to it, similar to a lightbulb. You know, a lightbulb has -- an incandescent lightbulb has a heating element, and the heating element is connected to the screw-on portion that you see on the outside, so that enables you to make electrical continuity.

Alternately, you could simply have the wire come out through the sides. There are a variety of ways in which one could do it. It's not shown in the patent, but one of ordinary skill in the art would know that you have to have electrical continuity, which means that the wire would have to be connected either directly or indirectly with something to convey the electricity to the battery.

Q. To confirm, the '788 Patent doesn't describe the direct connection between the heating element and the battery; is that correct?

A. It does not. One of ordinary skill in the art would know that it is necessary.

Q. The same thing with an indirect connection between the heating wire and the battery. That's also not described in the '788 Patent,

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correct?

A. No, sir. Correct.

Q. Dr. Garris, you're a patent agent; is that correct?

A. Yes, sir.

Q. So you understand that under U.S. patent law, there must be written description support in the specification for each claim limitation?

A. Well, there has to be written -- yes.

Q. In your opinion, is there written description support in the '788 Patent for the heating assembly comprising a bulb containing a heating wire in communication with the battery?

A. I think there is, because it's such a basic form of electrical engineering that one of ordinary skill in the art would immediately know that. There's a lot of things that are not shown in the figure or not described, likely because one of ordinary skill in the art would know that, and it's not necessary to describe it.

For example, when you look at Figure 3, the thickness of the glass and the effect on heat transfer, you know, there's lot of things that are not shown in the figure or explained in the patent, but one of ordinary skill in the art would know that

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they exist.

So I would say that there is sufficient support in the written description of the patent to support this claim limitation, 1d.

Q. Dr. Garris, do you have a copy of the Gilbert prior art reference?

A. I do. Should I pull it up?

Q. Yes, please.

A. Okay. Yes, I have it.

Q. In Paragraph 52 of your declaration, you refer to the Gilbert patent's cartridge as being "moistened with a chemically harmless flavoring preparation combining moisture and taste."

Do you see that?

A. Okay. 52. Yes, I do see that.

Q. The word "moistened" in this context means that the cartridge contains some amount of liquid; is that correct?

A. Yes, sir.

Q. The moisture of the flavoring preparation in the Gilbert cartridge is a fluid; is that correct?

A. Yes, sir.

Q. Can you take a look at column 3, lines 23 to 26 of Gilbert?

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A. Yes.
Q. That portion of Gilbert states, "The impregnation will be by a harmless flavored chemical compound. As suggested, such compounds may be solutions ranging from slightly mentholated water to a solution which would simulate artificially the flavor of Scotch whiskey."
Do you see that?
A. Yes, sir.
Q. The term "solution" in this context refers to a liquid, correct?
A. Yes.
Q. Water is a fluid; is that correct?
A. Yes.
Q. A solution of water and flavoring; is that correct?
A. Yes.
Q. So the flavoring of the Gilbert cartridge is a fluid, correct?
A. Yes.
Q. Can you turn to Paragraph 56 of your declaration now?
A. Okay. Yes. I've read it.
Q. In Paragraph 56, you state that Gilbert's battery 32 is provided at the mouthpiece

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end of the cigarette, correct?

A. Correct.

Q. More specifically, the battery 32 of Gilbert is located inside the mouthpiece; is that correct?

A. Yes. Yeah. Yeah, looking at... yes.

Q. Still looking in Paragraph 56, Dr. Garris, the second sentence of that paragraph reads, "The heating element is preferably a vacuum tube or bulb 36 having a screw plug 37 for detachably engaging with the socket in the screw plug 37."

Did I read that correctly?

A. Yes.

Q. Is there a typo in that sentence?

A. Let's see. The heating element...

I don't think so. Are you referring to my use of the word "vacuum tube"?

Where would the error be?

Q. My question goes to the end of the sentence, where you say that the bulb has a screw plug 37 for detachably engaging with the socket in the screw plug 37.

My reading is that it's saying that the screw plug 37 detachably engages with itself, and I

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was just hoping you could --

A. Oh, I see. I see what you're saying. In other words, my numerals might be wrong. It is similar to a lightbulb and preferably having... I see what you mean, the structure of the bulb...

I'm not sure I see where the typo is. We're talking here about the insert. There is an insert 22 surrounding the bulb which does act as -- to promote heat transfer, you know, all along the bulb.

