

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN HYDRODERMABRASION
SYSTEMS AND COMPONENTS
THEREOF**

Inv. No. 337-TA-1408

INITIAL DETERMINATION ON VIOLATION OF SECTION 337

Administrative Law Judge MaryJoan McNamara

(August 26, 2025)

SELECTED SUMMARY FINDINGS

Pursuant to the Notice of Investigation, 89 Fed. Reg. 58188, dated July 17, 2024, this is the Initial Determination (“ID”) of the Investigation in the Matter of Certain Hydrodermabrasion Systems and Components Thereof, United States International Trade Commission Investigation No. 337-TA-1408. *See* 19 C.F.R. § 210.42(a).

It is a finding of this ID that Complainant HydraFacial LLC f/k/a Edge Systems LLC (“Complainant” or “HydraFacial”) has proven by a preponderance of evidence that Respondent Cartessa Aesthetics, LLC (“Respondent” or “Cartessa”) has violated subsection (b) of Section 337 of the Tariff Act of 1930, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain hydrodermabrasion systems and components thereof.

It is a finding of this ID that Cartessa has infringed asserted claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 of U.S. Patent No. 11,865,287 (“the ’287 patent”). It is a finding of this ID that Cartessa has not infringed asserted claim 32 of the ’287 patent. It is also a finding of this ID that asserted claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 of the ’287 patent are not invalid.

It is a finding of this ID that one or more of HydraFacial’s domestic industry products have satisfied the technical industry prong of the domestic industry requirement for the ’287 patent. It is also a finding of this ID that HydraFacial has satisfied the economic prong of the domestic industry requirement under Section 337(a)(3)(A) and (B).

Accordingly, this decision recommends: (1) a Limited Exclusion Order (“LEO”) with a standard certification provision; (2) a Cease and Desist Order (“CDO”); and (3) that no bond be entered during the Presidential Review Period.

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ABBREVIATIONS

The following shorthand references to the parties, related U.S. agencies, and related proceedings are used in this Initial Determination:

Complainant or HydraFacial	Complainant HydraFacial LLC f/k/a Edge Systems LLC
Respondent or Cartessa	Respondent Cartessa Aesthetics, LLC ¹
CBP	U.S. Customs and Border Protection
PTO	U.S. Patent and Trademark Office

The following abbreviations for pleadings, exhibits, briefs, transcripts, and Orders are used in this Initial Determination:

Compl.	Complaint
Resp.	Verified Response of Cartessa Aesthetics, LLC to the Notice of Investigation and Complaint Under Section 337 of the Tariff Act of 1930, as Amended
CX	Complainant's exhibit
CDX	Complainant's demonstrative exhibit
CPX	Complainant's physical exhibit
CPBr.	Complainant's Pre-Hearing Brief
CBr.	Complainant's Initial Post-Hearing Brief
CRBr.	Complainant's Reply Post-Hearing Brief
CPSt.	Complainant's Pre-Hearing Statement
CMBr.	Complainant's <i>Markman</i> Brief

¹ The other named respondent, Eunsung Global Corp., was terminated from this Investigation based on consent order. (See Order No. 19 (Dec. 19, 2024), *unreviewed*, Comm'n Notice, Doc. ID No. 841387 (Jan. 21, 2025).).

Public Version

JX	Joint exhibit
RX	Respondent’s exhibit
RDX	Respondent’s demonstrative exhibit
RPX	Respondent’s physical exhibit
RPBr.	Respondent’s Pre-Hearing Brief
RBr.	Respondent’s Initial Post-Hearing Brief
RRBr.	Respondent’s Reply Post-Hearing Brief
RPSt.	Respondent’s Pre-Hearing Statement
RMBr.	Respondent’s <i>Markman</i> Brief
Tr.	Evidentiary hearing transcript
Dep. Tr.	Deposition transcript
Joint CC Chart	Joint Post-Hearing Claim Construction Chart (Doc. ID No. 841458 (Jan. 21, 2025))
<i>Markman</i> Order	Order No. 50 (June 11, 2025) ²

The following shorthand references to certain products and patents at issue are used in this Initial Determination:

’287 patent	U.S. Patent No. 11,865,287
Asserted Patent	’287 patent
Asserted Claims	Claims 11, 12, 14, 16, 18, 19, 22, 24, 25, and 32 of the ’287 patent
Accused Products	Skinwave and SKNLAB hydrodermabrasion products
DI Products	Syndeo, Elite, and Allegro products
HydraFacial Systems	DI Products and HydraFacial’s Tower product, collectively

² See also Order Nos. 29 and 32.

I. INITIAL DETERMINATION ON VIOLATION OF SECTION 337

A. Technology Comment

The technology at issue is hydrodermabrasion systems and components thereof.

Hydrodermabrasion systems are designed to deliver various liquid solutions through a handpiece with a tip to the skin of a patient in order to improve and revitalize the skin. The devices deliver solutions to the skin of a patient through the use of a vacuum source, which draws the desired solution from a container in which the treatment solution is stored, through the handpiece to the patient's skin surface and then away from the handpiece to a waste container.

B. Summary of Findings

A summary of this decision's finding is summarized below.

Table 1: Summary of Findings

Product	Patent	Claims	Determination
Accused Products	'287 patent	11, 12, 14, 16, 18, 19, 22, 24, and 25	Violation
		32	No violation
DI Products	'287 patent	11, 12, 14, 16, 18, 19, 22, 24, and 25	Satisfied
		32	Not satisfied

II. BACKGROUND

A. Institution and Selected Procedural History

On June 11, 2024, HydraFacial LLC f/k/a Edge Systems LLC ("HydraFacial" or "Complainant" or "Edge Systems") filed a complaint ("Complaint") under Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, alleging infringement of claims 1, 2-10, 11, 12, 14-20, 22, 23-25, 26, 28-36, 37, and 39-45 of U.S. Patent No. 11,865,287 ("the '287 patent").

(Compl. at ¶ 3.).

The Commission instituted this Investigation pursuant to subsection (b) of Section 337 of the Tariff Act of 1930, as amended, on July 17, 2024. 89 Fed. Reg. 58188-89 (July 17, 2024).

The Notice of Investigation (“NOI”) names as complainant: HydraFacial LLC f/k/a Edge Systems LLC of Long Beach, California (“HydraFacial” or “Complainant”). *Id.* at 58188. The NOI names as respondents: Cartessa Aesthetics, LLC of Melville, New York (“Cartessa” or “Respondent,” and with HydraFacial, the “Parties”) and Eunsung Global Corp. of the Republic of Korea (“Eunsung”). *Id.* Commission Investigative Staff is not a party in this Investigation. *Id.*

On August 19, 2024, Cartessa filed a response to the Complaint and NOI. (Doc. ID No. 830010 (Aug. 19, 2024).). On August 20, 2024, Eunsung filed a response to the Complaint and NOI. (Doc. ID No. 830035 (Aug. 20, 2024).).

On October 15, 2024, pursuant to Commission Rule 210.21(c)(1)(ii), Eunsung filed a motion to terminate this Investigation with respect to it based upon a consent order, which was granted. (Order No. 19 (Dec. 19, 2024), *unreviewed*, Comm’n Notice, Doc. ID No. 841387 (Jan. 21, 2025); Motion Docket No. 1408-003 (Oct. 15, 2024).).

A *Markman* hearing was held on January 14, 2025. (See Order No. 20 (Dec. 20, 2024); Doc. ID No. 843778 (Feb. 18, 2025).). The adopted constructions of the disputed claim terms were provided in Order Nos. 29 and 32, which issued on March 14, 2025 and March 19, 2025, respectively. (See Order Nos. 29 (Mar. 14, 2025), 32 (Mar. 19, 2025).). In Order No. 29, the claim term “block” was found to be indefinite.³ (See Order No. 29 at 7 (Mar. 15, 2025).). As

³ The claim term “block” is recited, *inter alia*, in independent claim 26, which was terminated but

noted in Order Nos. 29 and 32, Order No. 50 (“*Markman* Order”) issued, which provided explanations for the adopted constructions.⁴ (See Order No. 29 at 7; Order No. 32 at 1; *Markman* Order (June 11, 2025).).

On March 12, 2025, HydraFacial filed two (2) motions *in limine* (“MIL”) while Cartessa filed one (1) MIL. (Motion Docket No. 1408-028 (Mar. 12, 2025) (HydraFacial); (Motion Docket No. 1408-029 (Mar. 12, 2025) (Cartessa).). The Parties filed respective oppositions. (Doc. ID No. 846232 (Mar. 19, 2025) (Cartessa’s Opp’n); Doc. ID No. 846235 (Mar 19, 2025) (HydraFacial’s Opp’n).).

The MILs, and their rulings, are summarized in Table 2 below.

Table 2: Parties’ MILs

MIL	Issue	Ruling
HydraFacial’s MIL Nos. 1 and 2 (Motion Docket No. 1408-028)	MIL No. 1: to exclude Cartessa and its expert’s reliance on “the Tower” as prior art MIL No. 2: to limit Dr. Morton Jensen’s testimony on his opinions of inherent anticipation by Greenberg ⁵	Denied. (See Order No. 37 (Mar. 27, 2025).).

addressed in Section VII.G, because claim 32, which was not terminated, ultimately depends from claim 26. (JX-0001 at cls. 26, 32.).

⁴ The *Markman* Order did not include constructions or explanations for disputed claim terms that were recited in claims that HydraFacial terminated from this Investigation, including a claim that contained the word “block.”

⁵ When he testified during the evidentiary hearing, Dr. Morton Jensen was an Associate Professor of Biomedical Engineering at the University of Arkansas. (RPSt. at Ex. A.). Cartessa identified Dr. Jensen as an expert to testify about “the technical background of the asserted patent; the claim construction of the asserted patent; the invalidity and/or unenforceability of the asserted patent; the manufacture, design, structure, function, and operation of the accused products and alleged domestic industry products; the knowledge of a person of ordinary skill in the art; the non-infringement and nonpractice of the asserted

MIL	Issue	Ruling
Cartessa's MIL (Motion Docket No. 1408-029)	MIL: to preclude HydraFacial from introducing into evidence, and making arguments based on, certain late produced documents that are the subject of Cartessa's pending Motion to Preclude Complainant and Dr. Seth from Relying on Certain Late Produced Documents, ⁶ as well as evidence not produced during discovery	Denied. (Order No. 38 (Mar. 27, 2025)).

On March 20, 2025, HydraFacial filed an unopposed motion for partial termination by withdrawal of claims 1-10, 15, 17, 20, 23, 26, 28-31, 33-37, and 39-45 of the '287 patent, which was granted. (Order No. 34 (Mar. 26, 2025), *unreviewed*, Comm'n Notice, Doc. ID No. 848520 (Apr. 11, 2025); Motion Docket No. 1408-034 (Mar. 20, 2025)).

The evidentiary hearing ("Hearing") was held on April 9-11 and 14-15, 2025.⁷ (*See, e.g.,*

patent by the accused products and the alleged domestic industry products; the scope of the prior art; and the manufacture, design, structure, function and operation of prior art products and designs." (RPSt. at 2.). Dr. Jensen was admitted, without objection, as an expert on the subject matter for which he was called to testify. (Tr. at 598:5-12.).

⁶ Cartessa raised the same issues and arguments in its motion to preclude ("Motion to Preclude"). (*See* Motion Docket No. 1408-026 (Feb. 18, 2025)). Thus, Order No. 38 renders moot Cartessa's Motion to Preclude. Additionally, Cartessa moved for leave ("Motion for Leave") to file exhibits in excess of 100 pages in support of its Motion to Preclude. (Motion Docket No. 1408-025 (Feb. 18, 2025)). Although Cartessa's Motion for Leave was not formally granted around the time it was filed, the exhibits for which Cartessa sought leave, which Cartessa attached to the Motion to Preclude, were reviewed in their entirety. Thus, in that sense, the Motion for Leave was constructively granted.

⁷ On February 7, 2025, prior to the Hearing, and in accordance with the Adopted Procedural Schedule and Commission Rule 210.18(a), the Parties each filed one (1) motion for summary determination ("MSD"). HydraFacial filed a MSD with respect to satisfaction of the economic prong of the domestic industry requirement. (Motion Docket No. 1408-022 (Feb. 7, 2025)). Cartessa filed a MSD regarding the unenforceability of the Asserted Patent based on prosecution laches. (Motion Docket No. 1408-021 (Feb.

Order No. 5 (Aug. 6, 2024); Order No. 36 (Mar. 27, 2025).).

Following the Hearing, HydraFacial and Cartessa each filed three (3) motions to strike (“MTS”). (Motion Docket Nos. 1408-039 (May 1, 2025), 1408-048 (May 27, 2025), 1408-051 (June 25, 2025) (HydraFacial); Motion Docket Nos. 1408-037 (May 1, 2025), 1408-045 at Ex. 1 (May 16, 2025), 1408-050 (June 24, 2025) (Cartessa)).

The MTSs, and their rulings, are summarized in Tables 3 and 4 below.

Table 3: HydraFacial’s MTSs

MIL	Issue	Ruling
HydraFacial’s MTS 1 (Motion Docket No. 1408-039)	Motion to strike the testimony of Cartessa’s expert, Dr. Morten Jensen, that HydraFacial alleges was outside the scope of his expert reports and deposition	Denied. (<i>See</i> Order No. 56 (July 29, 2025)).
HydraFacial’s MTS 2 (Motion Docket No. 1408-048)	Motion to strike “new arguments” that HydraFacial alleges Cartessa raised for the first in Cartessa’s Initial Post-Hearing Brief	Denied. (<i>See</i> Order No. 56 (July 29, 2025)).
HydraFacial’s MTS 3 (Motion Docket No. 1408-051)	Motion to strike a “new invalidity theory and characterization of Palmer” that HydraFacial alleges Cartessa raised for the first time in Cartessa’s Initial Post-Hearing Brief	Denied. (<i>See</i> Order No. 56 (July 29, 2025)).

7, 2025).). On February 12, 2025, Cartessa filed a second MSD that certain claims of the Asserted Patent are invalid as anticipated by U.S. Patent Application Publication No. 2003/0093089 A1 (“Greenberg”). (Motion Docket No. 1408-023 (Feb. 12, 2025)). In conjunction with its second MSD, Cartessa moved for leave to file a corrected Statement of Facts in support of the second MSD. (Motion Docket No. 1408-024 (Feb. 18, 2025)). Because the issues raised in each of the Parties’ MSDs are addressed in this ID, the MSDs and any associated motions, e.g., Motion Docket No. 1408-024, are moot.

Table 4: Cartessa’s MTSs

MIL	Issue	Ruling
Cartessa’s MTS 1 (Motion Docket No. 1408-037)	Motion to strike the testimony and corresponding demonstratives of HydraFacial’s expert, Mr. Karl Leinsing, that Cartessa alleges are outside the scope of his expert reports and deposition ⁸	Denied. (<i>See</i> Order No. 57 (July 31, 2025).).
Cartessa’s MTS 2 (Motion Docket No. 1408-045)	Motion to strike what Cartessa alleges as HydraFacial’s “new claim construction argument” in HydraFacial’s Initial and Responsive Post-Hearing Briefs	Denied. (<i>See</i> Order No. 57 (July 31, 2025).).
Cartessa’s MTS 3 (Motion Docket No. 1408-050)	Motion to strike citations to unadmitted exhibits in HydraFacial’s Initial Post-Hearing Brief	Denied. (<i>See</i> Order No. 57 (July 31, 2025).).

B. The Parties

1. Complainant HydraFacial LLC f/k/a Edge Systems LLC

Complainant HydraFacial LLC f/k/a Edge Systems LLC (“HydraFacial” or “Complainant”) is a California limited liability company having its principal place of business in

⁸ When he testified during the Hearing, Mr. Karl Leinsing was President of ATech Designs, Inc. (CPSt. at Ex. A.). HydraFacial identified Mr. Leinsing as an expert to testify about “the technology at issue, the level of a person of ordinary skill in the art, the state of the art at the time of the filing of the Asserted Patent, the Asserted Patent, the Domestic Industry Products, the Accused Products, infringement, the technical prong of the domestic industry requirement, validity of the Asserted Patent, and certain aspects of secondary considerations of non-obviousness.” (CPSt. at 1-2.). Mr. Leinsing was admitted, without objection, as an expert on the subject matter for which he was called to testify. (Tr. at 209:3-11.).

Long Beach, California. (Compl. at ¶ 10.). HydraFacial is a wholly owned subsidiary of Beauty Health. (CBr. at 6 (citing Tr. (Pallavi Seth)⁹ at 420:6-19; CDX-0005C.0003; CX-0475; CDX-0002C.0002; Tr. (Vipul Savsani)¹⁰ at 121:14-122:2; CX-0192).).

HydraFacial described itself as follows:

HydraFacial is a worldwide leader in the design, development, manufacture, and sale of high-quality skin resurfacing and rejuvenation systems, including hydrodermabrasion systems. These systems rejuvenate skin by cleaning and exfoliating the skin surface, extracting debris from pores, and nourishing the skin's surface with therapeutic solutions that moisturize and protect the treated skin surface. HydraFacial markets and sells these systems throughout the United States to end users such as dermatologists, plastic surgeons, cosmetic physicians, and aestheticians at medical spas.

(Compl. at ¶ 11.).

2. Respondent Cartessa Aesthetics, LLC

Respondent Cartessa Aesthetics, LLC (“Cartessa” or “Respondent”) is a New York limited liability company with a principal place of business in Melville, New York. (Resp. at ¶ 15.).

III. JURISDICTION AND IMPORTATION

A. The Commission Has Jurisdiction

To have the authority to decide a case, a court or agency must have both subject matter jurisdiction and jurisdiction over either the parties or the property involved. *See Certain Steel*

⁹ When she testified during the Hearing, Dr. Pallavi Seth was a Principal at the Brattle Group. (CPSt. at Ex. A.). HydraFacial identified Dr. Seth as an expert to testify about “the economic prong of the domestic industry, public interest, remedy, bonding, and certain aspects of secondary considerations of non-obviousness.” (CPSt. at 2.). Dr. Seth was accepted, without objection, as an expert on the subject matter for which she was called to testify. (Tr. at 418:16-24.).

¹⁰ When he testified during the Hearing, Mr. Vipul Savsani was the Global Vice President of Financial Planning and Analysis for HydraFacial. (CPSt. at 2.). HydraFacial identified Mr. Savsani as a fact witness to testify about “aspects of HydraFacial’s business, including the history of HydraFacial, HydraFacial’s domestic activities, sales of the Domestic Industry Products, investments made by HydraFacial in the Domestic Industry Products, and certain aspects of secondary considerations. (*Id.*).

Rod Treating Apparatus and Components Thereof, Inv. No. 337-TA-97, Comm’n Op., 215 U.S.P.Q. 229, 231 (U.S.I.T.C. 1981).

Cartessa stipulated that it imports, sells for importation, or sells after importation into the United States the Accused Products. (RPBr. at 3; *see also* Doc. ID No. 850188 (Joint Statement of Undisputed Issues (“JSUI”)) at 2 (May 1, 2025).). The Commission therefore has statutory authority over the present Investigation. *See Certain Light-Based Physiological Measurement Devices & Components Thereof*, Inv. No. 337-TA-1276, Comm’n Op. at 15 (Nov. 14, 2023). Cartessa did not contest importation or statutory authority. (RPBr. at 3-4.).

Additionally, Cartessa appeared and participated in this Investigation and did not contest the Commission’s jurisdiction over it. (RPBr. at 4.). Accordingly, Cartessa has consented to personal jurisdiction at the Commission. *See Certain Optical Disk Controller Chips & Chipsets & Prods. Containing Same, Including DVD Players & PC Optical Storage Devices*, Inv. No. 337-TA-506, FID at 4-5 (May 16, 2005), *unreviewed in relevant part*.

B. HydraFacial Has Standing in the Commission

The Commission recently clarified that 35 U.S.C. § 281 does not apply directly to the Commission.¹¹ *Certain Active Matrix Organic Light-Emitting Diode Display Panels & Modules for Mobile Devices, & Components Thereof*, Inv. No. 337-TA-1351, Comm’n Op. at 12-13 (Apr. 24, 2024). Rather, “the determination of who may bring a section 337 investigation begins with the language of the Commission’s governing statute and regulations promulgated pursuant to that authority.” *Id.* (citing 19 U.S.C. § 1337; 19 C.F.R. § 210.12); *see also id.* at 15 (“[T]he pertinent issue is whether [Complainant] satisfied the prerequisites of the Commission’s rules to bring a

¹¹ 35 U.S.C. § 281 states: “A patentee shall have remedy by civil action for infringement of his patent.”

section 337 action as of the date the complaint was filed.”). Accordingly, consistent with the Commission’s rules and practice, “at least one complainant must be the owner or exclusive licensee of the patent.” *Id.* at 14; *see also id.* at 15-16 (finding it appropriate to consider whether complainant “is a ‘patentee’ who can bring a patent infringement action under 35 U.S.C. § 281” in determining whether complainant is the owner or exclusive licensee).

In this Investigation, the Parties did not dispute that HydraFacial owns by assignment the right, title, and interest in the Asserted Patent. (JSUI at 2.). The certified assignment document filed with the Complaint shows HydraFacial’s ownership of the Asserted Patent. (*See* Compl. at Ex. 2; *see also id.* at ¶ 26.).

IV. THE ASSERTED PATENT

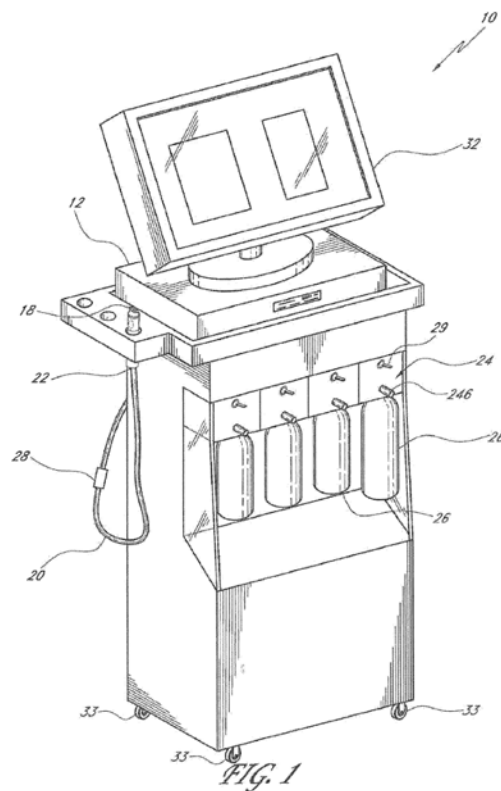
The ’287 patent (“Asserted Patent”), entitled “Devices and Methods for Treating Skin,” issued on January 9, 2024, from U.S. Patent Application No. 18/094,884, filed on January 9, 2023. (JX-0001 (’287 patent) at (10), (21), (45), (54).). The ’287 patent results from a family of continuation applications, ultimately claiming priority to Provisional Application No. 60/755,310, filed on December 30, 2005. (*Id.* at (60), (63).). HydraFacial contended that the asserted claims are entitled to claim priority to this provisional application. (*See* Doc. ID No. 829332, Complainant’s Notice of Patent Priority Dates (Aug. 12, 2024).). Cartessa did not dispute the priority date. (*See* RMBR. at 5; JSUI at 2.).

The ’287 patent names Roger Ignon, Scott Mallett, Abraham Solano, and William Cohen as the inventors. (JX-0001 at (72).).

The ’287 patent is directed to “the field of skin treatment, and more specifically apparatuses and methods for treating a person’s skin.” (*Id.* at 1:30-31.). The specification describes one embodiment that has a console with a user input device and a handpiece assembly.

The handpiece assembly is configured to treat skin. A fluid line provides fluid communication between the console and the handpiece assembly. A manifold system is coupled to the console and controlled by the user input device, such as a computer, touchscreen, keyboard, and the like. The manifold system is configured to hold releasably a plurality of fluid sources and deliver fluid from at least one of the plurality of fluid sources to the handpiece assembly. (*Id.* at 2:19-28.).

Figure 1: Figure 1 of the '287 Patent



(*Id.* at Fig. 1.).

As noted above in Section I.B (Table No. 1), at issue in this Investigation are claims 11, 12, 14, 16, 18, 19, 22, 24, 25, and 32 (“Asserted Claims”) of the '287 patent (bolded below). The Asserted Claims are reproduced below, along with the unasserted claims from which certain Asserted Claims depend.

11. A skin treatment apparatus comprising:

a console that includes a fluid control member that is configured to be in fluid communication with at least a first container and a second container when the first container and the second container are connected to the fluid control member;

a handpiece assembly configured to contact a skin surface of a subject;

a waste conduit configured to be in fluid communication with the handpiece assembly and a vacuum source to move waste away from the handpiece assembly when the waste conduit and the handpiece assembly are each connected to the console; and

wherein when each of the first container and the second container are connected to the console, the fluid control member is configured to be in fluid communication with each of the first container and the second container;

wherein when the handpiece assembly is connected to the console, the fluid control member is configured to be in fluid communication with the handpiece assembly;

wherein when (i) each of the first container and the second container contains treatment material, (ii) the first container and the second container are connected to the console, and (iii) the handpiece assembly is connected to the console, the skin treatment apparatus is configured to selectively draw treatment material from the first container or the second container to the handpiece assembly using, at least in part, a vacuum created along a distal end of the handpiece assembly by the vacuum source.

12. The skin treatment apparatus of claim 11, wherein treatment material from the first container and the second container are configured to be drawn to the handpiece assembly sequentially.

14. The skin treatment apparatus of claim 11, wherein the console comprises the vacuum source.

16. The skin treatment apparatus of claim 11, wherein the treatment material in the first container is a skin treatment fluid.

17. (unasserted) The skin treatment apparatus of claim 11, further comprising a computing device configured to control at least one function of the skin treatment apparatus.

18. The skin treatment apparatus of claim 17, further comprising a user input device to facilitate control of a flow of treatment materials from at least one of the first container and the second container to the handpiece assembly.

19. The skin treatment apparatus of claim 18, wherein the user input device

comprises a touch screen.

22. A system for treating skin, the system comprising:

a console configured to receive a first container and at least one additional container;

a collection lumen configured to be in fluid communication with the first container and the at least one additional container when the first container and the at least one additional container are connected to the console; and

a handpiece having a working end, the working end of the handpiece being configured to contact skin tissue of a subject during use;

wherein the working end of the handpiece is configured to be placed in fluid communication with a vacuum source to create a suction force along a distal end of the handpiece when the vacuum source is activated and the handpiece is connected to the console and wherein the working end of the handpiece is configured to be placed in fluid communication with the first container or the at least one additional container through the collection lumen; and

a supply conduit that places the collection lumen in fluid communication with the working end of the handpiece when the handpiece is connected to the console;

wherein each of the first container and the at least one additional container includes treatment materials, and wherein treatment materials from the first container and the at least one additional container are configured to be delivered to the supply conduit sequentially when the first container and the at least one additional container are connected to the console.

24. The system of claim 22, further comprising a computing device configured to control at least one function of the system.

25. The system of claim 24, further comprising a user input device to facilitate control of a flow of fluids from the first container and the at least one additional container to the handpiece.

26. (unasserted) A system for treating skin, the system comprising:

a console configured to receive a first container and at least one additional container;

a handpiece configured to contact skin tissue of a subject; and

a block in the console, wherein the block is:

configured to selectively receive fluid from the first container when the first container is connected to the console;

configured to selectively receive fluid from the at least one additional container when the at least one additional container is connected to the

- console; and,
- configured to selectively be in fluid communication with the handpiece through a first conduit when the handpiece is connected to the console; and
- a vacuum source;
- wherein the handpiece is configured to be in fluid communication with the vacuum source through a second conduit when the handpiece is connected to the console;
- wherein the at least one additional container comprises a second container and a third container such that the console is configured to receive at least three containers; and
- wherein when the handpiece is connected to the console and the first container, the second container and the third container each contains fluid and is connected to the console, the system is configured to deliver to the handpiece one at a time fluid contained in the first container, fluid contained in the second container, and fluid contained in the third container.
30. (unasserted) The system of claim 26, further comprising a computing device configured to control at least one function of the system.
31. (unasserted) The system of claim 30, further comprising a user input device to select a flow of fluids from the first container and the at least one additional container to the handpiece.
32. The system of claim 31, wherein the user input device comprises a touch screen.

(JX-0001 at cls. 11, 12, 14, 16-18, 19, 22, 24-26, 30-32.).

V. THE PRODUCTS AT ISSUE

A. Accused Products

HydraFacial alleged that Cartessa's Skinwave and SKNLAB hydrodermabrasion products ("Accused Products") practice one or more of the Asserted Claims of the Asserted Patent. (*See, e.g.*, CBr. at xi.). Cartessa entered into an agreement to sell Eunsung's H2 hydrodermabrasion product under the Skinwave product name. (CX-0848C (Gabe Lubin Dep.

Tr.)¹² at 18:10-16.). Cartessa also sells ██████████ SKNLAB hydrodermabrasion treatment device. (*Id.* at 25:11-26:3.). The Accused Products, shown below in Figure 2, are hydrodermabrasion systems for treating skin. (*See, e.g.*, CPBr. at 8.).

Figure 2: Pictures of the Accused Products



(CX-0829C; CX-0200C; CDX-0004C.0169.).

B. DI Products

HydraFacial asserted that its Syndeo, Elite, and Allegro products (“DI Products”) practice one or more of the Asserted Claims. (*See, e.g.*, CBr. at xi.). The DI Products, shown below in Figure 3, are hydrodermabrasion systems that are configured to deliver various liquid solutions to the skin of a patient using a handpiece with a tip that contacts the patient’s skin to improve and revitalize the skin. (*See, e.g.*, CPBr. at 8; Compl. at ¶ 23.). The devices are able to deliver

¹² At the time of his deposition, Mr. Gabe Lubin was the founder and CEO of Cartessa. (CX-0848C (Lubin Dep. Tr.) at 12:13-17.).

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these solutions to the skin of the patient through the use of a vacuum source, which draws the desired solution from a container in which the treatment solution is stored, through the handpiece to the patient's skin surface, and then away from the handpiece to a waste container. (Compl. at ¶ 23.).

Figure 3: Pictures of the DI Products



(CPX-0001; CPX-0002; CPX-00003; *see also* CDX-0004C.0011-.0013.).

VI. DEFINITION OF A PERSON OF ORDINARY SKILL IN THE ART¹³

During the *Markman* proceedings, HydraFacial contended that one of ordinary skill in the art:

would have had a degree in science or engineering plus a minimum of three years of experience in the medical device industry. Alternatively, a product designer could have an additional two years of experience in the industry in lieu of a formal science or engineering degree. The person of ordinary skill would also consult with a physician as needed to understand the medical implications of the disclosed device, including the effect of the device on the skin.

(CMBR. at 9 (citations omitted)).

Cartessa asserted that one of ordinary skill in the art:

would have a moderate to high level of education and/or experience, with additional education substituting for experience and vice versa. The POSITA in skin treatment apparatus design would ordinarily have a bachelor's degree in a technical discipline, including education in one or more fields relating to engineering, physics, computer sciences, or medicine, and two years of experience in industry working in the field of skin treatment.

(RMBR. at 8 (citations omitted)).

Both proposals were found to be appropriate for a person of ordinary skill in the art because the differences among the proposed definitions had little, if any, effect on the claim construction analysis set forth in the *Markman* Order. (*Markman* Order at 6.).

VII. DIRECT INFRINGEMENT

A. Legal Standards

1. Literal Infringement

“Determination of infringement is a two-step process which consists of determining the

¹³ The legal standard for the level of ordinary skill in the art can be found in *Markman* Order. (*See Markman* Order at 5-6.).

scope of the asserted claim (claim construction) and then comparing the accused product . . . to the claim as construed.” *Certain Sucralose, Sweeteners Containing Sucralose, and Related Intermediate Compounds Thereof*, Inv. No. 337-TA-604, Comm’n Op. at 36 (Apr. 28, 2009) (citing *Litton Sys., Inc. v. Honeywell, Inc.*, 140 F.3d 1449, 1454 (Fed. Cir. 1998)).

An accused device literally infringes a patent claim if it contains each limitation recited in the claim exactly. *Litton*, 140 F.3d at 1454. Each patent claim element or limitation is considered material and essential. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991). In a Section 337 investigation, the complainant bears the burden of proving infringement of the asserted patent claims by a preponderance of the evidence. *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376, 1384 (Fed. Cir. 1998). If any claim limitation is absent, there is no literal infringement of that claim as a matter of law. *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000).

2. Doctrine of Equivalents

Where literal infringement is not found, infringement can still be found under the doctrine of equivalents. The Supreme Court has described the essential inquiry of the doctrine of equivalents analysis in terms of whether the accused product or process contains elements identical or equivalent to each claimed element of the patented invention. *Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 40 (1997). According to the Federal Circuit:

Infringement under the doctrine of equivalents may be found when the accused device contains an “insubstantial” change from the claimed invention. Whether equivalency exists may be determined based on the “insubstantial differences” test or based on the “triple identity” test, namely, whether the element of the accused device “performs substantially the same function in substantially the same way to obtain the same result.” The essential inquiry is whether “the accused products or process contain elements identical or equivalent to each claimed element of the

patented invention[.]”

TIP Sys., LLC v. Phillips & Brooks/Gladwin, Inc., 529 F.3d 1364, 1376-77 (Fed. Cir. 2008) (citations omitted).

B. Infringement Overview

HydraFacial accused the Accused Products of directly infringing claims 11, 12, 14, 16, 18, 19, 22, 24, 25, and 32 of the '287 patent, both literally and under the doctrine of equivalents (“DOE”).¹⁴ (*See, e.g.*, CBr. at 28.).

Claims 12, 14, 16, 18, and 19 ultimately depend from claim 11. Claim 18 depends from claim 17, which is no longer asserted, but is addressed below. Claim 19 depends from claim 18. Claims 24 and 25 ultimately depend from claim 22. Claim 25 depends from claim 24. Claim 32 ultimately depends from claim 26. Claim 32 depends from claim 31, which depends from claim 30. Claims 26, 30, and 31 are no longer asserted but are addressed below.

For the reasons discussed below, HydraFacial has met its burden and proven that the Accused Products directly infringe claims 11, 12, 14, 16, 18, 19, 22, 24, and 25. With respect to claim 32, because that claim depends from claim 26, and claim 26 contains the claim term “block” that was construed as indefinite, HydraFacial could not meet its burden to prove that the Accused Products infringe claim 32. *Ibormeith IP, LLC v. Mercedes-Benz, LLC*, 732 F.3d 1367, 1378 (Fed. Cir. 2013) (noting that if an independent claim is indefinite, “the dependent claims . . . would also be invalid, because they incorporate the elements of [the] independent claim”).

¹⁴ In its Initial Post-Hearing Brief, HydraFacial made only general assertions that the Accused Products directly infringe the Asserted Claims either literally or under the DOE. (*See, e.g.*, CBr. at 3, 28.). HydraFacial did not present any specific arguments or evidence with respect to DOE for any particular claim element during the Hearing or in its Reply Post-Hearing Brief. Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

C. The Accused Products Practice Claim 11 of the '287 Patent

1. 11[pre]: “A skin treatment apparatus comprising:”

It is undisputed that the Accused Products are systems for treating skin/skin treatment apparatuses. (*See, e.g.*, JSUI at 2.). Additionally, Cartessa’s documents and webpages confirm that each of the Accused Products is a skin treatment apparatus. (*See* Tr. (Leinsing) at 307:9-19 (Skinwave), 307:21-308:10 (SKNLAB); CDX-0004C.0179-.0080; CX-0741.0001; JX-0009C.0005; CX-0204C.0007.).

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products meet the preamble of claim 11.

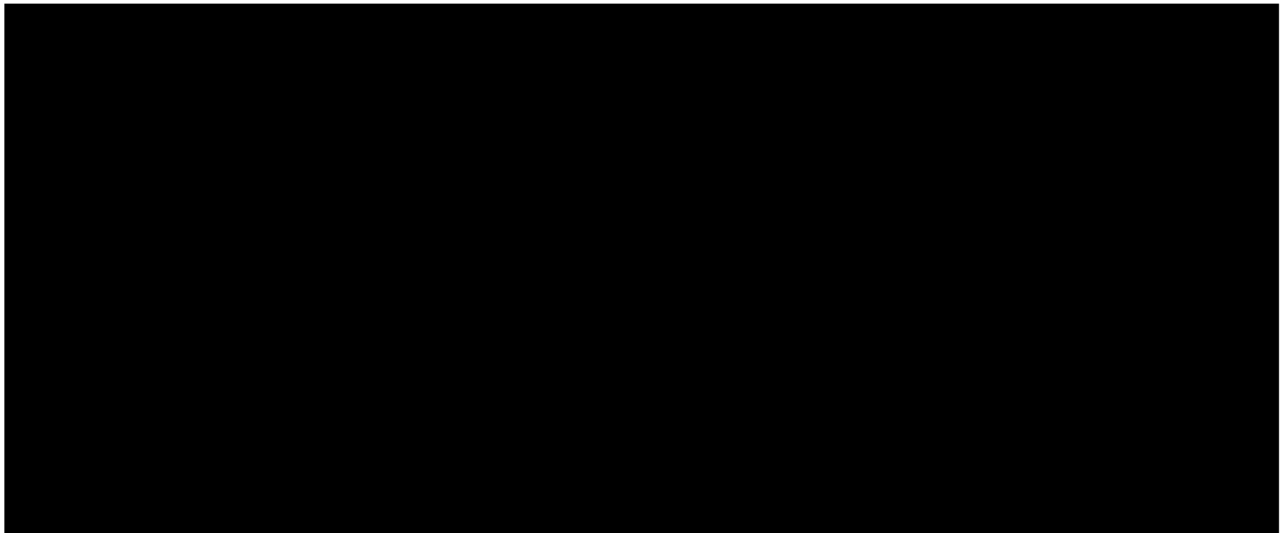
2. 11[a]: “a console that includes a fluid control member that is configured to be in fluid communication with at least a first container and a second container when the first container and the second container are connected to the fluid control member;”

Each of the Accused Products has a console that includes a fluid control member configured to be in fluid communication with at least a first container and a second container when the first container and the second container are connected to the fluid control member. (Tr. (Leinsing) at 309:10-18, 310:6-311:5 (Skinwave), 323:20-23 (SKNLAB); CDX-0004C.0183, .0185, .0194.).

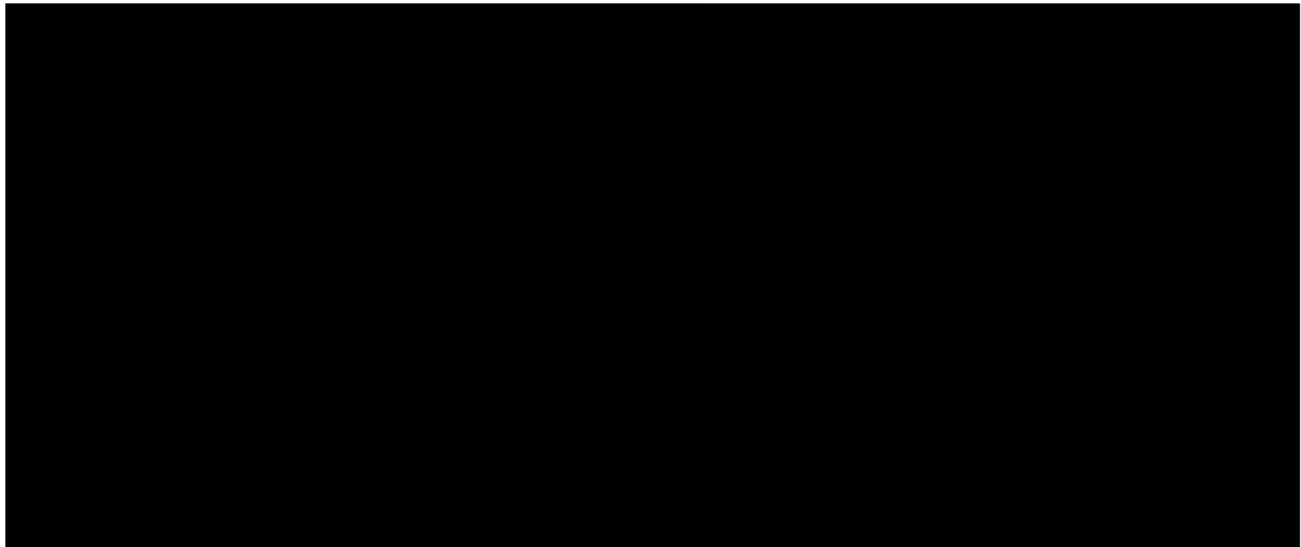
As set forth and explained in the *Markman* Order, the term “fluid control member” is subject to 35 U.S.C. § 112, ¶ 6, i.e., means-plus-function, where the corresponding structure is “manifold system 24,” “switches 29,” “lumen 171,” or “valves, fluid lines, and the like,” and equivalents of these structures. (*See Markman* Order at 2.).

The fluid control member of the SKNLAB, shown below in Figure 4, includes fluid lines, valves, and a collection lumen extending through the white rectangular structure.

Figure 4: SKNLAB's Fluid Control Member



(CDX-0004C.0195 (citing JX-0085C; CX-0295C)).



(CDX-0004C.0196 (citing CX-0292C); *see also id.* at .0194.).

Referencing slides 195 and 196 of his demonstratives shown above in Figure 4, HydraFacial's expert, Mr. Leinsing, opined that the structures in the SKNLAB, alone or in combination, satisfy the corresponding structure of the fluid control member limitation.

Q. Let's turn to 195, slide 195. What are you showing here?

A. So here I'm looking further for a -- for the fluid communication confirmation

and also for other structures that satisfy the fluid control member.

So, namely, I'm looking for that lumen again. I took off the end fittings of the white rectangular block shown in CX-295, and took it off both ends. I looked down the end, as shown in JX-85, and [REDACTED]

* * *

But you can see the [REDACTED]

* * *

Q. [REDACTED]
[REDACTED] Does that have the required structure of the claim construction for the fluid control member?

A. Yes. It has fluid communication with each of the containers as I've shown through [REDACTED] is an example, and then all the others would be the same for that fluid communication part of the function. And then the lumen itself is the structure.

* * *

Q. So, yes, let's go to slide 196, if you can explain that you've shown there.

A. So now, knowing that there's a [REDACTED]
[REDACTED], we have pictures, CX 292 now, where you can imagine now that [REDACTED]
[REDACTED] and that will go to the next page.

Q. [REDACTED]
[REDACTED]

A. Yes, [REDACTED]

Q. Then [REDACTED] is that correct?

A. Correct.

Q. Now, the [REDACTED] that you show and identify here on slide 196, are [REDACTED] also part of the fluid control member?

A. Yes.

Q. Do these [REDACTED] satisfy the structure and function of the fluid control member?

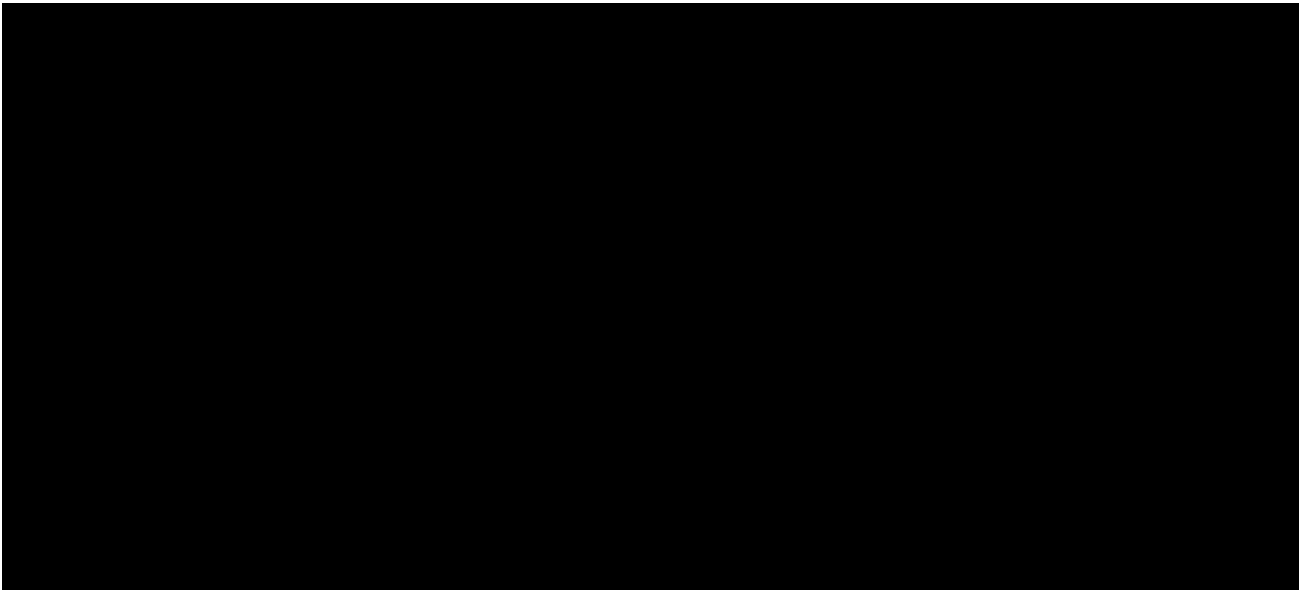
A. Yes, they do. They're the structure.

(Tr. (Leinsing) at 323:24-324:9, 324:17-21, 325:20-326:21.).

The fluid control member structures of the Skinwave, shown below in Figure 5, also include [REDACTED]

[REDACTED]

Figure 5: Skinwave's Fluid Control Member Structures



(CDX-0004C.0186 (citing CX-0773C)).

In describing slide 186 of his demonstrative shown above in Figure 5, Mr. Leinsing testified that the structures in the Skinwave also meet the corresponding structure of the claimed fluid control member.

Q. Now if we turn to slide 186, what are you showing here with regard to the Skinwave?

A. So here, if we opened up the Skinwave, and took the covers off, as I showed in

the previous picture, this is the fluid control member that I've removed from the device. It's shown in CX-773.

You can see that white rectangular block structure there, and you can see those [REDACTED]

And this also shows the [REDACTED]
[REDACTED] to select which container.

There's [REDACTED] at the top of picture CX-773, and the one [REDACTED]
[REDACTED]. That's right here
(pointing.)

So this is the [REDACTED]
[REDACTED]

And what that does is [REDACTED]
[REDACTED]

Q. So looking at that image, then, are there [REDACTED] there?

A. So, yes, this image, there's [REDACTED]
[REDACTED] for fluid communication and connection to each of
the bottles.

* * *

Q. Looking at the fluid control member that you've identified, can that include the [REDACTED]
[REDACTED] of the Skinwave device?

A. I'm sorry. I didn't hear all of your question.

Q. Yes. So let me rephrase it. The fluid control member that you've identified,
can that include the [REDACTED]?

A. Yes, it includes [REDACTED]. So it satisfies
that structure for fluid control member.

(Tr. (Leinsing) at 311:6-312:16, 315:4-13.).

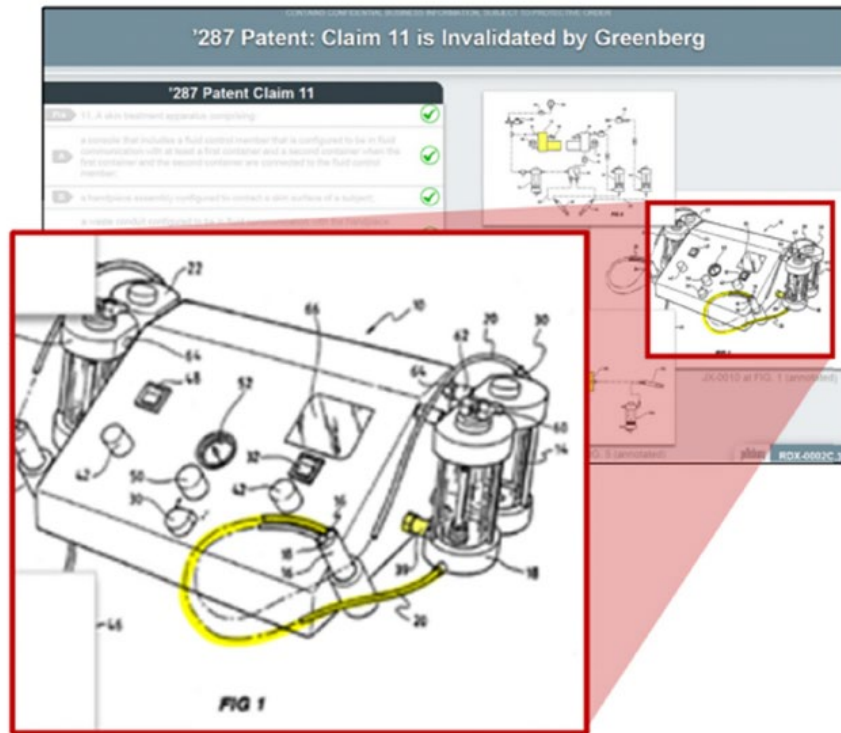
Cartessa did not dispute that each of the Accused Products has a fluid control member, as
this structure was construed. (*See e.g.*, Tr. (Jensen) at 629:20-631:6 (arguing only that the fluid

control member is not connected to the first and second container, not that the Accused Products lack a fluid control member).).