Q. So my reading of that second sentence, the end part, to me it seems to be saying that the screw plug detachably engages with itself. It says, "detachably engaging with the socket in the screw plug 37," and I just want to make sure that is what you intended to --

A. Oh. Now I get what you're saying. Yeah. I see what you're saying. Okay. Let me take a look at Gilbert and see what 37 is. It's a little bit -- I see what you mean, the 37 looks like the end piece -- 37 and 38, in other words. Let's see...

Yeah. The socket is 38. I see what you're saying. The socket I think is 38. The bulb is 36. Let me find 37.

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Yeah. Okay. In paragraph -- let's say in column 2, line 46, it says, The heating element is preferably a vacuum tube or bulb 36 having a screw plug 37, for detachable engagement with the socket 30. Then the screw plug 37 has an end contact 38 adapted to -- yeah, so the socket is 30.

So yeah, I think you're right. There is a typo there.

Q. Can you just, for the record, tell me what you intended to say there?

A. Okay. So going to... let's see. Going to 56, it says, "The structure of the bulb 36, as disclosed by Gilbert," and preferably elongated and of a diameter to fit within the insert 22 in such a manner as to provide..."

I see. I'm sorry it took me so long to see what you're saying. Yeah, you're quite right. I see. 36 having a screw plug 37 for detachably engaging with the socket in the screw plug -- I think that should be 30. The socket is 30. Or perhaps it would be better to write "engaging with the socket 30."

I would say engaging with the socket 30, period. Cross out the rest of this. In other words, the bulb screws in just like an ordinary

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lightbulb. So yeah, that's definitely a typo.

Q. So jumping back a few paragraphs, in Paragraph 54, you state that, "Gilbert's device comprises a cartridge connected axially and sequentially to a tube 15 and a mouthpiece 24."

Do you see that?

A. Yes, sir.

Q. The tube 15 is shown in Figure 7 of the Gilbert patent; is that correct?

A. Figure 7, let me look at that.

Yes, sir.

Q. Figure 7 shows that tube 15 has an internal shoulder 18 that divides the tube into relatively short and substantially longer chambers; is that correct?

A. Right. Yes, sir.

Q. Tube 15 has an outer end portion 16 and an inner end portion 17, correct?

A. Yes.

Q. At the outer end portion 16, the tube has an opening for receiving the cartridge 20; is that correct?

A. That is correct, yes.

Q. The cartridge is placed inside the tube 15 so that it is abutted against the internal

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shoulder 18, correct?

A. Correct.

Q. In Paragraph 57 of your declaration, you state, "In operational use, inhalation will cause ambient air to be drawn through the passages 21 of the cartridge 20 which has been impregnated with suitable flavoring material which is mixed with the inhaled air, and such air then passes into the heating chamber and is caused to flow around the heating bulb 36."

Did I read that correctly?

A. Yes, sir.

Q. So in Gilbert, ambient air is drawn through the passages of the cartridge 20, correct?

A. Yes. I tried to show that in my annotated schematic of Figure 2.

Q. So in operation, the ambient air is drawn through the opening at the outer end -- at the opening at the outer end portion 16 of tube 15, through the cartridge 20 and into the interior of tube 15; is that correct?

A. That is correct.

Q. The flavoring material of the cartridge 20 mixes with the inhaled air as it passes through the cartridge; is that correct?

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A. That is correct.

Q. The heated and flavored air then passes into the heating chamber within tube 15, correct?

A. Correct.

Q. Would Gilbert's device work if ambient air was not drawn through the passages of the cartridge 20?

A. You mean if you did not hold those with the space passages? Well, I could visualize a situation where the flavor cartridge had a very, very -- you know, was sort of a low -- a very, very high porosity, say something like steel wool, where the porosity is very -- the pores, let's say the pores in the material, are very low, in which case air could be drawn through, in the same way it is with common filters that we have, you know, air filters and whatnot. They're highly porous, but they do not have channels going through it.

So to answer your question, I would say that Gilbert would still be functional without those passages if -- provided that the flavor cartridge was very low porosity and allowed it to go through.

Now, of course if it was low porosity, it would probably hold less liquid, but it would still be functional. It could still be functional.

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Q. More generally, Gilbert's device needs to have ambient air drawn through the cartridge?

A. That is true.

Q. Okay.

A. Yes, sir, that is true.

Q. In Paragraph 57 of your declaration, you state that, "Inhalation causes ambient air to be drawn through passages 21 of the cartridge 20 such that the flavoring material of the cartridge is mixed with the inhaled air."

Did I read that correctly?

A. Yes.

Q. "After the air and flavoring material are mixed, the mixture passes into the heating chamber and is caused to flow around the heating bulb." Correct?

A. Correct.

Q. Paragraph 58, you state that, "Gilbert expressly discloses that the tumbling of the air around the heat source provides for uniformity of heat transfer."