Based on the evidence, Mr. Leinsing persuasively testified that the fluid control member is configured to be in fluid communication with at least a first container and a second container [REDACTED]. (Tr. (Leinsing) at 309:10-311:5, 312:5-16, 315:19-316:23, 317:9-20, 318:12-21, 322:22-323:2, 328:1-14; CDX-0004C.0185-86, .0193-95; CX-0741.0001; JX-0028C.0021, .0039; CX-0773C; JX-0054C; CX-0292C; JX-0085C; CX-0295C.). Mr. Leinsing explained that the fluid control member is in fluid communication when the first container and the second container are connected to the fluid control member. (Tr. (Leinsing) at 309:19-310:5, 310: 2-21, 328:15-329:4; CDX-0004C.0183-.0188, .0194; CX-0741.0001; JX-0028C.0021; CX-0773C; CX-0292C.).

Cartessa's contention that the "fluid control member" must be *directly* and *physically* connected to each of the containers for purposes of infringement is *completely inconsistent* with its expert's position on invalidity. Cartessa's expert, Dr. Jensen, relied on "tubing" and *indirect* coupling to meet the "connection" limitations with respect to invalidity and the prior art. (Tr. (Jensen) at 749:22-750:2 (relying on Greenberg and RDX-0002C.0035, testifying that "[s]hown on Fig. 1, the handpiece is connected to the console").). Dr. Jensen's demonstrative, RDX-0002C.0035, which HydraFacial magnified in its Initial Post-Hearing Brief, is reproduced below in Figure 6.

Figure 6: Jensen Demonstrative Showing Indirect Coupling to Meet “Connection” Limitations with Respect to Invalidity



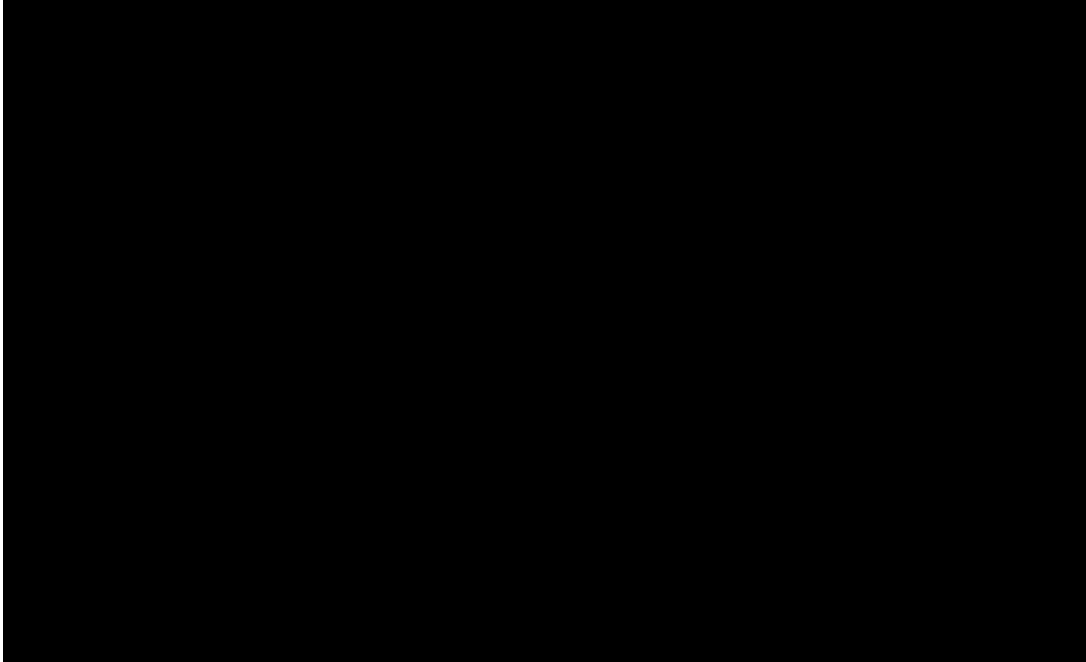
(CBr. at 33 (citing RDX-0002C.0035 (annotated))).).

In other words, with regard to invalidity, Dr. Jensen opined that *any* tubing or fluid lines running from the containers to the fluid control members, *direct or indirect*, qualifies as “connecting” the containers to the fluid control member. Cartessa cannot *credibly argue* that the same should not apply for purposes of infringement. Thus, Dr. Jensen’s entirely *inconsistent* positions on direct versus indirect tubing with respect to infringement and invalidity weighed heavily against his testimony on these issues.

Additionally, because the structure of the “fluid control member” has been construed to include “fluid lines,” the fluid lines themselves are a part of the fluid control member. In that context, the fluid control member is directly and physically connected to the containers. (Tr. (Leinsing) at 309:9-310:21.). This is shown in Mr. Leinsing’s demonstratives, copied below in

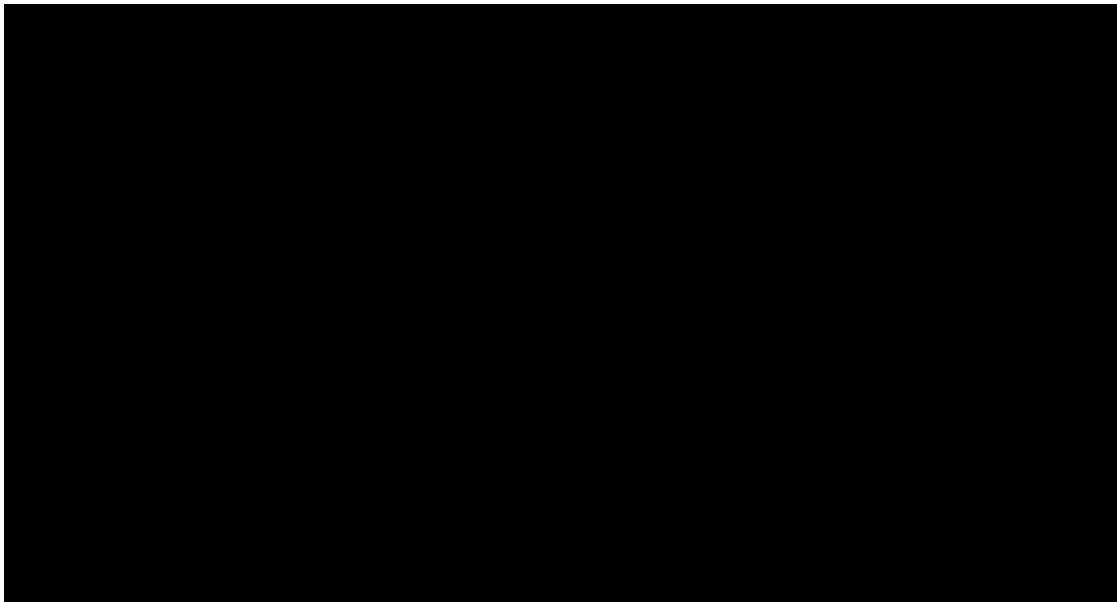
Figures 7 and 8.

Figure 7: Leinsing Demonstratives Showing Fluid Lines of Skinwave Are Directly and Physically Connected to Containers



(CDX-0004C.0185 (citing JX-0052C); *see also id.* at .0215.).

Figure 8: Leinsing Demonstratives Showing Fluid Lines of SKNLAB Are Directly and Physically Connected to Containers



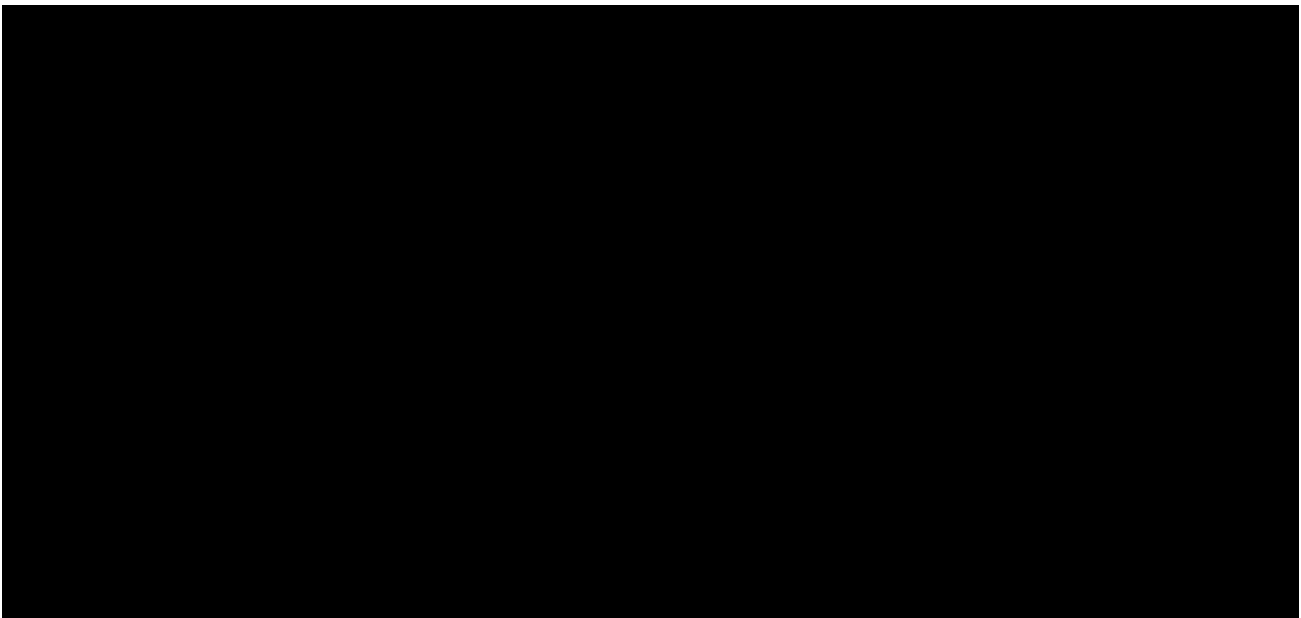
(CDX-0004C.0216 (citing CX-0292C); *see also id.* at .0194.).

Thus, the corresponding structures required by the claim construction are found in the Accused Products. (Tr. (Leinsing) at 311:8-313:23, 314:7-315:13, 313:24-314:6, 316:24-317:7, 318:1-9, 324:1-10, 326:19-21; CDX-0004C.0186, .0187, .0195, .0196; CX-0773C; CX-0774C; JX-0056C; JX-0085C.).

Order No. 32 and the *Markman* Order also set forth the function of the fluid control member to “be in fluid communication with at least a first container and a second container when the first container and the second container are connected to the fluid control member” and “be in fluid communication with the handpiece assembly.” (See Order No. 32 at 1-2; *Markman* Order at 1-2.). The Accused Products meet both functional requirements for the following reasons.

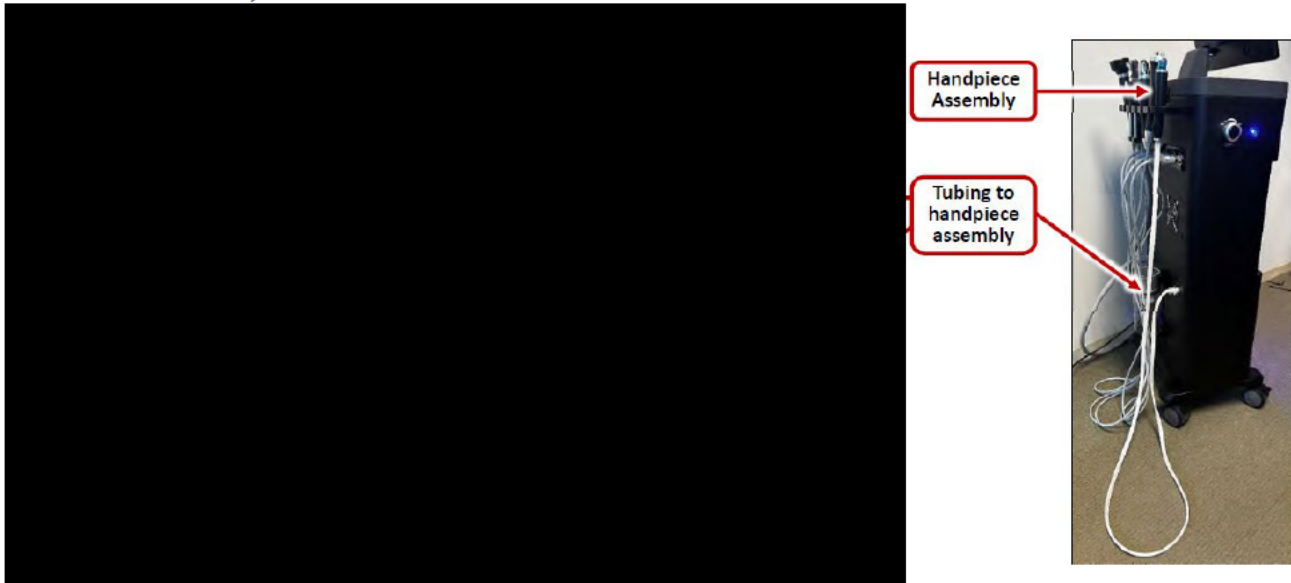
First, as demonstrated in Mr. Leinsing’s demonstratives copied below in Figure 9, the fluid control member of the Accused Products is in fluid communication with the handpiece.

Figure 9: Leinsing Demonstratives Showing Fluid Communication in the Accused Products



(CDX-0004C.0193 (citing JX-0028C.0039); see also CDX-0004C.0188-.0092 (showing the fluid communication pathway from the fluid control member to the handpiece); Tr. (Leinsing) at

318:10-322:14.).



(CDX-0004C.0197 (citing JX-0081C; JX-0082C; JX-0077C); Tr. (Leinsing) at 325:13-327:25.).

Moreover, the fluid control member of the Accused Products is configured to be in fluid communication with at least a first container and a second container. Mr. Leinsing provided reasoned and credible testimony that fluid communication does *not* require *continuous fluid flow* and is merely a state in which there is plumbing between the points.

Q. So fluid communication, you understand, is a term that's easily understood by a person of ordinary skill in the art; isn't that correct?

A. That's correct. *That's a phrase in the art that basically says that there's plumbing there where you can have communication. It doesn't mean that there's necessarily flow.* Just like an electrical communication drawing or electronics drawing, it shows wires going from a computer to an LCD screen, it doesn't mean that there's actually electricity flowing, it just means that those two things communicate together. And in this case we have fluid communication.

Q. And the common understanding of fluid communication is the state that makes the passage of fluid possible, correct?

A. I would say that it makes -- it makes the system capable of passing fluid, and the fluid term, when used with communication, would be understood to be broader in that sense.

(Tr. (Leinsing) at 399:18-400:11 (emphasis added).).

The evidence clearly supports a finding that there is tubing or plumbing from each of the first container and the second container to the fluid control member (and all structures encompassed by that term). (Tr. (Leinsing) at 309:10-311:5, 312:5-16, 315:19-316:23, 317:9-20, 318:12-21, 322:22-323:2, 328:1-14; CDX-0004C.0185-86, .0193-95; CX-0741.0001; JX-0028C.0021; CX-0773C; JX-0054C; JX-0028C.0039; CX-0292C; JX-0085C; CX-0295C; JX-0078.).

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 11[a].

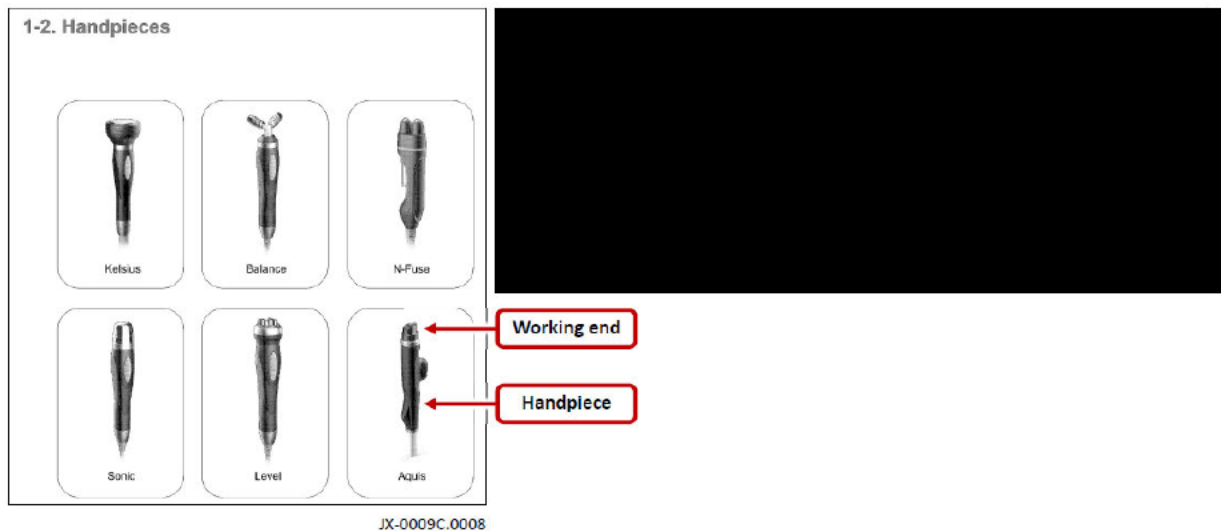
3. 11[b]: “a handpiece assembly configured to contact a skin surface of a subject;”

As HydraFacial correctly noted, the '287 patent uses the terms “handpiece” and “handpiece assembly” interchangeably. (CBr. at 36 (citing JX-0001 at 5:54-62 (identifying “handpiece assembly 18” and “handpiece 18” in the same passage), 6:38-48 (expressly equating handpiece assembly with handpiece)). Accordingly, each of the terms was given the same construction: “plain and ordinary meaning, i.e., the part that is designed to be held by hand.” (See Order No. 29 at 9.).

The handpiece or handpiece assembly in each of the Accused Products is designed to be held by hand, and the tip of the handpiece assembly is configured to contact skin. (Tr. (Leinsing) at 329:24-331:6; CDX-0004C.0200-.0201.). For example, documents showing the Accused Products in operation demonstrate that the handpiece is intended to be held in the hand and placed in contact with the skin via its tip. (See CX-0751; JX-0028C.0026; JX-0009C.0008; JX-0012C.0005.). The tip is part of the handpiece whether it is removeable or permanently affixed. (See *Markman* Order at 15-17.).

The handpiece of the SKNLAB is shown below in Figure 10.

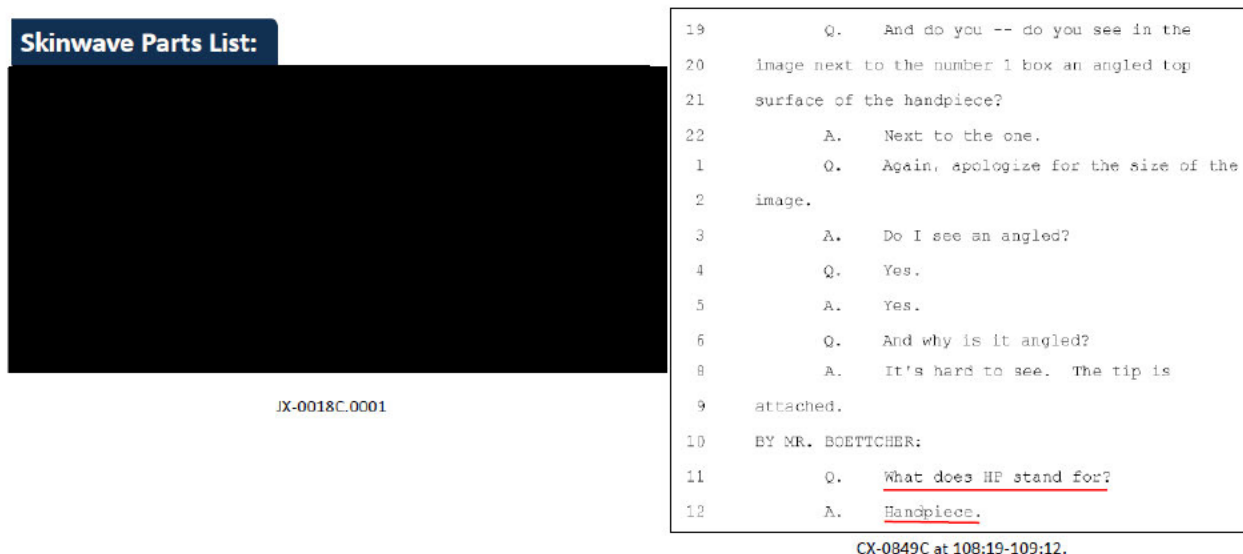
Figure 10: SKNLAB Handpiece



(CDX-0004C.0263 (citing JX-0009C.0008; JX-0012C.0005).).

The handpiece of the Skinwave is shown below in Figure 11.

Figure 11: Skinwave Handpiece



(CDX-0004C.0262 (citing JX-0018C.0001; CX-0849C (Charles Peterson Slade Dep. Tr.)¹⁵ at

¹⁵ At the time of his deposition, Mr. Charles Peterson Slade was Vice President of Field Service at Cartessa. (CX-0849C (Slade Dep. Tr.) at 22:12-14, 24:4-7, 26:20-27:11.).

108:19-109:12).).

Cartessa contended that the Accused Products do not practice this claim element because “the disposable tip, which is a separate component from the handpiece assembly, is the only component that touches skin.” (RRBr. at 17 (citations omitted).). According to Cartessa, “[t]his physical separation between the handpiece and the removable tip means that the handpiece assembly lacks the claimed ‘contact skin tissue of a subject.’” (*Id.* at 18.).

However, as HydraFacial noted (CBr. at 38), Cartessa attempted to distinguish a removable tip from a unitary handpiece during the *Markman* proceedings, stating in its *Markman* Brief that “the ‘handpiece assembly’ and the ‘handpiece’ do not include an easily removable tip that is intended to be swapped for other tips.” (RMBR. at 46 (arguing that “handpiece” and “handpiece assembly” should only be the “portion that can be assembled to make the ‘handheld portion’ of the device which does not include the removable tip”)).). Cartessa’s proposed construction was squarely rejected. As explained in the *Markman* Order, “the specification discloses using the handpiece in conjunction with both **removable** tips, ‘[i]n some embodiments, the tip 34 is removably coupled to the main body 30 such that the tip may be removed from the main body 30 and thrown away to avoid cross-contamination,’ **and permanently coupled** tips, ‘[t]he tip 34 can be permanently or temporarily coupled to the distal end 36 of the main body 30.’” (*Markman* Order at 16 (emphases added) (quoting JXM-0001 at 7:11-26).).

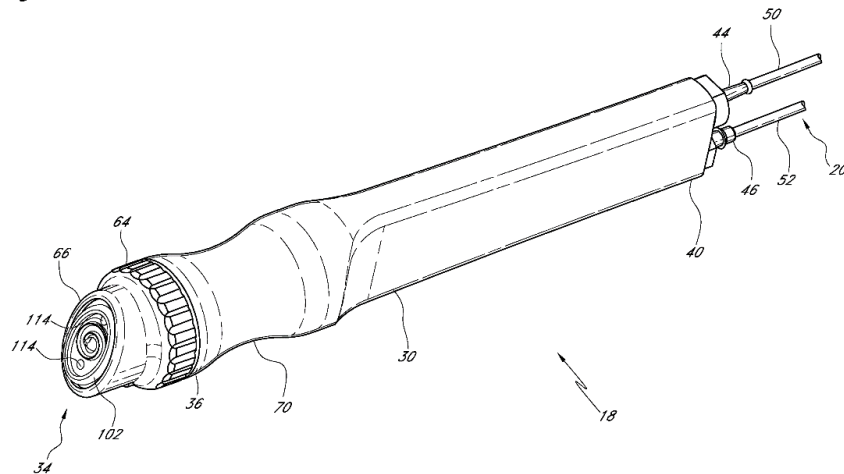
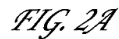
The specification of the ’287 patent also discloses the following, which was quoted in the *Markman* Order:

With reference to FIGS. 2A and 2B, the handpiece assembly 18 includes a main body 30 and a tip 34. The handpiece assembly 18 can be conveniently held within the hand of a user so that the user can place the **tip 34 in operative engagement with a person’s skin.**

(*Markman* Order at 16 (emphasis added) (quoting JXM-0001 at 6:49-53)).

Figure 2A of the '287 patent, copied below in Figure 12, also depicts a removable tip.

Figure 12: Figure 2A of the '287 Patent



(*Id.* at Fig. 2A; *see also id.* at 9:30-34 (“The skirt 64 is preferably configured to provide a gripping surface suitable for applying leverage or force sufficient to remove the tip 34 from the main body 30.”)).

For these reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 11[b].

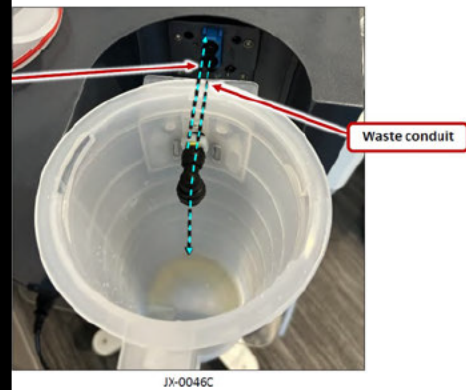
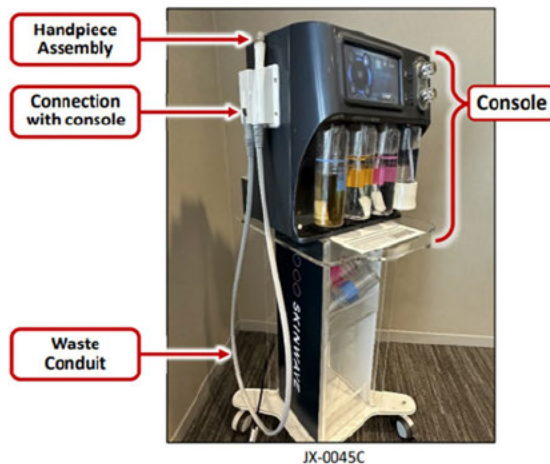
4. **11[c]: “a waste conduit configured to be in fluid communication with the handpiece assembly and a vacuum source to move waste away from the handpiece assembly when the waste conduit and the handpiece assembly are each connected to the console; and”**

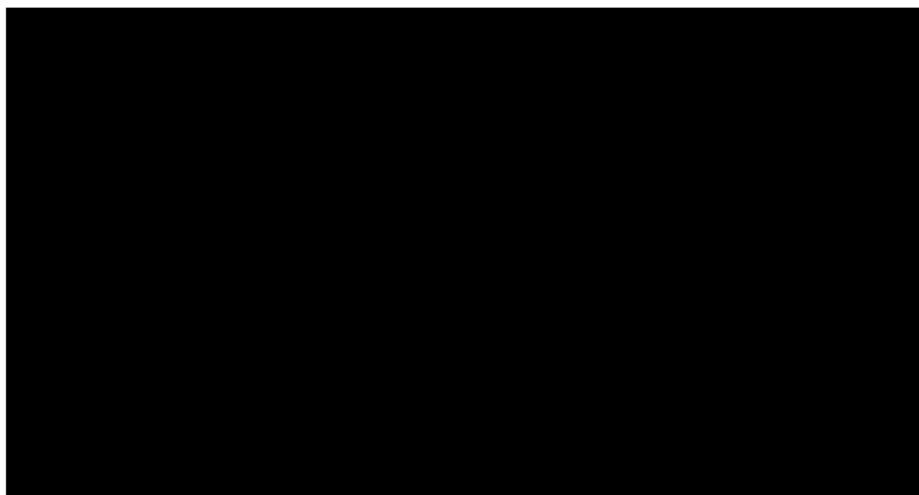
The Accused Products include a waste conduit configured to be in fluid communication with the handpiece assembly and a vacuum source to move waste away from the handpiece assembly when the waste conduit and the handpiece assembly are each connected to the console. (Tr. (Leinsing) at 331:13-332:3.).

Mr. Leinsing testified that the handpiece assembly of each of the Accused Products has two (2) tubes, each of which connects to the console. (Tr. (Leinsing) at 331:11-336:16, 336:21-

339:9; CDX-0004C.0203-.0212.). He explained that the first tube connects the handpiece to the collection lumen/fluid control member via the console. (*Id.*). Mr. Leinsing also explained that the second tube (the waste conduit) places the handpiece assembly in fluid communication with the vacuum source via the console. (*Id.*).

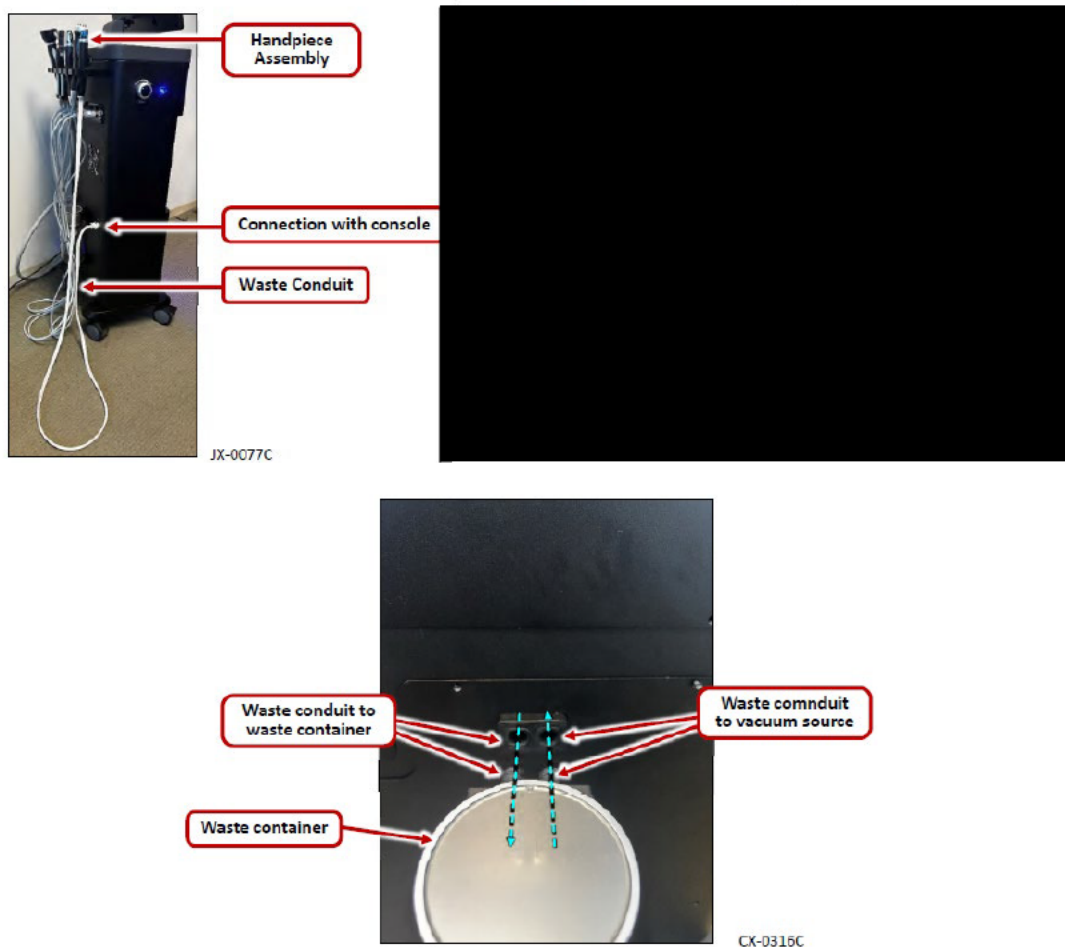
Figure 13: Leinsing Demonstratives Showing Waste Conduit Configuration of Skinwave

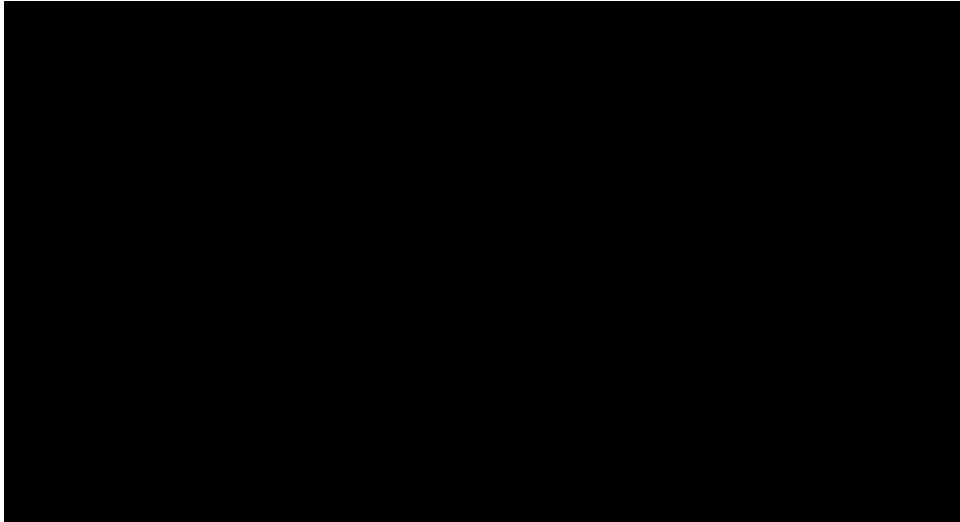




(CDX-0004C.0203-.0207 (citing JX-0045C; JX-0055C; CX-0765C; JX-0046C; JX-0051C; CX-0763C).).

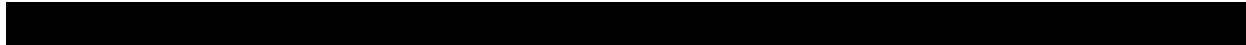
Figure 14: Leinsing Demonstratives Showing Waste Conduit Configuration of SKNLAB





(CDX-0004C.0209-.0212 (citing JX-0077C; CX-0286C; CX-0316C; CX-0285C; CX-0284C)).

Cartessa contended that “[t]he waste conduit of the Accused Products does not put the handpiece assembly in fluid communication with the *vacuum source*” because “there are



source in both Accused Products, preventing ‘fluid communication.’” (RRBr. at 21 (emphasis added); *see also* RPBr. at 20.). However, as HydraFacial pointed out, “nothing in the claim language requires a *single* conduit that is the only structure connecting the handpiece directly to the vacuum source.” (CBr. at 40 (emphasis added)). *See Crystal Semiconductor Corp. v. TriTech Microelectronics Int’l, Inc.*, 246 F.3d 1336, 1348 (Fed. Cir. 2001) (“In the parlance of patent law, the transition ‘comprising’ creates a presumption that the recited elements are only a part of the device, that the claim does not exclude additional, unrecited elements.”) (citation omitted). Thus, Cartessa’s contention is without merit.

Additionally, Cartessa argued that “there is no ‘waste conduit configured to be in fluid communication with . . . a vacuum source’ because liquid does not flow all the way to the

vacuum source.” (RPBr. at 20; *see also* RRBBr. at 22-23.).¹⁶ Cartessa’s argument fails for the following reasons.

First, Cartessa’s argument disregards the claim language, which requires: (i) “a waste conduit configured to be in fluid communication with the handpiece assembly”; and (ii) “a vacuum source to move waste away from the handpiece assembly when the waste conduit and the handpiece assembly are each connected to the console.” (JX-0001 at cl. 11.). As HydraFacial correctly pointed out, the claim language does ***not*** require the “waste conduit” to be in “fluid communication” with the “vacuum source.” (*Id.*). The claim recites that the “***waste conduit . . . be in fluid communication with the handpiece assembly***” and the “***vacuum source to move waste away from the handpiece assembly. . . .***” (*Id.* (emphases added)).

Second, Cartessa appears to base its understanding and argument on an incorrect reading of the claim language. The claim does recite “a waste conduit configured to be in fluid communication with the handpiece assembly and a vacuum source” (*Id.*). However, when read in the context of the rest of the claim, the “vacuum source” is the subject carrying out the function of “mov[ing] waste away from the handpiece assembly when the waste conduit and the handpiece assembly are each connected to the console.” (*See* JX-0001 at cl. 11 (“a waste conduit configured to be in fluid communication with the handpiece assembly” and “a ***vacuum source to move waste away from the handpiece assembly when the waste conduit and the handpiece assembly are each connected to the console***”) (emphasis added)).

¹⁶ According to Cartessa, HydraFacial alleged for the “first time” in HydraFacial’s Initial Post-Hearing Brief that the “claim language does not require the ‘waste conduit’ to be in ‘fluid communication’ with the ‘vacuum source.’” (RRBr. at 22 (quoting CBr. at 41)). As Cartessa noted, it filed a MTS “to address this new, untimely construction.” (*Id.* at 22 n.9.). Cartessa’s MTS was denied. (*See* Order No. 57; *see also* Section II.A, Table 4 (MTS 2), *supra.*).

Even assuming, *arguendo*, the claim requires “fluid communication” between the handpiece and the vacuum source, as discussed above in Section VII.C.2 (claim element 11[a]), under the plain and ordinary meaning of “fluid communication,” the handpiece and the vacuum source have the necessary plumbing between them to provide the claimed communication.¹⁷ (Tr. (Leinsing) at 331:7-339:9.).

Cartessa also contended in its Pre-Hearing Brief that the handpiece of the Accused Products is not connected to the console because there is an intervening conduit between the handpiece and the **console**. (RPBr. at 18.). However, Cartessa did not raise this argument in its Reply Post-Hearing Brief. (RRBr. at 21-27.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

Accordingly, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 11[c].

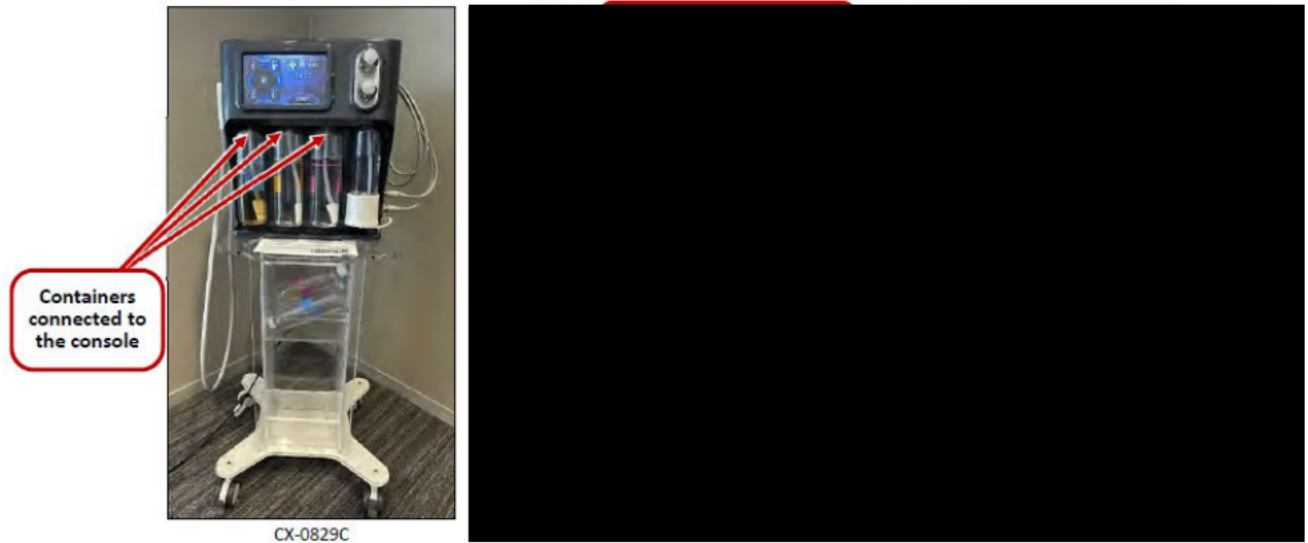
5. 11[d]: “wherein when each of the first container and the second container are connected to the console, the fluid control member is configured to be in fluid communication with each of the first container and the second container;”

Each of the Accused Products comprises a system wherein when each of the first container and the second container are connected to the console, the fluid control member is configured to be in fluid communication with each of the first container and the second container. (Tr. (Leinsing) at 340:3-18; CDX-0004C.0215-16; JX-0052C; JX-0078C; CX-0292C.).

¹⁷ The claim term, “selectively be in fluid communication” was given its “plain and ordinary meaning, i.e., be in fluid communication in response to a selection.” (See Order No. 29 at 9.). Although “selectively . . . in fluid communication” is narrower in scope than “fluid communication,” the adopted construction does not limit the meaning of the “fluid communication” portion of the claim term to certain types of communication or connection.

Shown below in Figure 15 is the Skinwave console receiving and being connected to a first container and at least one additional container.

Figure 15: Leinsing Demonstrative Showing Skinwave Console



(CDX-0004.0215 (citing CX-0829C; JX-0052C)).

The SKNLAB console is also configured to receive and connect to a first container and at least one additional container, as shown below in Figure 16.

Figure 16: Leinsing Demonstrative Showing SKNLAB Console



(CDX-0004C.0216 (citing JX-0078C; CX-0292C)).

The console of each of the Accused Products has a mechanism for receiving and holding the containers. For example, the console of each of the Accused Products has a front portion that is configured to receive at least three (3) separate containers. A container can be coupled to the console of the Accused Products by rotating the container. (JX-0009C.0010 (SKNLAB) (showing containers received in console); CX-0741 (Skinwave) (same); JX-0028C.0021 (explaining that the main body of Skinwave receives containers by turning the containers counterclockwise).). Cartessa's employee, Mr. Slade, confirmed that the console is configured to receive the containers.

Q. And where do these containers connect to the Skinwave?

A. There is a part on the inside of the console that they screw into.

Q. You said it's in the inside of the console, correct?

A. Yes.

(CX-0849C (Slade Dep. Tr.) at 127:1-7.).

Mr. Slade also confirmed that the term "console" includes the device as a whole. (CX-0849C (Slade Dep. Tr.) at 179:9-13 ("Q. So when he's referring to the console, he is referring to the device as a whole? A. You would have to ask Jim, but that's my understanding."), 195:11-14.).

Additionally, as discussed above in Section VII.C.2 (claim element 11[a]), Cartessa's requirement of a direct physical connection between the fluid control member and the containers is without merit. Even assuming, *arguendo*, that the '287 patent requires such a connection, the containers of the Accused Products physically connect to the console by physically connecting to the shelf that is part of the console. (Tr. (Leinsing) at 340:3-18; CDX-0004C.0215-.0216; JX-0052C; JX-0078C; CX-0292C.).

Moreover, the fluid control member is configured to be in fluid communication with each of the first and second containers when such containers are connected to the console for the reasons discussed above in Section VII.C.2.

Accordingly, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 11[d].

6. 11[e]: “wherein when the handpiece assembly is connected to the console, the fluid control member is configured to be in fluid communication with the handpiece assembly;”

Each of the Accused Products comprises a system wherein when the handpiece assembly is connected to the console, the fluid control member is configured to be in fluid communication with the handpiece assembly. (Tr. (Leinsing) at 340:24-342:1; CDX-0004C.0219-.0220; JX-0045C; JX-0077C.). As discussed above in Section VII.C.4 (claim element 11[c]), the handpiece assembly of the Accused Products is connected to the console. Additionally, for the reasons discussed above in Section VII.C.6 (claim element 11[e]), the fluid control member is configured to be in fluid communication with the handpiece assembly when the handpiece assembly is connected to the console.

Cartessa did not dispute this in its Reply Post-Hearing Brief. (RRBr. at 27-29.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 11[e].

7. 11[f]: “wherein when (i) each of the first container and the second container contains treatment material, (ii) the first container and the second container are connected to the console, and (iii) the handpiece assembly is connected to the console, the skin treatment apparatus is configured to selectively draw treatment material from the first container or the second container to the handpiece assembly using, at least in part, a vacuum created along a distal end of the handpiece

assembly by the vacuum source.”

Each of the Accused Products comprises a system that includes: (i) a first container and a second container that can contain treatment material; (ii) a first container and a second container that can connect to the console; and (iii) a handpiece assembly that can connect to the console. Specifically, the Accused Products include containers with treatment material. (Tr. (Leinsing) at 343:5-12, 345:11-23; CDX-0004.0222, .0224; JX-0028C.0021; CX-0741.0001; JX-0012C.0003.). Additionally, as discussed above in Sections VII.C.4 (claim element 11[c]) and VII.C.5 (claim element 11[d]), the containers and the handpiece assembly are connected to the console.

Moreover, HydraFacial presented testimonial and documentary evidence that the Accused Products selectively draw treatment material from the first container or the second container to the handpiece assembly using, at least in part, a vacuum created along a distal end of the handpiece assembly by the vacuum source. (Tr. (Leinsing) at 343:13-345:3, 343:24-25, 344:8-9, 346:1-24, 305:12-306:5, 345:20-346:4, 365:16-366:19; CDX-0004C.0223-.0225, .0268; *see also* CX-0762C; CX-0748; CX-0750; JX-0048; JX-0028C.0026, .0039 (flow knob); JX-0077C; JX-0009C.0010; JX-0012C.0003, .0005.).

Cartessa’s only rebuttal argument was that “[t]he containers of the Accused Products are not connected to the console.” (RRBr. at 29.). However, for the reasons discussed above in Section VII.C.2, Cartessa’s argument is not supported by the evidence.

Accordingly, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 11[f].

D. The Accused Products Practice Claims 12, 14, 16, 18, and 19 of the '287 Patent¹⁸

1. Claim 12: “The skin treatment apparatus of claim 11, wherein treatment material from the first container and the second container are configured to be drawn to the handpiece assembly sequentially.”

As discussed above in Section VII.C, the first container and the at least one additional container for each of the Accused Products contain treatment materials and are connected to the console.

Moreover, HydraFacial presented testimonial and documentary evidence that treatment materials from the first container and the second container are configured to be delivered to the supply conduit sequentially. (Tr. (Leinsing) at 347:22-348:21; CDX-0004C.0229-.0230; JX-0028C.0026; JX-0009C.0037; JX-0012C.0007, .0011; *see also* JX-0075C; JX-0090C).). For example, the Skinwave delivers treatment fluids to the handpiece sequentially via a user selecting the appropriate container from which to draw treatment fluid. (*See* CDX-0004C.0229; JX-0028C.0026.). Similarly, the SKNLAB delivers treatment fluids to the handpiece sequentially when a user chooses the appropriate container from which to draw treatment fluid via icons on a touchscreen. (*See* JX-0009C.0037 (user manual discussing [REDACTED] [REDACTED] [REDACTED]; JX-0012C.0007, .0011.).

Cartessa did not separately dispute the additional claim element recited in claim 12 in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 29 (arguing only that the Accused Products do not infringe claim 12 because they do not infringe claim 11); RRBBr. at 29 (same).).

¹⁸ Because asserted claim 18 depends from claim 17, which was not asserted, claim 17 is also addressed below.

Accordingly, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice the additional claim element recited in claim 12.

2. Claim 14: “The skin treatment apparatus of claim 11, wherein the console comprises the vacuum source.”

Each of the Accused Products comprises a vacuum source, wherein the console comprises the vacuum source. (Tr. (Leinsing) at 349:2-15; CDX-0004C.0232-.0233; CX-0763C; CX-0284C; *see also* Section VII.C.4, *supra*.).

Cartessa did not separately contest that the vacuum source is located inside of the console (i.e., cabinet or main housing) of the Accused Products in its Reply Post-Hearing Brief. (RRBr. at 29 (arguing only that the Accused Products do not infringe claim 14 because they do not infringe claim 11)). Thus, any argument on this issue is deemed waived under Ground Rule and 10.1.

For the reasons discussed above, HydraFacial has proven by a preponderance of evidence that the Accused Products practice the additional claim element recited in claim 14.

3. Claim 16: “The skin treatment apparatus of claim 11, wherein the treatment material in the first container is a skin treatment fluid.”

Each of the Accused Products comprises a first container that contains skin treatment fluid. (Tr. (Leinsing) at 349:22-350:25; CDX-0004C.0235-.0237; CX-0741.0001; JX-0028C.0021; JX-0012.0003, .0005; JX-0009C.0010.).

Cartessa did not separately dispute this in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 29 (arguing only that the Accused Products do not infringe claim 16 because they do not infringe claim 11); RRBr. at 29 (same)). Thus, any argument on this issue is

deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

For these reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice the additional claim element recited in claim 16.

4. Claim 17: “The skin treatment apparatus of claim 11, further comprising a computing device configured to control at least one function of the skin treatment apparatus.”

Each of the Accused Products comprises a computing device configured to control at least one function of the system. (Tr. (Leinsing) at 351:7-354:2; CDX-0004C.0239-.0244.). For example, the Accused Products include a computing device, which controls at least container selection, start and stop functions for dispensing solution, and vacuum intensity. (*See, e.g.*, CX-0769C; CX-0770C; CX-0291C.).

Cartessa did not separately contest this in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 29 (arguing only that the Accused Products do not infringe claim 17 because they do not infringe claim 11); RRBr. at 29 (same).). Thus, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

Accordingly, HydraFacial has proven by a preponderance of evidence that the Accused Products practice the additional claim element recited in claim 17.

5. Claim 18: “The skin treatment apparatus of claim 17, further comprising a user input device to facilitate control of a flow of treatment materials from at least one of the first container and the second container to the handpiece assembly.”

Each of the Accused Products includes a touchscreen that controls which container is selected for the flow of fluids to the handpiece, which requires user input, and also includes various control dials or knobs. (Tr. (Leinsing) at 351:7-354:2; CDX-0004C.0239-.0244; JX-0028C.0026 (Skinwave touchscreen); JX-0049C (SKNLAB touchscreen); JX-0009C.0023,

.0039 (flow control dial); JX-0086C (same).).

Cartessa did not separately dispute this in its Reply Post-Hearing Brief. (RRBr. at 29 (arguing only that the Accused Products do not infringe claim 18 because they do not infringe claim 17).). Accordingly, any argument on this issue is deemed waived under Ground Rule and 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice the additional claim element recited in claim 18.

6. Claim 19: “The skin treatment apparatus of claim 18, wherein the user input device comprises a touch screen.”

As discussed above in Section VII.D.5 (claim 18), each of the Accused Products comprises a user input device to select a flow of fluids from the first container and the at least one additional container to the handpiece wherein the user input device comprises a touch screen. (*See also* Tr. (Leinsing) at 351:17-352:15.).

Cartessa did not separately contest this in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 30 (arguing only that the Accused Products do not infringe claim 19 because they do not infringe claim 18); RRBr. at 29 (same).). Thus, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

Accordingly, HydraFacial has proven by a preponderance of evidence that the Accused Products practice the additional claim element recited in claim 19.

E. The Accused Products Practice Claim 22 of the '287 Patent

1. 22[pre]: “A system for treating skin, the system comprising:”

There is no dispute that the Accused Products are systems for treating skin/skin treatment apparatuses. (*See, e.g.*, JSUI at 2.). Moreover, as discussed above in Section VII.C.1 (claim

element 11[pre]), the Accused Products are systems for treating skin. (*See also* Tr. (Leinsing) at 355:10-356:25; CDX-0004C.0250-52; CX-0849C (Slade Dep. Tr.) at 127:1-7; CX-0741.0001.).

Accordingly, HydraFacial has proven by a preponderance of evidence that the Accused Products meet the preamble of claim 22.

2. 22[a]: “a console configured to receive a first container and at least one additional container;”

As discussed above in Section VII.C.5 (claim element 11[d]), the Accused Products include a console configured to receive a first container and at least one additional container. (*See also* Tr. (Leinsing) at 355:10-356:25; CDX-0004C.0250-.0252; CX-0849C (Slade Dep. Tr.) at 127:1-7; CX-0741.0001.).

Cartessa contended that the “containers of the Accused Products are not received by the console but are configured to connect to an internally threaded mount mounted to a shelf attached to the back or front housing,” which was Cartessa’s rebuttal argument to claim elements 11[a] and 11[d]. For the reasons discussed above in Sections VII.C.2 (claim element 11[a]) and VII.C.5 (claim element 11[d]), Cartessa’s argument is not supported by the evidence.

For these reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 22[a].

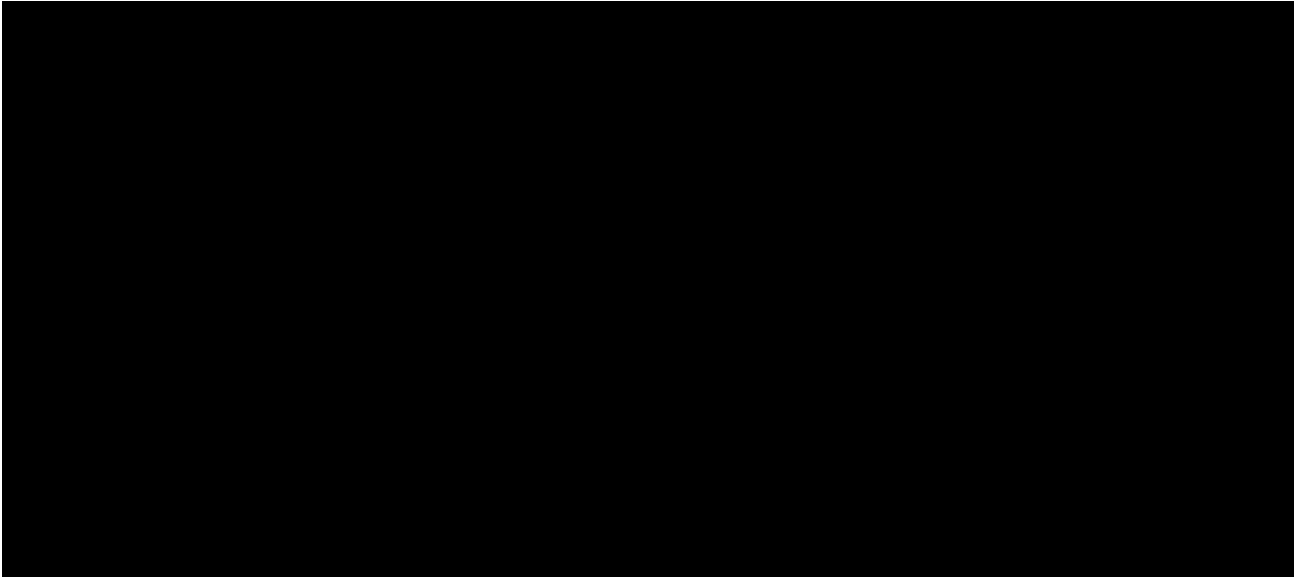
3. 22[b]: “a collection lumen configured to be in fluid communication with the first container and the at least one additional container when the first container and the at least one additional container are connected to the console; and”

Each of the Accused Products includes a collection lumen configured to be in fluid communication with the first container and the at least one additional container when the first container and the at least one additional container are connected to the console. (Tr. (Leinsing) at 357:11-360:24, CDX-0004C.0255-.0258; JX-0052C; CX-0773C; JX-0056C; CX-0292C; CX-

0295C; JX-0085C.).

The collection lumen within the manifold of the SKNLAB is shown below in Figure 17.

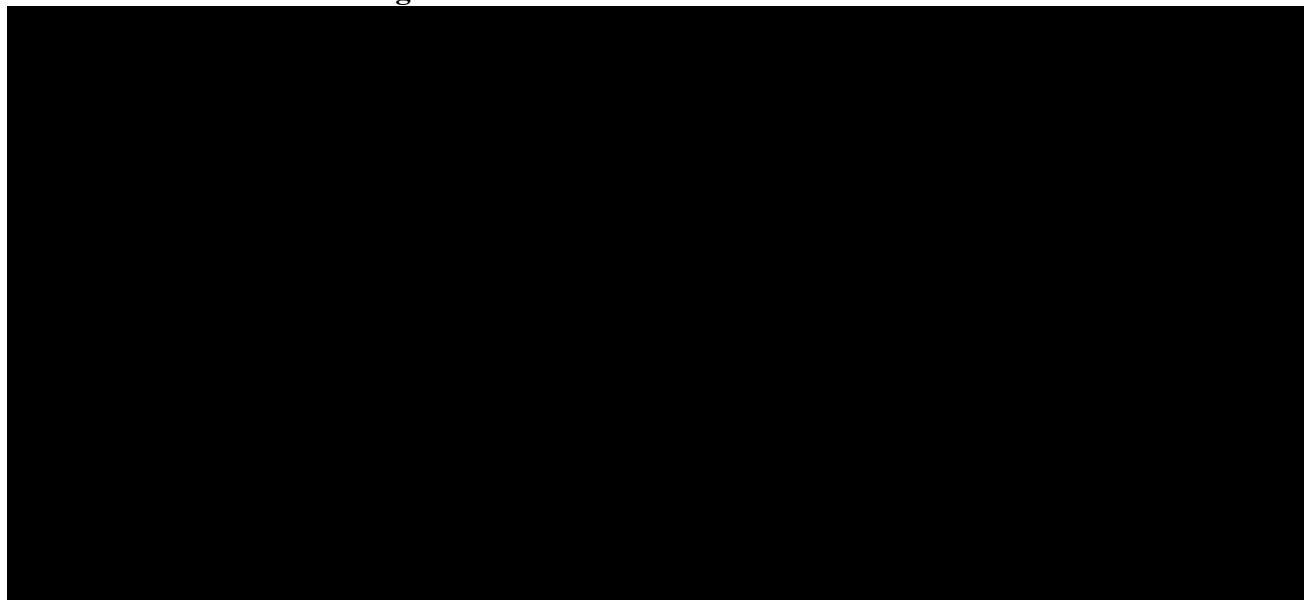
Figure 17: Collection Lumen in SKNLAB



(CDX-0004C.0258 (citing CX-0295C; JX-0085C).).

The collection lumen within the manifold of the Skinwave is shown below in Figure 18.

Figure 18: Collection Lumen in Skinwave



(CDX.0004C.0256 (citing CX-0773C; JX-0056C).).

As explained above in Section VII.C.5 (claim element 11[d]), each of the Accused Products has a first container and at least one additional container connected to the console. Moreover, the collection lumen is part of the fluid control member structures and receives treatment material from the containers in each of the Accused Products. (Tr. (Leinsing) at 357:11-360:24.). The collection lumen receives fluid from the fluid lines that extend into the containers, as shown in above in Figures 17 and 18. Thus, the collection lumen is configured to be in fluid communication with the containers for the same reasons as stated above in Section VII.C.2 (claim element 11[a]).

Cartessa presented the same argument here as it did for claim element 11[d], i.e., that neither the first nor the additional container in the Accused Products is connected to the console. (RRBr. at 30.). For the reasons discussed above in Section VII.C.5 (claim element 11[d]), Cartessa's argument is unsupported and, thus, not compelling.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 22[b].

4. 22[c]: “a handpiece having a working end, the working end of the handpiece being configured to contact skin tissue of a subject during use;”

As discussed in Section VII.C.3 (claim element 11[b]) above, the handpiece in each of the Accused Products has a working end that contacts the skin during use. (Tr. (Leinsing) at 361:4-363:12; CDX-0004C.0261-.0264; JX-0028C.0026; JX-0018C.0001; CX-0849C (Slade Dep. Tr.) at 108:19-109:12; JX-0009C.0008; JX-0012C.0005.).

For this claim element, Cartessa raised the same argument it did for claim element 11[b], i.e., that the handpiece in each of the Accused Products is not in contact with the skin surface. For the reasons discussed above in Section VII.C.3 (claim element 11[b]), Cartessa's argument is

unpersuasive and not supported by the evidence.

For the reasons discussed above, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 22[c].

5. **22[d][i]: “wherein the working end of the handpiece is configured to be placed in fluid communication with a vacuum source to create a suction force along a distal end of the handpiece when the vacuum source is activated and the handpiece is connected to the console and”**

As explained in Section VII.C.4 above (claim element 11[c]), the Accused Products meet this claim element. Moreover, Mr. Leinsing explained how a vacuum source is used in the Accused Products to create a suction force along a distal end of the handpiece when the vacuum source is activated and the handpiece is connected to the console. (Tr. (Leinsing) at 364:18-367:21; CDX-0004C.0267-.0270; JX-0045C; JX-0028C.0039; JX-0077C; JX-0012C.0005.).

Cartessa contended that the handpiece is not “in fluid communication with the vacuum source because (i) liquid stops at the waste container and (ii) the structure and plumbing of the Accused Products does not allow liquid to flow to the vacuum source,” which are essentially the same arguments Cartessa raised with respect to claim element 11[c]. (RRBr. at 31; *id.* at Section III.D.1.c.). As discussed above in Section VII.C.4, these unsupported arguments are not compelling.

For these reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 22[d][i].

6. **22[d][ii]: “wherein the working end of the handpiece is configured to be placed in fluid communication with the first container or the at least one additional container through the collection lumen; and”**

As discussed above in Sections VII.C.2 (claim element 11[a]), VII.C.5 (claim element 11[d]), and VII.C.6 (claim element 11[e]), each of the Accused Products meet this claim

element. Additionally, Sections VII.C.5 (claim element 11[d]) and VII.E.3 (claim element 22[b]) discuss how the fluid control member and collection lumen are in fluid communication with each container, while Section VII.C.6 (claim element 11[e]) explains how the fluid control member is in fluid communication with the handpiece. (*See also* Tr. (Leinsing) at 367:22-369:24; CDX-0004C.0271-.0273.).

Cartessa did not contest that the Accused Products meet [ii] of claim element 22[d] in its Reply Post-Hearing Brief. (RRBr. at 31-32.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

Accordingly, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 22[d][ii].

7. 22[e]: “a supply conduit that places the collection lumen in fluid communication with the working end of the handpiece when the handpiece is connected to the console;”

The Accused Products include a supply conduit that places the collection lumen in fluid communication with the working end of the handpiece when the handpiece is connected to the console. (*See* Section VII.C.6, *supra*.). As Mr. Leinsing explained, in each of the Accused Products, there is a tube that connects the handpiece to the console and provides a conduit that continues into the console and places the handpiece in fluid communication with the collection lumen. (Tr. (Leinsing) at 370:6-372:2; CDX-0004C.0275-.0278; JX-0028C.0039; CX-0292C; JX-0081C; JX-0082C; JX-0077C.).

Cartessa did not dispute that the Accused Products meet this claim element in its Reply Post-Hearing Brief. (RRBr. at 31-32.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that

the Accused Products practice claim element 22[e].

8. **22[f]: “wherein each of the first container and the at least one additional container includes treatment materials, and wherein treatment materials from the first container and the at least one additional container are configured to be delivered to the supply conduit sequentially when the first container and the at least one additional container are connected to the console.”**

As discussed above in Section VII.C.7 (claim element 11[f]), each of the Accused Products includes a first container and at least one additional container containing treatment materials, which Cartessa did not dispute. (RRBr. at 32; *see also* Tr. (Leinsing) at 372:12-24, 381:7-16.). The treatment materials contained in the first and additional containers are also configured to be delivered to the supply conduit sequentially when the first container and the at least one additional container are connected to the console. (*See* Section VII.D.1 (claim 12); *see also* Tr. (Leinsing) at 372:12-24, 381:7-16.).

Cartessa’s sole non-infringement contention with respect to this claim element is that the “containers are not connected to the console,” which is the same argument Cartessa raised for claim element 11[d]. (RRBr. at 32.). For the reasons discussed in Section VII.C.5 (claim element 11[d]), Cartessa’s argument is unsupported and, thus, unpersuasive.

For these reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 22[f].

F. The Accused Products Practice Claims 24 and 25 of the ’287 Patent

1. **Claim 24: “The system of claim 22, further comprising a computing device configured to control at least one function of the system.”**

As discussed in Section VII.D.4 (claim 17), each of the Accused Products includes a computing device configured to control at least one function of the Accused Product. (*See also* Tr. (Leinsing) at 382:3-17.).

Cartessa did not separately dispute this in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 35 (arguing only that the Accused Products do not infringe claim 24 because they do not infringe claim 22); RRBr. at 33 (same).). Thus, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

Accordingly, HydraFacial has proven by a preponderance of evidence that the Accused Products practice the additional claim element recited in claim 24.

2. Claim 25: “The system of claim 24, further comprising a user input device to facilitate control of a flow of fluids from the first container and the at least one additional container to the handpiece.”

As discussed in Section VII.D.5 (claim 18), each of the Accused Products includes a user input device to facilitate control of a flow of fluids from the first container and the at least one additional container to the handpiece. (*See also* Tr. (Leinsing) at 382:18-383:10.).

Cartessa did not separately dispute this in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 35 (arguing only that the Accused Products do not infringe claim 25 because they do not infringe claim 22); RRBr. at 33 (same).). Thus, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

For the reasons discussed above, HydraFacial has proven by a preponderance of evidence that the Accused Products practice the additional claim element recited in claim 25.

G. The Accused Products Do Not Practice Claim 26 of the '287 Patent¹⁹

1. 26[pre]: “A system for treating skin, the system comprising:”

For the reasons discussed above in Section VII.E.1 (claim element 22[pre]), HydraFacial

¹⁹ As noted above in Section II.A, claims 1-10, 15, 17, 20, 23, 26, 28-31, 33-37, and 39-45 of the '287 patent, each of which recites “block” or depends from an independent claim that recites block, were terminated from this Investigation. (*See* Order No. 34 (Mar. 26, 2025), *unreviewed*, Comm’n Notice, Doc. ID No. 848520 (Apr. 11, 2025).). HydraFacial did not move to terminate claim 32, which depends

has proven by a preponderance of evidence that the Accused Products meet the preamble of claim 26. (*See also* JSUI at 2.).

2. 26[a]: “a console configured to receive a first container and at least one additional container;”

For the reasons discussed above in Sections VII.C.2 (claim element 11[a]) and VII.E.2 (claim element 22[a]), HydraFacial has proven by a preponderance of evidence that each of the Accused Products has a console configured to receive a first container and at least one additional container, and thus, practices claim element 26[a].

3. 26[b]: “a handpiece configured to contact skin tissue of a subject; and”

For the reasons explained in Sections VII.C.3 (claim element 11[b]) and VII.E.4 (claim element 22[c]) above, HydraFacial has proven by a preponderance of evidence that each of the Accused Products includes a handpiece configured to contact skin tissue of a subject, and thus, practices claim element 26[b].

4. 26[c]: “a block in the console, wherein the block is:”

As noted above in Section II.A, the term “block” was construed to be indefinite.²⁰ (*See*

from claims 26, 30, and 31. On March 21, 2025, Cartessa filed a motion for summary determination (“MSD”) of invalidity of claim 32 due to indefiniteness in view of Order No. 29, which was denied without prejudice. (Motion Docket No. 1408-035 (Mar. 21, 2025); Order No. 41 (Apr. 1, 2025).). In its opposition to Cartessa’s MSD, HydraFacial proposed “try[ing] just a single claim [claim 32]” to “ensure that the record is complete in the event that . . . the Commission disturbs the findings or claim construction ruling within the life-span of the ‘287 Patent.” (Doc. ID No. 847195, Ex. A at 2-3 (Mar. 28, 2025).). In denying Cartessa’s MSD without prejudice, Order No. 41 permitted HydraFacial to present evidence on claim 32. (*See* Order No. 41 at 5-6.). Because claim 32 is still an asserted claim in this Investigation, unasserted (terminated) claim 26, from which claim 32 depends, is addressed below for purposes of infringement and the technical prong of the domestic industry requirement.

²⁰ In its opposition to Cartessa’s MSD of invalidity of claim 32, HydraFacial proposed presenting limited evidence during the Hearing for just claim 32, which was granted. (*See* Order No. 41 (Apr. 1, 2025).). As HydraFacial noted in its opposition, “claim 26 includes subject matter that is similar, if not verbatim, to corresponding subject matter of claims that are already being asserted and will be heard, at the

also Order No. 29 at 7.). Therefore, the Accused Products cannot practice this claim element and ultimately, claim 26, in its entirety.

Accordingly, HydraFacial has not proven by a preponderance of evidence that the Accused Products practice claim element 26[c].

5. 26[c][i]: “configured to selectively receive fluid from the first container when the first container is connected to the console;”

Because “block” was construed to be indefinite, the “block” recited in claim element 26[c] cannot be configured to selectively receive fluid from the first container when the first container is connected to the console.

Accordingly, HydraFacial has not proven by a preponderance of evidence that the Accused Products practice claim element 26[c][i].

6. 26[c][ii]: “configured to selectively receive fluid from the at least one additional container when the at least one additional container is connected to the console; and,”

Because “block” was construed to be indefinite, the “block” recited in claim element 26[c] cannot be configured to selectively receive fluid from the at least one additional container when the at least one additional container is connected to the console.

Accordingly, HydraFacial has not proven by a preponderance of evidence that the Accused Products practice claim element 26[c][ii].

Hearing.” (Doc. ID No. 847195, Att. A at 2 (Mar. 28, 2025).). HydraFacial stated that “claims 24 and 25, which are being asserted, contain similar subject matter to that of claims 30 and 31,” and “claims 26, 30, and 31 contain a similar dependency structure to that of Asserted Claims 22, 24, and 25.” (*Id.*). In their post-hearing briefing, HydraFacial and Cartessa discussed each element of claims 26, and 30-32, with citation to their experts’ testimony in support, on infringement, technical DI, and invalidity. (CBr. at 53-57 (infringement), 74-79 (technical DI)); CRBr. at 8-29 (anticipation and obviousness), 53-57 (public use); RBr. at 22-24 (anticipation), 26-27 (obviousness), 46-51 (same), 64-68 (same), 69 (same), 117-23 (public use); RRBr. at 33-39 (non-infringement), 46-49 (technical DI).). In the event that the Commission disagrees with Order No. 29 and the indefiniteness construction of the term “block,” the Parties briefed and presented evidence with respect to claims 26 and 30-32.

7. 26[c][iii]: “configured to selectively be in fluid communication with the handpiece through a first conduit when the handpiece is connected to the console; and”

Because “block” was construed to be indefinite, the “block” recited in claim element 26[c] cannot be configured to selectively be in fluid communication with the handpiece through a first conduit when the handpiece is connected to the console.

Accordingly, HydraFacial has not proven by a preponderance of evidence that the Accused Products practice claim element 26[c][iii].

8. 26[d]: “a vacuum source;”

For the reasons discussed above in Sections VII.C.4 (claim element 11[c]) and VII.D.2 (claim 14), HydraFacial has proven by a preponderance of evidence that each of the Accused Products includes a vacuum source, and thus, practices claim element 26[d].

9. 26[e]: “wherein the handpiece is configured to be in fluid communication with the vacuum source through a second conduit when the handpiece is connected to the console;”

As discussed in Section VII.C.4 (claim element 11[c]) above, the Accused Products include a handpiece configured to be in fluid communication with the vacuum source through a second conduit, i.e., waste conduit recited in claim element 11[c], when the handpiece is connected to the console.

Accordingly, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 26[e].

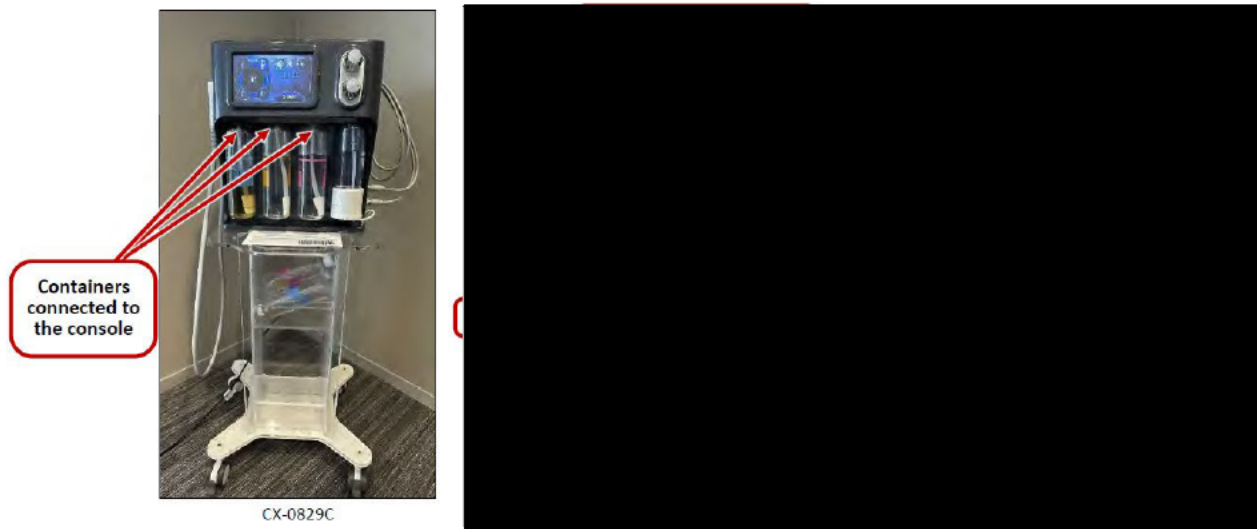
10. 26[f]: “wherein the at least one additional container comprises a second container and a third container such that the console is configured to receive at least three containers; and”

As explained above in Section VII.C.5 (claim element 11[d]), the Accused Products are configured to receive at least two (2) containers. The evidence HydraFacial relied upon to

demonstrate that each Accused Product has a console configured to receive at least two (2) containers also show that the console can receive three (3) containers.

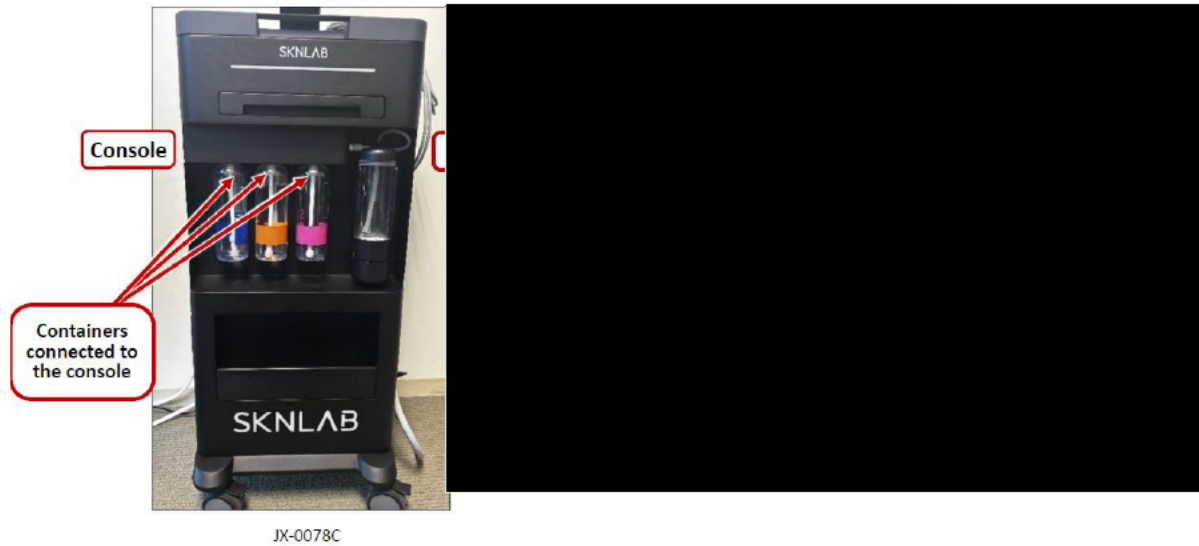
Examples of the Skinwave and SKNLAB consoles receiving and being connected to three (3) containers are shown in Mr. Leinsing's demonstratives, copied below in Figures 19 and 20. The annotated photographs of the Skinwave and SKNLAB show at least three (3) containers.

Figure 19: Leinsing Demonstrative Showing Three Containers Connected to the Skinwave Console



(CDX-0004.0215 (citing CX-0829C; JX-0052C)).

Figure 20: Leinsing Demonstrative Showing Three Containers Connected to the SKNLAB Console



(CDX-0004C.0216 (citing JX-0078C; CX-0292C)).

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 26[f].

11. **26[g]: “wherein when the handpiece is connected to the console and the first container, the second container and the third container each contains fluid and is connected to the console, the system is configured to deliver to the handpiece one at a time fluid contained in the first container, fluid contained in the second container, and fluid contained in the third container.”**

For the reasons explained above in Sections VII.C.4 (claim element 11[c]) and VII.D.1 (claim 12), HydraFacial has proven by a preponderance of evidence that the Accused Products practice claim element 26[g].

H. The Accused Products Do Not Practice Claim 32 of the '287 Patent²¹

1. **Claim 30: “The system of claim 26, further comprising a computing device configured to control at least one function of the system.”**

²¹ Because asserted claim 32 depends from claims 30 and 31, which were not unasserted, claims 30 and 31 are also addressed below.

Because the term “block” recited in independent claim 26 was construed to be indefinite, rendering claim 26 invalid, claim 30, which depends from claim 26, is also invalid. *See, e.g., Ibormeith IP*, 732 F.3d at 1378 (noting that if an independent claim is indefinite, “the dependent claims . . . would also be invalid, because they incorporate the elements of [the] independent claim”).

Additionally, because the Accused Products do not practice claim 26, and claim 30 depends from claim 26, the Accused Products do not practice claim 30. *See, e.g., Monsanto Co. v. Syngenta Seeds, Inc.*, 503 F.3d 1352, 1359 (Fed. Cir. 2007) (“One who does not infringe an independent claim cannot infringe a claim dependent on (and thus containing all the limitations of) that claim.”); *Wahpeton Canvas Co., Inc. v. Frontier, Inc.*, 870 F.2d 1546, 1553 (Fed. Cir. 1989) (“It is axiomatic that dependent claims cannot be found infringed unless the claims from which they depend have been found to have been infringed.”).

For these reasons, HydraFacial has not proven by a preponderance of evidence that the Accused Products practice claim 30.

2. Claim 31: “The system of claim 30, further comprising a user input device to select a flow of fluids from the first container and the at least one additional container to the handpiece.”

Because the term “block” recited in claim 26 was construed to be indefinite, rendering claim 26 invalid, claim 31, from which claim 31 ultimately depends, is also invalid. *See, e.g., Ibormeith IP*, 732 F.3d at 1378.

Moreover, because the Accused Products do not practice claim 26, and claim 31 ultimately depends from claim 26, the Accused Products do not practice claim 31. *See, e.g., Monsanto*, 503 F.3d at 1359; *Wahpeton Canvas*, 870 F.2d at 1553.

For the foregoing reasons, HydraFacial has not proven by a preponderance of evidence

that the Accused Products practice claim 31.

3. Claim 32: “The system of claim 31, wherein the user input device comprises a touch screen.”

Because the term “block” recited in claim 26 was construed to be indefinite, rendering claim 26 invalid, claim 32, which ultimately depends from claim 26, is also invalid. *See, e.g., Ibormeith IP*, 732 F.3d at 1378.

Additionally, because the Accused Products do not practice claim 26, and claim 32 ultimately depends from claim 26, the Accused Products do not practice claim 32. *See, e.g., Monsanto*, 503 F.3d at 1359; *Wahpeton Canvas*, 870 F.2d at 1553.

Accordingly, HydraFacial has not proven by a preponderance of evidence that the Accused Products practice claim 31.

VIII. TECHNICAL PRONG OF THE DOMESTIC INDUSTRY REQUIREMENT

A. Legal Standard

A complainant in a patent-based Section 337 investigation must demonstrate that it is practicing or exploiting the patents at issue. *See* 19 U.S.C. § 1337(a)(2) and (3); *Microsphere Adhesives*, Inv. No. 337-TA-366, Comm’n Op. at 8. “In order to satisfy the technical prong of the domestic industry requirement, it is sufficient to show that the domestic industry practices any claim of that patent, not necessarily an asserted claim of that patent.” *Certain Ammonium Octamolybdate Isomers*, Inv. No. 337-TA-477, Comm’n Op. at 55 (U.S.I.T.C. Jan. 5, 2004).

The test for claim coverage for the purposes of the technical prong of the domestic industry requirement is the same as that for infringement. *Certain Doxorubicin and Preparations Containing Same*, Inv. No. 337-TA-300, FID at 109, 1990 WL 710463 (U.S.I.T.C. May 21, 1990), *aff’d*, Views of the Commission at 22 (October 31, 1990) (“*Doxorubicin*”).

“First, the claims of the patent are construed. Second, the complainant’s article or process is examined to determine whether it falls within the scope of the claims.” *Id.* The technical prong of the domestic industry can be satisfied either literally or under the doctrine of equivalents. *Certain Dynamic Sequential Gradient Devices and Component Parts Thereof*, Inv. No. 337-TA-335, FID at 44, Pub. No. 2575 (U.S.I.T.C. Nov. 1992).

B. Technical Prong Overview

HydraFacial alleged that all the DI Products practice claims 11, 12, 14, 16, 18, 22, 24, and 25 of the ’287 patent. (*See, e.g.*, CBr. at 58.). HydraFacial also alleged that the Syndeo DI Product alone practices claims 19 and 32 of the ’287 patent. (*Id.*).

For the reasons discussed below, HydraFacial has met its burden and proven that one or more of the DI Products practice claims 11, 12, 14, 16, 18, 19, 22, 24, and 25. Because claim 32 is invalid as indefinite, HydraFacial could not meet its burden and prove that the Syndeo DI Product practices that claim. Nevertheless, HydraFacial has satisfied the technical prong of the domestic industry requirement for the ’287 patent.

C. The DI Products Practice Claim 11 of the ’287 Patent

1. 11[pre]: “A skin treatment apparatus comprising:”

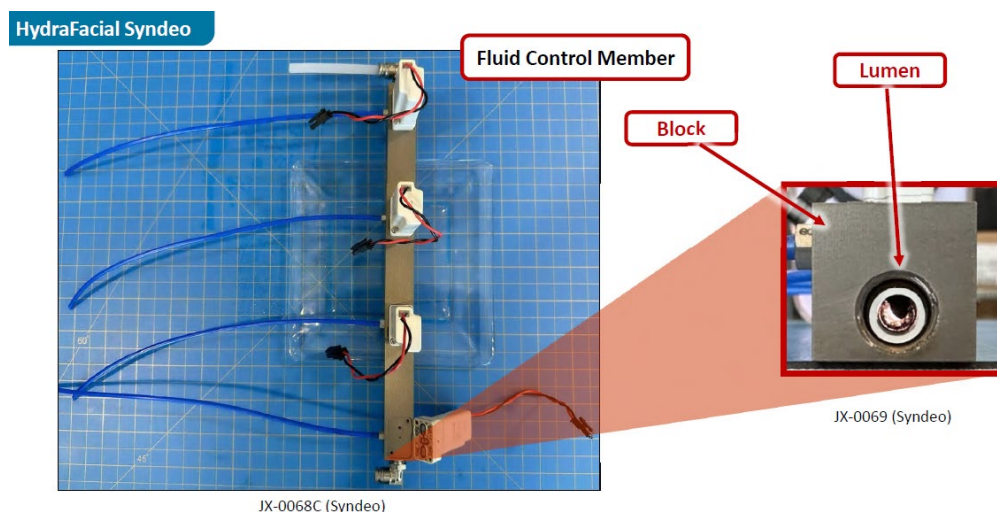
It is undisputed that the DI Products are systems for treating skin/skin treatment apparatuses. (JSUI at 3-4.). HydraFacial’s documents and webpages confirm that each of the DI Products meets the preamble of claim 11. (Tr. (Leinsing) at 221:4-222:4; CDX-0004C.0017-.0018; JX-0031.0004; CX-0303C.0004.).

For these reasons, HydraFacial has proven by a preponderance of evidence that the DI Products meet the preamble of claim 11.

2. **11[a]: “a console that includes a fluid control member that is configured to be in fluid communication with at least a first container and a second container when the first container and the second container are connected to the fluid control member;”**

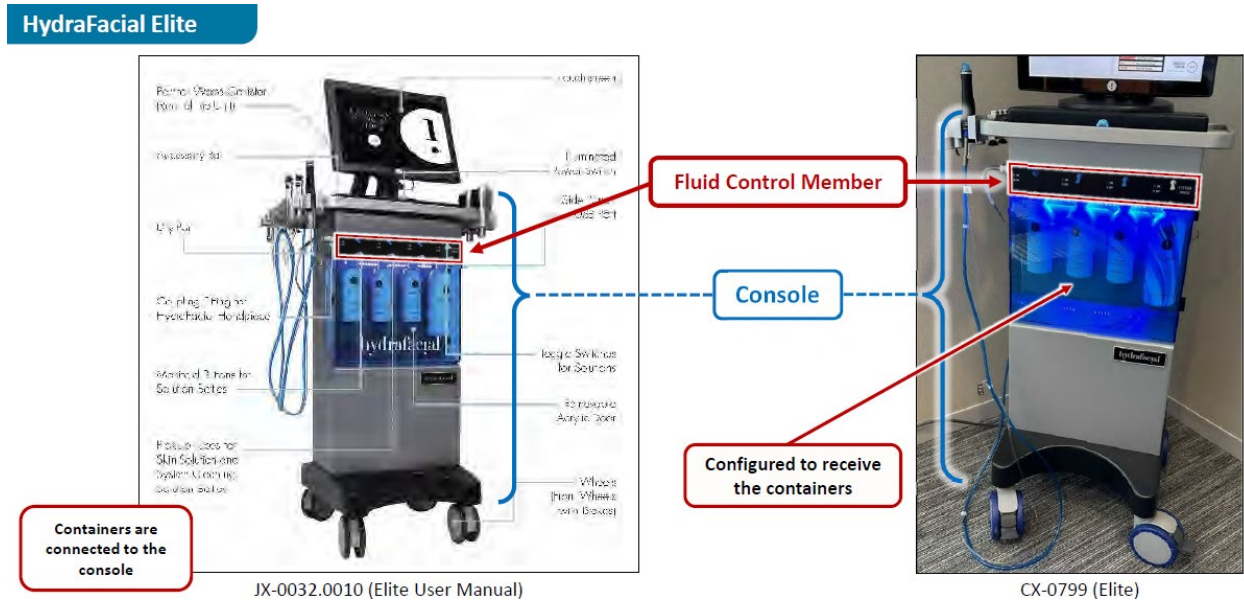
Each of the DI Products has a console that includes a fluid control member that is configured to be in fluid communication with at least a first container and a second container when the first container and the second container are connected to the fluid control member. (Tr. (Leinsing) at 223:21-224:19, 237:18-21, 230:19-232:3; CDX-0004C.0022, .0028-.0029; JX-0031.0010, .0013, JX-0064; JX-0032.0010, CX-0799; JX-0033.0008, CX-0800.). As a means plus function term, the corresponding structure of “fluid control member” was construed to include “manifold system 24,” “switches 29,” “lumen 171,” and “valves, fluid lines, and the like.” (*Markman* Order at 2.). The fluid control members of the DI Products are shown below in Figures 21, 22, and 23, including the fluid lines, valves, and collection lumens.

Figure 21: Leinsing Demonstrative Showing Fluid Control Member of the Syndeo DI Product



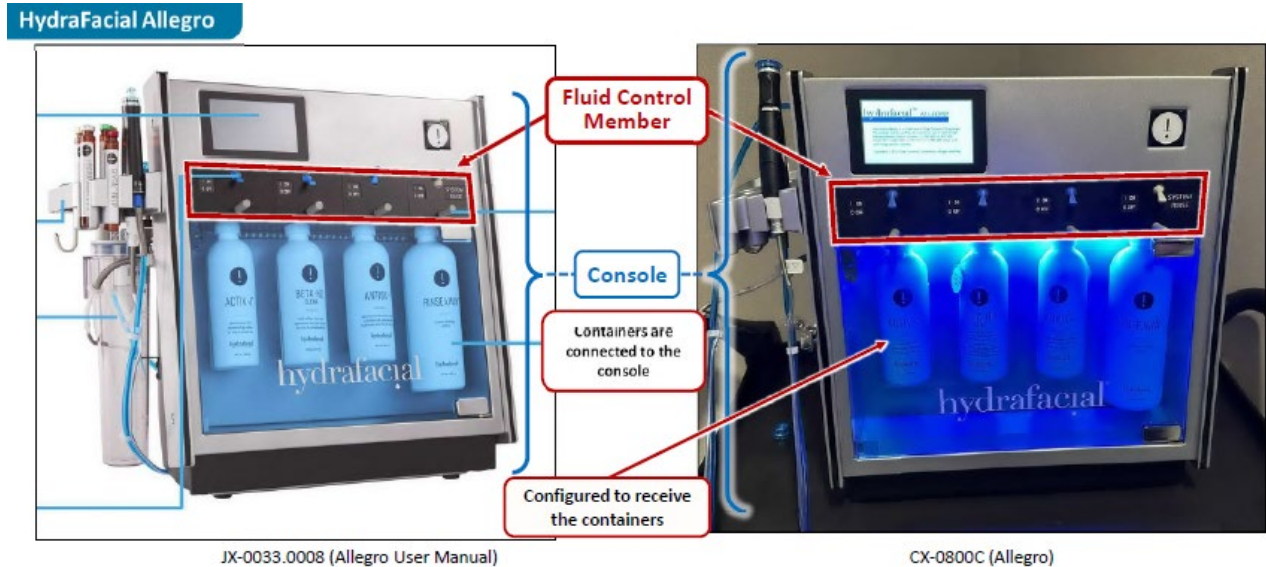
(CDX.0004C.0025(citing JX-0068; JX-0069).).

Figure 22: Leinsing Demonstrative Showing Fluid Control Member of the Elite DI Product



(CDX-0004C.0028 (citing JX-0032.0010; CX-0799)).

Figure 23: Leinsing Demonstrative Showing Fluid Control Member of the Allegro DI Product



(CDX.0004C.0029 (citing JX-0033.0008; CX-0800)).

Mr. Leinsing testified that the fluid control member is configured to be in fluid

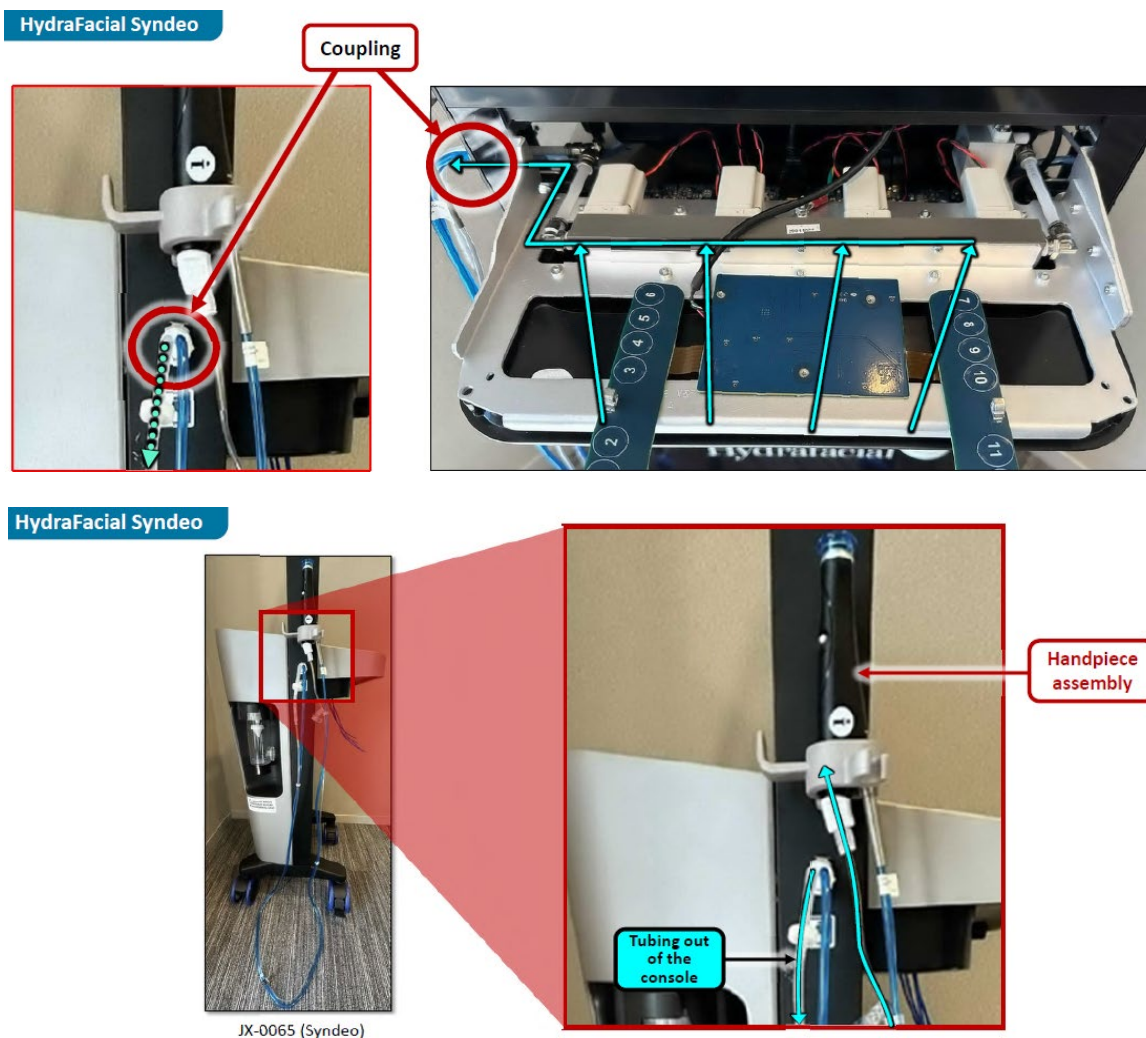
communication with at least a first container and a second container via tubing, which allows the fluid control member to receive fluid from the respective containers. (Tr. at (Leinsing) at 224:20-225:11, 226:25-227:8, 227:19-22, 237:22-238:1, 233:4-234:10, 232:24-233:9; CDX-0004C.0024, .0025, .0031; CX-0306C.0001-02; JX-0068; JX-0066; CX-0823; CX-0803.). He explained that this occurs when the first container and the second container are connected to the fluid control member. (Tr. (Leinsing) at 224:9-19, 254:12-13; 231:6-9; 232:11-12; 232:2-3; 236:23-237:1; CDX-0004C.0023, .0024, .0031, .0034; JX-0031.0010, .0013; CX-0776; CX-0306C.0001-02; JX-0068; JX-0066; CX-0823; CX-0803.).

As shown above in Figures 21-23, the corresponding structures required by the adopted claim construction are found in the DI Products. (Tr. (Leinsing) at 225:5, 225:12-25 (lumen), 225:12-25 (manifold, valves), 226:12, 226:22-24 (metal block structure), 234:14-23, 235:17-25 236:1-22; CDX-0004C.0024, .0025, .0032-.0034; CX-0306C.0001-.0002; CX-0794; JX-0069; CX-0802; CX-0824; CX-0803.).

The corresponding function of “fluid control member” is “be in fluid communication with at least a first container and a second container when the first container and the second container are connected to the fluid control member” and “be in fluid communication with the handpiece assembly.” (Order No. 32 at 1-2; *Markman* Order at 1-2.). The DI Products also meet both functional requirements for the following reasons.

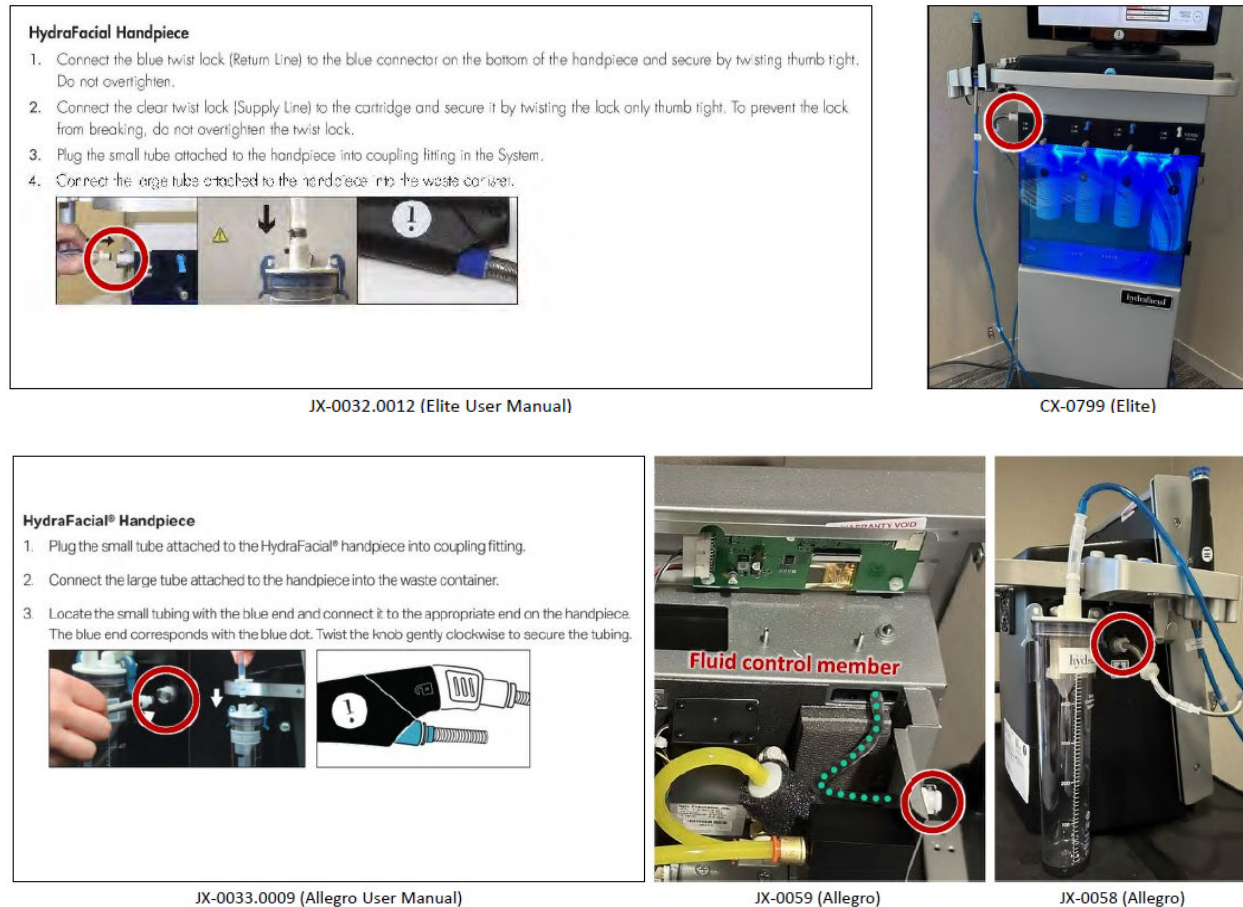
First, the fluid control member of each DI Product is in fluid communication with the handpiece, as shown below in Figures 24 and 25.