Did I read that correctly?

A. Yes, sir.

Q. In Paragraph 58, you state, "Therefore, the purpose of the bulb is to raise the temperature

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of the inhaling mixture."

Is that correct?

A. Yes, sir.

Q. So the temperature of the inhaling mixture is increased as it passes around the heating bulb 36, correct?

A. Yes, sir.

Q. The inhaling mixture includes inhaled air, correct?

A. Right. Yes, sir.

Q. And the temperature of the inhaled air is increased as the mixture passes around the heating bulb; is that correct?

A. Yes. In other words, all of the constituents of the mixture are all heated uniformly, so presumably to similar temperatures, but the air and the solution, the inhaling mixture is heated together, but each constituent is also heated.

Q. So the air is heated, and also the flavoring material is heated?

A. Yes, sir.

Q. Can you take a look now, Dr. Garris, at Paragraph 78 of your declaration?

A. Let me see.

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Okay. So here...

Okay. I've reviewed it. Is there a question?

Q. Sure. So in Paragraph 78, you say that Gilbert's bulb cannot be disposed of in separate chambers; is that correct?

A. Well, yeah. I think that's correct.

Q. Why can Gilbert's bulb not be disposed of in separate chambers?

A. Okay. Let's go back to -- I think we have to go back. I think what we're talking about here is, going back to 75, it points out that Mr. Kodama opines that what separates the first chamber from the second chamber in the Gilbert device is the shank 25, and I think that's what I'm arguing about, that's shown...

Okay. What he's saying here is this portion here in blue is the shank, and Mr. Kodama seems to be stating that the shank is the thing that defines the separation of a first and second chamber.

I think what I'm saying is it's not really the shank that determines the first and second chamber. It's the end of the bulb that is...

In other words, when you read the

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Gilbert reference, it's always talking about the bulb as defining a certain chamber. There is no reference in reading the patent that shows that this shank separates the two chambers. If there's any separation, it's the end of the tube. So therefore, I disagree with Mr. Kodama's interpretation.

Q. Your opinion is that the tube defines the separation of the chambers, and therefore the tube cannot be -- let me restate that.

Your opinion is that the tube of the bulb is what defines the chambers in Gilbert, and therefore the bulb cannot be disposed of in separate chambers, correct?

A. Yeah. I think the idea is if you look at Figure 9, you see the end of the bulb with a space. And what happens is when the user sucks on the mouthpiece, they cause the bulb to move down and make electrical contact, and the electrical contact actuates the heating element. So this space here that you find is basically a distinct marker between the first and the second chamber.

The chamber, by the way, is really defined by the internal portion, not the external portion.

So I think what Mr. Kodama is doing is

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he's kind of looking at the mouthpiece in isolation. But the first and second chamber is the chamber that encloses the heating element, and the heating element -- and that chamber is defined by basically this space here 33. So the chamber, the so-called -- I guess first chamber is defined by this, not the shank.

There's nothing in the patent that attributes special, you know, a special characteristic to the shank as far as defining the chambers. The shank is just an element that makes the parts fit together properly, but it's not the functional chamber. The functional chamber is defined by where the heating element is.

Q. Okay. So you said there's a space between the bulb and the battery, and when a user inhales, the bulb comes in contact with the battery, and therefore the separation between the chambers is really that space between the bulb and the battery. Is that what you're saying?

ATTORNEY COLLS: Form.

THE WITNESS: Yes.

BY ATTORNEY NIGHTINGALE:

Q. Just to restate my question, this space between the bulb and battery is what defines the

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separation between the first and second chambers in Gilbert, correct?

A. Yes. Yes. The first and second chamber, yes.

Now, here I come up with another argument, in 79. Here, I say, for example, the first chamber is where the screw plug makes contact with the battery, purple. So here's the battery. Okay. So here's where the screw plug makes contact with the battery. Let's go back a bit here.

I'm trying to remember what Kodama's argument was. Let me go back.

Okay. He's contending that the first chamber is the mouthpiece and the second chamber is the tube 15. He is basically saying that it's the shank... shank 25. Where's 25...

So looking at this long one, the shank 25 is over here. So Mr. Kodama is basically saying that the separation of the two chambers is over here.

I see. So this figure here shows what the petitioner is trying to say, but this is the first chamber, this is the second chamber over here, and basically it's this -- what he's trying to -- now I'm beginning to understand.

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The argument is he's basically saying the first chamber and the second chamber overlap so that there is -- number one, this is -- what we're trying to do is we're trying to say that Gilbert -- that Gilbert anticipates the claim language in Claim 1, and Claim 1 says casing comprising a first chamber and a second chamber, the two chambers sequentially within the casing.

One argument is that they're not sequentially in the casing because they overlap each other. The other argument is, okay, so he is saying that the battery is located in the first chamber. So the way he's defined it here, he's put the battery in the first chamber but a fluid-containing member located in the second chamber. So okay.

Okay. Another one is a sealing element forming a partition between the first and second chambers. There is no sealing element, so he's missing that one. This is the first, and this is the second chamber. There is no sealing element separating the two.

Since they -- they're concentric during a portion of it, there can't be -- there's no separation. They're concentric, and they're one and the same. So Gilbert does not meet that, that

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requirement.

An air inlet provided on an external wall of a casing. There is no inlet on the second wall of the casing, so...

I'm sorry I had difficulty answering your question, but I think what Kodama was trying to do was get to the overall picture of why Gilbert anticipates the '788 Patent. I think he's using definitions for first chamber and second chamber that are inconsistent, and that's what I'm trying to express here.

I think that concludes my answer.

Q. So what you said, Dr. Garris, about the chambers of Gilbert overlapping each other, that is in reference to Paragraph 79 in your declaration; is that correct?

A. Well, yes, I think that's clearly shown in Mr. Kodama's sketch here. They're clearly overlapping.

So in claim 78 -- in Paragraph 78, I discuss that. Now, the shank is not a partition that separates the two casings. It's include -- according to Kodama's diagram, the shank is part of both the first and the second chamber, because the shank -- yes, that's described in 78.

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Q. So in Paragraph 79, you mention two chambers in Gilbert, correct?

A. Okay. Let me read that.

Okay. Let's take a look at this construction. He's saying the first chamber -- what we're saying here is that, for example, the first chamber is where the screw plug makes contact with the battery. So that would be right over here.

So the first chamber is all of this to the left, and then it says the second chamber is where the air flows out. So the air flows out over here.

So I think what we're saying here is there's ambiguity. There is no clear sequential separate -- in other words, the claim limitation that I think they're referring to -- that I am referring to is that a sealing element forming a partition between first and second chambers and the fact that the first and second chamber are located sequentially between the casing.

In other words, if this were the second chamber and this were -- I'm sorry, if this were the first chamber where the air comes out and this was the second chamber where the heating element touches the battery, the two chambers would be overlapping

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each other. So there would be no sealing element forming a partition between the first and second chambers. The shank seems to be -- there is no partition element in the spirit of the patent. I think that's what I'm saying in 79.

Q. In Paragraph 79, you're saying that under Mr. Kodama's interpretation, there is no separation between the chambers and the chambers are not located sequentially from each other; is that correct?

A. Well, that they're overlapping each other. There is no sealing element forming a partition between the first and second chambers.

Q. So in this scenario where the first and second chambers are overlapping each other, they're both located in the mouthpiece; is that correct?

A. Well, I guess I'm not clear on exactly the way -- they are -- they are overlapping. Yeah, I guess in the mouth -- Mr. Kodama seems to define it in terms of these threads over here, the threads connecting the mouthpiece to the second chamber of the second housing.

So if you call this whole thing the mouthpiece -- let's say the detachable portion of the mouthpiece where you can unscrew it, if you call

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that whole thing the mouthpiece, Mr. Kodama seems to define that as the first chamber.

But in looking at that, you can see if you define the first chamber in that way, the first and second chamber overlap mostly during a portion of the -- during a portion of the mouthpiece.

Q. So there's some overlapping between the first chamber and the second chamber as Mr. Kodama is defining those chambers, but the second chamber does have a portion that is not overlapping with the first chamber; is that correct?

A. That is correct.

Q. So in Figure 9, on Page 28 of your declaration, the shank is colored dark blue, correct?

A. Page 28.

Oh, yes.

Q. And the shank, that's at the leftmost portion of that annotated figure, correct?

A. Correct.

Q. The annotated -- excuse me.

On Page 28, there's also a colored version of Figure 6, correct?

A. Oh, yes. Yes, there is.

Q. Does Figure 6 depict the shank 25?

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A. Yes.

Q. Is the shank 25 the portion of Figure 6 shown with hatching?

A. Yes, sir.

Q. Can you please turn to Paragraph 85 of your declaration? Excuse me. Actually let me ask one more question about your previous testimony.

You said that in Gilbert it is the bulb, the heating bulb that defines the first and second chambers; is that correct?

ATTORNEY COLLS: Form.

THE WITNESS: Well, I think if you're going to -- you know, what we're really talking about is the '788 Patent.