Figure 24: Leinsing Demonstrative Showing Syneo DI Product's Fluid Control Member in Fluid Communication with Handpiece



(CDX-0004C.0026-.0027 (showing the fluid communication path from the fluid control member to the handpiece through the tubing) (citing JX-0065; JX-0066); Tr. (Leinsing) at 229:3-230:15.).

Figure 25: Leinsing Demonstrative Showing Elite and Allegro DI Products' Fluid Control Member in Fluid Communication with Handpiece



(CDX-0004C.0036-.0037 (describing same for Elite and Allegro) (citing JX-0032.0012; CX-0799; JX-0033.0009; JX-0059; JX-0058); Tr. (Leinsing) at 238:2-239:16.).

Second, the fluid control member of each DI Product is configured to be in fluid communication with at least a first container and a second container. As Mr. Leinsing explained, fluid communication does *not* require *continuous fluid flow* and is merely a state in which there is plumbing between the points. (Tr. (Leinsing) at 399:12-24 (“[Fluid communication is] a phrase in the art that basically says that there’s plumbing there where you can have communication. It doesn’t mean that there’s necessarily flow.”)).

Mr. Leinsing also testified that this plumbing exists from both the first container or the

second container to the fluid control member (and all structures encompassed by that term). (Tr. (Leinsing) at 225:2-11, 227:22-228:6, 229:6-18, 229:23-230:5 (lumen to coupling), 230:9-15 (coupling to handpiece), 238:2-22, 238:23-239:16; CDX-0004C.0025-27, .0036-.0037; JX-0065; JX-0066; JX-0068; JX-0069; JX-0032.0012; CX-0799; JX-0033.0009; JX-0059; JX-0058.).

In its Reply Post-Hearing Brief, Cartessa did not dispute that the DI Products satisfy this claim element. (RRBr. at 39.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 11[a].

3. 11[b]: “a handpiece assembly configured to contact a skin surface of a subject;”

The handpiece or handpiece assembly, which the '287 patent uses interchangeably (JX-0001 at 5:54-60, 13:28-33) in each of the DI Products, is designed to be held by hand, and the tip of the handpiece assembly is configured to contact skin. (Tr. (Leinsing) at 240:18-243:3, 243:4-12, 244:8-21; CDX-0004C.0041-.0045, .0047.). Documents showing the DI Products in operation unequivocally show that the handpiece is intended to be held in the hand and placed in contact with the skin via its tip. One of these documents, which Mr. Leinsing annotated, is copied below in Figure 26.

Figure 26: Leinsing Demonstrative Showing Handpiece Assembly of the DI Products



(CDX-0004C.0043 (citing JX-0034.0004 (HydraFacial user guide); *see also* CX-0784; CX-0776; JX-0031.0019, .0012, .0022; JX-0070 at 0:23; CX-0785; JX-0032.0017, .0018; CX-0787; CX-0800; JX-0033.0009; JX-0061 at 00:09.).

Cartessa contended that because the “tip” of the handpiece is a separate component, it is not “designed to be held by hand,” and the part that is “designed to be held by hand,” i.e., the handpiece, “is not the part that contacts skin,” which is the same argument Cartessa raised for non-infringement of this claim element. (RRBr. at 39.). For the reasons discussed above in Section VII.C.3, Cartessa’s assertion is not supported by the evidence.

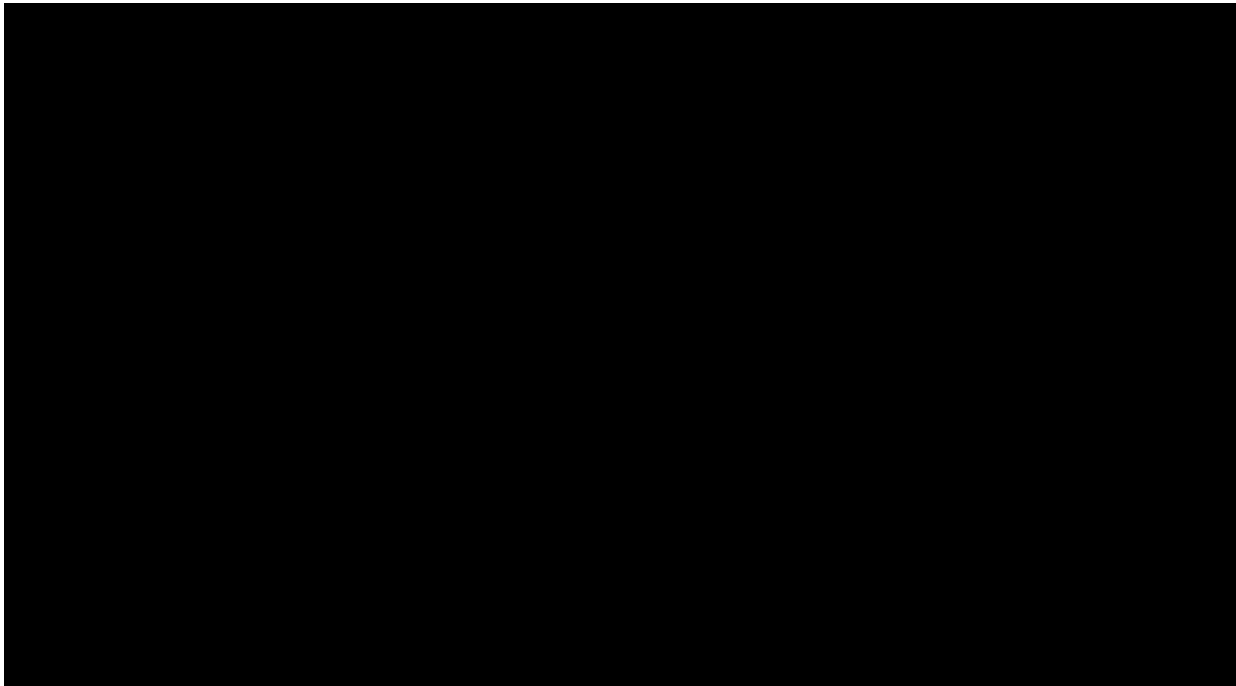
For these reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 11[b].

4. **11[c]: “a waste conduit configured to be in fluid communication with the handpiece assembly and a vacuum source to move waste away from the handpiece assembly when the waste conduit and the handpiece assembly are each connected to the console; and”**

The handpiece assembly of each of the DI Products has two (2) tubes, each of which connects to the console. (Tr. (Leinsing) at 245:5-249:13; CDX-0004C.0049-.0054; JX-0044C; CX-0810; CX-0814; JX-0031.0012; CX-0815; CX-0816; CX-0813; JX-0058.). Referencing his

demonstrative copied below in Figure 27, Mr. Leinsing explained that the first tube connects the handpiece to the collection lumen/fluid control member via the console. (Tr. (Leinsing) at 245:12-246:4.). The second tube (the waste conduit) places the handpiece assembly in fluid communication with the vacuum source via the console. (*Id.*).

Figure 27: Leinsing Demonstrative Showing Schematic of Syndeo DI Product



(CDX-0004C.0049 (citing JX-0044C).).

Cartessa raised the same arguments here as it did for non-infringement of this claim element. (RRBr. at 21.). Specifically, Cartessa contended that “[t]he waste conduit of the DI Products does not put the handpiece assembly in fluid communication with the vacuum source” because “there are multiple conduits, connectors, and components between the handpiece assembly and the vacuum source[.]” (RRBr. at 40.). Cartessa also argued that the DI Products do not practice this claim element because there is a waste container between the handpiece and vacuum source that prevents the ability for liquid to pass to the vacuum source. (*Id.* at 41.). For the reasons discussed in Section VII.C.4 with respect to infringement of claim element 11[c],

Cartessa's arguments are not persuasive or credible because they are not supported by the evidence.

Accordingly, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 11[c].

- 5. 11[d]: “wherein when each of the first container and the second container are connected to the console, the fluid control member is configured to be in fluid communication with each of the first container and the second container;”**

Each of the DI Products includes a system wherein when each of the first container and the second container is connected to the console, the fluid control member is configured to be in fluid communication with each of the first container and the second container. (Tr. (Leinsing) at 250:22-252:5; CDX-0004C.0058.). Moreover, the fluid control member is configured to be in fluid communication with each of the first and second containers when such containers are connected to the console. (*See* Section VIII.C.2 (claim element 11[a]), *supra.*).

Cartessa did not challenge this claim element with respect to the DI Products during the Hearing or in its Reply Post-Hearing Brief. (Tr. (Jensen) at 709:2-716:10 (providing testimony on the DI Products with respect to the “handpiece” and vacuum source “fluid communication” limitations only); RRRBr. at 39.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

For the reasons discussed above, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 11[d].

- 6. 11[e]: “wherein when the handpiece assembly is connected to the console, the fluid control member is configured to be in fluid communication with the handpiece assembly;”**

Each of the DI Products includes a system wherein when the handpiece assembly is

connected to the console, and the fluid control member is configured to be in fluid communication with the handpiece assembly. (Tr. (Leinsing) at 252:6-253:22; CDX-0004C.0060-61; JX-0064; CX- 0799; JX-0058.). As discussed above in Section VIII.C.4 (claim element 11[c]), the handpiece assembly of the DI Products is connected to the console. Additionally, as explained above in Section VIII.C.2 (claim element 11[a]) the fluid control member is configured to be in fluid communication with the handpiece assembly when the handpiece assembly is connected to the console.

Cartessa did not contest this claim element with respect to the DI Products during the Hearing on in it Reply Post-Hearing Brief. (Tr. (Jensen) at 709:2-716:10 (providing testimony on the DI Products with respect to the “handpiece” and vacuum source “fluid communication” limitations only); RRBr. at 39.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 11[e].

7. **11[f]: “wherein when (i) each of the first container and the second container contains treatment material, (ii) the first container and the second container are connected to the console, and (iii) the handpiece assembly is connected to the console, the skin treatment apparatus is configured to selectively draw treatment material from the first container or the second container to the handpiece assembly using, at least in part, a vacuum created along a distal end of the handpiece assembly by the vacuum source.”**

Each of the DI Products has a system that includes: (i) a first container and a second container that can contain treatment material; (ii) a first container and a second container that can connect to the console; and (iii) a handpiece assembly that can connect to the console. Specifically, the DI Products include containers with treatment material. (Tr. (Leinsing) at

253:23-254:13, 286:5-17; CDX-0004C.0063-.0065, .0082; JX-0031.0013; CX-0776; CX-0311C.0002, .0004; JX-0032.0013; CX-0785; JX-0033.0011; CX-0800.). Moreover, as discussed in Sections VIII.C.4 (claim element 11[c]), VIII.C.5 (claim element 11[d]), and VIII.C.6 (claim element 11[e]), the handpiece assembly and containers are connected to the console.

Mr. Leinsing testified that the DI Products are configured to selectively draw treatment material from the first container or the second container to the handpiece assembly using, at least in part, a vacuum created along a distal end of the handpiece assembly by the vacuum source. (Tr. (Leinsing) at 256:1-259:1, 216:1-24, 217:19-22; CDX-0004C.0067-.0070; JX-0031.0014; JX-0032.0014; JX-0033.0011; JX-0043C.0396.).

Cartessa did not challenge this claim element with respect to the DI Products during the Hearing or in its Reply Post-Hearing Brief. (Tr. (Jensen) at 709:2-716:10 (providing testimony on the DI Products with respect to the “handpiece” and vacuum source “fluid communication” limitations only); RRBr. at 39.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

Accordingly, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 11[f].

D. The DI Products Practice Claims 12, 14, 16, 18, and 19 of the '287 Patent²²

1. Claim 12: “The skin treatment apparatus of claim 11, wherein treatment material from the first container and the second container are configured to be drawn to the handpiece assembly sequentially.”

As discussed above in Section VIII.C.7 (claim element 11[f]), the first container and the

²² Because asserted claim 18 depends from claim 17, which was not asserted, claim 17 is also addressed below.

at least one additional container for each of the DI Products contain treatment materials and are connected to the console.

Additionally, treatment materials from the first container and the at least one additional container are configured to be delivered to the supply conduit sequentially. (Tr. (Leinsing) at 260:1-261:4; CDX-0004C.0074-76; JX-0031.0014; JX-0032.0014; CX-0819; JX-0033.0011; CX-0800.). For example, the Syndeo DI Product delivers treatment fluids to the handpiece sequentially, either automatically or by the user selecting buttons on the touchscreen. (*See* CDX-0004C.0074 (citing JX-0031.0014).). Similarly, the Elite and Allegro products deliver treatment fluids to the handpiece sequentially when a user selects the appropriate toggle switches. (*See* CDX-0004C.0075-76 (citing JX-0032.0014; CX-0819; JX-0033.0011; CX-0800).).

Cartessa contested that the Syndeo DI Product meets this claim element in one document. (JSUI at 3.). However, Cartessa did not separately dispute that the DI Products are configured to be drawn to the handpiece assembly sequentially in its Reply Post-Hearing Brief. (RRBr. at 44 (arguing only that the DI Products do not practice claim 12 because they do not practice claim 11).). Thus, any argument on this issue is deemed waived under Ground Rule and 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice the additional claim element recited in claim 12.

2. Claim 14: “The skin treatment apparatus of claim 11, wherein the console comprises the vacuum source.”

The DI Products include a vacuum source in the console. (Tr. (Leinsing) at 261:13-262:4; CDX-0004C.0079; CX-0810; CX-0815; CX-0813; *see also* Section VIII.C.4, *supra*.).

In its Reply Post-Hearing Brief, Cartessa did not separately contest that the vacuum source is located inside of the console (i.e., cabinet or main housing) of the DI Products. (RRBr.

at 44 (arguing only that the DI Products do not practice claim 14 because they do not practice claim 11); *see also* Tr. (Jensen) at 709:2-716:10 (providing testimony on the DI Products with respect to the “handpiece” and vacuum source “fluid communication” limitations only).).

Accordingly, any argument on this issue is deemed waived under Ground Rule 10.1.

For the reasons discussed above, HydraFacial has proven by a preponderance of evidence that the DI Products practice the additional claim element recited in claim 14.

3. Claim 16: “The skin treatment apparatus of claim 11, wherein the treatment material in the first container is a skin treatment fluid.”

The first container for each of the DI Products contains skin treatment fluid. (Tr. (Leinsing) at 263:3-264:6; CDX-0004C.0082-.0084; CX-0311C.0002, .0004; JX-0032.0010, .0013; JX-0033.0008, .0011.).

Cartessa did not contest that the DI Products meet this claim element. (JSUI at 3-4.). Additionally, Cartessa did not separately dispute the additional claim element recited in claim 16 in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 54 (arguing only that the DI Products do not practice claim 16 because they do not practice claim 11); RRBr. at 44 (same).). Accordingly, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

For these reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice the additional claim element recited in claim 16.

4. Claim 17: “The skin treatment apparatus of claim 11, further comprising a computing device configured to control at least one function of the skin treatment apparatus.”

Each of the DI Products includes a computing device configured to control at least one function of the system. (Tr. (Leinsing) at 264:26-267:22; CDX-0004C.0087-.0090; CX-0314C;

CX-0821; JX-0031.0015, .0016; JX-0061; CX-0303C.0018, .0021; CX-0791.). The DI Products have touch screen displays that display options for controlling container selection (Syndeo DI Product), start and stop functions for dispensing solution (all DI Products), and vacuum intensity (all DI Products). (*See, e.g.*, CX-0314C; CX-0821; JX-0031.0015, .0016; JX-0061, CX-0303C.0018, .0021; CX-0791.). Additionally, the Elite and Allegro DI Products include toggle switches that allow the user to select treatment material containers. (CDX-0004C.0075-.0076 (citing JX-0032.0014; CX-0819; JX-0033.0011; CX-0800.).

Cartessa did not separately dispute the additional claim element recited in claim 17 in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 54 (arguing only that the DI Products do not practice claim 17 because they do not practice claim 11); RRBr. at 44 (same).). Thus, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

Accordingly, HydraFacial has proven by a preponderance of evidence that the DI Products practice the additional claim element recited in claim 17.

5. Claim 18: “The skin treatment apparatus of claim 17, further comprising a user input device to facilitate control of a flow of treatment materials from at least one of the first container and the second container to the handpiece assembly.”

Each of the DI Products includes a user input device to select a flow of fluids from the first container and the at least one additional container to the handpiece. As discussed above with respect to claim 17: (i) the Syndeo DI Product has a touch screen display that display options for controlling container selection (CX-0314C; CX-0821; JX-0031.0015, .0016.); and (ii) the Elite and Allegro DI Products use toggle switches that permit the user to choose treatment material containers (CDX-0004C.0075-.0076 (citing JX-0032.0014; CX-0819; JX-0033.0011;

CX-0800).).

Cartessa did not dispute that the DI Products meet this claim element. (JSUI at 3-4.). Cartessa also did not separately contest the additional claim element recited in claim 18 in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 54 (arguing only that the DI Products do not practice claim 18 because they do not practice claim 17); RRBr. at 44 (same).). Accordingly, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice the additional claim element recited in claim 18.

6. Claim 19: “The skin treatment apparatus of claim 18, wherein the user input device comprises a touch screen.”²³

As discussed above in Section VIII.D.5 (claim 18), the Syndeo DI Product comprises a user input device to select a flow of fluids from the first container and the at least one additional container to the handpiece wherein the user input device comprises a touch screen. (Tr. (Leinsing) at 268:4-8; CDX-0004C.0093; CX-0821; CX-0314C.).

Cartessa did not contest that the Syndeo DI Product meets this claim element. (JSUI at 3.). Additionally, Cartessa did not separately dispute the additional claim element recited in claim 19 in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 54 (arguing only that the DI Products do not practice claim 19 because they do not practice claim 18); RRBr. at 44 (same).). Accordingly, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

²³ As noted above in the Technology Prong Overview (Section VIII.B, *supra*), HydraFacial alleged that only the Syndeo DI Product practices claim 19.

For these reasons, HydraFacial has proven by a preponderance of evidence that the Syndeo DI Product practices the additional claim element recited in claim 19.

E. The DI Products Practice Claim 22 of the '287 Patent

1. 22[pre]: “A system for treating skin, the system comprising:”

It is undisputed that the DI Products are systems for treating skin/skin treatment apparatuses. (JSUI at 3-4; *see also* Tr. (Leinsing) at 268:18-269:8; Section VIII.C.1 (claim element 11[pre]), *supra.*).

Accordingly, HydraFacial has proven by a preponderance of evidence that the DI Products meet the preamble of claim 22.

2. 22[a]: “a console configured to receive a first container and at least one additional container;”

As discussed above in Section VIII.C.5 (claim element 11[d]), the DI Products include a console configured to receive a first container and at least one additional container. (*See also* Tr. (Leinsing) at 269:9-270:1; CDX-0004C.0098-.0099; CX-0776; CX-0799; CX-0800.).

Cartessa did not contest that the DI Products meet this claim element. (JSUI at 3-4.). Moreover, Cartessa did not dispute this in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 54; RRB. at 44.). Accordingly, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

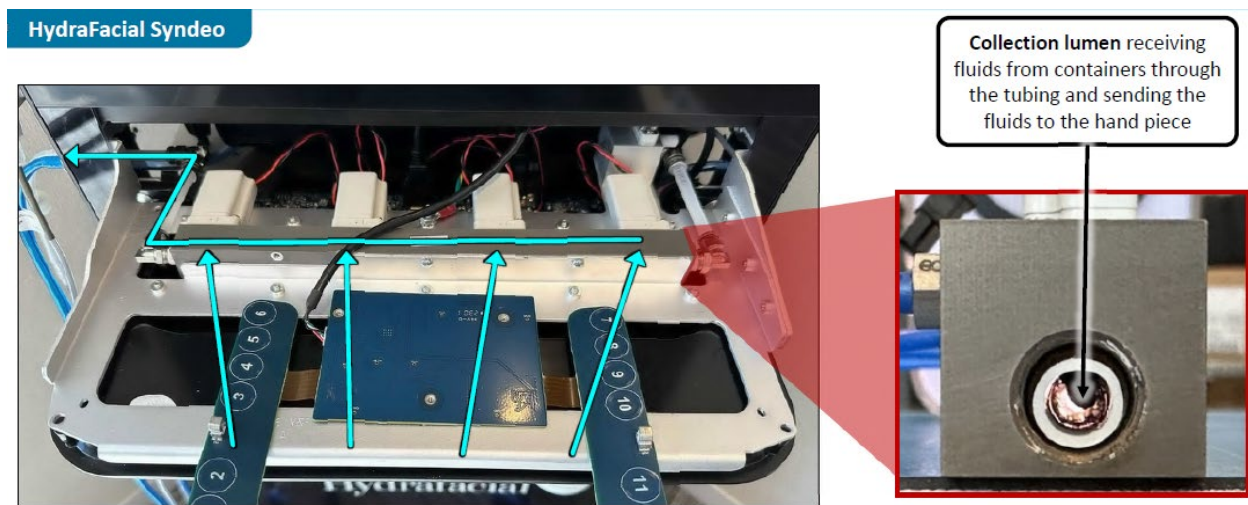
For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 22[a].

3. 22[b]: “a collection lumen configured to be in fluid communication with the first container and the at least one additional container when the first container and the at least one additional container are connected to the console; and”

Each of the DI Products includes a collection lumen configured to be in fluid

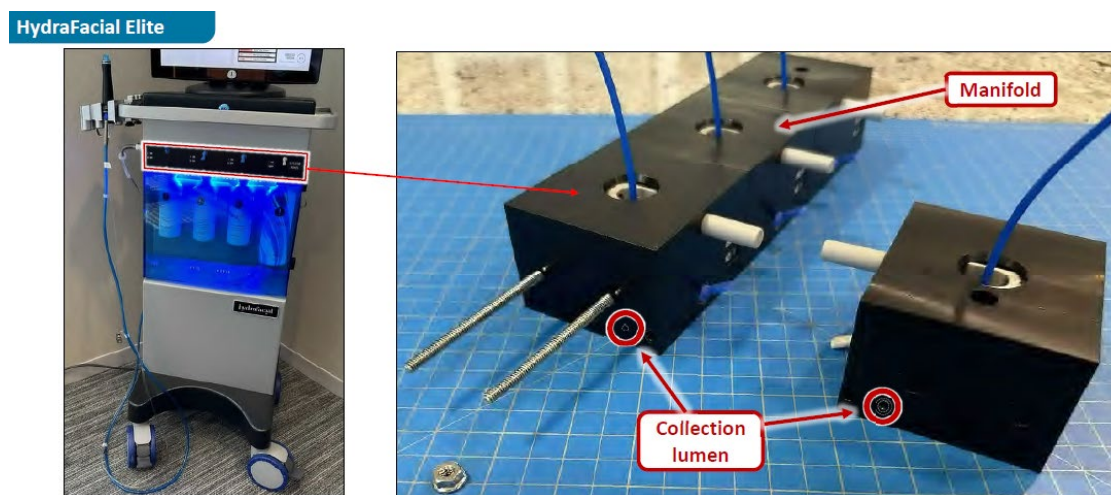
communication with the first container and the at least one additional container when the first container and the at least one additional container are connected to the console. (Tr. (Leinsing) at 270:13-273:21; CDX-0004C.0102-05; CX-0306C.0001; JX-0066; JX-0069; CX-0799, CX-0802; CX-0800; CX-0824.). The collection lumen with the console for each DI Product is shown below in Figures 28-30.

Figure 28: Collection Lumen of the Syndeo DI Product



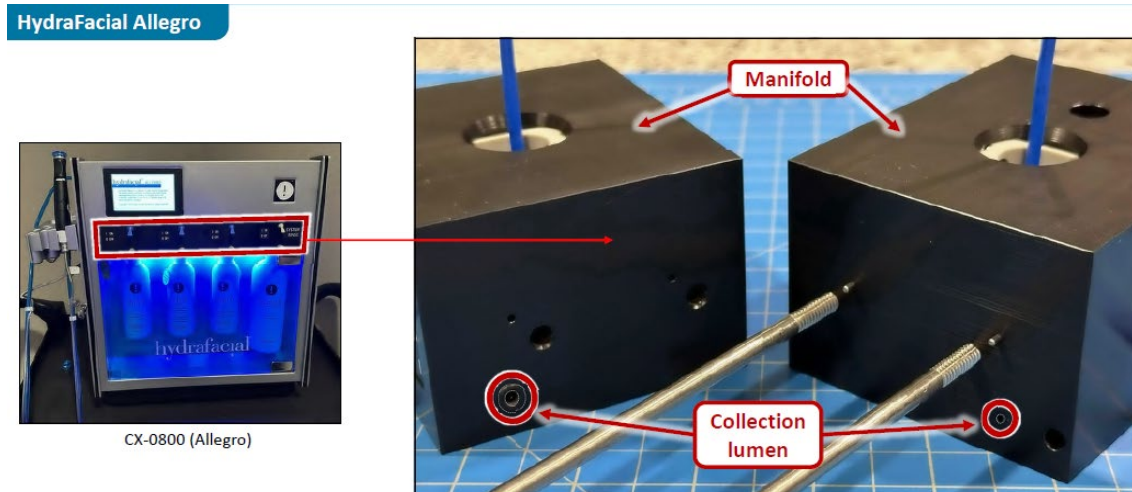
(CDX-0004C.0103 (citing JX-0066; JX-0069).).

Figure 29: Collection Lumen of the Elite DI Product



CDX.0004C.0105 (citing CX-0799; CX-0802).).

Figure 30: Collection Lumen of the Allegro DI Product



CDX.0004C.0105 (citing CX-0800; CX-0824).).

As discussed above in Section VIII.C.5 (claim element 11[d]), each of the DI Products has a first container and at least one additional container connected to the console. Moreover, as Mr. Leinsing testified, the collection lumen is part of the fluid control member. (Tr. (Leinsing) at 270:13-273:21.). Thus, for the same reasons discussed above in Section VIII.C.2 (claim element 11[a]), the collection lumen is configured to be in fluid communication with the containers.

Cartessa did not dispute this in its Reply Post-Hearing Brief. (RRBr. at 44.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 22[b].

4. **22[c]: “a handpiece having a working end, the working end of the handpiece being configured to contact skin tissue of a subject during use;”**

For the reasons discussed in Section VIII.C.3 (claim element 11[b]), the DI Products

include a handpiece that has a working end configured to contact skin tissue of a subject during use. (*See also* Tr. (Leinsing) at 274:14-275:19; CDX-0004C.0109-.0111; JX-0031.0019; JX-0034.0004; JX-0032.0017.).

As explained in Section VIII.C.3, Cartessa’s argument that the tip is a separate component” and “not part of the handpiece” is unsupported and unpersuasive.

For these reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 22[c].

5. **22[d]: “wherein the working end of the handpiece is configured to be placed in fluid communication with a vacuum source to create a suction force along a distal end of the handpiece when the vacuum source is activated and the handpiece is connected to the console and wherein the working end of the handpiece is configured to be placed in fluid communication with the first container or the at least one additional container through the collection lumen; and”**

As explained above in Section VIII.C.4 (claim element 11[c]), the DI Products meet this limitation. Additionally, Mr. Leinsing explained how a vacuum source is used to create a suction force along a distal end of the handpiece when the vacuum source is activated and the handpiece is connected to the console. (Tr. (Leinsing) at 277:6-278:10; CDX-0004C.0114; CX-0311C.0004; JX-0034.0004; CX-0798C.).

Moreover, Section VIII.C.5 (claim element 11[d]) discusses how the fluid control member is in fluid communication with each container. Section VIII.C.6 (claim element 11[e]) explains how the fluid control member is in fluid communication with the handpiece. (*See also* Tr. (Leinsing) at 277:6-278:10; CDX-0004C.0114; CX-0311C.0004; JX-0034.0004; CX-0798C.).

Cartessa’s only arguments are that there can be no fluid communication because: (1) the treatment material or fluid does not flow to the vacuum source; or (2) there are multiple conduits

in the system. (RPBr. at 47; RRBr. at 45-46.). As explained above in Section VIII.C.4, these arguments are without merit.

Accordingly, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 22[d].

6. 22[e]: “a supply conduit that places the collection lumen in fluid communication with the working end of the handpiece when the handpiece is connected to the console;”

The DI Products include a supply conduit that places the collection lumen in fluid communication with the working end of the handpiece when the handpiece is connected to the console. (*See* Section VIII.C.2 (claim element 11[a]), *supra.*). Mr. Leinsing testified that in each of the DI Products, there is a tube that connects the handpiece to the console. He explained that this tube places the handpiece in fluid communication with the collection lumen. (Tr. (Leinsing) at 278:15-280:5; CDX-0004C.0116-.0019; JX-0066; JX-0065; CX-0799; JX-0032.0012; CX-0800, JX-0059; JX-0058.).

Cartessa did not contest this in its Reply Post-Hearing Brief. (RRBr. at 44.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 22[e].

7. 22[f]: “wherein each of the first container and the at least one additional container includes treatment materials, and wherein treatment materials from the first container and the at least one additional container are configured to be delivered to the supply conduit sequentially when the first container and the at least one additional container are connected to the console.”

As discussed in Section VIII.C.7 (claim element 11[f]) above, the first container and the at least one additional container of the DI Products contain treatment materials. Moreover, as

discussed in Section VIII.D.1 (claim 12), the treatment materials from the first container and the at least one additional container are configured to be delivered to the supply conduit sequentially when the first container and the at least one additional container are connected to the console.

Cartessa did not dispute this in its Reply Post-Hearing Brief. (RRBr. at 44.). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

For these reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 22[f].

F. The DI Products Practice Claims 24 and 25 of the '287 Patent

1. Claim 24: “The system of claim 22, further comprising a computing device configured to control at least one function of the system.”

As discussed above in Section VIII.D.4 (claim 17), the DI Products include a computing device configured to control at least one function of the system. (*See also* Tr. (Leinsing) at 282:6-10.).

Cartessa did not contest that the DI Products meet this claim element. (JSUI at 3-4.). Additionally, Cartessa did not separately dispute the additional claim element recited in claim 24 in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 57 (arguing only that the DI Products do not practice claim 24 because they do not practice claim 22); RRBr. at 46 (same).). Accordingly, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice the additional claim element recited in claim 24.

2. Claim 25: “The system of claim 24, further comprising a user input device to facilitate control of a flow of fluids from the first container and the at least one additional container to the handpiece.”

A discussed above in Section VIII.D.5 (claim 18), the DI Products include the claimed user input device. (*See also* Tr. (Leinsing) at 282:15-23.).

Cartessa did not contest that the DI Products meet this claim element. (JSUI at 3-4.). Moreover, Cartessa did not separately contest the additional claim element recited in claim 25 in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 57 (arguing only that the DI Products do not practice claim 25 because they do not practice claim 24); RRBr. at 46 (same).). Accordingly, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

Accordingly, HydraFacial has proven by a preponderance of evidence that the DI Products practice the additional claim element recited in claim 25.

G. The DI Products Do Not Practice Claim 26 of the '287 Patent²⁴

1. 26[pre]: “A system for treating skin, the system comprising:”

It is undisputed that the DI Products are systems for treating skin/skin treatment apparatuses. (JSUI at 3-4; Section VIII.C.1 (claim element 11[pre]), *supra*; Section VIII.E.1 (claim element 22[pre])).

Thus, HydraFacial has proven by a preponderance of evidence that the DI Products meet the preamble of claim 26.

2. 26[a]: “a console configured to receive a first container and at least one additional container;”

As explained in Section VIII.C.2 (claim element 11[a]) above, the DI Products have a

²⁴ Because asserted claim 32 depends from claims 26, 30, and 31, which were not asserted, these claims are also addressed below. *See also* n.3, *supra*.

console configured to receive a first container and at least one additional container.

Cartessa did not dispute this in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 57; RRBBr. at 46.). Accordingly, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 26[a].

3. 26[b]: “a handpiece configured to contact skin tissue of a subject; and”

As discussed above in Section VIII.C.3 (claim element 11[b]), the DI Products include a handpiece configured to contact skin tissue of a subject.

Cartessa’s argument that the handpiece of the DI Products do not contact skin tissue due to the tip is unsupported and unpersuasive for the reasons discussed in Section VIII.C.3.

Accordingly, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 26[b].

4. 26[c]: “a block in the console, wherein the block is:”

As noted above in Section II.A, the term “block” was construed to be indefinite. (*See also* Order No. 29 at 7.). Therefore, the DI Products cannot practice this claim element and ultimately, claim 26 in its entirety. Accordingly, HydraFacial has not proven by a preponderance of evidence that the DI Products practice claim element 26[c].

5. 26[c][i]: “configured to selectively receive fluid from the first container when the first container is connected to the console;”

Because “block” was construed to be indefinite, the “block” recited in claim element 26[c] cannot be configured to selectively receive fluid from the first container when the first container is connected to the console. Thus, HydraFacial has not proven by a preponderance of

evidence that the DI Products practice claim element 26[c][i].

6. **26[c][ii]: “configured to selectively receive fluid from the at least one additional container when the at least one additional container is connected to the console; and,”**

Because “block” was construed to be indefinite, the “block” recited in claim element 26[c] cannot be configured to selectively receive fluid from the at least one additional container when the at least one additional container is connected to the console. Thus, HydraFacial has not proven by a preponderance of evidence that the Accused Products practice claim element 26[c][ii].

7. **26[c][iii]: “configured to selectively be in fluid communication with the handpiece through a first conduit when the handpiece is connected to the console; and”**

Because “block” was construed to be indefinite, the “block” recited in claim element 26[c] cannot be configured to selectively be in fluid communication with the handpiece through a first conduit when the handpiece is connected to the console. Thus, HydraFacial has not proven by a preponderance of evidence that the Accused Products practice claim element 26[c][iii].

8. **26[d]: “a vacuum source;”**

As explained in Section VIII.C.4 (claim element 11[c]) above, the DI Products include a vacuum source, which Cartessa did not contest in its Pre-Hearing Brief or Reply Post-Hearing Brief. (RPBr. at 57; RRBr. at 46.). Accordingly, any argument on this issue is deemed abandoned, withdrawn, and/or waived under Ground Rules 7.2 and 10.1.

For the foregoing reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 26[d].

9. 26[e]: “wherein the handpiece is configured to be in fluid communication with the vacuum source through a second conduit when the handpiece is connected to the console;”

As discussed above in Section VIII.C.4 (claim element 11[c]), the DI Products include a handpiece configured to be in fluid communication with the vacuum source through a second conduit when the handpiece is connected to the console.

Cartessa raised similar arguments here as it did for claim element 11[c]. (RRBr. at 47-48.). According to Cartessa, the difference between claim elements 11[c] and 26[e] is that 11[c] requires the *waste conduit* to be in fluid communication with the handpiece and the *vacuum source*, whereas 26[e] requires the *handpiece* to be in fluid communication with the *vacuum source* via a second conduit. (RRBr. at 47 (emphasis in original) (citing JX-0001 at cls. 11, 26).). Cartessa contended that “[r]egardless of whether the handpiece or the second conduit needs to be in fluid communication with the vacuum source, neither component is in fluid communication with the vacuum source because (i) liquid stops at the waste container and (ii) the structure and plumbing of the DI Products does not allow liquid to flow to the vacuum source.” (*Id.* at 47-48 (citation omitted).). For the reasons discussed in Section VIII.C.4, Cartessa’s arguments are unsupported and otherwise not persuasive.

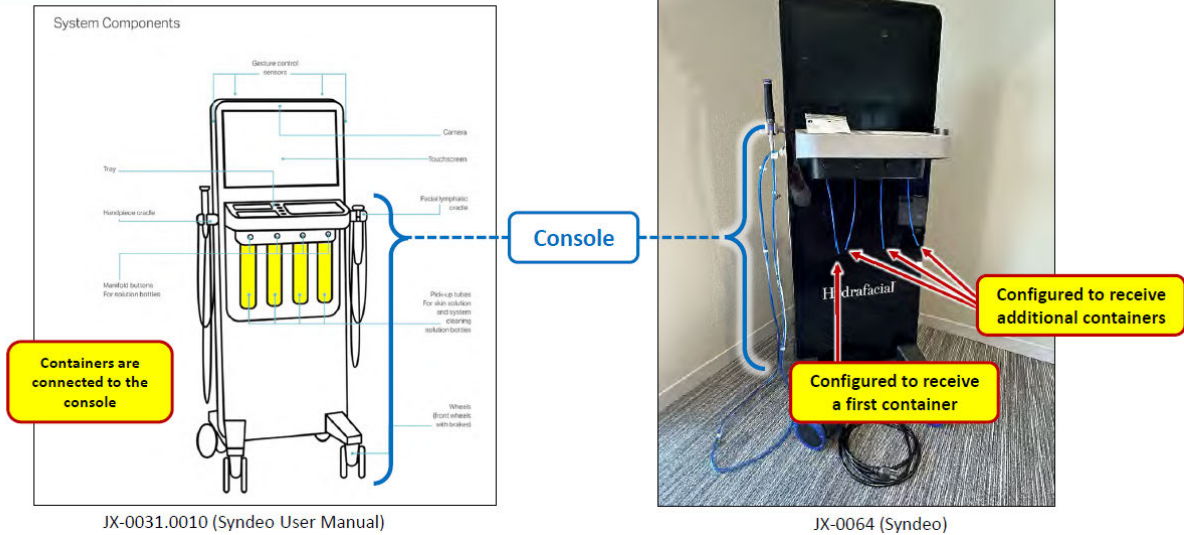
For these reasons, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 26[e].

10. 26[f]: “wherein the at least one additional container comprises a second container and a third container such that the console is configured to receive at least three containers; and”

The DI Products are configured to receive at least three (3) containers. For example, the diagram and picture below in Figure 31 show that the console of the Syndeo DI Product is configured to receive at least three (3) containers.

Figure 31: Console of Syndeo DI Product with at Least Three Containers

HydraFacial Syndeo

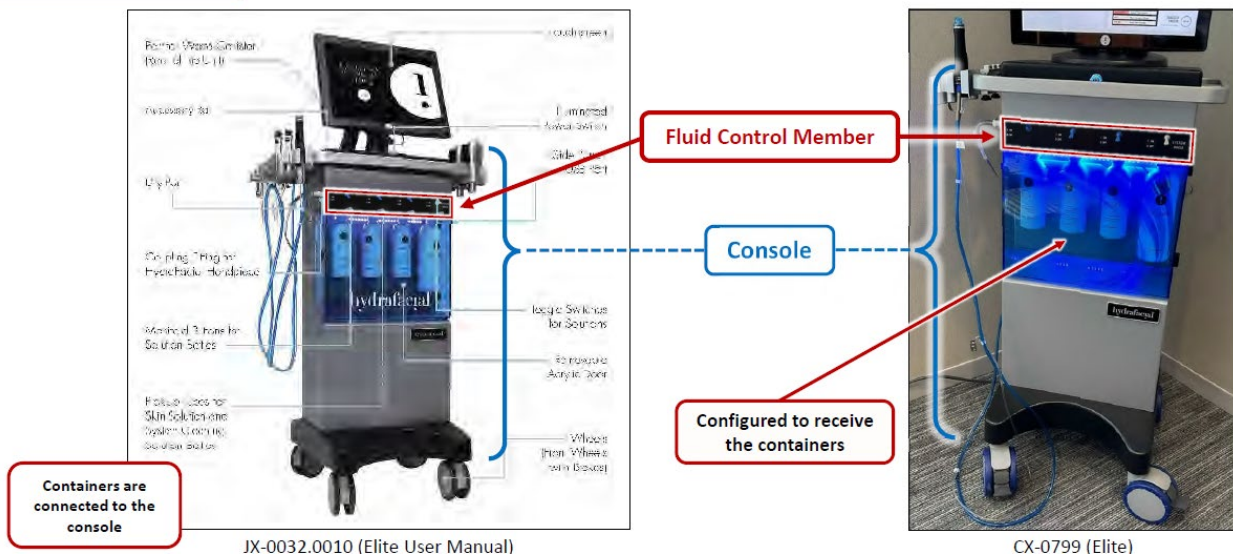


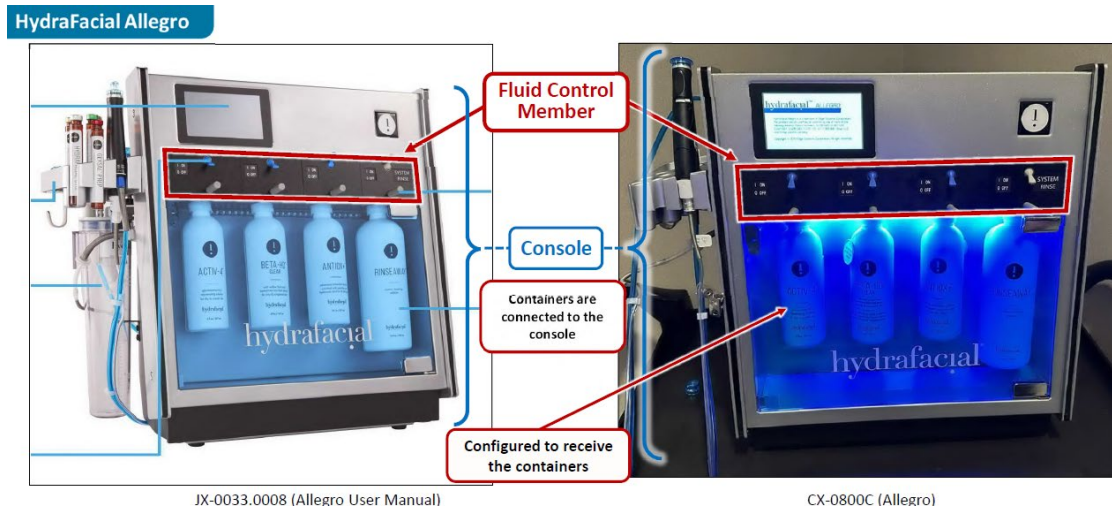
(CDX-0004.0022 (citing CX-0031.0010; JX-0064).).

Pictures of the Elite and Allegro DI Products, copied below in Figure 32, also show a console configured to receive or connect to at least three (3) containers.

Figure 32: Consoles of Elite and Allegro DI Products with at Least Three Containers

HydraFacial Elite





(CDX-0004C.0028-29 (citing JX-0032.0010; CX-0799; JX-0033.0008; CX-0800).).

Cartessa did not dispute this in its Reply Post-Hearing Brief. (RRBr. at 46.).

Accordingly, any argument on this issue is deemed waived under Ground Rule 10.1.

For the reasons discussed above, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 26[f].

11. **26[g]: “wherein when the handpiece is connected to the console and the first container, the second container and the third container each contains fluid and is connected to the console, the system is configured to deliver to the handpiece one at a time fluid contained in the first container, fluid contained in the second container, and fluid contained in the third container.”**

As explained in Sections VIII.C.4 (claim element 11[c]) VIII.D.1 (claim 12) above, the DI Products meet this claim element.

Cartessa did not contest this in its Reply Post-Hearing Brief. (RRBr. at 46.).

Accordingly, any argument on this issue is deemed waived under Ground Rule 10.1.

Accordingly, HydraFacial has proven by a preponderance of evidence that the DI Products practice claim element 26[g].

H. The DI Products Do Not Practice Claim 32 of the '287 Patent

1. Claim 30: “The system of claim 26, further comprising a computing device configured to control at least one function of the system.”

Because the term “block” recited in claim 26 was construed to be indefinite, rendering claim 26 invalid, claim 30, which depends from claim 26, is also invalid. *See, e.g., Ibormeith IP*, 732 F.3d at 1378.

Moreover, because the DI Products do not practice claim 26, and claim 30 depends from claim 26, the DI Products do not practice claim 30. *See, e.g., Monsanto*, 503 F.3d at 1359; *Wahpeton Canvas*, 870 F.2d at 1553.

For the foregoing reasons, HydraFacial has not proven by a preponderance of evidence that the Accused Products practice claim 30.

2. Claim 31: “The system of claim 30, further comprising a user input device to select a flow of fluids from the first container and the at least one additional container to the handpiece.”

Because the term “block” recited in claim 26 was construed to be indefinite, rendering claim 26 invalid, claim 31, which ultimately depends from claim 26, is also invalid. *See, e.g., Ibormeith IP*, 732 F.3d at 1378.

Additionally, because the DI Products do not practice claim 26, and claim 31 ultimately depends from claim 26, the DI Products do not practice claim 31. *See, e.g., Monsanto*, 503 F.3d at 1359; *Wahpeton Canvas*, 870 F.2d at 1553.

For these reasons, HydraFacial has not proven by a preponderance of evidence that the Accused Products practice claim 31.

3. Claim 32: “The system of claim 31, wherein the user input device comprises a touch screen.”

Because the term “block” recited in claim 26 was construed to be indefinite, rendering

claim 26 invalid, claim 32, which ultimately depends from claim 26, is also invalid. *See, e.g., Ibormeith IP*, 732 F.3d at 1378.

Moreover, because the DI Products do not practice claim 26, and claim 32 ultimately depends from claim 26, the DI Products do not practice claim 32. *See, e.g., Monsanto*, 503 F.3d at 1359; *Wahpeton Canvas*, 870 F.2d at 1553.

Accordingly, HydraFacial has not proven by a preponderance of evidence that the DI Products practice claim 32.

IX. INVALIDITY²⁵

A. Legal Standards

1. Anticipation

A determination that a patent is invalid as anticipated under 35 U.S.C. § 102 requires a finding, based upon clear and convincing evidence, that each and every limitation is found either expressly or inherently in a single prior art reference. *See, e.g., Celeritas Techs. Inc. v. Rockwell Int'l Corp.*, 150 F.3d 1354, 1361 (Fed. Cir. 1998). Anticipation is a question of fact, including whether a limitation, or element, is inherent in the prior art. *In re Gleave*, 560 F.3d 1331, 1334-35 (Fed. Cir. 2009) (“*Gleave*”); *Certain Comput. Network Sec. Equip. and Sys., Related Software, Components Thereof, and Prods. Containing the Same*, Inv. No. 337-TA-1314, ID, 2023 WL 5744218, at *113 (Aug. 8, 2023). “Newly discovered results of known processes directed to the same purpose are not patentable because such results are inherent.” *Arbutus*

²⁵ In addition to arguments that the asserted claims are invalid based on anticipation, obviousness, prior use, and lack written description, Cartessa included in its Initial Post-Hearing Brief an argument that the claim term “block” was indefinite. (RBr. at 123-26.). That term was construed to be indefinite in Order No. 29. (*See* Order No. 29 at 7.). Moreover, as discussed in Section II.A above, all the asserted claims that recite “block,” except for claim 32, were terminated from this Investigation. Because this issue has already been addressed, any additional discussion of indefiniteness of this claim term is not warranted.

Biopharma Corp. v. ModernaTX, Inc., 65 F.4th 656, 662 (Fed. Cir. 2023) (quotations omitted).

“While [a]rtisans of ordinary skill may not recognize the inherent characteristics or functioning of the prior art, whether a reference anticipates is assessed from the perspective of one skilled in the art.” *Id.* at 663 (quotations omitted).

The limitations must be arranged or combined as in the claimed invention, though identical terminology is not required. *Id.* The prior art reference must be enabling and describe the invention sufficiently to place it in the possession of a person of ordinary skill in the art. *Certain Light-Emitting Diode Prods., Sys., and Components Thereof (III)*, Inv. No. 337-TA-1168, Comm. Determination, 2022 WL 22782261, at *20 (Mar. 1, 2022). The limitations must be arranged or combined the same way as in the claimed invention, although an identity of terminology is not required. *Id.* at 1334 (noting that “the reference need not satisfy an *ipsissimis verbis* test”); MPEP § 2131.

In addition, the prior art reference’s disclosure must enable one of ordinary skill in the art to practice the claimed invention “without undue experimentation.” *Gleave*, 560 F.3d at 1334. A prior art reference that allegedly anticipates the claims of a patent is presumed enabled; however, a patentee may present evidence of non-enablement to overcome this presumption. *Impax Labs., Inc. v. Aventis Pharmaceuticals Inc.*, 468 F.3d 1366, 1382 (Fed. Cir. 2006). “[W]hether a prior art reference is enabling is a question of law based upon underlying factual findings.” *Gleave*, 560 F.3d at 1335.

[A] reference can anticipate a claim even if it does not expressly spell out all the limitations arranged or combined as in the claim, if a person of skill in the art, reading the reference, would at once envisage the claimed arrangement or combination. . . . Thus, even when a reference discloses elements in different locations in the disclosure, the relevant question is whether the reference is sufficiently clear in disclosing the combinability of those elements such that a skilled artisan would at once envisage the claimed combination.

Chamberlain Grp. v. Techtronic Indus. Co., 935 F.3d 1341, 1350 (Fed. Cir. 2019) (cleaned up).

For the reasons explained below, Cartessa has not met its burden to prove that Greenberg, JX-0010, anticipates the '287 patent. First, the Greenberg invention focuses on dry, abrasive particles with minimal lubrication with oils, which is not the same as the '287 patent's requirement of fluids, i.e., water, with additives of oils or other liquids as treatment materials. Second, as HydraFacial argued, and it is a finding here, Cartessa with the support of its expert, Dr. Jensen, impermissibly combined structures from different Greenberg embodiments to argue that the Greenberg meets every limitation of the '287 patent. (*See* CRBr. at 12 (citing RBr. at 9-17)).