The heating element, the heating element is located -- according to claim element 1d, the heating element is located in the second chamber. So it's not that the heating element defines the second chamber. The heating element does not define the second chamber, but it has to be in the second chamber.

So if Mr. Kodama is asserting that it meets each and every claim, it must meet that limitation that the heating element is in the

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second chamber.

So I think if you use Mr. Kodama's assertion that the Gilbert patent anticipates the '788 Patent, at least it has to be inside the second chamber. I wouldn't say -- in general, it doesn't define the second chamber. I think what defines the second chamber is shown in Figure 2 of the '788 Patent.

What seems -- what defines it is the sealing element 50. The sealing element 50 separates the first and second chamber.

So when you look at the -- when you look at the Gilbert patent, there really isn't a sealing element in the spirit of the '788 Patent at all. That's one of the reasons why it doesn't anticipate the claims, but I would not say in general that the -- I would say that the second chamber has to be at least as long as the heating element involved in Gilbert. If it's any shorter than that, then it doesn't meet the claim limitation.

So that would be my statement.

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BY ATTORNEY NIGHTINGALE:

Q. You said in Claim 1, there is the requirement that the heating assembly is located in the second chamber, right?

A. That's right. It has to be in the second chamber.

Q. Does the heating assembly need to be located entirely in the second chamber?

A. I believe so. That's the teaching of the patent.

Q. That's not recited in the claim language, correct?

A. That's correct. That's correct. Reading the '788 Patent, I believe it requires that the heating element be in the second chamber.

Q. What's the basis for your opinion that the heating assembly needs to be located entirely in the second chamber?

A. Well, partly because it basically says that -- basically -- let's go back to the patent itself, the specification of the patent.

If you read, for example, claim element 1f, it says, "A tube element communicating between the first and second chambers, with a first distal end of the tube element located in the first

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chamber, and the second distal end of the tube element located in the second chamber and affixed to the bulb."

So again, this is basically saying that the bulb has to be in the second chamber. I think the clear teaching of the patent is that the bulb is in the second chamber, and it's not -- it's not in both chambers.

It's in the second chamber because if it was in the first chamber, there would be an additional heat transfer mechanism, which is not -- which is not taught in the patent. The teaching mechanism of the patent is that the fluid is directed through this tube element communicating between the first and second chambers and that the air -- that the tube element transports the air into the second chamber where it is heated by the heating element.

It would not be consistent with the patent if you had heating going on in the first chamber. Also, it wouldn't be proper design because if you had the heating element in the first chamber, that would tend to heat up the battery and all of the electronics, and it wouldn't make any sense.

So all of the heating must be done in

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the second chamber and that the -- so the heating element must be in the second chamber. And I think that's supported by claim element 1f, where they talk about how there's a tube element communicating between the first and second chamber, which basically mean it goes through the sealing element, which is in 1g.

Q. Let's go back in Paragraph 85 of your declaration now, Dr. Garris.

A. Yes, sir.

Q. Do the claims of the '788 Patent require the casing to be insulated?

A. No.

Q. Do the claims of the '788 Patent include any limitation that precludes air from escaping from the chambers?

A. No. No. But I think a person of ordinary skill in the art would know that it would be inconsistent with the design of the device. It's kind of like having a patent for an automobile engine with holes in the cylinder. One would not do that.

Q. Does the -- excuse me.

Do the claims of the '788 Patent include any limitation stating that air within the chambers

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cannot cool off?

A. No. There is no such limitation. But again, that's against common sense because you don't want to heat the mixture and then cool it and then heat it again. Unless there was a special purpose for doing that, a person of ordinary skill in the art would not expect that you would do that.

Q. In Paragraph 85 of your declaration, you mention the problem of air inside the substantially longer chamber, Gilbert, escaping into the atmosphere; is that correct?

A. Yes.

Q. Would you only have that problem if the air inlets are located on the substantially longer chamber?

A. Well, in the Gilbert patent, you know, at the distal end of the first chamber, you have the solution cartridge. So what you're doing is you're taking air in through the solution cartridge, and then the air is mixing with the solution inside the cartridge, and then it comes into the body of the -- into the chamber of the first chamber of the Gilbert patent.

Now, if you had holes there, some of that solution would be leaking, and it would bypass

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the mouthpiece, so that solution would be just released into the atmosphere, which obviously would be a very undesirable thing because you're wasting material.