Cartessa did not convincingly explain how Dr. Jensen's mixture of different components of different embodiments using different treatment systems with different structures to accommodate the type of treatment material used would have been "at once envisaged" by a person of ordinary skill. *Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1068 (Fed. Cir. 2017) ("[A] reference can anticipate a claim even if it 'd[oes] not expressly spell out' all the limitations arranged or combined as in the claim, if a person of skill in the art, reading the reference, would 'at once envisage' the claimed arrangement or combination.").

2. Obviousness

Under 35 U.S.C. § 103(a), a patent is valid unless "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made" to a person having ordinary skill in the art. 35 U.S.C. § 103(a). The ultimate question of obviousness is a question of law, but "it is well understood that there are factual issues underlying the ultimate obviousness decision."

Richardson-Vicks, 122 F.3d 1476, 1479 (Fed. Cir. 1997) (citing *Graham v. John Deere Co. of*

Kansas City, 383 U.S. 1, 17 (1966)).

After claim construction, “[t]he second step in an obviousness inquiry is to determine whether the claimed invention would have been obvious as a legal matter, based on underlying factual inquiries including: (1) the scope and content of the prior art, (2) the level of ordinary skill in the art, (3) the differences between the claimed invention and the prior art, and (4) secondary considerations of non-obviousness.” *Smiths Indus. Med. Sys., Inc. v. Vital Signs, Inc.*, 183 F.3d 1347, 1354 (Fed. Cir. 1999) (citing *Graham*, 383 U.S. at 17). The existence of secondary considerations of non-obviousness does not control the obviousness determination; a court must consider “the totality of the evidence” before reaching a decision on obviousness. *Richardson-Vicks*, 122 F.3d at 1483.

The Supreme Court clarified the obviousness inquiry in *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 389 (2007). The Supreme Court said:

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. *Sakraida* and *Anderson’s-Black Rock* are illustrative—a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.

Following these principles may be more difficult in other cases than it is here because the claimed subject matter may involve more than the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for the improvement. Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be made explicit.

* * *

The obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents. The diversity of inventive pursuits and of modern technology counsels against limiting the analysis in this way. In many fields it may be that there is little discussion of obvious techniques or combinations, and it often may be the case that market demand, rather than scientific literature, will drive design trends. Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may, in the case of patents combining previously known elements, deprive prior inventions of their value or utility.

KSR, 550 U.S. at 417-19.

The Federal Circuit has since held that when a patent challenger contends that a patent is invalid for obviousness based on a combination of several prior art references, “the burden falls on the patent challenger to show by clear and convincing evidence that a person of ordinary skill in the art would have had reason to attempt to make the composition or device, or carry out the claimed process, and would have had a reasonable expectation of success in doing so.”

PharmaStem Therapeutics, Inc. v. ViaCell, Inc., 491 F.3d 1342, 1360 (Fed. Cir. 2007) (citations omitted).

The TSM²⁶ test, flexibly applied, merely assures that the obviousness test proceeds on the basis of evidence--teachings, suggestions (a tellingly broad term), or motivations (an equally broad term)--that arise before the time of invention as the statute requires. As *KSR* requires, those teachings, suggestions, or motivations need not always be written references but may be found within the knowledge and creativity of ordinarily skilled artisans.

Ortho-McNeil Pharm., 520 F.3d at 1365.

3. Prior Use

The public use bar is triggered “where, before the critical date, the invention is in public use and ready for patenting.” *Polara Eng’g Inc v. Campbell Co.*, 894 F.3d 1339, 1348 (Fed. Cir. 2018) (internal quotations omitted) (citation omitted). A prior public use “must exhibit all of the

²⁶ TSM is an acronym that stands for teaching, suggestion, motivation.

claim limitations” in the same device or in an obvious variation of the claimed invention. *See Star Sci., Inc. v. R.J. Reynolds Tobacco Co.*, 655 F.3d 1364, 1377 (Fed. Cir. 2011) (citing *Clock Spring, L.P. v. Wrapmaster, Inc.*, 560 F.3d 1317, 1325-26 (Fed. Cir. 2009) (“We have held that the public use bar applies to obvious variants of the demonstrated public use.”). “[T]he party challenging validity must prove that the claims are invalid by clear and convincing evidence.” *Polara Eng’g*, 894 F.3d at 1348. Whether an invention was in public use prior to the critical date within the meaning of 35 U.S.C. § 102(b) is question of law based on underlying facts. *See, e.g., Am. Seating Co. v. USSC Group, Inc.*, 514 F.3d 1262, 1267 (Fed. Cir. 2008).

“[T]he statutory presumption of validity provided in 35 U.S.C. § 282 places the burden of proof upon the party attacking the validity of the patent, and that burden of persuasion does not shift at any time to the patent owner.” *TP Labs., Inc. v. Prof’l Positioners, Inc.*, 724 F.2d 965, 971 (Fed. Cir. 1984). Thus, it is “incorrect to impose on the patent owner . . . the burden of proving that a ‘public use’ was ‘experimental,’” rather courts look to all evidence put forth by the parties to determine “whether the entirety of the evidence [leads] to the conclusion that there [has] been ‘public use.’” *Id.* However, if a party makes a *prima facie* case of public use, the patent owner has the burden to “come forward with convincing evidence to counter that showing.” *Id.*

When it comes to the public use and on-sale bars under 35 U.S.C. § 102(b), courts have “looked with disfavor upon invalidating patents on the basis of mere testimonial evidence absent other evidence that corroborates that testimony.” *Finnigan Corp. v. Int’l Trade Comm’n*, 180 F.3d 1354, 1366 (Fed. Cir. 1999); *see also Juicy Whip, Inc. v. Orange Bang, Inc.*, 292 F.3d 728, 737-38 (Fed. Cir. 2002) (“[O]ral testimony of prior public use must be corroborated in order to invalidate a patent.”); *Deering v. Winona Harvester Works*, 155 U.S. 286, 300-01 (1894)

("[O]ral testimony, unsupported by patents or exhibits, tending to show prior use of a device," is "open to grave suspicion."); *Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed-Wire Co.*, 143 U.S. 275, 284 (1892) ("Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information.").

"[I]n the context of a public use bar, evidence of experimental use may negate either the 'ready for patenting' or 'public use' prong." *Barry v. Medtronic, Inc.*, 914 F.3d 1310, 1328 (Fed. Cir. 2019) (quoting *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 424 F.3d 1373, 1379-80 (Fed. Cir. 2005)). A use may be experimental if its purpose is: "(1) [to] test claimed features of the invention or (2) to determine whether an invention will work for its intended purpose—itself a requirement of patentability." *Polara Eng'g*, 894 F.3d at 1348.

The following factors are relevant to the experimental-use inquiry:

(1) the necessity for public testing, (2) the amount of control over the experiment retained by the inventor, (3) the nature of the invention, (4) the length of the test period, (5) whether payment was made, (6) whether there was a secrecy obligation, (7) whether records of the experiment were kept, (8) who conducted the experiment, (9) the degree of commercial exploitation during testing, (10) whether the invention reasonably requires evaluation under actual conditions of use, (11) whether testing was systematically performed, (12) whether the inventor continually monitored the invention during testing, and (13) the nature of contacts made with potential customers.

Clock Spring, L.P. v. Wrapmaster, Inc., 560 F.3d 1317, 1327 (Fed. Cir. 2009) (quoting *Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1353 (Fed. Cir. 2002)).

4. Written Description

In pertinent part, 35 U.S.C. § 112, states the written description requirement:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best

mode contemplated by the inventor of carrying out his invention.

35 U.S.C. § 112 (Pre-AIA).

A patent’s specification satisfies the written description requirement when it “reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Novartis Pharms. Corp. v. Accord Healthcare, Inc.*, 38 F.4th 1013, 1016 (Fed. Cir. 2022) (“*Novartis*”) (quoting *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (citations omitted) (“*Ariad*”). In *Novartis*, the Federal Circuit held that the written description requirement was not met because the specification did not support that a “skilled artisan would understand a negative limitation to necessarily be present in [the] disclosure.” *Novartis*, 38 F. 4th at 1020.

The written description analysis into whether there is “possession as shown in the disclosure” in the patent at issue is “an objective inquiry into the four corners of the specification from the perspective of a person of ordinary skill in the art.” *Ariad*, 598 F.3d at 1351. The analysis varies depending on context. *Id.*

[T]he level of detail required to satisfy the written description requirement varies depending on the nature and scope of the claims and on the complexity and predictability of the relevant technology. For generic claims, we have set forth a number of factors for evaluating the adequacy of the disclosure, including “the existing knowledge in the particular field, the extent and content of the prior art, the maturity of the science of technology, [and] the predictability of the aspect at issue”

Ariad, 598 F.3d at 1351 (citations omitted); see also *Juno Therapeutics, Inc. v. Kite Pharma, Inc.*, 10 F. 4th 1330, 1335 (Fed. Cir. 2021) (“What is required to meet the written description requirement ‘varies with the nature and scope of the invention at issue, and with the scientific and technologic knowledge already in existence.’”).

The written description requirement is separate from the enablement requirement. *Ariad*, 598 F.3d at 1344. In *Ariad*, the inventors had over “years of hard work, great skill and

extraordinary creativity” discovered, named and described “previously unknown cellular components as a necessary predicate for their inventions” in a field of invention that was particularly unpredictable. *Id.* at 1354. The patent failed to meet the written description where it disclosed the use of three (3) classes of molecules, but failed to sufficiently disclose molecules capable of the claimed function of reducing NF- κ B activity. *Id.* at 1354-55.

Compliance with the written description requirement is a question of fact. *Id.* at 1354-55; *see also Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 323 F.3d 956, 963 (Fed. Cir. 2002) (“*Enzo Biochem*”) (“Compliance with the written description requirement is essentially a fact-based inquiry that will ‘necessarily vary depending on the nature of the invention claimed.’” (quoting *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563 (Fed. Cir. 1991) (“*Vas-Cath*”))).

The written description requirement does not require examples or an actual reduction to practice. *Ariad*, 598 F.3d at 1352. Filing of a patent application is a constructive reduction to practice that “in a definite way identifies the claimed invention can satisfy the written description requirement.” *Id.* The written description need not use the same words as the claimed invention, but a description that only renders the claimed invention obvious is also not adequate. *Id.*

Evidence of possession of the claimed invention may include “‘disclosure of sufficiently detailed, relevant identifying characteristics . . . i.e., complete or partial structure, other physical and/or chemical properties, functional characteristics when coupled with a known or disclosed correlation between function and structure, or some combination of such characteristics.’” *Enzo Biochem*, 323 F.3d at 954 (quoting and adopting the PTO’s standard for compliance with written description requirement; Guidelines for Examination of Patent Applications Under the 35 U.S.C. 112, 1, “Written Description” Requirement, 66 Fed. Reg. 1099, 1106 (Jan. 5, 2001) (“PTO Guidelines”) (emphasis deleted)).

The written description requires a comparison between the claimed invention and the disclosure, as explained below in the PTO Guidelines.

The analysis of whether the specification complies with the written description requirement calls for the examiner to ***compare the scope of the claim with the scope of the description*** to determine whether applicant has demonstrated possession of the claimed invention. Such a review is conducted from the standpoint of one of skill in the art at the time the application was filed and should include a determination of the field of the invention and the level of skill and knowledge in the art. Generally, there is an inverse correlation between the level of skill and knowledge in the art and the specificity of disclosure necessary to satisfy the written description requirement. Information which is well known in the art need not be described in detail in the specification.

See PTO Guidelines, 66 Fed. Reg. at 1105 (citations omitted); Manual of Patent Examining Procedure § 2163(II)(A)(2) (“MPEP”) (June 2020) (emphasis added); *see also Indivior UK Ltd. v. Dr. Reddy’s Lab’s S.A.*, 18 F.4th 1323, 1328 (Fed. Cir. 2021) (“*Invidior*”) (describing that claims in a parent application can provide written description support for ranges in a child application); *Ariad*, 598 F.3d at 1351 (“the specification must describe an invention understandable to that skilled artisan and show that the inventor actually invented the invention claimed”).

The purpose of the “written description” requirement is to “convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of *the invention*. The invention is, for purposes of the ‘written description’ inquiry, *whatever is now claimed*.” *Vas-Cath*, 935 F.2d at 1563-64 (emphasis in original). In other words, the specification must describe the claimed invention.

To comply with the written description requirement of ... pre-AIA 35 U.S.C. 112, first paragraph, or to be entitled to an earlier priority date or filing date under ... [35 U.S.C.] 120..., each claim limitation must be expressly, implicitly, or inherently supported in the originally filed disclosure. When an explicit limitation in a claim "is not present in the written description whose benefit is sought it must be shown that a person of ordinary skill would have understood, at the time the patent application was filed, that the description requires that limitation." *Hyatt v. Boone*, 146 F.3d 1348, 1353, 47 USPQ2d 1128, 1131 (Fed. Cir. 1998); *see also ... Yeda Research and Dev. Co. v. Abbott GMBH & Co.*, 837 F.3d 1341, 120 USPQ2d 1299 (Fed. Cir. 2016) ("Under the doctrine of inherent disclosure, when a specification describes an invention that has certain undisclosed yet inherent properties, that specification serves as adequate written description to support a

subsequent patent application that explicitly recites the invention's inherent properties.") (citing *Kennecott Corp. v. Kyocera Int'l, Inc.*, 835 F.2d 1419, 1423 (Fed. Cir. 1987)).

(MPEP § 2163 II(A)(3)(b); see also *Novartis*, 38 F.4th at 1016 ("possession must be 'shown in the disclosure'").).

It is not enough that a claimed invention is 'an obvious variant of that which is disclosed in the specification.' Disclosure is essential; it is 'the *quid pro quo* of the right to exclude.'" (citations omitted.); *Nuvo Pharms. (Ireland) Designated Activity Co. v. Dr. Reddy's Lab'ys Inc.*, 923 F.3d 1368, 1376-77 (Fed. Cir. 2019) ("*Nuvo*") ("The essence of the written description requirement is that a patent applicant, as part of the bargain with the public, must describe his or her invention so that the public will know what it is and that he or she has truly made the claimed invention.") (quoting *AbbVie Deutschland GmbH & Co. v. Janssen Biotech, Inc.*, 759 F.3d 1285, 1298 (Fed. Cir. 2014)).

A patent is presumed to have adequate written description. *Novartis*, 38 F.4th at 1019. Clear and convincing evidence overcomes the presumption of validity. *Ariad*, 598 F.3d at 1354.

B. The Asserted Claims of the '287 Patent Are Not Anticipated

1. Overview of the Prior Art

Cartessa relied on Greenberg for anticipation. (RBr. at 6.). For the following reasons, Cartessa did not present clear and convincing evidence that the Asserted Claims of the '287 patent are anticipated.

a) Greenberg (JX-0010)

U.S. Patent Application Publication No. 2003/0093089 to Greenberg ("Greenberg"), entitled "Apparatus for Variable Mico Abrasion of Human Tissue and/or Hides Using Different Size and Types of Abrasive Particles," was published on May 15, 2003. (JX-0010 at (10), (43),

(54), (76).). The Parties did not dispute that Greenberg is prior art to the '287 patent under pre-AIA 35 U.S.C. §§ 102(b), (e). (JSUI at 5.). Greenberg was also before the patent examiner during prosecution of the '287 patent. (JX-0010 at (56).).

Greenberg discloses a microdermabrasion machine “using abrasive particles of different sizes and/or type.” (JX-0010 at ¶ [0002]; Tr (Jensen) at 1025:4-13; Tr. (Leinsing) at 1163:21-1165:8.).

Greenberg’s systems use particles of “aluminum oxide” or “hard organic material that is sufficiently dried.” (JX-0010 at ¶¶ [0068], [0072].). Greenberg prefers particle of “ground up nutshells such as walnut shells” because “[t]hese ground up or pulverized shells can sufficiently dry not to cause blocking in the tubes of a micro-dermabrasion apparatus....” (*Id.* at ¶ [0069].). Greenberg contemplates other particles, “provided that the particles are sufficiently dry and of a suitable size.” (*Id.* at ¶ [0070].). Although Greenberg discloses mixing the dry particles with various oils/fragrances, it cautions “great care needs to be taken to ensure that the particle do not become too wet whereupon they will not be able to move freely through the apparatus but will stick to the container and the various tubes.” (*Id.* at ¶ [0085].).

Greenberg also includes a supply container designed to be used solely with dry particles that are propelled against a patient’s skin through the handle. (*Id.* at ¶ [0049]; Tr (Leinsing) at 1167:19-1168:18, 1170:10-24, 1173:6-18, 1175:15-25, 1176:12-23, 1184:10-18.).

2. Cartessa Has Not Proven by Clear and Convincing Evidence that Greenberg Anticipates the '287 Patent

a) The '287 Patent and Greenberg Focus on Different Treatment Material and Types of Methods: Abrading vs. Smoothing and Soothing

Cartessa failed to prove by clear and convincing evidence that Greenberg anticipates the

Asserted Claims of the '287 patent. As noted above, Greenberg was cited during the prosecution of the '287 patent. (*See* JX-0001 at 21:48-49.). Cartessa contended initially in its Pre-Hearing Brief that Greenberg anticipates claims 1-3, 8-12, 14, 16, 22, 26, 34-37, 39, and 45 of the '287 Patent. (RPBr. at 66.).²⁷ However, during the Hearing, the Parties and their experts, explicitly focused on Greenberg's anticipation of claims 11, 12, 14, 16, 22 and 26. (RBr. at 6; Tr. (Leinsing) at 1163:10-15.).

The claims upon which HydraFacial, Cartessa, and their experts focused in Greenberg, contain descriptions of the systems/apparatus for delivering skin treatments, but with an explicit focus on the nature of the "treatment material" that the Greenberg apparatus versus the '287 apparatus deliver for the skin treatments described. (JX-0001 at cls. 11, 12, 14, 16, 22; Tr. (Leinsing) at 1163: 5-15, 1165:5:15; Tr. (Jensen) at 1030:1-1039:9 (discussing how Greenberg's organic materials such as walnut shells when pulverized and mixed with oils can be "liquids," "treatment materials" and "fluids").).

While at first blush, Greenberg and the '287 patent appear to be similar in that they both describe apparatus/systems that are structured with handpieces and a type of console that contain containers to transport "treatment material" that is designed to enhance facial skin rejuvenation and exfoliation, there are critical distinctions between Greenberg and the '287 patent that defeat Cartessa's anticipation arguments.

As a starting point, Greenberg teaches what HydraFacial describes as "an old-style" system for conducting microdermabrasion procedures that uses a hand tool to apply treatment materials to a targeted area of skin. (*See* CRBr. at 105 (citing JX-0010 at Abstract, ¶¶ [0049]-

²⁷ As noted in Section II.A, claims 1-10, 26, 34-37, 39 and 45 were terminated from the Investigation.

[0064], Fig. 1).). Unlike the '287 patent, and as explained in more detail below, Greenberg does not anticipate the '287 patent, in part, because Greenberg uses “abrasive particles of different sizes.” (JX-0010 (Greenberg) at ¶ [0002].). Greenberg includes a supply container that houses particles of different sizes or type, which are propelled through a handpiece and tip to treat a patient’s skin. (*Id.* at ¶ [0049].).

It is important to note the difference in the manner in which microdermabrasion and dermabrasion or hydrodermabrasion affects a person’s skin. In the “Description of the Related Art” in the '287 patent, the two techniques of dermabrasion and microdermabrasion are described as follows.

Both techniques remove portions of the epidermis called the stratum corneum which the body interprets as a mild injury. The body then replaces the lost skin cells, resulting in a new outer layer of skin. Additionally, despite the mild edema and erythema, associated with the procedures, the skin looks and feels smoother because of the new outer layer of skin.

* * *

Dermabrasion leaves the skin red and raw-looking. The removed skin can take several months to regrow and heal. Recent efforts have led to the use of lasers instead of abrasive elements

(JX-0001 at 1:41-47, 53-56.).

HydraFacial’s expert, Mr. Leinsing, testified persuasively that Greenberg’s “supply container” is designed to be used with *dry particles* that are used for abrading a patient’s skin. (*Id.* at ¶ [0049]; Tr. (Leinsing) at 1167:19-1168:18, 1170:10-24, 1173:6-18, 1175:15-25, 1176:12-23, 1184:10-18) (emphasis added).). Additionally, Greenberg’s systems use particles of “aluminium oxide” or “hard organic material that is sufficiently dried.” (JX-0010 at ¶¶ [0068], [0072].). At times, to lubricate the particles as described, Greenberg suggests the use of “ground up nutshells such as walnut shells” because “[t]hese ground up or pulverized shells can [sic]

sufficiently dry not to cause blocking in the tubes of a micro-dermabrasion apparatus and yet still have levels of oils and other substances that are left as a *residue* against the skin on which they are impacted.” (*Id.* at ¶ [0069] (emphases added).).²⁸

Greenberg contemplates other particles, “provided that the particles are *sufficiently dry* and of a suitable size.” (*Id.* at ¶ [0070] (emphasis added).). Cartessa and its expert, Dr. Jensen, argued that Greenberg’s disclosure of “essential oils” on the dry particles satisfy the “Fluid Limitations” (discussed below). (RBr. at 11.).

However, even though Greenberg teaches that dry particles can be mixed with various oils/fragrances, and coloring, Greenberg also advises that “great care needs to be taken to ensure that the particle do not become *too wet* whereupon they will not be able to move freely through the apparatus but will *stick* to the container and the various tubes.” (JX-0010 at ¶ [0085] (emphases added).). In yet another paragraph [0087] which is cited above, Greenberg states explicitly that Greenberg’s oils/fragrances are designed to provide a dry coating on the particles. Greenberg also requires that the particles “cannot possess a coating that will provide for

²⁸ [0069] One of the organic materials that have been found to be particularly useful is ground up nutshells such as walnut shells. These ground up or pulverized shells can sufficiently dry not to cause blocking in the tubes of a micro-dermabrasion apparatus and yet still have levels of oils and other substances that are left as a residue against the skin on which they are impacted.

[0070] In fact, experimentation with different types of organic material has shown, that provided that the particles are sufficiently dry and of a suitable size, a whole range of organic particles may be used. For example, one may equally well use coconut shell, walnut shell, peach kernels and other fruit kernels but to name a few.

[0087] It is to be understood that other additions to the synthetic or organic materials may be used. For example whilst the above discussion looked at the use of organic abrasive particles or coating particles with such oils and fragrances, one may also add colouring to the abrasive particles whether they are synthetic or organic.... Thus, it is to be understood that the additive to the abrasive particle are not intended to be limited to those described above. They may be various, such as tea tree oils, and essences, colourings and so on. The only requirement would be that as a collection of particles they cannot possess coating that will provide adhesion between the different particles. (JX-0010 at ¶¶ [0069], [0070], [0087].).

adhesion between the different particles.” (*Id.* at ¶ [0087].). Repeatedly, Greenberg stresses “dry” pulverized particles or materials.

By contrast, the ’287 patent is a hydrodermabrasion system that, as HydraFacial stated, “stems from the original disclosure that created the field of hydrodermabrasion, which has virtually eliminated the commercial market for microdermabrasion.” (CRBr. (citing Tr. (Dubois) at 161:23-136:11).).²⁹

The face of the ’287 patent describes the “Field” and helps explain some of the differences between microdermabrasion and hydrodermabrasion as follows:

Microdermabrasion refers generally to a procedure in which the surface of the skin is removed due to mechanical rubbing by a handpiece emitting a stream of sand or grit. For example, a handpiece can be used to direct an air flow containing tiny crystals or aluminum oxide, sodium chloride, or sodium bicarbonate. The momentum of the of the grit tends to wear away two or three cell layers of the skin with each bypass of the handpiece. Alternatively new “crystal free” microdermabrasion techniques utilize a diamond tipped handpiece without a stream of grit.

(JX-0001 at 1:30-32.).

²⁹ HydraFacial noted in the “anticipation” section of its Reply Post-Hearing Brief that Greenberg “teaches away from using liquids to treat the patient’s skin[.]” (CRBr. at 4 (citing JX-0010 (Greenberg) at ¶¶ [0069]-[0088] (other citations omitted).). While “teaching away” arguments are used for obviousness and not for anticipation, that argument does apply to some of the conclusions about obviousness that are contained in Section IX.C.2-3 with respect to Greenberg. “A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.” *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009) (quoting *Ricoh Co., Ltd. v. Quanta Comput. Inc.*, 550 F.3d 1325, 1332 (Fed. Cir. 2008)). Moreover, a reference “must [be] considered for all it taught, disclosures that diverged and taught away from the invention at hand as well as disclosures that pointed towards and taught the invention at hand.” *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 296 (Fed. Cir. 1985) (citation omitted). A reference does not teach away “if it merely expresses a general preference for an alternative invention but does not ‘criticize, discredit, or otherwise discourage’ investigation into the invention claimed.” *DePuy*, 567 F.3d at 1327 (quoting *In re Fulton*, 391 F.3d at 1201).

One of HydraFacial's witnesses, Dr. Elliot Duboys,³⁰ the only medical doctor and a plastic surgeon who has used microdermabrasion on patients, described the problems with microdermabrasion of the type taught by Greenberg as follows:

Q. . . . Dr. Duboys, is microdermabrasion one type of skin rejuvenating treatment?

A. It is.

Q. What is microdermabrasion?

A. Microdermabrasion uses particles, *dry particles*, on the skin to abrade the skin, usually assisted with a handheld device that has a suction to collect the abrasive particles. *It's painful. It dries out the skin. And it is very irritating.*

Q. And are there -- you just mentioned one, but are there any other drawbacks to microdermabrasion with respect to its impact on the skin?

A. Yes. Over the course of time, they have associated pulmonary diseases with polyps of the trachea and the larynx, pain, of course, dryness of the skin.³¹

(Tr. (Duboys) at 160:7-22 (emphases added); *see also* JX-0001 at 1:34-2:22 (Description of the Related Art).).

Another witness, Mr. Gabe Lubin,³² a fact witnesses and the founder and Chief Executive Officer ("CEO") of Cartessa, who also testified that he had 18 years of experience in the "device" industry, was asked whether he understood the difference between microdermabrasion

³⁰ Dr. Elliott Duboys testified on April 9, 2025. At the time of the Hearing, Dr. Duboys was a Board-Certified Plastic Surgeon. (CPSt. at 2.). HydraFacial identified him as an expert to testify about "the effects and results of hydrodermabrasion and microdermabrasion and copying as evidence of secondary considerations of non-obviousness." (*Id.*). Dr. Duboys was accepted as an expert, without objection, on the subject matter for which he was called to testify. (Tr. at 157:16-18.). However, Dr. Duboys' testimony revealed that he was not an expert on the subject of copying.

³¹ Dr. Duboys described that among the advantages of hydrodermabrasion are that "it permits easier translation, easier movement over the surface of the skin. It's much less -- it's much more soothing than microdermabrasion. And much less painful." (Tr. (Duboys) at 161:9-162:14.).

³² As noted above, Mr. Gabe Lubin testified by deposition on behalf of Cartessa. At that time, he was the founder and Chief Executive Officer of Cartessa. (CX-0848C (Lubin Dep. Tr.) at 13:20-14:6; CDX-0006C.0026.).

and hydrodermabrasion:

Q. Do you have an understanding of what the difference is between hydrodermabrasion and microdermabrasion?

A. I think I do.

Q. What's your understanding of that difference?

A. My understanding is that hydro uses *fluids* and dermabrasion *does not*.

(CX-0848C (Lubin Dep. Tr.) at 13:20-14:6 (emphases added); CDX-0006C.0026.).

Similarly, Mr. Leinsing, Hydrafacial's expert, testified:

Q. Thank you, Mr. Leinsing. Let's turn to slide 7C.5. And here we have an image of the Greenberg reference. Can you provide us a summary of your opinion related to the Greenberg reference?

A. Yes. First, the Greenberg reference -- it's publication 3089. First, this reference was cited on the face of the patent and was in front of the Patent Examiner during prosecution of the '287 patent. It is a microdermabrasion patent -- or a patent on microdermabrasion technology. It uses *dry solid particles* to blast the skin, and it has multiple embodiments.

(Tr. (Leinsing) at 1162:1-8 (emphasis added)).

Dr. Leinsing added the distinction that while Greenberg is a microdermabrasion system, the '287 patent is a hydrodermabrasion system. While hydrodermabrasion uses fluids, the focus of the two systems is different: "And you can see in the container there, the particles that are there at the bottom of the container. So what this Greenberg reference talks about is using these dry particles of different sizes . . ." (*Id.* at 1164:19-23.).

b) Greenberg Does Not Disclose the "Fluid Limitations"

Certain of the Asserted Claims of the '287 patent recite that the treatment containers contain "treatment materials" (claims 11 and 22) or a "fluid" which HydraFacial described collectively as the "Fluid Limitations" or "Fluid Terms." (CRBr. at 8 (citing JX-0001 at 21:48-

49, 23:51-52, 24:35-36, 25:21-25)).³³ According to HydraFacial’s understanding, and as adopted here, both Parties appeared to use the terms “fluid,” and “treatment material” to be the same. (*Id.* at 8 n.1.). For its purposes, the ’287 patent states that the terms “fluid” and “treatment material” may be used synonymously. (JX-0001 at 5: 51-54.). However, the Parties clearly have different understandings of what each of those terms mean. Clearly, Mr. Leinsing and Dr. Jensen disagree on the composition and meaning of “treatment materials.”

Cartessa argued that Greenberg’s disclosure of dry “highly abrasive particles” in a supply container satisfies the Fluid Limitations. (*See* RRB. at 10-11; RBr. at 9 (“It is not clear that the Fluid Claims are limited to liquids, but even if they are, liquids are taught in Greenberg (*e.g.*, tea tree oils and fragrances) among the many treatment materials.”); *see also* JX-0010 at ¶ [0087]; Tr. (Jensen) at 724:23-725:4, 730:8-730:15, 730:25-731:22.).

The heart of HydraFacial’s dispute with Cartessa is whether Greenberg’s use of “dry particles” with oils used for lubrication means that “liquids” are equivalent to fluids, and whether Greenberg’s apparatus that aims at using “dry particles” are the same. Dr. Jensen, Cartessa’s expert, argued that Greenberg be considered to be using fluids or liquids because Greenberg’s dry particles can be lubricated with oils. (Tr. (Jensen) at 1023:1-1024:6.). Cartessa and Dr.

³³ It should be noted that other claim limitations in the ’287 patent, such as claims 1, 9, 10, and 16, also explicitly talk about “fluid,” or “fluids” or “fluid treatment” system. (*See, e.g.* Tr. (Leinsing) at 1164:9-1165:1165:4, 1167:19-1168:18, 1172:24-1173:13-1175:25, 1176:12-1177:9. (Mr. Leinsing describes that the containers of Greenberg are designed to “aerate” and transport particles through the handpiece assembly which are structurally different than the containers and structures of the ’287 patent that are designed to pull liquid through the handpiece assembly.). The design assembly of Greenberg is not designed to “designed to pull out any liquid. [The liquids] would be trapped in there.” (Tr. (Leinsing) at 1164:9-1165:4, 1167:19-1168:18.). In other words, for the same reasons as for claims 11 and 22, Greenberg fails to disclose skin treatment fluids. (Adopting CRBr. at 12.). Moreover, as Mr. Leinsing seems to suggest, the structure of the Greenberg systems and the ’287 patent invention are not per se “design choices;” they were necessitated by the type of “treatment material” the different systems use.

Jensen also argued that Greenberg uses “liquids”—its tree tea oils and the like. (RBr. at 9-10; Tr. (Jensen) at 1023:1-1024:25.). In Dr. Jensen’s elaboration, he explained that in the context of the ’287 patent, “treatment materials” are the same as “fluids, liquids, gases, liquids with suspended particles, and gases with suspended particles.”³⁴ HydraFacial argued clearly that the Greenberg reference cannot be viewed in the same way. (CRBr. at 8.).

As HydraFacial observed, [I]t is undisputed that Greenberg does not disclose using oils, fragrances, or any other “liquid” as a standalone treatment material. (*See* Tr. (Leinsing) 1165:15-1166:6 (testifying that the oils used in Greenberg provide a coating of the particles for the purpose of imparting fragrance); *see also* CRBr. at 11 (citing JX-0010 at ¶¶ [0011], [0082], [0087]-[0088]; Tr. (Jensen) 1031:14-19.). Moreover, Greenberg makes it clear that the added oil does not remain as a liquid. (CBr. at 11 (citing JX-0010 at ¶¶ [0068]-[0071], [0085], [0087]; Tr. (Leinsing) at 1166:9-24; Tr. (Jensen) 1036:23-1038:7 (acknowledging Greenberg’s requirement for the particles to be dry).). At one point, Dr. Jensen argued that sand and salt, in context, can be considered to be “liquids” or “fluids.”

Q. In your deposition you testified that salt is a fluid.

A. In some circumstances, if salt is being mixed with air, just like if you are on a beach, I believe we talked about this on Friday, that sand can be carried by the liquid fluid, being the ocean water, and then it becomes part of the fluid. So can salt. Salt can be part of a fluid if it is carried by a fluid such as air. So can salt. Salt can be part of a fluid if it is carried by a fluid such as air.

³⁴ During cross-examination, Dr. Jensen was asked how he defined the “treatment material” in the context of the ’287 patent. “Q. And that’s fair. So your opinion is that treatment materials -- strike that. In the context of the ’287 patent, you agree that treatment materials equals fluids equal your understanding that they are fluids, liquids, gases, liquids with suspended particles, and gases with suspended particles, correct? A. In my own definition, that is correct, but, as I said, when we discuss infringement, I apply HydraFacial’s own definition of what a fluid is.” (Tr. (Jensen) at 1023:23-1024:6.). In other words, Dr. Jensen acknowledged that he used HydraFacial’s definition of “fluid” for infringement, but his own definition of “fluid” for invalidity. (*Id.* at 1023:1-1024:5.).

(Tr. (Jensen) at 1019:19-1020:2.).

Cartessa argued that HydraFacial conflates “liquid” with “fluid” and argued that “fluid” could be “anything that can flow and is synonymous with the term “treatment material.” (RRBr. at 10.). The ’287 patent itself says that “fluid” can be used synonymously with “treatment material.” (JX-0001 at 5:52-54.).) However, the ’287 patent does not even remotely suggest that “dry particles” are liquids or fluids. Neither does the Greenberg reference. (*See* CRBr. at 10-11.).

As Cartessa and its expert, Dr. Jensen argued, the ’287 patent “describes ‘treatment material’ as “a broad term and includes, but is not limited to, medicament, a substance tending to flow or conform to the outline of its container such as fluid, gas, liquid (e.g., serums, water, saline, etc.), gel, fluidized material, additives, and/or a plurality of fine solids.” (RBr. at 10 (citing JX-0001 at 5:47-54; Tr. (Jensen) at 724:23-725:4, 730:5-15, 730:25-731:22).). That is true. However, the focus of the ’287 treatment system and how it treats is distinguishable from Greenberg whether it is a system that largely uses “dry” treatment material or fluids as the primary method of treatment.

For the following reasons, Cartessa’s arguments are less persuasive and have not been adopted to the extent that they argue that the Greenberg apparatus and the ’287 apparatus are both fluid-based systems.

c) The Plain and Ordinary Meaning Applies to the Term “Fluid”

The Parties did not propose a construction for the term “fluid” or “liquid” or “treatment material” during the *Markman* proceedings.³⁵ Accordingly, the plain and ordinary meaning

³⁵ Because the Parties did not ask that the terms “fluid” or “liquid” or even “treatment material” be

applies. *See Laryngeal Mask Co. v. Ambu*, 618 F.3d 1367, 1370 (Fed. Cir. 2010) (stating that “words of a claim are generally given their ordinary and customary meaning as understood by a person of ordinary skill in the art”); *Thorner v. Sony Comput. Ent. Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012); *see also Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005)

construed during *Markman* proceedings, the Parties were asked to address in their post-hearing submissions whether *O2 Micro* applies. (Tr. at 1312:19-1313:5.). Cartessa argued that *O2 Micro* has limited application. (RBr. at 3.). HydraFacial argued that it does not apply and should not apply post-Hearing because in failing to ask that the terms “fluid,” “liquids” or “treatment material” be construed during *Markman* proceedings, Cartessa waived that right consistent with Order No. 2, Ground Rule 1.1 and Order No. 29 at 10. (CRBr. at 11-12.). *O2 Micro* states that “[w]hen the parties raise an actual dispute regarding the proper scope of these claims, the court, not the jury, must resolve that dispute.” *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008). “When the parties present a fundamental dispute regarding the scope of a claim term, it is the court’s duty to resolve it.” *Id.* at 1362. While courts have “great latitude” in how to conduct claim construction, parties should be involved. *TNS Media Research, LLC v. Tivo Research & Analytics, Inc.*, 629 F. App’x 916, 938-39 (Fed. Cir. 2015). *O2 Micro* requires resolution of the dispute prior to the issue going to a jury. *O2 Micro*, 521 F.3d at 1360. Since there is not a jury in an administrative proceeding, Cartessa claimed that the terms need not have been resolved before the Hearing. (RBr. at 3.). Clearly, the terms at issue were not resolved before the Hearing because the Parties did not present the disputed claim terms for construction.

However, Cartessa claimed post-Hearing that it was “prepared to resolve the dispute...” (*Id.*). To that end, Cartessa stated it was “willing to limit the Fluid Terms to require liquid as long as the term ‘fluid’ is used consistently throughout the claims, meaning that the term ‘fluid communication’ would require the ability for liquid to pass—consistent with HydraFacial’s prior proposed construction of the term ‘fluid communication.’” (Tr. at 8:6-9:4.). Cartessa claimed that in a different investigation (Inv. No. 337-TA-1417), for one of the related patents (U.S. Patent 11,446,477 (RX-0053)), HydraFacial proposed constructions for the term “fluid communication.” One of the proposed constructions was a “state that makes the passage of fluid possible,” meaning that the structure allows for the fluid, here liquid, to be able to pass. (RRBr. at 3 (citing Tr. at 8:6-9:4.). Cartessa claimed that HydraFacial’s expert agreed. (*Id.* (citing Tr. (Leinsing) at 401:21-24 (“That means that the fluid communication would be possible....It just means that that’s possible, basically that it’s plumbed”)).).

Cartessa appears to have misunderstood Mr. Leinsing’s testimony. The testimony was: “Q: But just to be clear, your patent in the section we’ve just looked at does not describe the flow of air, does it? A. That’s why I’ve said that it’s not -- **fluid communication has nothing to do with flow of anything. It’s talking about whether or not there’s a pathway.** That’s what this part says. **Or whether or not they are plumbed together.** And that’s what I’m saying, which is very consistent with this current case.” (Tr. (Leinsing) at 403:15-23) (emphases added).). What Mr. Leinsing talked about, in fact, was that the term “fluid communication” required connection or plumbing between the components recited in claims 22 and 23 of the ’287 patent and was related to whether the Accused Products infringed claims 22-23. (CRBr. at 8-9.). Mr. Leinsing did not suggest that “fluid” was the same as “fluid communication.” As noted above, HydraFacial argued that “fluid” be given its plain and ordinary meaning. (*Id.* at 9.).

(en banc).

For the “plain and ordinary meaning,” the intrinsic record, including the prosecution history, provides a perspective that a person of skill would understand and apply. As a starting point from the perspective of patent prosecution, the abrasive dry “particles” of Greenberg are not “fluids.” In other words, even if “dry” particles as in Greenberg are lubricated with oils or other materials as described, the Greenberg system does not teach a “fluid”-based system. (*See* above, this Section.).

As HydraFacial noted, and this decision agrees, the patent examiner who examined the application of the ’287 patent understood that the term “fluid” does not encompass solid abrasive particles as found in Greenberg. (CRBr. at 9.). During prosecution of the ’287 patent, the patent examiner explicitly found that U.S. Patent Pub. No. 2001/0049511 A1 (“Coleman”) did not disclose three (3) containers each of which contained a ‘treatment fluid’ because one of the three containers contained abrasive material only. (*See* JX-0002 (’287 Patent FH) at 1316-17 (Office Action of October 11, 2023, stating that “Coleman fails to disclose that all three containers contain fluid.”), 1454-55 (applicant arguing that a new claim having an “identical or similar scope to Claims 7 and 14” is patentable based on the examiner’s view on allowable subject matter).). Apparently, container 60A of Coleman contained abrasive material that the patent examiner found to be inconsistent with “fluids” of the ’287 patent being prosecuted. (*Id.*).

During the Hearing, Mr. Ted Papagiannis, the patent attorney who prosecuted the ’287 patent, also confirmed that the examiner’s finding with respect to the Coleman reference was that “abrasive material is not a fluid.” (Tr. (Papagiannis) at 1096:17-1098:1 (citing JX-0002 at 1303, 1313-17).). The ’287 patent was allowed over similar references such as Coleman because the ’287 patent does not use solid abrasive particles.

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There is another problem with respect to Cartessa and Dr. Jenson's use of the word the "fluid" in trying to apply it to Greenberg's dry particles, even with the addition of oils, such as "essential oils," tea tree oils, walnut shells or coconut shells as Greenberg allows. Cartessa argued in the alternative that Greenberg's mention of "essential oils" discloses a liquid and therefore satisfies the Fluid Limitations. (RBr. at 11.). As HydraFacial rightly noted, even the passages of Greenberg that Cartessa cited in support of its theory cannot be correct because Greenberg explains that oils merely "leave[s] a *residue* of oils" and that the particles need to be dry enough to prevent "adhesion between the different particles." (CRBr. at 11 (citing JX-0010 at ¶ [0087]); *see also id.* at ¶¶ [0011], [0082], [0088].). The particles cannot be wet. Dr. Jenson was pressed on his opinions on "liquids" in Greenberg during cross-examination:

Q. So doesn't Greenberg disclose that it's imperative to not get the machine wet; otherwise, it creates clogging?

A. No, because it, in that same paragraph, it says there's a choice of mixing.

Q. Okay. And isn't it true that you have never pointed to a single part of Greenberg that says that you can use any of these liquids, oils, or fragrances as the treatment material itself?

A. That's not true. I pointed to the fact that they can be part of the treatment material.

Q. So you've only pointed that they can be part of the treatment material. My question was different. Is there any part of Greenberg that you have ever pointed to that says that the oils and fragrances can be the only thing in the treatment material?

A. I have not pointed to that, but I -- sitting here today, I'm not saying that Greenberg leaves that option out.

(Tr. (Jensen) at 1038:17-1039:9; JX-0010 at [0085].).

Dr. Jenson appeared to be walking a fine line in trying to maintain an argument about how Greenberg's microdermabrasion apparatus operates that cannot be correct. He was

suggesting something that Greenberg does not say versus what it does say. Dr. Jensen's opinion was not credible when viewed against the entirety of Greenberg. While Greenberg clearly does not describe how "wet" the "dry particles" may be, or even refer to the oils as "liquids," Greenberg makes it clear in several paragraphs (cited above) including in [0069] that: "These ground up or pulverized shells can [sic] sufficiently dry not to cause blocking in the tubes of a micro-dermabrasion apparatus."

Again, HydraFacial and Mr. Leinsing argued correctly, and Cartessa did not seem to dispute, that Greenberg does not disclose using oils, fragrances, or any other "liquid" as a standalone treatment material. (Tr. (Leinsing) at 1165:15-1166:6 (testifying that the oils used in Greenberg provide a coating of the particles in part for the purpose of imparting fragrance); JX-0010 at ¶¶ [0011], [0082], [0087]-[0088]; Tr. (Jensen) at 1031:14-19.). Greenberg also is clear that the added oil does not remain as a liquid but is merely a lubricant, as part of the treatment material. (JX-0010 at ¶¶ [0068]-[0071], [0085], [0087]; Tr. (Leinsing) at 1166:9-24; Tr. (Jensen) at 1036:23-1038:7 (acknowledging Greenberg's requirement for the particles to be dry).).

Here, as HydraFacial also correctly argued, the applicant not only acquiesced to the examiner's finding that Greenberg's solid abrasive particles were not a fluid let alone treatment material that is the same as in the '287 patent, but the applicant relied on allowance over Coleman to obtain an allowable claim. (*See* CRBr. at 10, 11.). It is well established that failure to raise a direct challenge in response to an examiner's characterization results in a disclaimer. *See TopPharm, Inc. v. Ranbaxy Pharm., Inc.*, 336 F.3d 1322, 1330 (Fed. Cir. 2003) ("the public is entitled to equate an inventor's acquiescence to the examiner's narrow view of patentable subject matter with abandonment of the rest."). Because the applicant disclaimed dry particles alone from the scope of "fluid" and "treatment material," Greenberg's disclosure of dry particles

cannot satisfy the Fluid Limitations. Cartessa has not provided evidence that would overcome the disclaimer. (CRBr. at 11 (citing RBr. at 6-17).). Consequently, it is a finding here that “fluids” by themselves, are not the equivalent of “treatment material” used in Greenberg.

d) Greenberg’s Microdermabrasion System Is Incompatible with a Liquid System

When the inventors of the ’287 patent were developing the invention of the ’287 patent, they experimented with adding a liquid to the dry particles of an early microdermabrasion machine called the Delphia. According to Mr. Ignon, one of the ’287 inventors, the combination did not work because the machine clogged. (RX-0014C (Ignon Dep. Tr.) at 137:9:17.). As Mr. Ignon also explained, converting the Delphia to a “wet” machine, was not “a good test fit” because it “was configured to dry microdermabrasion and wasn’t feasible for wet use.” (*Id.* at 138:3-16.).

Clearly, and as HydraFacial and Mr. Leinsing argued, the design of the apparatus that Greenberg discloses is a system that is not intended to be used with fluids. (CRBr. at 11-12.). Mr. Leinsing testified that the containers disclosed in various embodiments of Greenberg, i.e., the supply containers that hold the treatment material, and the recovery containers that contain the waste material abraded from the skin, are “strictly designed for dry particle systems, not for liquid.” (Tr. (Leinsing) at 1172:24-1173:13, 1175:115-25, 1176:12-1177:9.). As Mr. Leinsing explained, the supply containers of Greenberg are built with features that “aerate” and mobilize “the dry particles for transport to the handpiece.” (*Id.* at 1164:9-1165:4, 1167:19-1168:18.).

According to Mr. Leinsing, Greenberg’s system is structurally different from the container design of the ’287 patent that accommodates and conveys liquids. (*Id.*; *see also* Tr. (Leinsing) at 1164:9-1165:4, 1167:19-1168:18.). According to Mr. Leinsing, because of the

design differences, the Greenberg containers are not “designed to pull out any liquid. [The liquids] would be trapped in there.” (*Id.*). As HydraFacial argued, and this decision finds, Greenberg fails to disclose the Fluid Limitations as required by claims 11 and 22. For the same reason, Greenberg fails to disclose “skin treatment fluid” recited in claim 16. (CRBr. at 12 (citing Tr. (Leinsing) at 1184:19-118:5:6).). Cartessa did not appear to have a viable rebuttal to the argument about the structural differences, and the sheer incompatibility, between Greenberg’s microdermabrasion system and the ’287 patent and the largely “dry” system of Greenberg and the “liquid” or wet system described in the ’287 patent.

3. Greenberg’s Various Embodiments Cannot Be Combined to Be “At Once Envisaged”

As HydraFacial explained, Cartessa combined “incompatible” structures from different Greenberg embodiments to meet the claimed limitations of the ’287 patent. (CRBr. at 12 (citing RBr. at 9-17).). By doing so, Cartessa not only could not show that Greenberg met each limitation of the ’287 patent, but also it did not meet its burden of proving clearly and convincingly that the asserted claims are invalid. *Microsoft*, 878 F.3d at 1068 (“[A] reference can anticipate a claim even if it ‘d[oes] not expressly spell out’ all the limitations arranged or combined as in the claim, if a person of skill in the art, reading the reference, would ‘at once envisage’ the claimed arrangement or combination.”).

HydraFacial argued that Cartessa and Dr. Jensen “indiscriminately” switched between different embodiments of Greenberg to allege that the limitations of the Asserted Claims are met. (CRBr. at 12-14.). Examples of Cartessa’s or Dr. Jensen’s inappropriate combinations that Cartessa identified that are not supported are:

- Cartessa identified the valve 108 in Greenberg Figure 5 as the “fluid control member” of claim 11.

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- Cartessa identified the “collection lumen” of claim 22, with the “block” of claim 26. (RBr. at 10, 19, 22-23.).
- Cartessa identified for the “vacuum source” that is recited in three claims, Figure 6 at 13-14, 19, 23 and argued that the positive and negative pressure in Greenberg is equivalent to and explains the incorporation of a vacuum from Figure 6 into the embodiment of Figure 5. (*Id.* at 13-14.2.).

These are only a few examples, but they are enough to suggest the problem. Dr. Jensen’s hearing testimony acknowledged the use of a vacuum in certain embodiments but failed to explain how the vacuum source can be adopted and adapted to other embodiments. (Tr. (Jensen) at 721:23-722:6 (testifying that the embodiment of Fig. 2 uses a vacuum), 722:24-723:17 (concluding that a vacuum can be used in the embodiment of Fig. 5 simply because the figure comes after Fig. 2.). Dr. Jensen described his conclusion as “immediately evident.” (Tr. (Jensen) at 723:12-17.). However, Dr. Jensen’s opinions were conclusory and confusing. He did not explain why or how why mixing and matching different components of different embodiments met the claim limitations at issue. (CRBr. at 13 (citing *e.g.*, *W.L. Gore & Assocs. v. Garlock, Inc.*, 721 F.2d 1540, 1554 (Fed. Cir. 1983) (dismissing expert’s opinion supplementing gaps in anticipation theories as “pure unsupported assertion” and holding that anticipation “cannot be predicated on mere conjecture”))).).

HydraFacial relied on Mr. Leinsing’s testimony to argue that Respondent’s proposed combination of Greenberg’s embodiments would **not** have been “at once envisaged” by a person of ordinary skill. Mr. Leinsing explained, for example, that the Greenberg embodiments illustrated in Figures 1-4 and 6 include a vacuum. (Tr. (Leinsing) at 1173:6-18, 1176:1-11.). However, the embodiment of Figure 5 does not include a vacuum. Rather, Figure 5 of Greenberg relies solely on positive airflow. (*Id.* at 1177:15-1178:6.). These are not the same. A vacuum creates negative air pressure that draws in air and debris while positive airflow creates

positive pressure to push air out of a system. In other words, a vacuum is used for cleaning by suction while positive airflow is used to expel contaminants or to bring air into a space. Mr. Leinsing also explained that, based on Greenberg's statement that "the same reference numbers . . . refer to the same and like parts," JX-0010 at ¶ [0048], the parts in Figure 5 are different from the parts bearing same names but different reference numbers in other figures. (Tr. (Leinsing) at 1179:21-1180:25.). As Mr. Leinsing explained, the unique design of the parts shown in Figure 5 of Greenberg that set them apart from the other embodiments, including the "fittings going in and out of the supply containers," indicate that the system of Figure 5 is a "positive airflow system only" that is not designed to work with a vacuum source. (*Id.* at 1180:20-25, 1181:1-8 (opining that the recovery container of Figure 5 differs in design from the rest of the embodiments)).

As HydraFacial noted, Mr. Leinsing also explained that Dr. Jensen appeared to ignore the complexities and incompatibility of the different designs shown in Greenberg that do not allow a person of skill in the art to "at once envisage" the various combinations of components that Dr. Jensen tried to put together while he explicitly ignored the structure and components of each embodiment. (CRBr. at 15 (citing (Tr. Leinsing), at 1181:9-1184:6).). Mr. Leinsing's explanations were more compelling and explanatory than Dr. Jensen's. Therefore, even without other examples of how Greenberg does not practice each and every claim of the '287 patent that the Parties contested with respect to anticipation, Cartessa has failed to show that Greenberg anticipates claims 11, 12, 14, 16, and 22 of the '287 patent. (CRBr. at 14 (citing (Leinsing) at 1177:15-1178:6).).

C. The Asserted Claims of the '287 Patent Are Not Obvious

1. Overview of the Prior Art

Cartessa relied on Greenberg and the following four prior art references for obviousness. (RBr. at 26.). For the reasons discussed below, Cartessa did not present clear and convincing evidence that the Asserted Claims of the '287 patent are obvious.

a) Trueba (JX-0014)

U.S. Patent No. 6,684,880 to Trueba ("Trueba"), entitled "Applicator for Dispensing Bioactive Compositions and Methods for Using the Same," was filed on December 4, 2001. (JX-0014 at (10), (22), (54), (75).). The Parties did not dispute that Trueba is prior art to the '287 patent under pre-AIA 35 U.S.C. §§ 102(b), (e). (JSUI at 5.).

Trueba is a Hewlett Packard patent disclosing a "jet dispenser" that combines inkjet technology with pharmaceutical administration. (*See* JX-0014 at 1:7-12, 3:42-45, 3:49-51.).

b) Karasiuk (RX-0340)

U.S. Patent No. 6,695,853 to Karasiuk ("Karasiuk"), entitled "Microdermabrasion System and Method of Use," was filed on November 21, 2001. (RX-0340 at (10), (22), (54), (75).). The Parties did not dispute that Karasiuk is prior art to the '287 patent under pre-AIA 35 U.S.C. §§ 102(b), (e). (JSUI at 6.). Karasiuk was also before the patent examiner during prosecution of the '287 patent. (JX-0010 at (56).).

Karasiuk discloses a "microdermabrasion device, microdermabrasion system employing the device and method of performing microdermabrasion." (RX-0340 at 2:21-23.). The microdermabrasion device configured to contact the skin (element 10 in the Figures) is depicted in Figure 1 of Karasiuk. (RX-0340 at Fig. 1.). The microdermabrasion device 10 has an elongated handle 12 and a tube 14 extending through a passageway 12a. (RX-0340 at 5:4-19.).

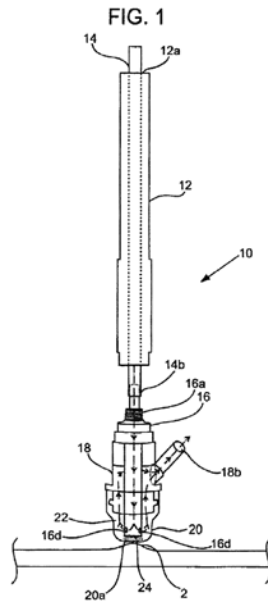
The tube 14 has a proximal end 14a and a distal end 14b and may be connected at its proximal end to a fluid reservoir 70. (*Id.* 5:20-23.). The proximal end of the tube 14a may be connected to a flow control valve and/or filter. (*Id.* at 5:23-30.). The distal end 14b is connected to functional block 16. (*Id.* at 5:30-42.). There is a vacuum head base 18 fitted over the functional block 16. (*Id.* at 5:43-52.). A treatment tip 20 is fitted over the vacuum head base 18 or alternatively is integrally machined or molded with the vacuum head base. (*Id.* at 5:53-67.). The treatment tip 20 includes an opening 20a “which targets an area of skin to be microabraded when tip 20 is applied to the skin.” (*Id.* at 5:67-6:5.). There is an annulus 22 that, at the distal portion of the functional block 16, is formed between the inside surface of the vacuum head base 18 and the outer surface of the functional block 16 and, at the proximal portion of the functional block 16, is formed between the inside surface of the tip 20 and the outer surface of the functional block 16. (*Id.* at 6:6-12.).

There is a passageway 16c that runs the full length of functional block 16 and thereby forms a “continuation of the flow path defined by tube 14 when tube 14 is connected to the proximal end of functional block 16.” (*Id.* at 6:12-18.). An abrasive member 24 is at the end of the functional block 16 and may be formed of abrasive particles of a size ranging from about 50 to 300 grit, or it may be formed of an abrasive member that is rounded, flared, concave, or elongated. (*Id.* at 6:18-28.). Coarser particles may be used for initial treatments while finer particles are maybe used for subsequent treatments. (*Id.* at 6:28-35.).

There are one or more openings 16d through the wall of the distal tubular structure of functional block 16 to establish flow pathways between passageway 16c and annulus 22. (*Id.* 6:35-42.). The vacuum head base 18 has an opening or port 18b for connection to a vacuum source such that, when the opening 20a is placed against skin tissue, a closed loop vacuum flow

path is established between the vacuum source and connecting line. (*Id.* at 6:42-51.). Figure 1 of Karasiuk is reproduced in Figure 33 below.

Figure 33: Figure 1 of Karasiuk Depicting Karasiuk’s Handheld Microdermabrasion Device



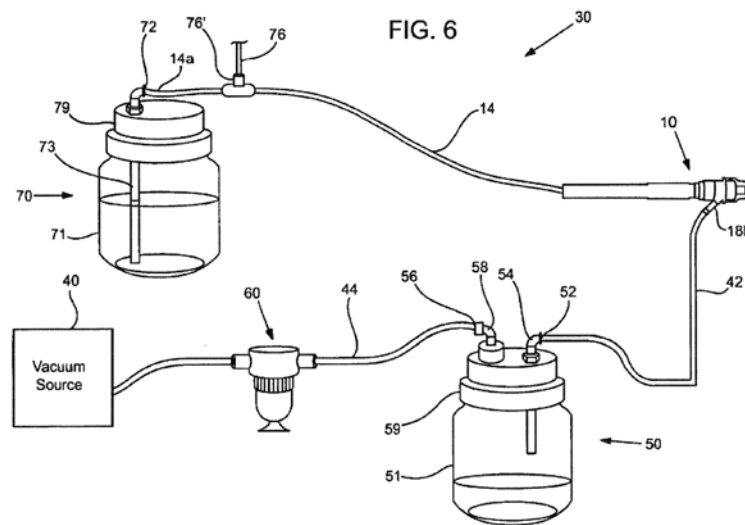
(RX-0340 at Fig. 1, 5:4-6:51.).

The microdermabrasion system 30 is depicted in Figure 6 of Karasiuk. (RX-0340 at Fig. 6.). The microdermabrasion device 10 is connected to a vacuum source 40 at opening or port 18b through vacuum line 42 with a collection reservoir 50 therebetween for receiving waste materials and, optionally, an inline filter 60 with a second vacuum line 44. (RX-0340 at 6:52-7:16.). The microdermabrasion device 10 is also connected to a fluid reservoir 70 through tube 14 that may be provided with a breather line 76 connected to tube 14. (*Id.* at 7:17-45.). The breather line 76 may be connected to tube 14 via a T-joint 76' or other interconnection, and includes an adjustable valve 78 or other means for varying the amount of air allowed into the tube 14. (*Id.*). The breather line allows the amount of vacuum to be adjusted for a given fluid and also allows for fluids having differing viscosities because fluids with differing viscosities

will require varying amounts of air to provide a constant vacuum level. (*Id.*).

During operation, fluid flows from fluid reservoir 70 through tube 14 and into the device 10, then out of the functional block 16 through openings 16d to be applied to the skin. (*Id.* at 7:65-8:22.). As the fluid continues out of the vacuum head base and into vacuum line 42, the exfoliated skin particles and any other waste are carried with the fluid into the collection reservoir 50. (*Id.* at 8:31-45.). Figure 6 of Karasiuk is reproduced below in Figure 34.

Figure 34: Figure 6 of Karasiuk's Microdermabrasion System



(*Id.* at Fig. 6, 6:52-7:45.).

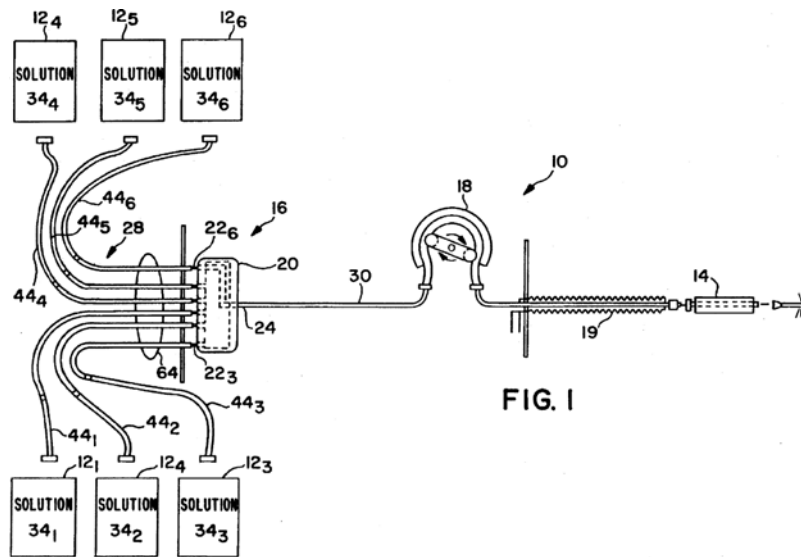
c) Palmer (JX-0015)

U.S. Patent No. 5,199,604 to Palmer et al. ("Palmer"), entitled "Irrigation System and Method for Delivering a Selected One of Multiple Liquid Solutions to a Treatment Site," was filed on September 2, 1991. (JX-0015 at (11), (22), (54), (75).). The Parties did not dispute that Palmer is prior art to the '287 patent under pre-AIA 35 U.S.C. §§ 102(b), (e). (JSUI at 6.).

Palmer discloses an "irrigation system and method for delivering a selected one of multiple liquid solutions to a treatment site" that includes "a plurality of solution reservoirs."

(JX-0015 at Abstract.). The irrigation system of Palmer can be used in connection with periodontal treatments. (*Id.* at 1:10-2:45.). Figure 1 of Palmer depicts an irrigation system 10 with a plurality of solution reservoirs 12, handpiece means 14 for delivering a selected one of the liquid solutions contained in one of the solution reservoirs 12 directly to a treatment site. (*Id.* at Fig. 1, 4:50-68.). There is a liquid solution coupling and selector means 16 for coupling the handpiece means 14 to a selected one of the liquid solutions in a respective solution reservoir 12, a pump means 18 for pumping the liquid solution from one of the reservoirs 12 to the handpiece means 14 for delivery to the treatment site. (*Id.* at 4:50-68). The liquid solution coupling and selector means 16 includes selector valve means 20 having a plurality of inputs 22, an output 24, and means for coupling one of the inputs to the output 24. (*Id.* at 5:1-9.). Figure 1 of Palmer is reproduced in Figure 35 below.

Figure 35: Figure 1 of Palmer Depicting Palmer's Irrigation System

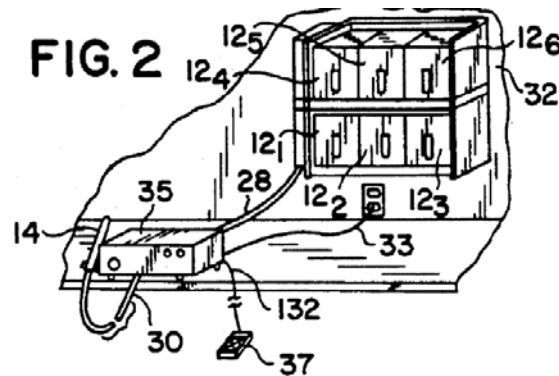


(*Id.* at Fig. 1, 4:50-5:9.).

Figure 2 of Palmer depicts wall-mounted reservoir storage means 32 with six (6) fluid reservoirs 12₁-12₆, handpiece 14, enclosure 35, first tubing means 28 that couples the enclosure

35 to the storage means 32, and second tubing means 30 that couples enclosure 35 to the handpiece 14. (*Id.* at Fig. 2, 5:10-6:51.). The enclosure 35 contains the pump means 18 depicted in Figure 1. (*Id.*). The power to operate the pump is provided through cord 33 upon depression of a conventional foot switch 37. (*Id.*). Figure 2 of Palmer is reproduced in Figure 36 below.

Figure 36: Figure 2 of Palmer Depicting Palmer's Irrigation System with Wall-Mounted Reservoir Storage Means



(JX-0015 at Fig. 2.).

Figures 11A-11C of Palmer depict a reservoir storage means 32 that either sits on a countertop 168, on a mobile cart 170, or inside a cabinet 172. (JX-0015 at Figs. 11A-11C, 9:57-10:2.). Figures 11A-11C of Palmer are reproduced in Figure 37 below.

Figure 37: Figures 11A-11C of Palmer Depicting Palmer's Means for Storage of Fluid Reservoirs

FIG. IIA

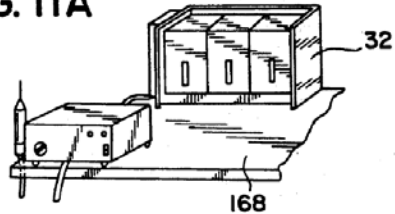


FIG. IIB

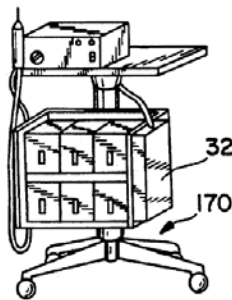
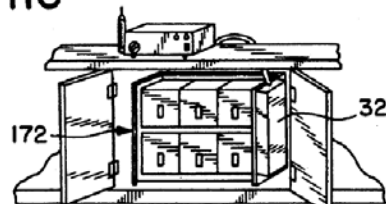


FIG. IIC



(JX-0015 at Figs. 11A-11C.).

d) Pond (JX-0016)

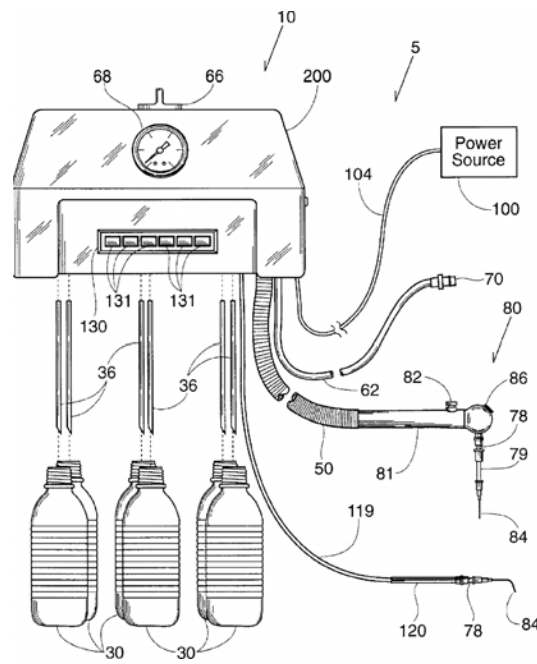
U.S. Patent No. 6,390,815 to Pond (“Pond”), entitled “Multiple Solution Dental Irrigator,” was filed on March 30, 2000. (JX-0016 at (10), (22), (54), (76).). The Parties did not dispute that Pond is prior art to the ’287 patent under pre-AIA 35 U.S.C. §§ 102(b), (e). (JSUI at 6.).

Pond, like Palmer, is directed to a dental irrigation device. (*See, e.g.*, JX-0016 at Abstract (“A fluid dispensing assembly that may be used to supply fluid for use in dental instrumentation

including irrigation, application, and aeration for treating a patient's mouth”), 1:60-63 (“the present invention provides an inexpensive apparatus and method for a fluid supply system that is capable of supplying a selected one of a plurality of fluid sources to a patient's mouth”), 2:32-40 (“the fluid dispensing assembly further comprises a single-fluid dental handpiece for delivering a dedicated fluid, such as air, to a patient's mouth . . . the invention comprises a fluid dispensing assembly whereby the dentist can supply pre-selected fluids to irrigate the field of operation within a patient's mouth”).).

Figure 2 of Pond depicts a fluid dispensing assembly 5 with fluid supply system 10 and multiple fluid reservoirs 30, wherein the fluid dispensing assembly is capable of supplying irrigation fluid from the fluid supply system to a dental handpiece 80. (JX-0004 at Fig. 2, 3:41-5:5; Tr. (Jensen) at 800:20-801:6; RDX-0002C.0096.). Figure 2 of Pond is reproduced in Figure 38 below.

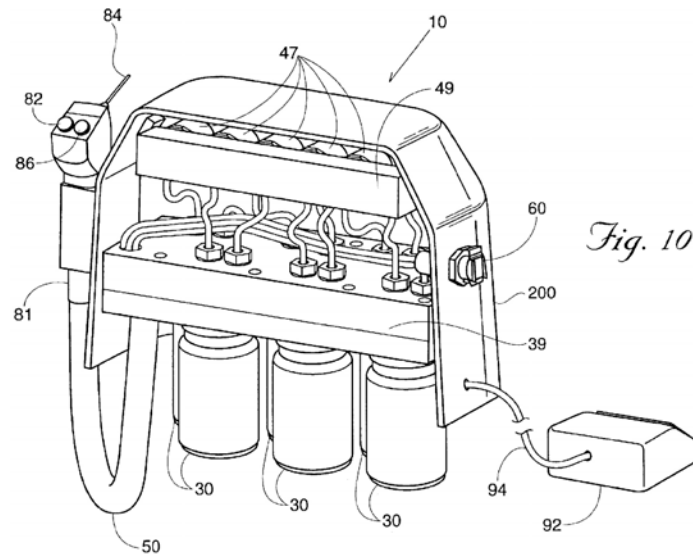
Figure 38: Fluid Dispensing Assembly Depicted in Figure 2 of Pond



(JX-0004 at Fig. 2, 3:41-5:5; Tr. (Jensen) at 800:20-801:6; RDX-0002C.0096.).

The fluid dispensing apparatus of Pond also has a fluid reservoir manifold 39 and a valve manifold 49 within a housing 200, as depicted in Figure 10 of Pond. Figure 10 of Pond is reproduced in Figure 39 below.

Figure 39: Fluid Dispensing Assembly Depicted in Figure 10 of Pond



(JX-0016 at Fig. 10, 7:16-8:54.).

2. Ground 1: Greenberg Alone Does Not Render Obvious Claims 11, 12, 14, 16, and 22

Cartessa asserted that to the extent Greenberg does not disclose certain claim elements of claims 11, 12, 14, 16, 22, and 26, those are obvious in view of Greenberg alone. (RBr. at 26.).

As an initial matter, because the term “block” recited in claim 26 was construed to be indefinite, claim 26 is invalid. Accordingly, Cartessa’s arguments on any claim elements recited in claim 26 are not addressed below.

For the reasons discussed below, Cartessa did not prove by clear and convincing evidence that Greenberg alone renders claims 11, 12, 14, 16, and 22 obvious.

a) Vacuum Source (claim elements 11[c], 11[f], 22[d]; claim 14)

Cartessa argued that one of ordinary skill would include the three-container configuration

depicted in Figure 5 of Greenberg with the negative pressure-only system of Figures 2, 4 or 6 of Greenberg to achieve the claimed vacuum source recited in claim elements 11[c], 11[f], and 22[d], and dependent claim 14 of the '287 patent. (RBr. at 27 (citing JX-0010 at ¶¶ [0077], [0079], Figs. 2, 4, 5, 6).). Relying on six (6) lines of Dr. Jensen's testimony and disclosures in Greenberg, Cartessa argued that Greenberg contemplates combining Figure 5 of Greenberg with other figures disclosed in Greenberg, and specifically, Figure 6 of Greenberg. (RBr. at 27 (citing Tr. (Jensen) at 724:15-21; JX-0010 at ¶ [0077])).).

The evidence on which Cartessa relied gravely falls short of clear and convincing evidence. For example, Dr. Jensen's scant testimony that Cartessa cited, and which is copied below, fails to provide any reasoning for why a skilled artisan would combine the teachings in Figures 5 and 6 of Greenberg to achieve the claimed vacuum source.

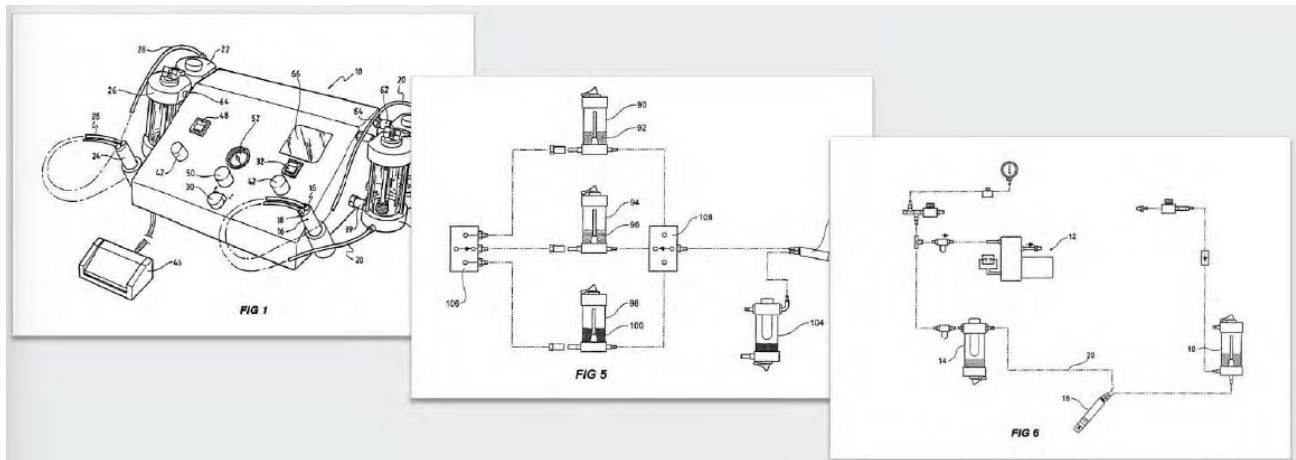
Q. . . . And so what is it that we're discussing here on slide 14, which shows JX 10, Figs. 1, 5, and 6?

A. So Fig. 1 is the sort of overall physical embodiment, and that's shown in Fig. 1 on the left here. And Figs. 5 and 6 are showing different configurations of how the physical embodiments can be set up.

(Tr. (Jensen) at 724:15-21 (discussing RDX-0002C.0014)).).

The demonstrative Dr. Jensen described in the quoted testimony (RDX-0002C.0014), reproduced below in Figure 40, also does not clarify or support his testimony.

Figure 40: Jensen Demonstrative Showing Figures 1, 5, and 6 of Greenberg



(RDX-0002C.0014 (citing JX-0010 at Figs. 1, 5, 6).).

The Greenberg disclosure that describes Figure 5 (JX-0010 at ¶ [0077]), which Cartessa cited, and copied below, again, does not explain or support Cartessa's contention.

[0077] This can be achieved in the present apparatus by having an apparatus with a plurality of supply containers housing different particles. As shown in FIG. 5 for example, there may be three different supply containers. Container 90 may house standard aluminium oxide particles 92, supply container 94 may house organically coated aluminium oxide particles 96 whilst supply container 98 may house organic particles 100. A supply container can be chosen to be in communication with handle 102 and recovery container 104 by the use of valve 106 that controls air flow into the respective supply container and valve 108 that than connects that supply container to the handle 102 and recovery container 104.

(JX-0010 at ¶ [0077].).

The Greenberg disclosure that describes Figure 6 (JX-0010 at ¶ [0079]) and to which Cartessa also cited is copied below.

However, it may also be possible to use one apparatus where the supply container is simply changed thereby changing the abrasive particles. Thus, an apparatus such as that shown in FIG. 6 may only have one supply container 18 and recovery container 14 and only one pneumatic source 12. To use different particles, the supply container can simply be replaced at the operator's discretion.

(*Id.* at ¶ [0079].).

Neither Cartessa nor Dr. Jensen provided any explanation how and why the two (2) Greenberg disclosures copied above (JX-0010 at ¶¶ [0077], [0079]) would inform a person of ordinary skill that Figure 5 can be combined with other figures, and in particular, Figure 6, which depicts a vacuum source. Cartessa and Dr. Jensen also failed to present any support for the contention that Figures 5 and 6 teach a *single* invention such that *Broadcom Corporation v. International Trade Commission* would be applicable, as Cartessa asserted. (RBr. at 27 (“Combining the vacuum source of Figure 6 with Figure 5 is an appropriate combination within the same reference that teaches a single invention”) (citing *Broadcom Corp. v. Int’l Trade Comm’n*, 28 F.4th 240, 253 (Fed. Cir. 2022) (finding that the PTAB did not improperly combine embodiments as Broadcom claimed because the figures at issue and the corresponding text “relate to a single invention”).).

Moreover, as HydraFacial’s expert, Mr. Leinsing, testified credibly and with evidence, Dr. Jensen did not explain why one of ordinary skill would have been motivated to alter explicit teachings of Greenberg to somehow achieve the claim limitations. (Tr. (Leinsing) at 1171:17-1172:1.). Referencing Figure 5, which Mr. Leinsing identified as Greenberg’s fourth embodiment (and a different embodiment than that depicted in Figure 6), and paragraph 77 of Greenberg annotated in his demonstratives, copied below in Figures 41 and 42, Mr. Leinsing provided the following testimony:

Q. Let’s turn to slide 7C.18, please.

This states it’s the Greenberg fourth embodiment from Fig. 5.

Can you explain what you’ve shown here?

A. Yes. So this is a fourth embodiment. It’s Fig. 5. And this system is showing three different microdermabrasion containers that have different particles, dry particles, of different size.

This particular embodiment is lacking, you know, vacuum. It doesn't have a pressure source. It shows only -- it discusses in the specification ***only in a positive airflow that come from valve 106***. And there's ***no explanation of how this is incorporated into the other embodiments, and nor does Dr. Jensen articulate that and show where those valves and vacuum sources would be connected***. Or then, if he does, he puts them in places that don't make sense, and we walked through that.

Q. Mr. Leinsing, I believe there's a bullet point on there indicating no flow control.

Can you explain what you mean by that?

A. Yes. So the previous embodiments, if we could step back one slide, I could point that out.

So, for example, there's no -- ***item 42 in Fig. 4, there's a flow control valve and it lays out where that's located***. And then, but in some cases there's not a flow control valve. So the fourth embodiment if we go back to the other slide ***in Fig. 5, there's no explanation of where you would put a flow control valve and which ones would need it***.

As we saw from previous embodiments, if it's a heavier particle, you would need more flow or less flow, but it doesn't explain like how that would work given the same amount of flow with three different types of particles.

Q. And moving to slide 7C.19, you've included an excerpt here from the Greenberg specification or publication, paragraph 77.

Can you explain why you included that?

A. Yes. So this is to explain that the fourth embodiment, or Fig. 5, of Greenberg is -- does not talk about vacuum. In fact, ***in paragraph 77, it talks about valve 106 that controls airflow into the respective supply container, and that's all it talks about. It doesn't talk about vacuum***.

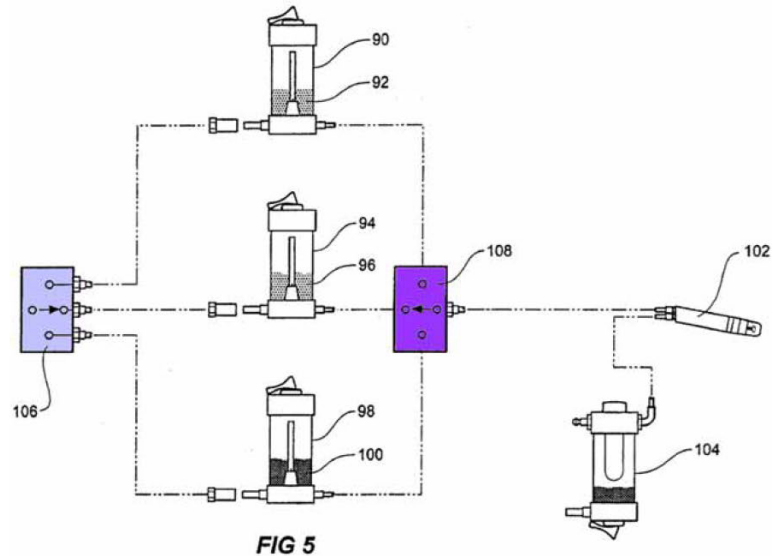
(Tr. (Leinsing) at 1177:15-1179:7 (emphases added).).

In other words, as Mr. Leinsing explained, Greenberg uses airflow for propelling its "abrasive particles" and does not disclose a vacuum as the '287 patent requires. Thus, the airflow structure of Greenberg would not work with the hydrodermabrasion, solution-based vacuum system of the '287 patent. (See Tr. (Leinsing) at 1180: 10-19, 1181:3-8.).

Figure 41: Leinsing Demonstrative Showing Greenberg's Fourth Embodiment (Figure 5) with No Vacuum and No Flow Control

- Microdermabrasion
- No vacuum
- Supply containers not designed for hydrodermabrasion
- Recovery container not designed for hydrodermabrasion
- Requires upstream air flow
- No flow control
- No explanation of how to combine with any embodiment

Fig. 5: Schematic



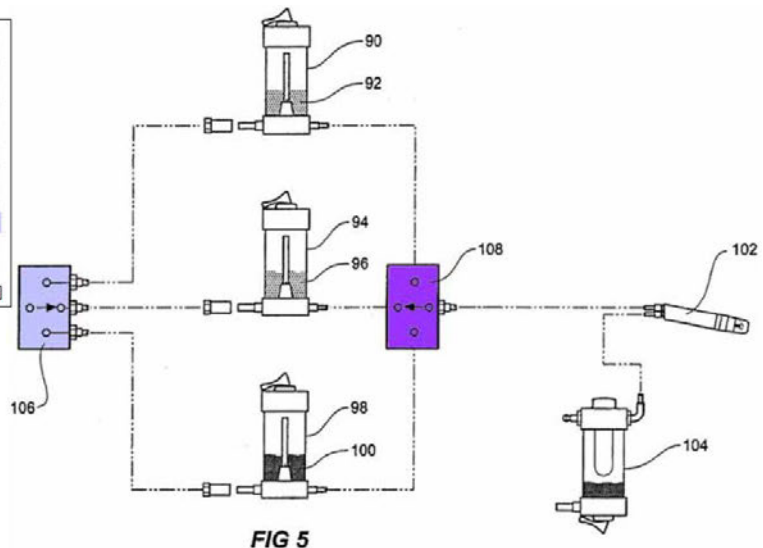
(CDX-0007C.0018 (citing JX-0010 at Fig. 5).).

Figure 42: Leinsing Demonstrative Showing Greenberg's Fourth Embodiment (Figure 5) with Valve that Controls Air Flow

[0077] This can be achieved in the present apparatus by having an apparatus with a plurality of supply containers housing different particles. As shown in FIG. 5 for example, there may be three different supply containers. Container 90 may house standard aluminium oxide particles 92, supply container 94 may house organically coated aluminium oxide particles 96 whilst supply container 98 may house organic particles 100. A supply container can be chosen to be in communication with handle 102 and recovery container 104 by the use of valve 106 that controls air flow into the respective supply container and valve 108 that then connects that supply container to the handle 102 and recovery container 104.

JX-0010 at [0077]

- Requires upstream air flow
- No flow control
- No explanation of how to combine with any embodiment



(CDX-0007C.0019 (citing JX-0010 at Fig. 5, ¶ [0077])).

Mr. Leinsing also credibly testified that, based on Greenberg's statement that "the same

reference numbers . . . to refer to the same and like parts” (JX-0010 at ¶ [0048]), the components in Figure 5 are different from the parts bearing same names but different reference numbers in other figures. Mr. Leinsing’s Hearing testimony is quoted below.

I talked about this during my deposition, and also I’ll explain here again, that this -
- for each one of the embodiments, particularly the supply containers, if you notice, it’s 26 and 18 for the first embodiment, then 26 and 18 for the second embodiment, 26 and 18 for the third embodiment, and then the fourth embodiment [Fig. 5] is different. This one [referring to Fig. 5] has 90 and 94 and 98. So a different number than the other embodiments.

And then we go to the fifth embodiment [referring to Fig. 6], and then it goes back to 18.

* * *

The recovery containers of all the embodiments for Greenberg are similar except for the fourth embodiment, or Fig. 5, which identifies it as 104 instead of 14 or 22, like the other embodiments, again, indicating that there’s something different about this recovery container.

(Tr. (Leinsing) at 1180:10-19, 1181:3-8.).

Mr. Leinsing explained that the unique design of the parts shown in Figure 5, which set them apart from the other embodiments, including the “fittings going in and out of the supply containers,” indicate that the system of Figure 5 is a “positive airflow system only” that is not designed to work with a vacuum source.

And you can also see that the fittings going in and out of the supply containers are different, which indicates that this is a different system or, to me, it’s an understanding that this is a positive airflow system only, that it’s not using positive airflow with vacuum, like some of the other ones, or vacuum alone.

(*Id.* at 1180:20-25.).

With respect to Figure 6, Mr. Leinsing pointed out that because it “just uses one supply container for dry particles,” there is “no ability to select among multiple containers,” i.e., “no switches or anything that you would switch between multiple containers or even multiple

assemblies.” (*Id.* at 1179:8-20.).

Dr. Jensen did not rebut the well-reasoned explanations that Mr. Leinsing provided in his testimony with respect to Figure 5 and the other figures disclosed in Greenberg. Specifically, not only did Dr. Jensen fail to present sufficient explanation why one of ordinary skill would have been motivated to alter Greenberg’s teachings to somehow arrive at these claim elements, but he also failed to present **any explanation** or evidence that there would have been an expectation of success in achieving the combination of the three-container embodiment depicted in Figure 5 with the vacuum source from Figure 6 or the other figures of the ’287 patent. *See, e.g., PharmaStem Therapeutics*, 491 F.3d at 1360 (“the burden falls on the patent challenger to show by clear and convincing evidence that a person of ordinary skill in the art would have had reason to attempt to make the composition or device, or carry out the claimed process, and would have had a reasonable expectation of success in doing so”).

For the foregoing reasons, Cartessa has failed to prove by clear and convincing evidence that Greenberg discloses the claimed vacuum source as recited in claim elements 11[c], 11[f], and 22[d]; and dependent claim 14.

b) Treatment Material/Treatment Fluid (claim elements 11[a], 11[c]-[f], 22[b], 22[d]-[f]; claims 12, 16)³⁶

Cartessa argued that Greenberg teaches the claimed “treatment material” and “treatment fluid” (“Fluid Limitations”) because Greenberg discloses at least five substances listed by the ’287 patent as a “fluid.” (RBr. at 27 (citing JX-0010 at ¶¶ [0022], [0024], [0069], [0072], [0077]) (other citation omitted)). According to Cartessa:

Greenberg discloses liquid, teaching the use of tea tree oil and others, so long as

³⁶ As discussed above in Section IX.B, Greenberg does not anticipate the Asserted Claims because Greenberg does not disclose, *inter alia*, “treatment material,” as recited in claims 11, 12, 16, and 22.

caution is taken to ensure that the liquid to particle ratio and chose [sic] of substances prevents clogging. JX-0010 at ¶ [0087]. Thus, because Greenberg teaches using an oil, such as tea tree oil, it would have been obvious to use a liquid because, e.g., benefits of use of a liquid such as fragrance is taught. *Id.*

(*Id.*).

None of the paragraphs upon which Cartessa relied (JX-0010 at ¶¶ [0022], [0024], [0069], [0072], [0077]) teaches a “fluid.” Greenberg at ¶ [0022] discloses “aluminium oxide **particles**” of various sizes (emphasis added). Greenberg at ¶ [0024] discloses “ground up **nut shells** chosen from the selection including but not limited to walnut, hazelnut, brazil and almond nut shells or a mixture thereof” (emphasis added). Greenberg at ¶ [0069] discloses the use of “ground up” or “pulverized [walnut shells] . . . **sufficiently dry** not to cause blocking in the tubes of a micro-dermabrasion apparatus and yet still have levels of oils and other substances that are left as a **residue** against the skin on which they are impacted” (emphases added). Greenberg at ¶ [0072] discloses mixing “highly abrasive particles such as aluminium oxide . . . with organic material that may not be abrasive, one achieves not only good abrasion but also simultaneous treatment of the skin.”

As referenced, Greenberg at ¶¶ [0022] and [0024] only disclose **dry particles** such as aluminium oxide particles and nut shells, and do not mention any type of “fluid” at all. (*Id.* at ¶¶ [0022], [0024].). Greenberg also explicitly defines “aluminium oxide” as “highly abrasive particles.” (*Id.* at ¶ [0072].).

With respect to Greenberg at ¶ [0069], the use of “oils or other substances” are taught to be “**left as a residue against the skin**” and not as a fluid-like delivery vehicle for the “ground up” or “pulverized” nut shells. (*Id.* at ¶ [0069] (emphasis added).). There was no dispute that Greenberg does not disclose using oils, fragrances, or any other “liquid” as a **standalone**

treatment material. (Tr. (Jensen) at 1031:14-19 (“Q. . . . So the oils are always used in conjunction with the particles, right? A. I believe that is true for Greenberg, that the liquid would be used in conjunction with a treatment material that contains particles.”); Tr. (Leinsing) at 1165:15-1166:6 (testifying that the oils used in Greenberg provide a coating of the particles for the purpose of imparting fragrance); JX-0010 at ¶¶ [0011], [0082], [0087]-[0088].).

With regard to Greenberg at ¶ [0072], Greenberg teaches mixing “highly abrasive particles such as aluminium oxide” with “organic material that may not be abrasive” but does not specify what those non-abrasive organic materials could be. (*Id.* at ¶ [0072].).

Moreover, Greenberg at ¶ [0077] discloses the following:

This can be achieved in the present apparatus by having an apparatus with a plurality of supply containers housing different particles. As shown in FIG. 5 for example, there may be three different supply containers. Container 90 may house standard aluminium oxide particles 92, supply container 94 may house organically coated aluminium oxide particles 96 whilst supply container 98 may house organic particles 100. A supply container can be chosen to be in communication with handle 102 and recovery container 104 by the use of valve 106 that controls air flow into the respective supply container and valve 108 that than connects that supply container to the handle 102 and recovery container 104.

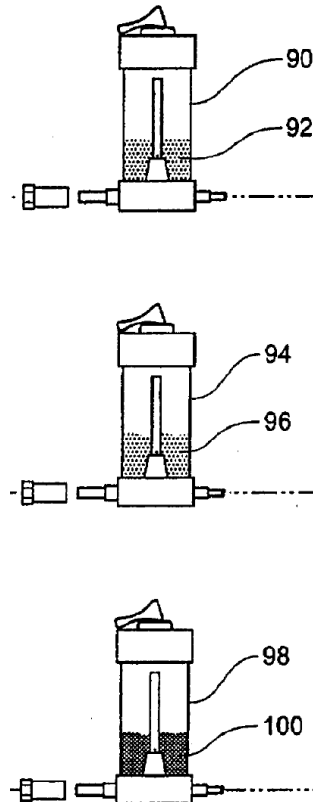
(JX-0010 at ¶ [0077].).

Again, there is no mention or description in Greenberg at ¶ [0077] of a “fluid,” as Cartessa contended. (RBr. at 27 (citations omitted).). As discussed above, Greenberg defines “aluminium oxide particles” as “highly abrasive particles.” (*Id.* at ¶ [0072].). With respect to “organic particles,” Greenberg discloses that they may include, *inter alia*, dry particles such as nut shells and fruit kernels, as well as particles with a surface film pat that remains on the surface being treated. (*See id.* at ¶¶ [0037], [0070].). Greenberg is not clear on whether fluids of any type would be considered an “organic particle.”

Moreover, the “standard aluminium oxide particles 92,” “organically coated aluminium

oxide particles 96,” “organic particles 100” listed in ¶ [0077] are depicted in Figure 5 as “*particles*” of different sizes, which is replicated below in Figure 43.

Figure 43: “Particles” Depicted in Figure 5 of Greenberg



(*Id.* at Fig. 5.).

Additionally, as discussed above with respect to what Cartessa argued with respect to anticipation that applies here, Greenberg expressly teaches *away* from using liquids. *See, e.g., UCB, Inc. Actavis Labs. UT, Inc.*, 65 F.4th 679, 692 (Fed. Cir. 2023) (“A reference teaches away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken.”) (internal quotations omitted) (citations omitted). This is particularly evident from at least the following Greenberg disclosures:

[0085] A micro-dermabrasion operator may provide the consumer with a choice of mixing various abrasive particles or particles with various oils/fragrance particles which are then used in the skin treatment[.] Of course, ***great care needs to be taken to ensure that the particle do not become too wet whereupon they will not be able to move freely through the apparatus but will stick to the container and the various tubes.***

[0087] It is to be understood that other additions to the synthetic or organic materials may be used. . . . They may be various, such as tea tree oils and essences, colourings and so on. The only requirement would be that ***as a collection of particles they cannot posses [sic] a coating that will provide for adhesion between the different particles.***

(JX-0010 at ¶¶ [0085] (emphasis added), [0087] (emphasis added)).

Dr. Jensen did not explain why one of ordinary skill would have been motivated to substitute the dry particles taught in Greenberg with fluids, other than the oils and fragrances, which Greenberg specifically teaches are to be used to ***coat*** the dry particles or leave a ***residue*** on the skin. Oils appear to be a skin enhancer that when mixed with dry particles permit a residue on the skin that softens or exfoliates. Dr. Jensen also failed to present any explanation or evidence that there would have been an expectation of success in using the systems described in Greenberg with fluids, especially in light of Greenberg’s explicit warning that the particles should “not become too wet” so as to clog the systems. *See, e.g., PharmaStem Therapeutics*, 491 F.3d at 1360.

For these reasons, Cartessa has failed to prove by clear and convincing evidence that Greenberg discloses the Fluid Limitations recited in claim elements 11[a], 11[c]-[f], 22[b], and 22[d]-[f]; and dependent claims 12 and 16.

c) Sequentially (claim 12; claim element 22[f])

Cartessa argued that Greenberg describes using a first highly abrasive treatment followed by a treatment with organic particles, intended to leave a residual layer on the skin. (RBr. at 27-

28 (citing JX-0010 at ¶ [0084])). Cartessa argued that “[t]o the extent not explicitly recited in Greenberg, switching valve positions provides treatment from the different supply containers at different times.” (*Id.* at 28 (citing Tr. (Jensen) at 752:8-13)).

With respect to anticipation of the term “sequentially” recited in claim 12 and claim element 22[f], Cartessa relied on ¶¶ [0077] and [0089] in support of its contention that: (i) “valves 106 and 108 of the three-container embodiment [depicted in Figure 5] control air flow and select whether the fluid from container 90, 94, or 98 will be in communication with the fluid control device/block/collection lumen and handle” (RBr. at 17 (citing JX-0010 at ¶ [0077])); (ii) “fluid will go from the first, second (one additional), or third container (90, 94, 98) through the block (108) to the handpiece, based on the valve position” (*id.* (citing JX-0010 at ¶ [0077], Fig. 5); and (iii) “Greenberg discloses that a person may wish to have a first treatment followed by a second treatment,” which is “achieved by switching valve position” (*id.* (citing JX-0010 at ¶ [0089]; Tr. (Jensen) at 752:1-13, 767:10-768:9)).

HydraFacial tersely rebutted Cartessa’s contention in its Pre-Hearing Brief (CPBr. at 114) but did not provide any rebuttal argument in its Reply Post-Hearing Brief (CRBr. at 3-16). Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

Although Greenberg may teach sequentially drawing treatment *particles* from supply containers to a handpiece (claim 12) or sequentially delivering treatment *particles* from supply containers to a supply conduit (claim element 22[f]) through the use of valves as Cartessa contended, claim 12 and claim element 22[f] also recite “treatment materials” as taught and contemplated by the ’287 patent, i.e., in a form that can *flow* such as fluid, liquid or gel. (*See, e.g.*, JX-0001 at Abstract (“A fluid line provides fluid communication between the console and the handpiece assembly. A manifold system is coupled to the console and controlled by the user

input device. The manifold system is configured to hold releasably a plurality of fluid sources and deliver fluid from at least one of the plurality of fluid sources to the handpiece assembly.”), 2:32-35, 2:39-43, 2:56-60, 5:47-54 (“As used herein, the term ‘treatment material’ is a broad term and includes, but is not limited to, medicament, a substance tending to flow or conform to the outline of its container such as fluid, gas, liquid (e.g., serums, water, saline, etc.), gel, fluidized material, additives, and/or a plurality of fine solids. The general term ‘fluid’ is used throughout synonymously with the term ‘treatment material’ and is to be given the same broad definition.”).). This is in stark contrast to the dry abrasive particles taught in Greenberg.

Moreover, for the reasons discussed above, Cartessa did not provide sufficient evidence that one of ordinary skill in the art would have been motivated to modify Greenberg’s dry abrasive particles with the type of fluid disclosed in the ’287 patent or that there would be an expectation of success in doing so. *See, e.g., PharmaStem Therapeutics*, 491 F.3d at 1360.

Accordingly, Cartessa has failed to prove by clear and convincing evidence that Greenberg discloses that the *treatment material/treatment fluid* recited in claim 12 is sequentially drawn to the handpiece or sequentially delivered to the supply conduit recited in claim element 22[f].

3. Ground 2: Greenberg in View of Trueba Does Not Render Obvious Claims 11, 12, 14, 16, and 22³⁷

Cartessa contended that Greenberg in view of Trueba renders obvious claims 17-19, 22, 24-25, and 30-32 of the ’287 patent. (RBr. at 28.). Like Ground 1, Cartessa’s arguments on any claim elements recited in invalid claim 26, and claims 30-32, which depend from claim 26, are

³⁷ Cartessa did not rely on Trueba for the noted deficiencies in Greenberg. For example, Cartessa did not allege that Trueba discloses the Fluid Limitations. (*See* RBr. at 28-34.). Thus, Cartessa left those deficiencies of Greenberg unaddressed.

not addressed below. *Ibormeith IP*, 732 F.3d at 1378 (noting that if an independent claim is indefinite, “the dependent claims . . . would also be invalid, because they incorporate the elements of [the] independent claim”).

With respect to claim 12 and claim element 22[f], Cartessa argued in the alternative that in the event that HydraFacial alleged Greenberg does not disclose the “sequentially” limitation, Trueba teaches automatic switching between first and second treatment fluids. (RBr. at 29 (citations omitted)).

For the following reasons, Cartessa did not prove by clear and convincing evidence that Greenberg in view of Trueba renders obvious claims 12, 17-19, 22, and 24-25 because: (i) Trueba is not analogous art; (ii) there is insufficient evidence that one of ordinary skill in the art would have been motivated to combine Greenberg with Trueba; and (iii) there is inadequate evidence of a reasonable expectation of success in combining the teachings of Greenberg with those taught in Trueba.

a) Trueba Is Not Analogous Art

“[A] ‘reference qualifies as prior art for an obviousness determination only when it is analogous to the claimed invention.’” *LKQ Corp. v. GM Glob. Tech. Operations LLC*, 102 F.4th 1280, 1296 (Fed. Cir. 2024) (en banc) (quoting *Airbus S.A.S. v. Firepass Corp.*, 941 F.3d 1374, 1379 (Fed. Cir. 2019)); see also *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004) (citation omitted). The Federal Circuit identified a two-part test to determine whether a reference qualifies as analogous art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed; and (2) if the reference is not within the field of the inventor’s endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved. *LKQ Corp.*, 102 F.4th at 1297. The analogous art requirement is “meant to

defend against hindsight.” *Id.* at 1296 (citations omitted).