A person of ordinary skill in the art would never dream of doing such a thing, because you're wasting -- you only have a certain amount of material in your cartridge, and allowing it to escape into the atmosphere and to bypass the user would definitely be antithetical to the design of the device, because you run out of solvent -- you'd run out of solution pretty quickly, and the user would not get the pleasure out of breathing the vapor.

A person of ordinary skill in the art would know that that is definitely a highly undesirable thing.

Q. Okay. I want to ask that question again, and I had asked you to answer in terms of the substantially longer chamber and the shorter chamber, Gilbert, using that terminology.

You mentioned the first and second chamber of Gilbert, which it's a little bit ambiguous as to which we're defining. So maybe I'll ask my question. You mentioned the problem about

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air escaping into the atmosphere. And my question is, does that problem only exist if the air inlets are located on the longer chamber?

A. I find your question a little bit confusing because at the very end of the longer chamber is the cartridge. In other words, in order for the Gilbert device to be functional, the air has to go through the cartridge, which means that it has to go through the passageways at the far end, at the distal end of the long portion of the chamber.

So if you put the air inlet -- the air anywhere between the cartridge and the mouthpiece, you would only be breathing in air. You know, a user using the device would simply breathe in air, and they would not breathe in any solution, so the device would be nonfunctional.

In fact, I would say that if the air inlets were -- rather than being at the very end with the cartridge, if the cartridge were closed, let's say you put an end cap at the end of the chamber and then you put air inlet holes up closer to the mouthpiece, you know, let's say downstream, downstream of the cartridge but still in the longer chamber, a user would simply be sucking in fresh air, so the device would be totally nonfunctional.

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Someone of ordinary skill in the art would never do that.

Q. I think we're talking past each other a little. The shorter chamber is what we see to the left of the shoulder 18, correct?

A. Oh, I see. I was looking at -- I was looking at Mr. Kodama's Figure 2, where he shows the first chamber as basically the mouthpiece and the second chamber as the long portion. So I was looking at it that the long portion includes -- basically I was looking at Kodama's annotated Figure 2.

So you're talking about a different configuration.

Q. Yes. Let's talk about what Gilbert refers to as the shorter chamber and the substantially longer chamber.

A. Okay. So Gilbert is referring to 18 as being the dividing portion. I guess 15 is the longer portion and 16 is the shorter portion?

Q. Yeah, that's what Gilbert is saying. Yes. So my question, Dr. Garris, when you in Paragraph 85 mention air escaping into the atmosphere, would you only have that problem if the air inlets are located on the substantially longer

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chamber, as Gilbert defines it?

A. Well, I... you would definitely have the problem if it was on the substantially longer portion.

On the shorter portion, would you still have air inlets 21, and in addition you're putting it on the periphery, putting additional air on the periphery, or are you closing off the air inlets 21? Just so I understand how to answer your question, are the inlets 21 open, or are they shut off?

Q. Let's say they're shut off.

A. Okay. And then what you do is you put air inlets on the periphery of the shorter portion. Well, I mean, that could -- that might not -- that would not be as effective, but the system might work. If you put air -- if you had holes on the periphery surrounding the cartridge and the cartridge was loaded, you probably would not get escape of -- you might not -- and you're talking about a situation where somebody is puffing on the e-cigarette?

Q. Sure. Yes.

A. Well, if you were puffing on the e-cigarette and you had air inlets on the periphery of the casing in the vicinity of the cartridge, that

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would also bring in air, and it would mix with the solution, and it would go through this e-cigarette in the same way.

It might not be as effective because the central portion of the cartridge would probably not get much air, and the peripheral portion would get all the air. So the balance would be wrong. But it would still work. Yeah, I would say it would still work.

Q. So --

A. I think with that understanding, we're not looking at Kodama's annotated drawing. We're looking at -- basically what you're saying is the Gilbert idea of, you know, of the separation being at 18, Section 18 in Figure 2.

Q. So the same question, but if we don't close off the air passages of the cartridge, would you have this problem of air escaping into the atmosphere if you put an air inlet on the shorter portion of Gilbert's casing?

A. Well, you could have some -- you could have some leakage there, but probably not, not if you were sucking. You know, if somebody was sucking on the mouthpiece, there would tend to be a vacuum inside, and the vacuum would suck the air through,

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rather than have it going to the back.

Now, if somebody blew on it, then, then fluid could go out in the opposite direction. But assuming that there's a user sucking on the mouthpiece 24, if you had holes on the periphery, you know, that would still bring in air that would go into the porous media impregnated with solution and would eventually find its way into the region with the heating element.

Q. In Paragraph 85, you talk about the problem of heated air inside the substantially longer chamber cooling off. Do you see that?