Cartessa stated that “Trueba was chosen because it comes from a similar field of as the ’287 Patent and the inventor was trying to solve a similar problem to the ’287 Patent: the application of fluid from different containers via a controller including pre-set protocols.” (RBr. at 28 (citing JX-0014 at 2:64-3:3, 4:65-5:17; Tr. (Jensen) at 732:8-12, 734:1-4).). According to Cartessa, Trueba “demonstrates that technology usable for administration of fluids from different contains [sic] can stretch to a broad range of technologies.” (*Id.* (citing JX-0014 at Abstract).). Cartessa thus argued that “Trueba is in the same field of endeavor.” (*Id.* at 29.).

However, as HydraFacial pointed out, “Trueba discloses a jet dispenser and combines inkjet technology and pharmaceutical administration.” (CRBr. at 17 (citing JX-0014 at 1:7-12); *see also id.* at 3:42-45 (“The present disclosure concerns an applicator for inhalational or mucosal delivery of a bioactive composition using a jet dispenser, such as a piezoelectric or thermal jet dispenser”).). Trueba explicitly acknowledges that the claimed invention “combines the **unrelated** technologies of pharmaceutical administration and inkjet technology.” (JX-0014 at 1:10-12 (emphasis added).).

Additionally, Mr. Leinsing provided credible and persuasive testimony that Trueba is neither in the same field of endeavor as the ’287 patent (i.e., skin treatment systems), nor is pertinent to the particular problems that the ’287 patent solved (i.e., reducing the pain and recovery time associated with dry microdermabrasion on skin, improving treatment efficacy, and improving the rapidity with which practitioners can perform treatments with multiple fluids). His testimony on this issue is reproduced below.

Q. . . . Can you explain briefly what the Trueba reference is about?

A. Yes. So the Trueba reference is a -- it’s some guys at HP, Hewlett Packard,

they came up with a print head that dispenses pixel size drops of ink, and then now came up with an idea to, for medicinal purposes, to dispense drugs that could be used for asthma or to print on the skin, like a patch or something.

So it's just very different technology and not related in any way to a hydrodermabrasion system.

Q. . . . Do you have an opinion as to whether Trueba is in a different field of endeavor than the '287 patent?

A. It's a completely different field.

Q. . . . And do you have an opinion as to whether Trueba is pertinent to the particular problems that the '287 patent solved?

A. It's not directed to the same problems as the '287. In fact, it doesn't even have a manifold or a fluid collection member. Each one of those print heads, they are all separate. They don't go into like a central collection lumen or anything. They are just little micro dots of ink or pharmaceutical drugs, and they come out their own. They don't go into a collection lumen. ***It's completely different. Doesn't solve any of the problems that were addressed by the '287 patent.***

(Tr. (Leinsing) at 1187:25-1189:1 (emphasis added).).

Additionally, the case law Cartessa cited in support of its argument that Trueba (and Palmer and Pond) are analogous art (RBr. at 29, 36, 55) provides nothing more than general propositions of what analogous art is. They fail to support why these references—which are in different fields of endeavor and are arguably quite far removed from the problems that '287 aimed to solve—are analogous. (*Id.* (citing *Comaper Corp. v. Antec, Inc.*, 596 F.3d 1343, 1351 (Fed. Cir. 2010); *Daedalus Blue LLC v. Vidal*, 2023-1313, 2024 WL 1091316, at *1 (Fed. Cir. Mar. 13, 2024).).

For example, in *Comaper*, the Federal Circuit disagreed with the district court's conclusion that the prior art asserted by the defendant was not analogous prior art because the asserted “patent's field of endeavor deals with cooling computers and electronic components” and the asserted prior art references each involves “cooling computer electronics using fans to

draw cool ambient air.” *Comaper*, 596 F.3d at 1350-51.

In *Daedalus Blue*, the Federal Circuit affirmed the PTAB’s finding that the one problem identified in the patent at issue, ““not permit[ting] a user to automatically select between multiple storage options’ and not addressing ‘[files] with varying storage or performance requirements or equipment with varying capacities and performance levels’” was reasonably pertinent to the problem addressed in the prior art reference: “namely that prior art storage access methods did not permit programmers to write code that would allow users to automatically select the appropriate storage devices based on ‘high or logical level’ concepts, such as ‘data sets, data bases and the like.’” *Daedalus Blue*, 2024 WL 1091316, at *1.

The field of endeavor specified in *Comaper* and the problem purportedly solved by the patent in *Daedalus Blue* are, on their face, similar. For the reasons discussed above, that is not the situation here. Thus, neither case supports Cartessa’s argument that Trueba, a patent involving inkjet technology to administer pharmaceutical compositions, is analogous to the ’287 patent’s claimed invention.

Accordingly, it is a finding of this ID that Trueba is not analogous prior art to the ’287 patent.

b) Cartessa Failed to Show a Motivation to Combine or a Reasonable Expectation of Success

Cartessa presented the following arguments and evidence in its Initial Post-Hearing Brief with respect to a motivation to combine the teachings of Greenberg with Trueba:

Greenberg itself suggests to a skilled artisan that electronic implementation of the fluid selection could be desirable, by employing electric solenoids to select the fluid container which are frequently electronically deployed, JX-0010 at ¶[0050], by suggesting that the device can be combined into different physical arrangements, e.g., showing that Figure 5 can be implemented into the other figures, *id.* at ¶[0077], and written in a manner to accommodate other changes, *id.* at ¶[0088]-[0090].

Trueba discusses computerized selection of fluids administered from the various containers according to particular sequences. JX-0014 at 12:9-13:3. It would be obvious to a POSITA to computerize Greenberg's apparatus in light of Trueba's disclosure. Jensen, Tr. at 733:19-735:8.

(RBr. at 29.).

According to Dr. Jensen, "Greenberg basically teaches multiple containers and a vacuum driven system to treat skin through a handpiece" and "Trueba is teaching a POSITA computerization of that process." (Tr. (Jensen) at 733:14-17.). Based on his understanding, Dr. Jensen opined that Greenberg and Trueba "are both regarding fluid flow and control fluid flow and fluid flow from multiple containers to a single location. And the combination of the two, is, for a POSITA, not complicated." (*Id.* at 733:21-25; *see also id.* at 734:1-4 ("So they are both regarding delivery of fluids for treatments, so they are from the same field of medical devices.")). Dr. Jensen's opinion is not compelling.

To being with, Greenberg and Trueba are not merely directed to "control[ling] fluid flow from multiple containers to a single location" and are not from similar fields of endeavor, as discussed above in Sections IX.B.1 and IX.C.3(a). As Mr. Leinsing explained, Greenberg is directed to a microdermabrasion system that involves air and dry particles, as opposed to Trueba, which involves a device designed to eject small, pixel-sized droplets of fluid. (Tr. (Leinsing) at 1189:2-11.).

Q. . . . [Y]ou heard Dr. Jensen's testimony related to Greenberg and Trueba.

Do you agree with him about any opinions whether there's a motivation to combine these references?

A. There wouldn't be any motivation to combine a dry microdermabrasion system that, keep in mind, has air and dry particles into a device that has super small pixel size droplets of fluid. I mean, if you try to put particles of sand through that, I don't understand how one can work with the other. They're just ***completely different technologies***.

(Tr. (Leinsing) at 1189:2-11 (emphasis added).).

That they both involve some type of “fluid from multiple containers to a single location” does not negate the fact they involve different technologies and are not in the “same” **broad** field of “medical devices,” as Dr. Jensen opined. (Tr. (Jensen) at 734:1-4.).

Moreover, in support of its argument that it would have been obvious to a skilled artisan to “computerize Greenberg’s apparatus in light of Trueba’s disclosure” (RBr. at 29), Cartessa relied in-part on the following testimony Dr. Jensen provided:

Q. What sort of benefits would one get if you took the computerization of Trueba and added it to the Greenberg device?

A. To automate things, and at the time Greenberg was filed, it was certainly, and I was working in that industry myself -- I don’t remember the exact dates -- but, I mean, automation and instrumentation, computerization of these types of devices was broadly accepted and broadly used.

Q. Would that change be complicated or beyond the skill of an ordinarily skilled artisan?

A. No, not at all. It would be **uncomplicated**.

Q. How would one go about adding the computerization of Trueba to a Greenberg device?

A. So the implementation of the -- it’s called a logical controller, basically, for selecting fluids based on conditions, opening, closing valves -- that’s standard engineering, you know, in the interface between electrical computer engineering and mechanical engineering, with a focus on biomedical applications.

Q. Would a person with a technical degree be capable of doing something like that?

A. Yes, absolutely.

(Tr. (Jensen) at 734:12-735:8 (emphasis added).).

By describing the modification to Greenberg to include the computer technology of Trueba as “uncomplicated,” Dr. Jensen appears to have opined that there would have been an

expectation of success in doing so. However, his testimony is problematic for the following reasons.

First, as noted in Section VI and the set forth in the *Markman* Order, the definition of one of ordinary skill in the art with respect to the '287 patent includes “a degree in science or engineering plus a minimum of three years of experience in the medical device industry” and “skin treatment apparatus design,” which includes a bachelor’s degree in a technical discipline such as engineering, physics, computer sciences, or medicine.” (*Markman* Order at 6.). The definition does not necessarily include skill or expertise in the areas of “electrical computer engineering and mechanical engineering, with a focus on biomedical applications,” as Dr. Jensen testified. Thus, Dr. Jensen’s assumption that one of ordinary skill with respect to the '287 patent would know how to “computerize” a device such as that disclosed in Greenberg is not clearly persuasive.

Second, Dr. Jensen did not explain in sufficient detail or provide corroborative evidence that a “logical controller” of a device like Trueba, which involves pharmaceutical compositions and not dry particles, could be successfully incorporated into the microdermabrasion device of Greenberg to control the valves and flow of Greenberg’s dry particles. In light of Dr. Jensen’s terse and unsupported testimony, his opinions are unsupported and speculative at best.

Third, with respect to Dr. Jensen’s assertion that “automation and instrumentation, computerization of these types of devices was broadly accepted and broadly used,” the fact that Cartessa could not find a prior art reference disclosing “automation,” “instrumentation,” and/or “computerization” of a device that is, on its face, more closely related to the microdermabrasion technology disclosed in Greenberg, and the hydroabrasion technology disclosed in the '287 patent than Trueba, undermines Dr. Jensen’s testimony.

Even if there is some merit to Dr Jensen’s testimony, for the reasons discussed above, Dr. Jensen’s ultimate opinion that there would have been a motivation to combine these two (2) disparate technologies, and doing so would have been “not complicated,” is not compelling and unsupported by any record evidence.

Accordingly, Cartessa failed to prove by clear and convincing evidence that one of ordinary skill in the art would have been motivated to combine Greenberg with Trueba with a reasonable expectation of success. *See, e.g., PharmaStem Therapeutics*, 491 F.3d at 1360.

c) Claims 12, 17-19, 24-25, and Claim Element 22[f]

Because it is a finding of this ID that Trueba is not analogous art, and that Cartessa failed to demonstrate that one of ordinary skill would have been motivated to combine Greenberg with Trueba with a reasonable expectation of success, Cartessa did not prove by clear and convincing evidence that the combination of the prior art references renders claims 12, 17-19, and 24-25 and claim element 22[f] obvious.

4. Ground 3: Karasiuk in View of Palmer Does Not Render Obvious Claims 11, 12, 14, 16, and 22

In addition to Greenberg, Cartessa relied on Karasiuk as a primary obviousness reference and Palmer, Pond, and Trueba as secondary obviousness references. (RBr. at 34-70.). Cartessa argued that claims 11, 12, 14, 16, 22, and 26 are invalid as obvious based on Karasiuk in view of Palmer. (RBr. at 34.).

As an initial matter, because the term “block” recited in claim 26 was construed to be indefinite, claim 26 is invalid. Accordingly, Cartessa’s arguments on any claim elements recited in claim 26 are not addressed below.

With respect to the combination of Karasiuk and Palmer, the Parties contested whether

Palmer, a reference directed to dental irrigation systems, is analogous art to the '287 patent. (CRBr. at 24-25; RBr. at 36.). For the reasons explained below, Palmer does not qualify as analogous art.

Additionally, the Parties disputed whether Cartessa proved obviousness for two (2) elements of claims 11, 12, 14, 16, and 22: (i) multiple fluid containers; and (ii) a handpiece connected to a console. (CRBr. at 17-25; RBr. at 36-42.). For the reasons explained below, Cartessa failed to prove by clear and convincing evidence that either “multiple fluid reservoirs” or “handpiece connected to a console” would have been obvious to one of ordinary skill.

As detailed below, HydraFacial successfully argued, and proved with evidence, that: (i) Palmer is not analogous art; (ii) “multiple fluid reservoirs” would not have been obvious; and (iii) a “handpiece connected to the console” would not have been obvious.

a) Palmer is Not Analogous Art

Cartessa argued that Palmer is analogous art because it is “both in the same field of endeavor and structurally similar.” (RBr. at 36.). Specifically, Cartessa contended that Palmer is in the same field of endeavor as the '287 patent because Palmer is directed to a “medical irrigation device.” (RBr. at 36.). Cartessa also argued that Palmer’s device is reasonably pertinent to the particular problem with which the '287 patent was involved because Palmer is directed to “delivering fluids from containers to a handpiece.” (*Id.*).

The evidence that Cartessa relied upon falls short of proving clearly and convincingly that Palmer is in the same field of endeavor as the '287 patent. Cartessa’s expert, Dr. Jensen, testified that “medically,” the '287 patent and Palmer “might be in *different* fields[.]” (Tr. (Jensen) at 803:17-23 (emphasis added).). However, he also testified that “technically, the fields are the *same*.” (*Id.* (emphasis added).). Dr. Jensen’s inconsistent testimony is quoted below.

Q. . . . Can you describe whether or not the art would be available and why under this motivation slide?

A. Right. So the art and physics and engineering that is used in these references are similar. Movement of fluids using pressure differentials, multiple treatment containers and a single outlet, and operated by the actuation of valves.

* * *

Q. With respect to the first bullet, do you have an opinion on whether or not the art represents things that are structurally similar?

A. Yes. As we just went over the last few slides, the devices are all very structurally similar -- multiple fluids, contemplated manifolds, different containers, and a single handpiece. So the arts of those references is definitely similar.

Q. Do they come from similar fields or different fields?

A. "Fields," meaning different types of devices or --

Q. Fields meaning --

A. Oh, sorry, fields. Medically it might be different fields, but, technically, the fields are the same. And so a design engineer looking to create a device used for treatment would not just stay within the medical area that is relevant to that particular treatment.

You look beyond that. You look into the technical -- what's available and what is being used technically at that time.

(Tr. (Jensen) at 802:2-8, 803:9-804:15; RDX-0002C.0098.).

Based on Cartessa's arguments and Dr. Jensen's testimony, Cartessa's position appears to be that, because Palmer's device also involves movement of fluids using pressure differentials and has many similar structural features, Palmer is necessarily in the same field of endeavor. Figure 44 below depicts the demonstrative that Dr. Jensen discussed in his testimony. Dr. Jensen's demonstrative notes that both Palmer and the '287 patent are "structurally similar," both involve movement of fluid using pressure differentials, and both are medical devices for "delivery of medical fluids to subjects."

Figure 44: Jensen Demonstrative Summarizing His Obviousness Positions

Obviousness Summary	
▪ Motivation to combine for computerization:	Structurally similar art: movement of fluid using pressure differentials conduits to a single outlet by actuation of valves.
▪ Similar fields:	Medical devices for delivery of medical fluids to subjects.
▪ Obvious benefits applicable to each:	Computerization, automation, clarity, precision, ease of use, modernization
▪ Ordinary in 2005 to automate through computerization	This would result in expected improvements using known techniques.

(Tr. (Jensen) at 802:2-804:18; RDX-0002C.0098.).

However, Cartessa did not conduct the proper legal analysis for determining the field of endeavor. Determining the field of endeavor requires reference to the “explanations of the invention’s subject matter in the patent application.” *In re Bigio*, 381 F.3d at 1325. Cartessa’s argument and Dr. Jensen’s testimony do not cite to or otherwise rely on the subject matter of the inventions disclosed in the ’287 patent. For this reason, it is a finding of this ID that Cartessa’s “field of endeavor” argument and evidence are legally insufficient.

In addition to the legal insufficiency with Cartessa’s analogous art analysis, Cartessa’s argument and Dr. Jensen’s opinion testimony are not consistent with the disclosure of the ’287 patent or the disclosure of Palmer. For example, the ’287 patent is directed to skin treatment devices, not medical devices for “delivery of medical fluids.” (JX-0001 at Abstract (“An apparatus for treating skin The handpiece assembly is configured to treat skin”), 1:30-32 (“The invention relates in general to the field of skin treatment, and more specifically to apparatuses and methods for treating a person’s skin.”), 22:29 (cl. 11) (“A skin treatment apparatus . . .”).). In contrast, Palmer is directed to dental irrigation devices. (JX-0015 at 1:10-

17 (“This invention relates generally to methods and apparatus for delivering liquid solutions to treatment sites, such as in connection with periodontic procedures and, more particularly, to irrigation systems and methods for delivering a selected one of multiple liquid solutions to a treatment site. The advantages of irrigation as a viable periodontal treatment are well documented.”), 11:44-46 (cl. 11) (“Periodontal irrigating system for delivering one of a plurality of liquid irrigating solutions to a treatment site in an oral cavity”).). Because neither Cartessa’s arguments nor Dr. Jensen’s testimony are consistent with the disclosures of the ’287 patent and Palmer, they are given little, if any, weight. Thus, Cartessa failed to introduce sufficient evidence to prove that Palmer is in the same field of endeavor as the ’287 patent.

However, even if a reference is not in the same field of endeavor as the patent, the reference is analogous art if the reference “is reasonably pertinent to the particular problem with which the inventor is involved.” *LKQ Corp.*, 102 F.4th at 1296. Cartessa argued that the ’287 patent is directed to the problem of “delivering fluids from containers to a handpiece.” (RBr. at 36.). Cartessa’s argument is unpersuasive because Cartessa did not cite to evidence in support of its contention, and the argument is not consistent with the disclosure of the ’287 patent.

According to the ’287 patent, the problems addressed by the ’287 patent are: the pain associated with dermabrasion of the skin, the mess that is created during that process, skin redness as a result of the process, and the lengthy recovery times while the skin regrows and heals. (JX-0001 at 1:48-2:22.).

Neither Cartessa nor its expert, Dr. Jensen, explained why Palmer’s system and method of selecting among different fluids are reasonably pertinent to the problems of the mess that is created during the process, skin redness as a result of the process, and lengthy recovery times while the skin regrows and heals. Dr. Jensen appears to have equated dental procedures with skin

procedures in a reduction of the complexities of each medical area and field of endeavor.

Therefore, it is a finding of this ID that Cartessa failed to prove that Palmer is “reasonably pertinent to the particular problem with which the inventor is involved.” *LKQ Corp.*, 102 F.4th at 1296.

Cartessa’s argument that Palmer is analogous art also fails because it relied on impermissible hindsight. The purpose of the analogous art requirement is to avoid hindsight bias. *Id.* Choosing a prior art reference because it is similar to the claims at issue, as opposed to choosing a prior art reference because one of ordinary skill would have considered it, is classic impermissible hindsight. *See, e.g., In re Oetiker*, 977 F.2d 1443, 1447 (Fed. Cir. 1992) (“[t]he combination of elements from non-analogous sources, in a manner that reconstructs the applicant’s invention only with the benefit of hindsight, is insufficient The knowledge can not come from the applicant’s invention itself.”). Cartessa stated in its Reply Post-Hearing Brief that the Palmer reference was chosen because it is similar to the claims of the ’287 patent. (RBr. at 35 (“Palmer was chosen because it is similar to the claims of the ’287 Patent by having a device with selection of multiple different fluids from multiple different containers, fed into a block that allows for selection of the material and delivery into a single line for transport to the handpiece, all housed in a single console, in a manner that renders obvious the supply side of the claims of the ’287 Patent”).). Because Cartessa’s reliance on Palmer for its obviousness argument is classic impermissible hindsight, Cartessa’s obviousness argument fails as a matter of law.

Moreover, HydraFacial argued, and Mr. Leinsing credibly testified, that Palmer is not analogous art because Palmer is directed to a dental irrigation device with a positive pressure system and that does not have the function to pull away water. (Tr. (Leinsing) at 1193:3-

1193:15, 1195:22-1196:13; CDX-0007C.0053, .0062, .0063.). Mr. Leinsing's testimony is quoted below.

Q. What have you shown here on slide 7C.53?

A. So this is showing the Palmer reference. It's a dental irrigation device. It's not analogous art. It's a peristaltic pump. So it's a positive pressure system with no vacuum. There's nothing there to pull away water. There's no recovery container. It's simply a pulsed jet used for cleaning your teeth.

* * *

Q. Let's turn to 7C.62.

Do you have an opinion as to whether Palmer is analogous art to the '287 patent?

A. Yes, I think I mentioned earlier, it's ***not analogous art***. This is a ***water pressure system***. It wouldn't be -- you can't combine pressure with a vacuum system. And it's for ***dental***. It's ***not for any hydrodermabrasion or anything related to even microdermabrasion***.

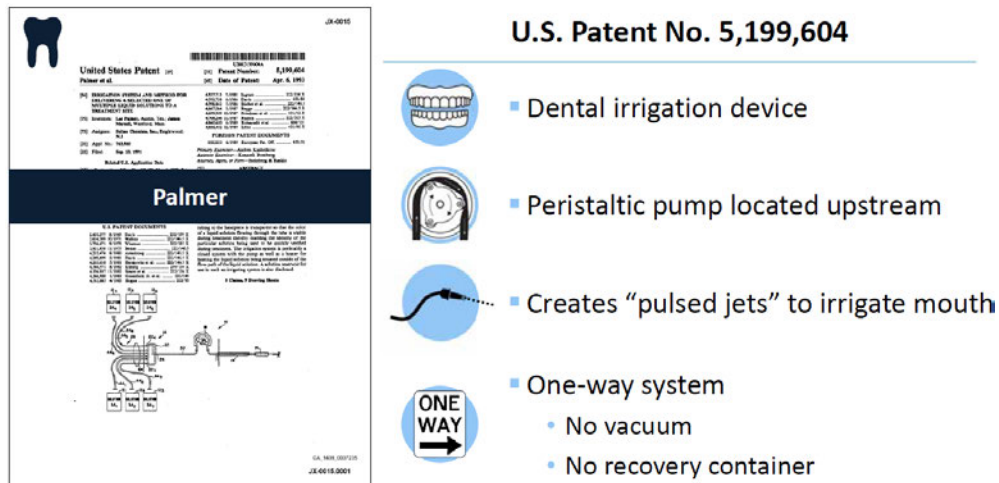
Q. Turning to 7C.63, do you have an opinion as to whether Palmer is pertinent to the particular problems solved in the '287 patent?

A. Yes, and ***it's not in any way associated with solving the problem of reducing pain or recovery time associated with dry microdermabrasion. It doesn't improve the treatment efficacy, and it's not anything to do with improving the speed at which practitioners can perform treatments with multiple fluids***.

(Tr. (Leinsing) at 1193:3-15, 1195:21-1196:13 (emphases added); CDX-0007C.0053, .0062, .0063.).

The first demonstrative referenced in Mr. Leinsing's testimony, reproduced above, is copied in Figure 45 below. Mr. Leinsing's testimony and associated demonstrative note that Palmer is directed to a dental irrigation device, has a peristaltic pump located upstream, uses "pulsed jets" to irrigate a patient's mouth, and is a "one-way" system, i.e., there is no vacuum or recovery container.

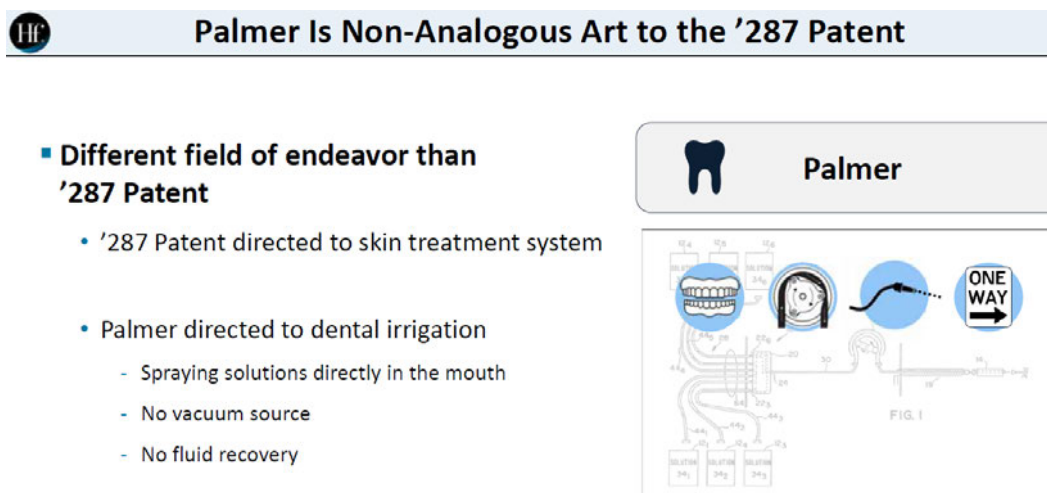
Figure 45: Leinsing Demonstrative Summarizing Palmer



(Tr. (Leinsing) at 1193:3-15; CDX-0007C.0053.).

The second demonstrative referenced in Mr. Leinsing's testimony is copied in Figure 46 below. Mr. Leinsing's testimony and demonstrative note that the '287 patent is directed to a skin treatment system, whereas Palmer is directed to a dental irrigation device that sprays solutions directly into the mouth, lacks a vacuum source, and lacks fluid recovery from a patient's mouth.

Figure 46: Leinsing Demonstrative Summarizing Why Palmer Is Non-Analogous Art to the '287 Patent



(Tr. (Leinsing) at 1195:21-1196:4; CDX-0007C.0062.).

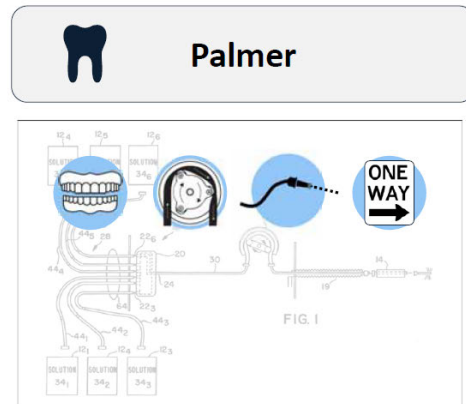
The third demonstrative referenced in Mr. Leinsing's testimony is copied in Figure 47 below. Mr. Leinsing's demonstrative notes that a problem addressed in the '287 patent is the reduction of pain and recovery time that are not associated with the procedure disclosed in Palmer.

Figure 47: Leinsing Demonstrative Summarizing Why Palmer Is Non-Analogous Art

■ **Not pertinent to particular problems that the '287 Patent solved**

'287 Patent

- Reducing pain and recovery time associated with dry microdermabrasion
- Improving treatment efficacy
- Improving rapidity with which practitioners can perform treatments with multiple fluids



(Tr. (Leinsing) at 1196:5-13; CDX-0007C.0063.).

HydraFacial's arguments and Mr. Leinsing's testimony are more consistent with the disclosures of Palmer and the '287 patent. Mr. Leinsing's testimony is more credible and persuasive than the unsupported evidence Cartessa and Dr. Jensen provided.

For the foregoing reasons, it is a finding of this ID that Palmer is not analogous art. Accordingly, Cartessa failed to prove by clear and convincing evidence that any claim of the '287 patent is invalid due to obviousness based on any combination of references that requires the Palmer reference.

b) Multiple Fluid Reservoirs (claim elements 11[a], 22[a])

Claim elements 11[a] and 22[a] recite language that requires multiple fluid reservoirs. (JX-0001 at 22:31-32, 42-46, 50-51 (cl. 11), 23:28-35, 45-47, 51-57 (cl. 22).). The main dispute is whether it would have been obvious to modify Karasiuk's microdermabrasion system to

include multiple fluid reservoirs, rather than only one fluid reservoir as disclosed in Karasiuk (element 70 in Figure 6 of Karasiuk). (RBr. at 34-42; CRBr. at 17-22.).

Cartessa's expert, Dr. Jensen, opined that it would be obvious to a skilled artisan to use multiple fluid reservoirs in Karasiuk's system. (Tr. (Jensen) at 798:25-799:21, 801:16-20, 802:21-807:7, 814:18-815:19; RX-0340 at Fig. 6, 7:17-45.). According to Dr. Jensen, Karasiuk allows for multiples of each of the components of the system. (*Id.*). Specifically, with respect to Dr. Jensen's opinion that multiple fluid containers (i.e. equating them to "reservoirs") would be obvious, Karasiuk teaches that the breather line 76 connected to tube 14 in Figure 6 includes an adjustable valve 78 that allows the amount of vacuum to be adjusted for a given fluid. (RX-0340 at Fig. 6, 7:17-45.). The ability to adjust the amount of vacuum for a given fluid allows the system to be used with different fluids having differing viscosities because the amount of vacuum necessary depends on the viscosity of the fluid. (*Id.*). According to Cartessa and Dr. Jensen, the ability to use different fluids suggests to one of ordinary skill that Karasiuk can have multiple containers to accommodate different fluids.

Moreover, according to Cartessa and Dr. Jensen, one of ordinary skill would be motivated to modify Karasiuk "by adopting the fluid selection structures of Palmer because Palmer provides a solution to the problem of choosing among the multiple containers for the multiple fluids of the Karasiuk/Palmer combination." (RBr. at 37-38; Tr. (Jensen) at 802:24-804:4.). Cartessa argued that adopting a "simple mechanical/structural element such as Palmer's fluid selection structures" constitutes "the mere application of a known technique to a piece of prior art ready for improvement because it involves no more than the predictable use of prior art elements according to their established functions." (*Id.*).

HydraFacial and Mr. Leinsing rebutted that Karasiuk lacks multiple containers. (CRBr.

at 19; Tr. (Leinsing) at 1191:22-1192:3.). However, Cartessa did not rely on Karasiuk for the “multiple containers” claim element. For that claim element, Cartessa relied on Palmer, which discloses multiple containers. Nevertheless, Cartessa’s obviousness argument fails at the outset because Palmer is not analogous art, and not because Karasiuk lacks multiple containers. *See infra*.

Mr. Leinsing also opined that Karasiuk’s ability to adjust the amount of vacuum via adjustable valve 78 means that Karasiuk’s system can accommodate different fluids in the single container 70, and not that the system of Karasiuk should be modified to use multiple containers. (Tr. (Leinsing) at 1191:8-1192:15; RX-0340 at Fig. 6, 7:17-45.). HydraFacial and Mr. Leinsing correctly asserted that Palmer’s use of multiple containers does not cure the Karasiuk’s deficiency because Palmer is directed to a dental irrigation handpiece that is not designed to contact the patient or any skin surface. (CRBr. at 21; Tr. (Leinsing) at 1193:3-1194:14.).

In contrast, Cartessa’s argument is problematic because there is no evidence that a person of ordinary skill in the art would have considered the lack of multiple containers in the system depicted in Figure 6 of Karasiuk as a problem. The undisputed evidence demonstrates that the problems in the relevant field, as taught by the ’287 invention, were the mess created during a facial dermabrasion procedure, the pain and redness caused by an abrasive procedure, and the long recovery times resulting from an abrasive procedure. (JX-0001 at 1:48-2:22; Tr. (Leinsing) at 1196:5-13; CDX-0007C.0063.).

One way the ’287 patent addresses the foregoing problems was by using multiple fluid reservoirs. (JX-0001.0048-.0050 (claiming multiple fluid reservoirs)). Neither Cartessa nor Dr. Jensen offered evidence or argument to support the contention that a skilled artisan would expect using the multiple container configuration of the Palmer irrigation system as a way of addressing

the problems that the '287 invention sought to solve. Instead of defining the problem as it was known to a person of ordinary skill in the art and then producing prior art evidence of the solution to that problem, Cartessa and Dr. Jensen engaged in an improper hindsight analysis by starting with the '287 patent solution, i.e., multiple containers, and then defining the problem based on that solution. (RBr. at 37-38 (“Palmer provides a solution to the problem of choosing among the multiple containers”).). Focusing on the “containers” was not the issue, and not the problems in the field that the '287 invention sought to solve.

Thus, Cartessa’s and Dr. Jensen’s hindsight analysis is incorrect and fails as a matter of law. *Insite Vision Inc. v. Sandoz, Inc.*, 783 F.3d 853, 859 (Fed. Cir. 2015) (“Defining the problem in terms of its solution reveals improper hindsight in the selection of the prior art relevant to obviousness.”).

For these reasons, it is a finding of this ID that Cartessa failed to prove by clear and convincing evidence that the “multiple containers” claim elements of the Asserted Claims would have been obvious.

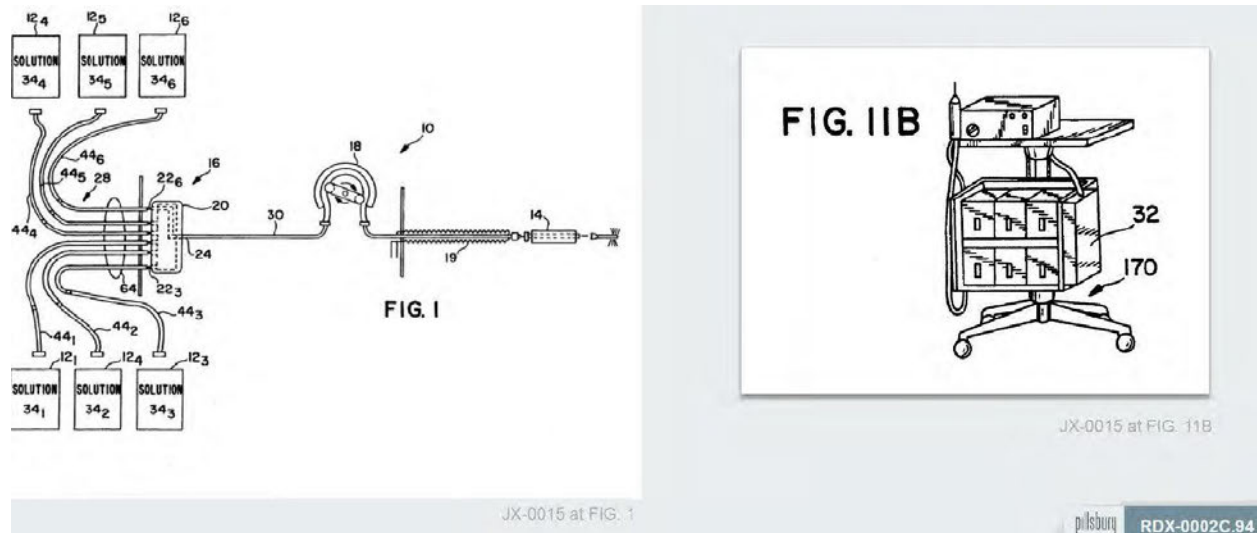
**c) Handpiece/Handpiece Assembly Connected to the Console
(claim elements 11[b]-[c], 22[c]-[d])**

Claim elements 11[b]-[c] and 22[c]-[d] recite language that requires a handpiece/handpiece assembly connected to a console. (JX-0001 at 22:30-36, 47-49 (cl. 11), 23:29-30, 36-38, 42-43 (cl. 22).). The crux of the Parties’ dispute is whether the Palmer reference would render obvious a modification to Karasiuk’s handpiece (element 10 in Figure 6) such that it is connected to a console. (RBr. at 38-39; CRBr. at 22-24.). HydraFacial argued that the Palmer handpiece (element 14 in Figure 1) is not connected to what Cartessa *identified* as the Palmer console (mobile cart 170 in Figure 11B). (CRBr. at 22-23.).

Notably, neither HydraFacial nor Mr. Leinsing argued that Palmer fails to disclose a handpiece connected to a console. Rather, HydraFacial asserted that what Cartessa *identified* as the claimed “console” in Palmer is not connected to what Cartessa pointed to as the claimed “handpiece” in Palmer. (CRBr. at 22.). Therefore, the issue is whether Cartessa sufficiently identified in the disclosure of Palmer the claimed “console” and the claimed “handpiece.”

According to Dr. Jensen’s testimony, Figure 11B of Palmer “shows a console with the handpiece attached to it.” (Tr. (Jensen) at 800:17-19, 852:9-17; RDX-0002C.0094.). In support of his argument that the Palmer handpiece (element 14) is attached to a console, Dr. Jensen pointed to Palmer’s figures, depicted in his demonstrative copied below in Figure 48.

Figure 48: Dr. Jensen’s Depiction of the Palmer Handpiece Connected to the Console



(Tr. (Jensen) at 800:17-19; RDX-0002C.0094.).

The unlabeled box sitting on top of the horizontal surface depicted in Figure 11B of Palmer is also depicted in Figure 2 of Palmer (labeled element 35). According to Palmer, element 35 is coupled to the handpiece 14 and to the storage means 32. (JX-0015 at Fig. 2, 5:10-6:51.). The enclosure 35 contains the pump means 18 depicted in Figure 1. (*Id.*). Although Dr.

Jensen did not identify exactly what in Palmer is the claimed “console,” Cartessa argued in its Initial Post-Hearing Brief that “[t]he entire unit is a console.” (RBr. at 39.). As best can be understood, Cartessa’s reference to the “entire unit” is a reference to the entirety of Palmer’s Figure 11B.

According to HydraFacial and Mr. Leinsing, Palmer’s handpiece is connected to the enclosure 35, which is a control unit rather than a console. (CRBr. at 22-24; Tr. (Leinsing) at 1194:21-1196:13.). HydraFacial also contended that in Cartessa’s Reply Post-Hearing Brief, Cartessa identified the mobile cart 170 in Figure 11B of Palmer as the claimed “console.” (CRBr. at 22-24.). Therefore, according to HydraFacial, Cartessa waived any argument that anything else in Palmer constitutes the claimed “console.” (*Id.*).

Cartessa had the “burden to prove that all claimed limitations are disclosed in the prior art.” *PAR Pharm., Inc. v. TWI Pharms., Inc.*, 773 F.3d 1186, 1194 (Fed. Cir. 2014). Cartessa attempted to identify the entirety of Figure 11B of Palmer as the claimed “console” (RBr. at 39), but abandoned and/or withdrew that argument under Ground Rule 7.2 by failing to raise it in its Pre-Hearing Brief. (RPBr. at 107-34 (identifying only the mobile cart 170 Palmer as the claimed “console”).). To the extent Cartessa maintained the position that the mobile cart 170 depicted in Figure 11B of Palmer is the claimed “console,” Cartessa presented no evidence that the mobile cart 170 is connected to the handpiece 14. To the contrary, the mobile cart 170 appears to be a separate, detachable piece of equipment where the control unit 35 and the storage means 32 can be placed thereon or removed therefrom, as Mr. Leinsing discussed. (Tr. (Leinsing) at 1194:21-1196:13.).

Therefore, it is a finding of this ID that Cartessa failed to prove by clear and convincing evidence that the “handpiece connected to the console” claim elements of the Asserted Claims

would have been obvious.

d) Sequentially (claim 12; claim element 22[f])

Dependent claim 12 and claim element 22[f] recite language directed to drawing fluid first from one container and then from another container “sequentially.” (JX-0001 at 22:60-63 (cl. 12), 23:51-57 (cl. 22)). Cartessa argued, and Dr. Jensen provided unrebutted opinion testimony, that Palmer discloses drawing fluid first from one container and then from another container “sequentially.” (RBr. at 42, 46; Tr. (Jensen) at 860:6-18, 883:13-21.). However, for the reasons discussed above in Section IX.C.4, Cartessa did not remedy the deficiencies in its obviousness arguments and evidence with the combination of Karasiuk and Palmer.

5. Ground 4: Karasiuk in View of Palmer and Trueba Does Not Render the Asserted Claims Obvious

Ground 4 of Cartessa’s obviousness arguments relied on adding the Trueba reference to the combination of Karasiuk with Palmer. (RBr. at 51-54.). Specifically, Cartessa relied on Trueba to render obvious the claim language, contained in claim 22, directed to delivering fluids “sequentially.” (*Id.*).

As a threshold matter, it is a finding of this ID that Palmer is not analogous art to the ’287 patent. Thus, none of the claims are obvious in view of any prior art combination that requires the Palmer reference. Moreover, Cartessa failed to prove that Trueba is analogous art to the ’287 patent. (*See* Section IX.C.3(a)). Finally, neither Cartessa nor Dr. Jensen argued that Trueba renders obvious the “multiple containers” or “handpiece connected to the console” elements. As such, Trueba does not remedy the deficiencies in Cartessa’s obviousness case.

6. Ground 5: Karasiuk in View of Pond Does Not Render the Asserted Claims Obvious

Cartessa also argued that the Asserted Claims are invalid for obviousness based on the

combination of Karasiuk and Pond. (RBr. at 54-68.). The Parties' disputes with respect to Karasiuk and Pond are similar to their disputes with respect to Karasiuk and Palmer.

Specifically, the main disputes between the Parties are whether: (i) the Pond reference qualifies as analogous art; and (ii) the Pond reference would have rendered it obvious to modify Karasiuk to have multiple fluid reservoirs. (RRBr. at 54-68; CRBr. at 26-29.).

For the reasons discussed below, HydraFacial successfully argued, and proved with evidence, that: (i) Pond is not analogous art; and (ii) "multiple fluid reservoirs" would not have been obvious

a) Pond Is Non-Analogous Art

Cartessa contended that Pond is from the same "field of endeavor" as the '287 patent because both Pond and the '287 patent are "medical instruments directed to delivery of fluid medicament using pressure differences through a handpiece." (RBr. at 55.). For evidence, Cartessa cited the following opinion testimony from its expert, Dr. Jensen, which Cartessa also relied upon for Palmer:

Q. With respect to the first bullet, do you have an opinion on whether or not the art represents things that are structurally similar?

A. Yes. As we just went over the last few slides, the devices are all very structurally similar -- multiple fluids, contemplated manifolds, different containers, and a single handpiece. So the arts of those references is definitely similar.

Q. Do they come from similar fields or different fields?

* * *

A. . . . Medically it might be different fields, but, technically, the fields are the same. And so a design engineer looking to create a device used for treatment would not just stay within the medical area that is relevant to that particular treatment.

You look beyond that. You look into the technical -- what's available and what is being used technically at that time.

(Tr. (Jensen) at 803:9-804:4.).

Figure 49 below depicts the demonstrative that Dr. Jensen testified about in the testimony that is cited above. Dr. Jensen’s demonstrative says that both Pond and the ’287 patent are “structurally similar,” both involve movement of fluid using pressure differentials, and both are medical devices for “delivery of medical fluids to subjects.”

Figure 49: Dr. Jensen’s Obviousness Summary Demonstrative

Obviousness Summary
▪ Motivation to combine for computerization: Structurally similar art: movement of fluid using pressure differentials conduits to a single outlet by actuation of valves.
▪ Similar fields: Medical devices for delivery of medical fluids to subjects.
▪ Obvious benefits applicable to each: Computerization, automation, clarity, precision, ease of use, modernization
▪ Ordinary in 2005 to automate through computerization This would result in expected improvements using known techniques.

(Tr. (Jensen) at 802:2-804:18; RDX-0002C.0098.).

Cartessa also cited the following disclosure from Pond:

SUMMARY OF THE INVENTION

To overcome the above-identified concerns, the present invention provides an inexpensive apparatus and method for a fluid supply system that is capable of supplying a selected one of a plurality of fluid sources to a patient’s mouth.

(RBr. at 55 (citing JX-0016.0018 at 1:59-63).).

The evidence Cartessa relied on falls short of satisfying Cartessa’s burden of proving clearly and convincingly that Pond is directed to the same “field of endeavor” as the ’287 patent. Notably, neither Cartessa nor Dr. Jensen pointed to any disclosure in the ’287 patent that describes the field of endeavor as “medical instruments directed to delivery of fluid medicament

using pressure differences through a handpiece.” Therefore, Cartessa’s analogous art argument is insufficient as a matter of law. *In re Bigio*, 381 F.3d at 1325 (determining the field of endeavor requires reference to the “explanations of the invention’s subject matter in the patent application.”). For this reason, it is a finding of this ID that Cartessa’s “field of endeavor” argument and evidence are legally insufficient.

In addition to the legal insufficiency with Cartessa’s analogous art analysis, Cartessa’s argument and Dr. Jensen’s opinion testimony are not consistent with the disclosure of the ’287 patent. According to the disclosure of the ’287 patent, the ’287 patent is directed to skin treatment devices, not medical devices for “delivery of medical fluids.” (JX-0001 at Abstract (“An apparatus for treating skin The handpiece assembly is configured to treat skin”), 1:30-32 (“The invention relates in general to the field of skin treatment, and more specifically to apparatuses and methods for treating a person’s skin.”), 22:29 (cl. 11) (“A skin treatment apparatus . . .”).).

In contrast, Pond is directed to dental irrigation devices. (JX-0016 at Abstract (“A fluid dispensing assembly that may be used to supply fluid for use in dental instrumentation including irrigation, application, and aeration for treating a patient’s mouth”), 1:59-63 (“the present invention provides an inexpensive apparatus and method for a fluid supply system that is capable of supplying a selected one of a plurality of fluid sources to a patient’s mouth”), 2:32-40 (“the fluid dispensing assembly further comprises a single-fluid dental handpiece for delivering a dedicated fluid, such as air, to a patient’s mouth the invention comprises a fluid dispensing assembly whereby the dentist can supply pre-selected fluids to irrigate the field of operation within a patient’s mouth”).). Neither Cartessa nor Dr. Jensen explained how Pond is in the same field of endeavor as described in the foregoing disclosures of the ’287 patent.

To the contrary, the only disclosure from Pond that Cartessa cited says that Pond is directed to a fluid supply system that is capable of supplying fluids “to a patient’s mouth.” (RBr. at 55 (citing JX-0016 at 1:59-63).). Neither Cartessa nor Dr. Jensen explained why supplying fluids to a patient’s mouth as described in Pond is in the same field of endeavor as treating a patient’s skin as described in the ’287 patent. Therefore, Cartessa’s argument and Dr. Jensen’s testimony are not credible because they are inconsistent with the documentary evidence. For these reasons, it is a finding of this ID that Cartessa failed to prove that Pond is in the same field of endeavor as the ’287 patent.

Additionally, Cartessa argued that the ’287 patent is directed to the problem of “delivering fluids from containers to a handpiece.” (RRBr. at 36.). Cartessa’s argument is unpersuasive because Cartessa did not cite to evidence, and the assertion is not consistent with the disclosure of the ’287 patent. According to the disclosure of the ’287 patent, the problems addressed by the ’287 patent are the pain associated with dermabrasion of the skin, the mess that is created during the abrasive process, skin redness as a result of the abrasive process, and lengthy recovery times while the skin regrows and heals. (JX-0001 at 1:48-2:22.). Neither Cartessa nor Dr. Jensen explained why Pond’s system and method are reasonably pertinent to the problems that the ’287 patent invention sought to remedy. Accordingly, it is a finding of this ID that Cartessa failed to prove that Palmer is “reasonably pertinent to the particular problem with which the inventor is involved.” *LKQ Corp.*, 102 F.4th at 1296.

On the other hand, HydraFacial argued, and its expert Mr. Leinsing credibly testified, that Pond is not analogous art because Pond is directed to a dental irrigation device with a positive pressure system. (Tr. (Leinsing) at 1197:14-1198:1, 1200:16-1201:3; CDX-0007C.0066, .0072.). Mr. Leinsing’s full testimony in context is reproduced below.

Q. And now turning to 7C.66, can you provide a brief overview of the Pond reference?

A. Yes. So Pond is a dental irrigation device. It uses positive air pressure and air to push fluid out of the containers and towards the end of the handpiece. All individual six tubes go all the way to the end of the handpiece, and then there's a manifold at the end of the handpiece, and then there's a manifold at the end of the handpiece. There's no collection lumen or manifold inside a console. All six tubes from all six containers go to the handpiece.

And there's another picture we'll show of that. It's a one-way system. No vacuum. It's sprayed in your mouth. And then there's no recovery container.

* * *

Q. Let's turn to 7C.72.

And you've indicated that it's not -- that Pond is not pertinent to the particular problems that the '287 patent solved. And you've listed some reasons why here.

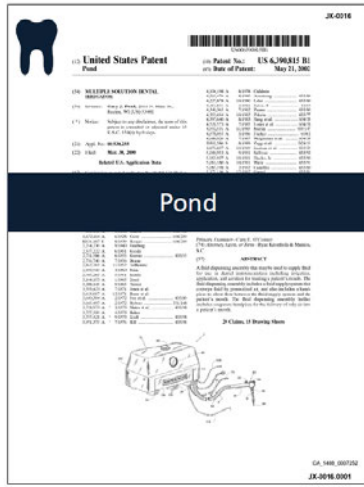
Can you briefly explain those?