A. Well, I think what's missing here probably -- this is not well written. Probably what's missing here is the proviso that the user is sucking on the mouthpiece. In other words, if the user wasn't sucking on the mouthpiece and you were heating up the fluid inside, there could be expansion which could cause leakage.

So I think with the proviso -- you know, what I just said was with the proviso that there's somebody sucking on it, they're producing a vacuum in that region, so the air would tend to come in through the inlets and go through.

But if there was no -- if for some

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reason the heating element was actuated and there was no sucking going on, then there could be expansion in there, in which case there would be escape of air, and it would tend to be warmer air, because it's being heated.

Q. Okay. You wouldn't have the problem of air escaping if you put the air inlet on the substantially shorter portion -- excuse me, on the shorter, the shorter chamber as Gilbert defines it?

A. Well, again, when the person is sucking on it, no.

Q. You wouldn't have the problem of air cooling off if you put the air inlet on the short chamber, as Gilbert defines it; is that correct?

A. Not if the person were sucking on it.

ATTORNEY NIGHTINGALE: Can we go off the record for a second, Rhonda.

(Break in proceedings.)

BY ATTORNEY NIGHTINGALE:

Q. Dr. Garris, do you have a copy of Lee?

A. A copy of Lee? Yes, sir. Let me pull it up. Okay.

Q. In Paragraph 96 of your declaration, you reference the Lee reference -- excuse me. That's a mouthful.

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You mention Lee and state, "Lee's heating element 133 is a nichrome wire and is shown as a cylindrical helical coil and the liquid nicotine solution that is being supplied from the storage housing 13 to the heating element 133, is done by wicking it through a porous fiber aggregate rod F that makes contact with the wire."

Did I read that correctly?

A. You got a little bit ahead of me. You're talking about Paragraph 96?

Q. That's right. So in Paragraph 96, you state, "Lee's heating element 133 is a nichrome wire and is shown as a cylindrical helical coil and the liquid nicotine solution that is being supplied from the storage housing 13 to the heating element 133, is done by wicking it through a porous fiber aggregate rod F that makes contact with the wire."

A. Somehow something is a little screwed up here. I'm on 96 --

ATTORNEY COLLS: I have that as 95.

THE WITNESS: 95. Okay.

BY ATTORNEY NIGHTINGALE:

Q. Apologies. It is Paragraph 95.

A. Yes, sir. Okay.

Q. In Lee, the nicotine solution is being

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supplied from the storage housing 13; is that correct?

A. Right. That's correct.

Q. The liquid nicotine solution is wicked from the storage housing 13 to the heating element 133; is that correct?

A. Correct.

Q. The fiber aggregate rod F wicks the solution from the storage housing 13 to the heating element 133?

A. Correct.

Q. The liquid nicotine solution makes contact with the nichrome wire in Lee; is that correct?

A. Yes.

Q. When the liquid makes contact with the heated wire, the heat is transferred from the wire to the liquid by conduction; is that correct?

A. Yes, I would say so.

Q. Is the storage housing 13 external to the nichrome wire?

A. Yes. It's separate from the nichrome wire. Yes.

Q. Can you turn now to Paragraph 113 of your declaration?

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A. Okay.

Q. In Paragraph 113, you reference your modified version of Lee's Figures 1a and 1b shown on Page 42; is that correct?

A. That is correct. Yes.

Q. In your modified figures, Lee's heating element 133 is depicted as being encapsulated within the glass bulb; is that correct?

A. Yes, sir.

Q. Your modified figures also show a portion of Lee's fiber aggregate rod being encapsulated within the glass bulb; is that correct?

A. Yes.

Q. Outside of the glass bulb, your modified figures show another portion of Lee's fiber aggregate rod coming into contact with an exterior surface of the bulb; is that correct?

A. You mean from the Figure 1a? Figure 1a? In my sketch, where I sketch the glass bulb, you're saying it shows it's in contact with another solid surface?

Q. My question is, the figures on Page 42 seem to show a portion of the fiber aggregate rod inside the glass bulb and also portions outside of the glass bulb; is that correct?

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A. That's correct.
Q. So in your modified figures, is nicotine solution wicked along the portions of the fiber aggregate rod that are not encapsulated by the bulb?
A. Yes.
Q. Is nicotine solution being wicked into contact with exterior surfaces of the glass bulb in your modified figures?
A. Well, the wicking material, the fiber wicking material does pass through the air outside -- does pass through the exterior portion of the bulb. I'm not sure -- it definitely passes through the exterior portion of the bulb. But I'm not sure I understand your question.
Q. Your figures seem to show a portion of -- excuse me, portions of the fiber aggregate rod coming into contact with the bulb? Is that what you're trying to depict there?
A. Well, it has to pass through the bulb, so it definitely is in contact with the bulb, and it has -- and it would be a tight contact. So yes, it's definitely in contact with the bulb.
Q. So is fluid wicked into contact with an exterior surface of the bulb, I guess, as it passes through?

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A. Yeah. In other words, it would be definitely in contact with the exterior surface of the bulb. But the thing about it is, what's being wicked in in Lee is a liquid that it's generally at a fairly, reasonably low temperature, because it's room temperature, more or less. And the vaporization doesn't actually take place until -- substantial vaporization takes place once it comes into contact with the coil.

But yeah, yeah, there is -- the liquid does pass through the fiber, porous rod at the exterior surface of the bulb. I think the answer to your question is yes.

ATTORNEY NIGHTINGALE: I don't have any more questions right now.

ATTORNEY COLLS: I don't have any questions.

ATTORNEY NIGHTINGALE: I think we're done.

ATTORNEY COLLS: We'll read.

ATTORNEY NIGHTINGALE: I'll take a rough and expedited for Tuesday after the holiday.

(Deposition adjourned at 1:03 p.m.)

* * * * *

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COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

I, Rhonda D. Tuck, RPR, CRR, Notary Public in and for the Commonwealth of Virginia at Large, and whose commission expires on May 31, 2028, do certify that the aforementioned appeared before me, via remote videoconferencing, was sworn by me, and was thereupon examined by counsel; and that the foregoing is a true, correct, and full transcript of the testimony adduced.

I further certify that I am neither related to nor associated with any counsel or party to this proceeding, nor otherwise interested in the event thereof.

I further certify that the deponent's right to review the transcript was reserved.

Given under my hand and notarial seal in Fluvanna County, Virginia, this 30th day of August, 2025.

Rhonda D. Tuck, RPR, CRR
Notary Public Registration No. 224847
Commonwealth of Virginia at Large
Job No. 7540748

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Cleveland, Ohio 44114
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September 2, 2025

To: David Colls, Esq.

Case Name: R.J. Reynolds Vapor Company v.
Healthier Choices Management Corp.
Veritext Reference Number: 7540748
Witness: Charles A. Garris, Jr., Ph.D., P.E.
Deposition Date: 8/29/2025

Dear Sir/Madam:

Enclosed please find a deposition transcript. Please have the witness review the transcript and note any changes or corrections on the included errata sheet, indicating the page, line number, change, and the reason for the change. Have the witness' signature notarized and forward the completed page(s) back to us at the Production address shown above, or email to production-midwest@veritext.com.

If the errata is not returned within thirty days of your receipt of this letter, the reading and signing will be deemed waived.

Sincerely,
Production Department

NO NOTARY REQUIRED IN CA

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DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 7540748
CASE NAME: R.J. Reynolds Vapor Company v. Healthier Choices Management Corp.
DATE OF DEPOSITION: 8/29/2025
WITNESS' NAME: Charles A. Garris, Jr., Ph.D., P.E.

In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.

I have made no changes to the testimony as transcribed by the court reporter.

_____ _____

Date Charles A. Garris, Jr., Ph.D., P.E.

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

They have read the transcript;
They signed the foregoing Sworn Statement; and
Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal

this _____ day of_____, 20____.

_____
Notary Public

_____
Commission Expiration Date

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DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 7540748
CASE NAME: R.J. Reynolds Vapor Company v. Healthier Choices Management Corp.
DATE OF DEPOSITION: 8/29/2025
WITNESS' NAME: Charles A. Garris, Jr., Ph.D., P.E.

In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.

I have listed my changes on the attached Errata Sheet, listing page and line numbers as well as the reason(s) for the change(s).

I request that these changes be entered as part of the record of my testimony.

I have executed the Errata Sheet, as well as this Certificate, and request and authorize that both be appended to the transcript of my testimony and be incorporated therein.

_____ _____
Date Charles A. Garris, Jr., Ph.D., P.E.

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

They have read the transcript;
They have listed all of their corrections in the appended Errata Sheet;
They signed the foregoing Sworn Statement; and
Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal this _____ day of_____, 20____.

_____
Notary Public

_____
Commission Expiration Date

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ERRATA SHEET

VERITEXT LEGAL SOLUTIONS MIDWEST

ASSIGNMENT NO: 7540748

PAGE/LINE(S) / CHANGE /REASON

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Date Charles A. Garris, Jr., Ph.D., P.E.

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____

DAY OF _____, 20_____ .

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Notary Public

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Commission Expiration Date

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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