A. Yeah. It's not addressing the problems that the '287 patent solved. ***You can't combine these with microdermabrasion or with Karasiuk to solve the problems of the patent. It doesn't help in reducing the pain and recovery time associated with dry microdermabrasion, improving the treatment efficacy, or improving the speed at which practitioners can perform treatments with multiple fluids.***

(Tr. (Leinsing) at 1197:14-1198:1, 1200:16-1201:3 (emphasis added); CDX-0007C.0066, .0072.).

The first demonstrative referenced in Mr. Leinsing's testimony reproduced above is depicted in Figure 50 below. Mr. Leinsing's testimony and associated demonstrative point out that Pond, unlike the '287 patent, is directed to a dental irrigation device, has an air pressure source located upstream, and is a one-way system with no vacuum and no recovery container.

Figure 50: Mr. Leinsing's Summary Demonstrative of Pond



U.S. Patent No. 6,390,815

Pond

-  Dental irrigation device
-  Air pressure source located upstream
-  High-pressure fluid containers
-  One-way system
 - No vacuum
 - No recovery container

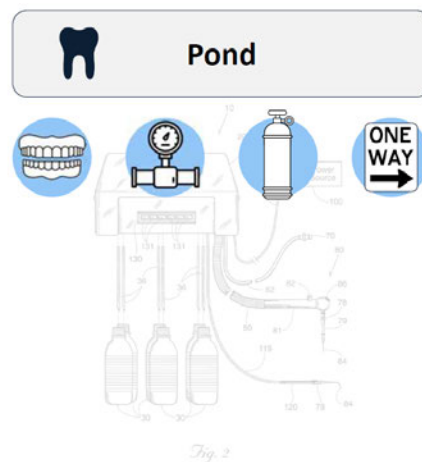
(Tr. (Leinsing) at 1197:14-1198:1; CDX-0007C.0066.).

The second demonstrative referenced in Mr. Leinsing's testimony, reproduced above, is depicted in Figure 51 below. Mr. Leinsing's testimony and associated demonstrative note that problems addressed in the '287 patent are: reduction of pain and recovery time associated with an abrasive skin procedure; improvement of treatment efficacy; and improvement in the rapidity with which practitioners can perform skin treatments with multiple fluids.

Figure 51: Mr. Leinsing's Summary Demonstrative of the Reasons Pond is Non-Analogous Art

■ Not pertinent to particular problems that the '287 Patent solved

- Reducing pain and recovery time associated with dry microdermabrasion
- Improving treatment efficacy
- Improving rapidity with which practitioners can perform treatments with multiple fluids



(Tr. (Leinsing) at 1200:16-1201:3; CDX-0007C.0072.).

Mr. Leinsing's testimony and associated demonstrative are consistent with disclosures in Pond. (*See, e.g.*, JX-0016 at Abstract ("A fluid dispensing assembly that may be used to supply fluid for use in dental instrumentation including irrigation, application, and aeration for treating a patient's mouth"), 1:60-63 ("the present invention provides an inexpensive apparatus and method for a fluid supply system that is capable of supplying a selected one of a plurality of fluid sources to a patient's mouth"), 2:32-40 ("the fluid dispensing assembly further comprises a single-fluid dental handpiece for delivering a dedicated fluid, such as air, to a patient's mouth . . . the invention comprises a fluid dispensing assembly whereby the dentist can supply pre-selected fluids to irrigate the field of operation within a patient's mouth").).

Mr. Leinsing's testimony and his associated demonstratives with exhibits, are also consistent with the disclosure of the '287 patent. (JX-0001 at Abstract, 1:30-32, 22:29.). In contrast, Palmer is directed to dental irrigation devices. (JX-0015 at 1:10-17, 11:44-46 (cl. 11).). Because Mr. Leinsing's testimony and demonstratives are consistent with the disclosure of Pond, whereas Dr. Jensen's are not, Mr. Leinsing's testimony is more credible. Thus, because HydraFacial's arguments and evidence are more consistent with the documentary evidence, they are persuasive.

For the foregoing reasons, it is a finding of this ID that Pond is not analogous art. Therefore, Cartessa failed to prove by clear and convincing evidence that any claim of the '287 patent is invalid due to obviousness based on any combination of references that requires the Pond reference.

b) Multiple Fluid Reservoirs (claim elements 11[a], 22[a])

Cartessa's argument for why "multiple fluid reservoirs" would have been obvious in view of the Pond reference is similar to its argument for why "multiple fluid reservoirs" would have

been obvious in view of the Pond reference. (RBr. at 56-58.). HydraFacial's rebuttal to Cartessa's Pond-based obviousness argument is similar to its rebuttal to Cartessa's Palmer-based obviousness argument. (CRBr. at 26 (referring back to its arguments for the Palmer reference).). The Parties' experts also offered competing testimony about whether Pond would have rendered it obvious to modify the Karasiuk system to include multiple containers. (Tr. (Jensen) at 802:24-804:18, 816:12-817:9; Tr. (Leinsing) at 1196:14-1197:13, 1201:4-15.).

Unsurprisingly, the problem with Cartessa's argument that "multiple fluid reservoirs" would be obvious in view of the Pond reference is the same as the problem with Cartessa's argument that "multiple fluid reservoirs" would be obvious in view of the Palmer reference. Specifically, there is no evidence that one of ordinary skill would have considered the lack of multiple containers in the system depicted in Figure 6 of Karasiuk a problem. According to the undisputed evidence, a person of ordinary skill understood that the problems in the field were: the mess created during an abrasive skin procedure; the pain and redness caused to a patient by an abrasive skin procedure; and the long recovery times resulting from an abrasive skin procedure. (JX-0001 at 1:48-2:22; Tr. (Leinsing) at 1196:5-13; CDX-0007C.0063.).

One method the '287 patent addresses (at least structurally) the foregoing problems is by providing multiple fluid reservoirs, or containers, each of which contains different solutions, such as water and serums. (*See, e.g.*, JX-0001 at cls. 11, 22 (claiming multiple fluid reservoirs).). Neither Cartessa nor Dr. Jensen offered evidence or argument to support the contention that one of ordinary skill would expect that using the multiple container configuration of the Pond irrigation system would address the problems with the skin-related pain, redness, and lengthy recovery times that were known in the field of the '287 patent.

Instead, Cartessa and Dr. Jensen worked backward from the '287 patent by defining the

problem with Karasiuk as the lack of multiple containers, *i.e.* the '287 patent solution. (RBr. at 58 (“Pond provides a solution to the problem of choosing from among the multiple containers the Karasiuk/Pond combination [sic].”).).)

In other words, instead of defining the problem as it was known to a person of ordinary skill in the art and then producing prior art evidence of a solution to that problem, Cartessa and Dr. Jensen engaged in an improper hindsight analysis by starting with the '287 patent structures for its solution, *i.e.*, multiple containers, and then defined the problem according to a hindsight analysis. In fact, Cartessa and Dr. Jensen ignored the problems that the '287 invention sought to solve. Cartessa's and Dr. Jensen's hindsight analysis is incorrect as a matter of law. *Insite Vision*, 783 F.3d at 859. Therefore, Cartessa's obviousness argument fails as a matter of law. Accordingly, it is a finding of this ID that Cartessa failed to prove clearly and convincingly that it would have been obvious in view of Pond to modify the system of Karasiuk to have multiple containers.

c) Fluid Control Member/Collection Lumen (claim elements 11[a], 22[b])

The Parties also disputed whether Pond would have rendered obvious the “fluid control member” element of independent claim 11 (claim element 11[a]) and the “collection lumen” element of independent claim 22 (claim element 22[b]). (RBr. at 55-56; CRBr. at 27-28.).

Order No. 32 and the *Markman* Order (Order No. 50) in this Investigation provide the adopted construction of the claim term “fluid control member.” (Order No. 32 (Mar. 19, 2025); Order No. 50 (June 11, 2025).). “Fluid control member” in the Asserted Claims was construed, in accordance with the Parties' request, as a means plus function term. (*Id.*). It was determined that the function is “be in fluid communication with at least a first container and a second

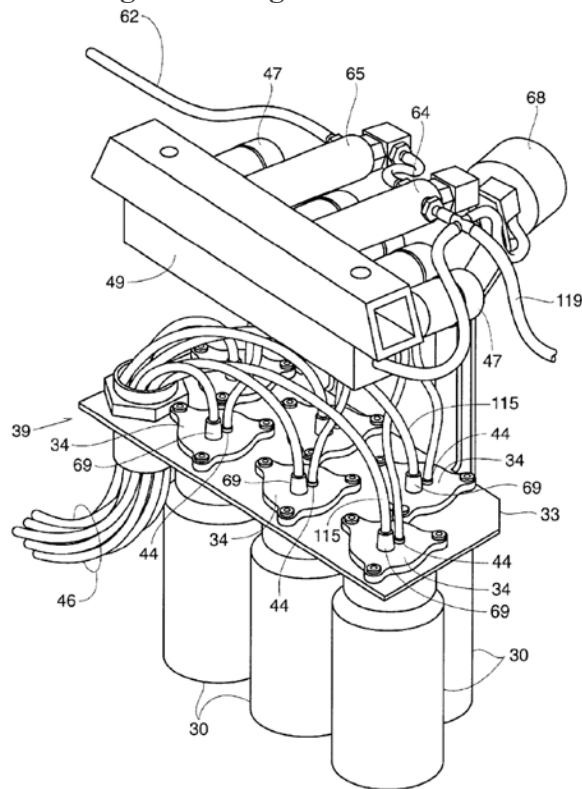
container when the first container and the second container are connected to the fluid control member” and “be in fluid communication with the handpiece assembly.” (*Markman* Order at 1-2.). It was also determined that the corresponding structure in the specification is the “manifold system 24,” (JX-0001 at 17:17-18:37; Figures 15A-15D), “switches 29” (17:21-22), or “lumen 171” (18:15-18), or “valves, fluid lines, and the like” (18:38-42), and equivalents of those structures. (*Id.*).

According to Cartessa and Dr. Jensen, each of elements 39 and 49 in Pond is the claimed “fluid control member.” (RBr. at 56; Tr. (Jensen) at 816:5-817:9, 877:19-878:4.). According to Cartessa, a skilled artisan “would be motivated to combine Pond’s fluid control device with Karasiuk because both devices relate to a system that provides fluid for irrigation, one to irrigate a patient’s mouth, and the other to provide fluid to exfoliate skin.” (RBr. at 56.). Cartessa also asserted that “[e]ach reference is directed to solving a problem of providing a user with the ability to select among multiple materials to be applied to a treatment site.” (*Id.*). Cartessa concluded that “[t]his would be the adoption of a structure in a manner that involves no more than the predictable use of prior art elements according to their established functions.” (*Id.*).

Cartessa’s argument and Dr. Jensen’s opinion are not consistent with the disclosures in Pond. According to Pond, the valve manifold 49 is one of the paths for the pressurized air that enters through supply line 62. (JX-0016.0021 at 8:38-54.). That is not the corresponding structure depicted and described in the ’287 patent. In the ’287 patent, manifold system 24 and the switches 29 attached to the manifold system 24 are designed to draw treatment fluid, not pressurized air, from the containers 26. (JX-0001 at 17:17-18:37, Figs. 15A-15D.). Nothing in Pond describes the valve manifold 49 as being in fluid communication with any of the containers 30 as required by the adopted construction. Moreover, the fluid reservoir manifold 39 of Pond is

described as comprising reservoir heads 34 mounted on an apertured reservoir manifold plate 33 as depicted in Figure 12. (JX-0016 at Fig. 12, 9:24-29.). In other words, the fluid reservoir manifold 39 of Pond appears to be nothing more than the mounting assembly that holds the fluid cannisters together, rather than a device that is in fluid communication with the containers 30 as required by the adopted construction. Figure 12 of Pond is reproduced in Figure 52 below.

Figure 52: Figure 12 of Pond



(JX-0016 at Fig. 12, 9:24-29.).

HydraFacial and Mr. Leinsing confirmed Pond’s description of the valve manifold 49 and the fluid reservoir manifold 39. (CRBr. at 27-28; Tr. (Leinsing) at 1198:13-1199:6 (“62 is an air line . . . and that puts air into this valve manifold That’s a manifold for air for each one of these valves to push the selected fluid through all of the multiple tubes that you see at 46,” and “[Element 39 is] just the bracket. That doesn’t even have anything to do with fluid at all. It’s

just holding the canisters.”).).

HydraFacial’s and Mr. Leinsing’s arguments and testimony are more consistent with the disclosure of Pond, and therefore credible. For the foregoing reasons, it is a finding of this ID that Pond neither discloses nor renders obvious the claimed “fluid control member.”

The Parties also have a related dispute whether Pond would have rendered obvious the “collection lumen” element of independent claim 22. (RBr. at 64-65; CRBr. at 27-28.). In the *Markman* Order, “collection lumen” was construed to have its plain an ordinary meaning, “i.e., an interior space or pathway that receives fluid.” (*Markman* Order at 9.).

According to Cartessa, the claimed “collection lumen” corresponds to the same elements in Pond that also correspond to the claimed “fluid control member.” (RBr. at 61-62.). However, as explained above in the context of the claimed “fluid control member,” those elements of Pond (elements 39 and 49) have nothing to do with receiving fluid as required by the adopted construction of “collection lumen.” Rather, the valve manifold 49 of Pond is an air manifold and the fluid reservoir manifold 39 of Pond is a mounting bracket for the fluid containers 30. For the same reasons as for the “fluid control member,” it is a finding of this ID that Pond neither discloses nor renders obvious the claimed “collection lumen” of the ’287 patent.

7. Ground 6: Karasiuk in View of Pond and Trueba Does Not Render the Asserted Claims Obvious

Ground 6 of Cartessa’s obviousness arguments relied on adding the Trueba reference to the combination of Karasiuk with Pond. (RBr. at 68-69.). Specifically, Cartessa relied on Trueba to render obvious the claim language, contained in claim 22 and claim 29, that is directed to delivering fluids “sequentially.” (*Id.*).

Because it is a finding of this ID that Pond is not analogous art, none of the claims are

obvious in view of any prior art combination that requires the Pond reference. Moreover, Cartessa failed to prove that Trueba is analogous art to the '287 patent. (*See* Section IX.C.3.). Finally, neither Cartessa nor its expert, Dr. Jensen, argued that Trueba discloses or renders obvious the “multiple containers,” “fluid control member,” or “collection lumen” claim elements. Therefore, Trueba does not remedy any of the deficiencies in Cartessa’s obviousness case.

8. Secondary Considerations

Because the Asserted Claims of the '287 patent are not invalid as obvious, evidence of objective indicia of non-obviousness is not necessary. However, in the event the Commission disagrees, the following analysis is provided.³⁸

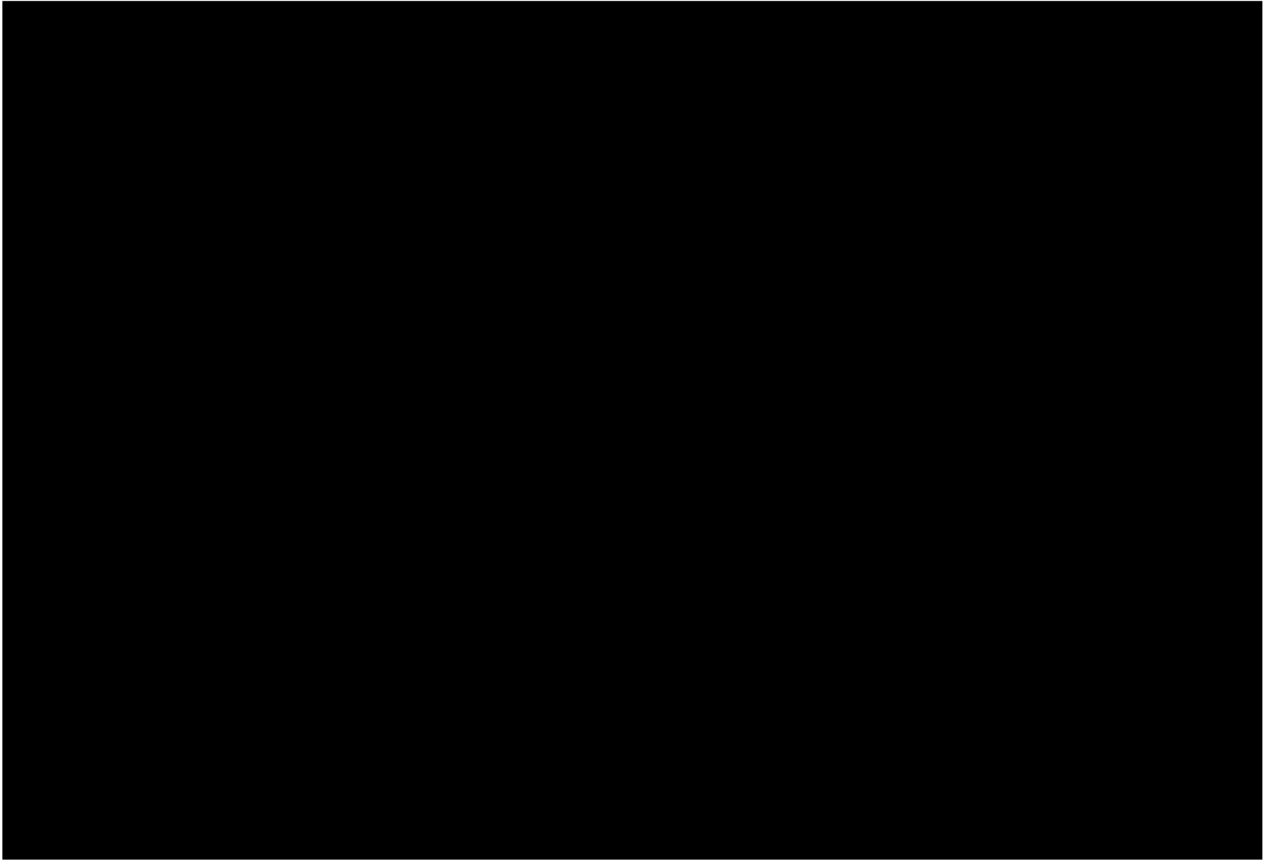
a) Commercial Success

HydraFacial asserted that its commercial success in the DI Products and practicing product (the “Tower”) is confirmed by its consistent growth in sales and revenue worldwide. (Tr. (Seth) at 445:23-446:14; CDX-0005C.0034, .0035, CX-0711C.). HydraFacial presented evidence that the worldwide sales of the DI Products and the Tower (“HydraFacial Systems”) have grown “exponentially” between the launch of the Tower in 2005 through 2023. (Tr. (Seth) at 445:23-446:5.). This is evident from Dr. Seth’s demonstrative, copied below in Figure 53, showing the growing worldwide unit sales and revenue of the HydraFacial Systems during this time period.

³⁸ With respect to secondary considerations, in its Pre-Hearing Brief and Reply Post-Hearing Brief, HydraFacial only addressed commercial success and copying. (CPBr. at 124-31; CRBr. at 57-67.). HydraFacial did not present any argument or evidence with regard to any other objective indicia of non-obviousness.

**Figure 53: Seth Demonstrative Showing Growth of Worldwide
Unit Sales and Revenue from 2005 to 2023**

**FIGURE 20: WORLDWIDE NET UNIT SALES AND NET SALES REVENUES OF DI PRODUTS
AND PRACTICING PRODUCT
(2005-2023)**



(CDX-0005C.0034 (citing CX-0711C)).

As Dr. Seth pointed out, and as shown below in Figure 54, from 2005 until the second quarter of 2024, the worldwide revenues of the HydraFacial Systems amounted to [REDACTED]

[REDACTED] (Tr. (Seth) at 446:56-14.).

**Figure 54: Seth Demonstrative Showing Worldwide Sales Revenues
from 2005 to Q2 2024**

**TABLE 23: NET WORLDWIDE SALES REVENUES BY DI PRODUCT
AND PRACTICING PRODUCT
(2005 TO JUNE 2024)**

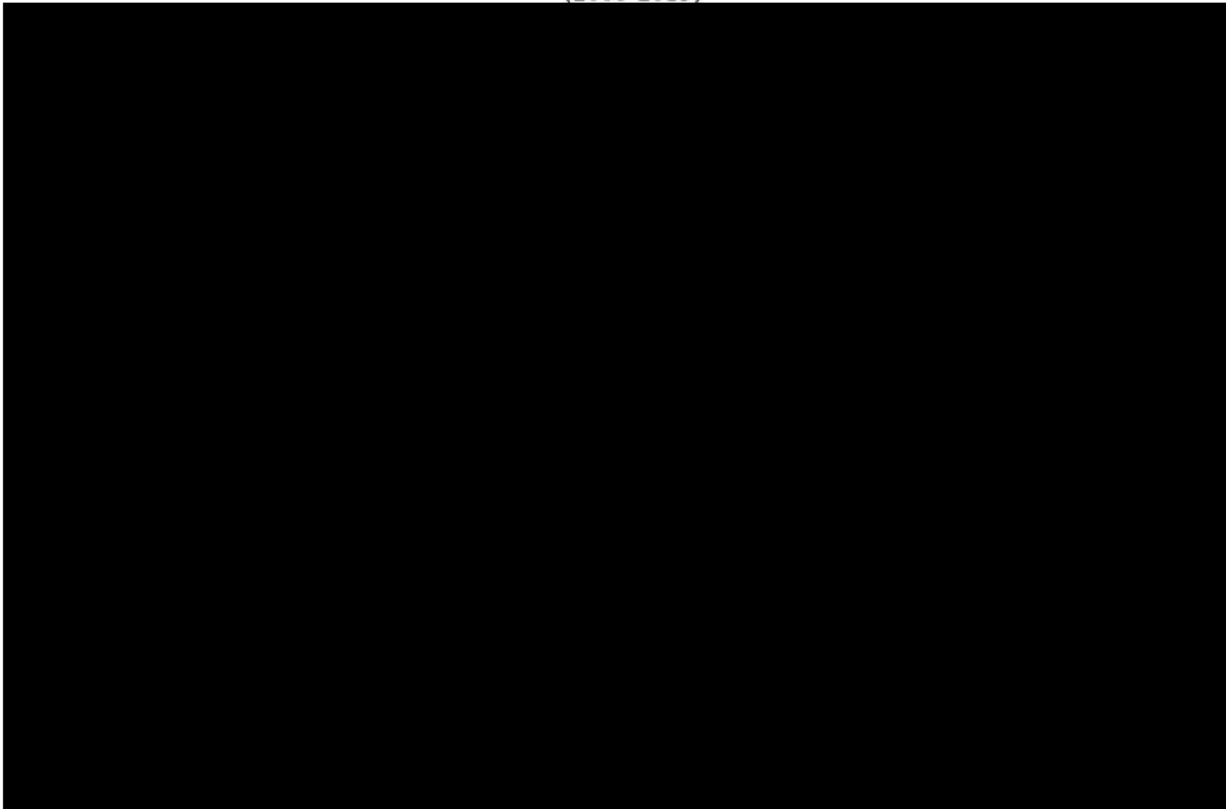
Model Name	Period	Worldwide Revenues
[A]	[B]	[C]
[1] Tower		
[2] Allegro		
[3] Elite		
[4] Syndeo		
[5] Total		

(CDX-0005C.0035 (citing CX-0711C)).

In comparison, HydraFacial's Nectre product, which does not practice the '287 patent, was not nearly as successful, as shown in Dr. Seth's demonstrative, copied below in Figure 55. (Tr. (Savsani) at 134:24-135:7; Tr. (Seth) at 447:13-22.).

**Figure 55: Seth Demonstrative Showing Worldwide Revenues
of Nectre Versus Tower**

**FIGURE 22: WORLDWIDE NET REVENUES FROM THE NECTRE AND TOWER/DI
PRODUCTS
(2006-2013)**



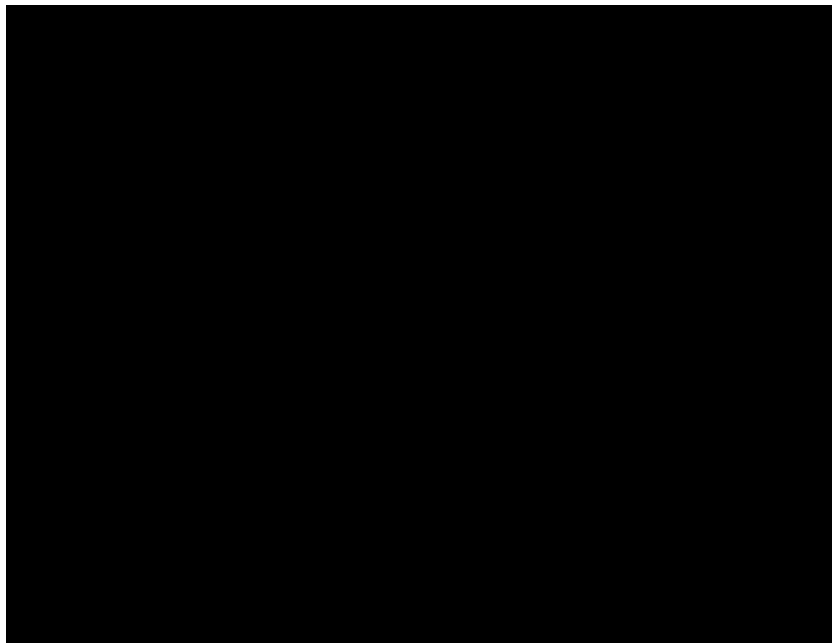
(CDX-0005C.0037 (citing CX-0711C).).

Cartessa argued that HydraFacial cannot establish a nexus between HydraFacial’s commercial success and the claimed invention because “[t]he sales of the HydraFacial’s products are attributable at least to the increase in sales of the beauty market since 1990.” (RBr. at 74 (citing JX-0025).). This argument is unpersuasive and not supported by the evidence.

As Dr. Seth testified, HydraFacial’s growth “significantly outpaced the growth of the global beauty industry[.]” (Tr. (Seth) at 443:16-18; CDX-0005C.0031; CX-0711C.). She explained that between 2012 and 2023, where the global cosmetics market experienced a

compound annual growth rate (“CAGR”)³⁹ of approximately 4%, the DI Products achieved a CAGR of approximately [REDACTED]. (Tr. (Seth) at 443:18-22; CDX-0005C.0031, .0032; JX-0025; CX-0198.). Additionally, during 2008 to 2013, the practicing products, i.e., Tower, had a CAGR of [REDACTED]. (Tr. (Seth) at 443:6-444:12; CDX-0005C.0031; CX-0711C.). As Dr. Seth opined, “the global cosmetics market growth rate was very small in comparison to how much the DI products and the practicing products grew during the same time period,” indicating that HydraFacial’s success has been driven by factors beyond general market trends. (Tr. (Seth) at 444:22-445:3.). This is evident in Dr. Seth’s demonstrative, which is copied below in Figure 56.

Figure 56: Seth Demonstrative Comparing CAGRs



(CDX-0005C.0032 (citing CX-0711C).).

Cartessa’s assertion that there is no nexus between HydraFacial’s commercial success and the Asserted Claims is also incorrect for the following reasons. As Mr. Leinsing testified,

³⁹ Dr. Seth described CAGR as “a way of evaluating how your investment grows at an annualized pace over time.” (Tr. (Seth) at 444:15-20.).

the claims are directed to skin treatment systems with specific key features, including: (1) multiple fluid containers; (2) a block, fluid control means, and/or lumen; (3) fluid communication between the fluid containers and the block, fluid control means and/or lumen; (4) fluid communication between a handpiece (including a tip) and the block, fluid control means and/or lumen; (5) a vacuum source; (6) a waste container; and (7) fluid communication between the vacuum source and waste container and the handpiece (including a tip). (Tr. (Leinsing) at 1206:21-1207:23.).

Furthermore, as Mr. Leinsing pointed out, the HydraFacial Systems do not contain other “key or driving features” that are not claimed. (Tr. (Leinsing) at 1208:4-5.). For example, although the HydraFacial Systems may include red and blue light therapy handpieces, the systems are primarily and extensively marketed as a **hydrodermabrasion** system, rather than light therapy devices. (Tr. (Leinsing) at 1208:6-13; CX-0838; CX-0837; CX-0836; CX-0835; CX-0310; CX-0834; CX-0833; CX-0832; CX-0831; CX-0830.). Thus, the features of the HydraFacial Systems that are significant are the features that are coextensive with the Asserted Claims. *See, e.g., Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373 (Fed. Cir. 2019) (“presuming nexus is appropriate when the patentee shows that the asserted objective evidence is tied to a specific product and that product embodies the claimed features, and is coextensive with them”) (internal quotations omitted) (quoting *Polaris*, 882 F.3d at 1072)).

Additionally, Cartessa contended that based on “various marketing material,” the tips used with the HydraFacial Systems, which are separately patented, are the “driver of sales.” (RBr. at 78 (citing RX-0292.0001-.0002).). However, this contention is meritless because the tips cannot be used without the HydraFacial Systems, as Mr. Savsani confirmed. (Tr. (Savsani) at 148:7-9.). Moreover, as HydraFacial noted, the tips are not “unclaimed” but are included

within the scope of the Asserted Claims as part of the handpiece or handpiece assembly. (CRBr. at 61 (citing JX-0001 at 5:42-46, 6:44-45, 10:39-11:3)). Mr. Leinsing also agreed that the handpiece, which includes the tip, is a “key claimed feature[]” of the HydraFacial Systems. (Tr. (Leinsing) at 1206:21-1207:14; CDX-0007C.0085.). That the tips are separately patented does not negate their inclusion within the Asserted Claims as part of the handpiece/handpiece assembly.

Cartessa’s argument that the tips are the drivers of the HydraFacial Systems sales is also undermined by the low sales of the non-practicing Nectre product. The Nectre was first introduced for sale in 2006. (Tr. (Seth) at 447:13-22; CDX-0005C.0037; CX-0711C.). According to HydraFacial, between 2006 and 2013, the Nectre product was sold for an average price of [REDACTED]. (CRBr. at 62.). Unlike the DI Products, the Nectre was a single-container hydrodermabrasion system that lacked a manifold, fluid control member, or collection lumen that could receive fluid from multiple connected containers. (CX-0318; CX-0319.). However, the Nectre used the same HydroPeel® tips that were used with the Tower, Elite, Allegro, and Syndeo systems. (CX-0318.0009 (Nectre); JX-0073C.0005 (Tower); JX-0032.0013 (Elite); JX-0033.0010 (Allegro); JX-0031.0013 (Syndeo)).

Cartessa’s assertion that the serums are the primary driver of commercial success is similarly without merit. (RBr. at 77.). As HydraFacial noted, the Asserted Claims specifically recite “treatment fluids” and “treatment materials,” which encompass the serums used in the HydraFacial Systems. (CRBr. at 62 (citing JX-0001 at cls. 11, 16, 22)). Thus, even if the serums contribute to the systems’ popularity, they are not extraneous to the claimed invention, but rather, are a part of it because they cannot be used without the HydraFacial Systems. (Tr. (Savsani) at 149:10-11.). Moreover, as Mr. Savsani testified, the DI Products are the core

revenue generator and without them, there would be no consumable revenue. (*Id.* at 134:8-19.).

Dr. Jensen acknowledged that the Nectre used the same tips and serums as, at least, the Tower and Elite. (Tr. (Jensen) at 1156:14-25.). Despite this, the Nectre sales paled in comparison to the sales of the practicing products. (Tr. (Seth) at 447:13-22; CDX-005C.0037; CX-0711C.). During the period of 2006 to 2013, the total worldwide net sales for the Nectre was approximately [REDACTED]. (CX-0711C.). In contrast, the total worldwide net sales for the Tower and Allegro, were [REDACTED] and [REDACTED]. (*Id.*). As Dr. Seth testified, the less complex and less expensive nature of the Nectre would have been an incentive for HydraFacial to market the Nectre more aggressively in order to reap a higher profit margin. (Tr. (Seth) at 446:15-447:4; CDX-0005C.0036.). However, HydraFacial's sales clearly illustrate customers' preference for the Tower over the Nectre. (Tr. (Seth) at 447:13-22; CDX-0005C.0037; CX-0711C.).

Cartessa also contended that there is a lack of nexus between the commercial success of the HydraFacial Systems and the '287 patent because the systems include other modalities of treatment not claimed in the '287 patent. (RBr. at 76-77.). That the HydraFacial Systems entail "multiple types of treatments" and HydraFacial's marketing materials advertise other treatments do not undercut the evidence HydraFacial presented in support of a nexus between the HydraFacial Systems' commercial success and the invention claimed in the '287 patent.

Additionally, Cartessa argued that Nectre's poor sales performance was because it was a tabletop unit, like the Allegro, as opposed to the Syndeo, Elite, and Tower, which are all console units. (RBr. at 74-75.). According to Cartessa, "the correlation between success, or lack thereof, appears to be based on whether the product is a tabletop unit," and not because it "accepts only one serum container." (*Id.* at 74-75.). Cartessa asserted that "a user may install a serum

cartridge in the handpiece, enabling multi-serum treatments in a manner similar to HydraFacial's multi-container systems." (*Id.* at 75 (citing Tr. (Savsani) at 146:23-147:8; RX-0318.0012).).⁴⁰

Cartessa's assertion, and its line of argument fail for the following reasons.

First, as HydraFacial correctly noted, this is a "new argument" that Cartessa did not raise in its Pre-Hearing Brief. (CRBr. at 64.). Thus, any argument on this issue is deemed abandoned, waived, and/or withdrawn under Ground Rule 7.2. Second, **nothing** in the cited testimony or document copied below indicates that installing a "serum cartridge . . . enable[es] multi-serum treatments in a manner similar to HydraFacial's multi-container systems," as Cartessa asserted. In the following portion of his testimony reproduced below, Mr. Savsani was shown a page of the Nectre System Owner's Manual copied below in Figure 57, and simply confirmed the following:

Q. I'm going to have you turn to page 11. One more, to 12. We're at CX-318.0012. In the middle of the page, do you see some discussion about installing a cartridge?

A. Yes, I do.

Q. And it looks like they are installing that cartridge at the handpiece; is that correct?

A. Yes.

Q. So an aesthetician could customize a facial by using the serum at the handpiece; is that correct?

A. Yes, that is correct.

(Tr. (Savsani) at 146:23-147:8.).

⁴⁰ The correct number is CX-0318, not RX-0318.

Figure 57: Nectre Disclosure of Serum Cartridge Installed at Handpiece

5) INSTALL THE SOLID CARTRIDGE

1. For ease of insertion, if the handpiece is dry, (ie. before the first treatment of the day, or when the handpiece has not been used for a while,) moisten the O-ring on the solid cartridge before inserting it into the handpiece.



2. Insert the solid cartridge into the cartridge handpiece. Push firmly until it snaps into place.



3. When the handpiece is not in use, remove the solid cartridge from the cartridge handpiece and store both the cartridge handpiece and the solid cartridge in the handpiece holder.

(CX-0318.0012.).

Cartessa appears to contend that being able to make such a modification somehow provides support for the assertion that consumers were not necessarily deterred from purchasing the Nectre because it was a single-container system. However, as shown above, there is no evidence supporting this contention.

Lastly, Cartessa's claim that the '287 patent is a "late-arising patent," and that the commercial success of the HydraFacial Systems cannot be linked to the '287 patent due to the existence of prior art patents in the Ignon patent family, is without merit. As discussed above, the HydraFacial Systems are coextensive with the Asserted Claims. *See, e.g., Fox Factory*, 944 F.3d at 1373.

HydraFacial presented evidence which demonstrates that HydraFacial's commercial

success of the HydraFacial Systems is not merely a result of overall market trends but is directly tied to its patented innovations, including the '287 patent. The comparative sales data, consumer preference, and technical advantages of the HydraFacial Systems confirm the nexus between the Asserted Claims and HydraFacial's commercial success. The consistent and substantial growth in revenue, coupled with a preference for the HydraFacial Systems over simpler alternatives, like the Nectre, provides additional support for a finding of non-obviousness of the '287 patent.

9. Copying

To establish copying, one must show evidence of replication of the patented product. *See Iron Grip Barbell Co., Inc. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2004) ("Not every competing product that arguably falls within the scope of a patent is evidence of copying. Otherwise every infringement suit would automatically confirm the nonobviousness of the patent. Rather, copying requires the replication of a specific product."). HydraFacial pointed to the following legal actions Edge Systems took against "infringers" as evidence of copying.⁴¹ (CRBr. at 66.).

1. *Edge Systems LLC, et al., v. Rafael Newton Aguila, a/k/a Ralph Aguila*, 2:14-cv-24517 (S.D. Fla.) ("*Aguila*"), where the plaintiffs asserted trademark infringement and infringement of U.S. Patent Nos. 6,299,620 (RX-0303); 6,641,591 (RX-0304); 7,678,120 (RX-0327); 7,789,886 (RX-0322); 8,066,716 (RX-0323); and 8,337,513 (RX-0326). (CX-0638.0003-06.). The court found that the defendant infringed U.S. Patent Nos. 6,299,620 and 6,641,591. (*Id.* at .0023-24.). As Cartessa noted, both of these patents are prior art to the '287 patent, have

⁴¹ In its Pre-Hearing Brief, HydraFacial also addressed a case captioned: *Edge Systems LLC v. Venus Concept USA Inc.*, 18-cv-62588 (S.D. Fla). (CPBr. at 131.). However, HydraFacial did not discuss this case in its Reply Post-Hearing Brief. Thus, any argument on this issue is deemed waived under Ground Rule 10.1.

different inventors than the '287 patent, and are unrelated to the '287 patent. (RX-0303 at (45), (75); RX-0304 at (45), (76); Tr. (Dubois) at 174:14-176:23 (HydraFacial expert confirming the same); RBr. at 71-72.).

2. *Edge Systems LLC, et al., v. Aesthetic Skin Systems LLC*, 2:17-cv-04597 (C.D. Cal.) ("*Aesthetic Skin Systems*"), where the plaintiffs asserted infringement of U.S. Pat. Nos. 6,641,591 (RX-0304); 7,678,120 (RX-0327); 7,789,886 (RX-0322); 8,048,089 (RX-0031); 8,066,716 (RX-0323); 8,337,513 (RX-0326); 9,468,464; and the U.S. Patent No. 9,550,052 ("the '052 patent") (RX-0037). (CX-0643 at ¶¶ 3, 8-10.). Although the '052 patent is related to the '287 patent (JX-0001 at (63)), the '287 patent was not asserted in that case. (CX-0643 at ¶ 3.). The parties entered into a consent order. (CX-0643.).

3. *Edge Systems LLC, et al., v. Image MicroDerm, Inc.* ("*Image MicroDerm*"), 2:17-cv-08699 (C.D. Cal.), where the plaintiffs asserted infringement of U.S. Pat. Nos. 6,641,591 (RX-0304); 7,789,886 (RX-0322); 8,066,716 (RX-0323); 8,337,513 (RX-0326); 9,468,464; and the '052 patent (RX-0037); 9,775,646. (CX-0645 at ¶¶ 3, 7-8.). As noted above, although the '052 patent is related to the '287 patent (JX-0001 at (63)), the '287 patent was not asserted in that case. (CX-0645 at ¶ 3.). The parties entered into a consent order. (CX-0645.).

"[T]he proponent of objective evidence offered to show nonobviousness, such as copying, must show that a nexus exists between the evidence and the claimed features of the invention." *Liqwd, Inc. v. L'Oreal USA, Inc.*, 941 F.3d 1133, 1138 (Fed. Cir. 2019) (citation omitted). Here, HydraFacial failed to show such a nexus. As Cartessa pointed out (RBr. at 72), the litigations *themselves* do not demonstrate copying (*Iron Grip Barbell*, 392 F.3d at 1325), and HydraFacial has not alleged any evidence of *actual* copying (CPBr. at 130-31).

With respect to *Aguila*, HydraFacial pointed to the fact that in the order granting the

plaintiffs' motion for summary judgement, the court described what HydraFacial referred to as "the defendant's copy of HydraFacial's Tower product" as follows:

Bootleg. Clone. Copycat. Imitation. Knock-off. Palm-Off. However one labels a peddled product that conspicuously capitalizes on another's intellectual property rights, this case presents the quintessential example.

(CRBr. at 66 (quoting CX-0638.0001) (other citation omitted).).

However, as noted above, the two (2) patents the court found to infringe are ***not*** related to the '287 patent. (CX-0638.0023-33; RX-0303 at (45), (75); RX-0304 at (45), (76); Tr. (Dubois) at 174:14-176:23.). Thus, this language and the court's decision in that case is irrelevant to this Investigation.

Dr. Dubois, a HydraFacial witness, testified with respect to alleged copying. As a plastic surgeon and part of his medical practice, Dr. Dubois provided facial skin rejuvenation to his patients. Dr. Dubois testified that he purchased, on the secondary market, from Mr. Aguila, a facial treatment system that he thought had been manufactured by HydraFacial. (Tr. (Dubois) at 165:5-15.). However, Dr. Dubois testified that after looking at the packaging, which was damaged, he neither used nor disassembled the accused product. (*Id.* at 166:4-15.). Notably, his only basis for believing that the accused product he purchased practiced the '287 patent is based upon conversations he had with Mr. Aguila, the defendant, and Mr. Leising.

Q. And you previously testified that your basis that the Aguila product contained the claimed features of the '287 patent is based on a discussion with either Mr. Aguila or a representative of his company; is that correct?

A. Yes.

Q. So your only basis for the Aguila product practicing the '287 patent is based on that discussion with Mr. Aguila?

A. With Mr. Aguila as well as ultimately with the court decision as well as a conversation that I had with our engineer, Mr. Leising.

Public Version

Q. Do you know when the last time someone saw that product was?

A. I personally haven't seen it since the time of the trial, which is, I think, 2015.

Q. Did you ever disassemble the product?

A. I did not.

Q. Do you know if Mr. Leinsing ever disassembled that Aguila product?

A. I do not.

Q. You stated during your deposition you were in fact afraid to plug the device in; is that correct?

A. And then I believe I changed my testimony. I ultimately plugged the device in, the computer screen did pop up. I did not use it for treatment. I was afraid to use it for a treatment.

Q. Okay. At the time of your deposition you didn't know if Mr. Aguila or his company had access to HydraFacial's engineering notebooks; is that correct?

A. No, I didn't know.

Q. At the time of your deposition you did not know if Mr. Aguila had any access to HydraFacial's design papers; is that correct?

A. I didn't know.

(Tr. (Dubois) at 172:1-173:9.).

There is no testimony or evidence that the Aguila product was ever disassembled or inspected by anyone to analyze whether it practiced the '287 patent. *See Liqwd*, 941 F.3d at 1138 ("Evidence of copying may include internal documents, direct evidence such as photos of patented features or disassembly of products, or access and similarity to a patented product."). Moreover, as Dr. Dubois confirmed, he had no information whether Mr. Aguila had any internal company documents or other information that Mr. Aguila actually copied the Edge Systems/HydraFacial product. (Tr. (Dubois) at 173:2-5.). *See Liqwd*, 941 F.3d at 1138. The lack of evidence weighs in favor of a finding that no copying occurred. *See Wyers v. Master*

Lock, 616 F.3d 1231, 1246 (Fed. Cir. 2010).

Moreover, that HydraFacial filed patent infringement suits involving the '052 patent, which resulted in consent orders, does not confirm there was copying of its products. Courts look at “whether there was actual evidence of copying efforts,” and the Federal Circuit has “firmly rejected [a] patent owner’s argument that a stipulation of infringement was by itself probative of copying.” *Liqwd*, 941 F.3d at 1137-38 (citing *Tokai Corp. v. Easton Enters., Inc.*, 632 F.3d 1358, 1370 (Fed. Cir. 2011)).

In *Aesthetic Skin Systems*, the defendant explicitly “denie[d] any wrongdoing or infringement.” (CX-0643 at ¶ 8.). In *Image MicroDerm*, although the consent order indicates that the defendant had knowledge of the asserted patents generally, there is no indication that the defendant had knowledge of the '052 patent specifically (the only patent related to the '287 patent) because where the other asserted patents are identified in paragraphs regarding the defendants’ knowledge in the context of induced infringement and willful infringement, the '052 patent is not identified. (CX-0645 at ¶¶ 11-14 (not listing the '052 patent for induced infringement); *id.* at ¶15 (not listing the '052 patent for willful infringement).). Neither consent order includes evidence of **actual** copying, e.g., efforts to replicate, access to internal documents, disassembly of a patented product, etc. See *Wyers*, 616 F.3d at 1246.

Based upon the testimony of its expert, Dr. Dubois, HydraFacial asserted that “rampant copying by others in the field has led to [Dr. Dubois’] inadvertent purchase of a counterfeit HydraFacial product.” (CRBr. at 65 (citing Tr. (Dubois) at 164:23-166:25).). During the Hearing, Dr. Dubois described this “experience” as follows:

Q. Dr. Dubois, do you have any personal experience with a competitor of HydraFacial copying HydraFacial's Tower product?

Public Version

A. I do.

* * *

Q. Could you please describe these circumstances to Judge McNamara?

A. Yes. When I was interested in purchasing the technology, and they came down, they told me what the price was, it was fairly -- it was much more expensive than the microdermabrasion units, I wanted to really test market it in my practice before investing in it.

So I wanted to see what was available on the secondary market. And I went to eBay and found somebody that was offering a refurbished HydraFacial device, and there were pictures on the website that was identical to the Elite system.

Q. And who was the person who was offering this for sale?

A. The last name was Aguila, Mr. Aguila.

Q. And did you ultimately purchase a product from Mr. Aguila?

A. I did, yes.

Q. And when you received that product from Mr. Aguila, did it appear to be similar to the HydraFacial product?

A. It was -- it wasn't similar; it was identical.

Q. Dylan, could we please pull up CDX 0003.4? Thank you.

Dr. Dubois, is this a demonstrative that you prepared for your testimony today?

A. It is, yes.

Q. What does CDX 0003.4 show?

A. On the left side of the screen is the HydraFacial Tower, and on the right side was the knock off product that I purchased from Mr. Aguila.

Q. Did you -- after you received the product from Mr. Aguila, did you subsequently become concerned about that product?

A. I did, yes.

Q. What were your concerns?

A. Well, the way it was packaged, number one. It was basically in a ramshackle type of cardboard box that, when I opened it, basically I was flooded with

Styrofoam peanuts. The device was not covered with perhaps plastics, so we had to kind of pick out the Styrofoam peanuts. And it was not what I would have expected from a factory refurbished product.

Q. So what did you do next?

A. I next sought out Edge Systems directly, and I tried to contact Mr. Aguila, and Mr. Aguila's website was closed down, and Mr. Aguila's phone number was also shut down.

Q. And what did you do next?

A. Then I started becoming concerned. And it was at that time that I contacted Edge Systems and spoke with them, and found out that they were in the midst of obtaining a temporary restraining order against Mr. Aguila at that time.

(Tr. (Dubois) at 164:23-166:25; *see also* CDX-0003.0004 (citing CX-0638.0006).).

Although Dr. Dubois may have purchased a “copycat,” “imitation,” or “knockoff” of a HydraFacial (then Edge Systems) product from Mr. Aguila (the defendant in the *Aguila* case discussed above), as the court in *Aguila* described the accused product, this does not adequately support HydraFacial's assertion that “Dr. Dubois' experience underscores the **pervasiveness** and **fidelity** of the copying and demonstrates that competitors have chosen replication over independent innovation.” (CRBr. at 66 (emphases added)). In *Aguila*, the plaintiffs alleged patent infringement against **one** defendant and **one** accused product. (CX-0638.0005-.0006.). Moreover, as discussed above, the two (2) patents found to infringe are **unrelated** to the '287 patent.

Because HydraFacial failed to demonstrate that “a nexus exists between the evidence and the claimed features of the invention,” HydraFacial has not shown a pattern of copying that would support a finding of non-obviousness, in the event that the '287 patent is found to be obvious. *Liqwd*, 941 F.3d at 1138.

D. The Asserted Claims Are Not Invalid as Anticipated by Alleged Prior Public Use of HydraFacial's Commercial Tower Devices Prior to the Critical Date

1. Prior Public Use Overview

Cartessa argued that the Asserted Claims of the '287 patent are invalid as anticipated under 35 U.S.C. § 102(b) as having been in public use more than one year prior to December 30, 2005.⁴² (RBr. at 83.). Cartessa's public use analysis is based on the commercial HydraFacial and HydraFacial MD devices ("Commercial Tower Devices"), which Cartessa did not dispute. (*Id.* at 82 ("Cartessa acknowledges that the unit inspected purports to be manufactured in May 2005 and that it was the 18th commercial unit manufactured."); JSUI at 5 ("The Parties do not dispute that the HydraFacial Tower system [was] manufactured in May of 2005").).

For the following reasons, Cartessa has not proven by clear and convincing evidence that: (i) the Commercial Tower Devices were used before December 30, 2004; and (ii) one, if any, of the earlier prototypes of the Commercial Tower Devices was used before December 30, 2004; and (iii) those earlier prototypes meet each claim element of the Asserted Claims.

Moreover, as HydraFacial noted, any alleged use of the prototypes before December 30, 2004 was experimental and, therefore, is not invalidating. (CRBr. at 30.).

2. HydraFacial's Prototypes and Tower Devices

There was no dispute that several prototypes of the HydraFacial devices were developed and tested by the inventors of the '287 patent.

The first prototype was referred to as the Medela Prototype 1. (Tr. (Leinsing) at 1204:4-

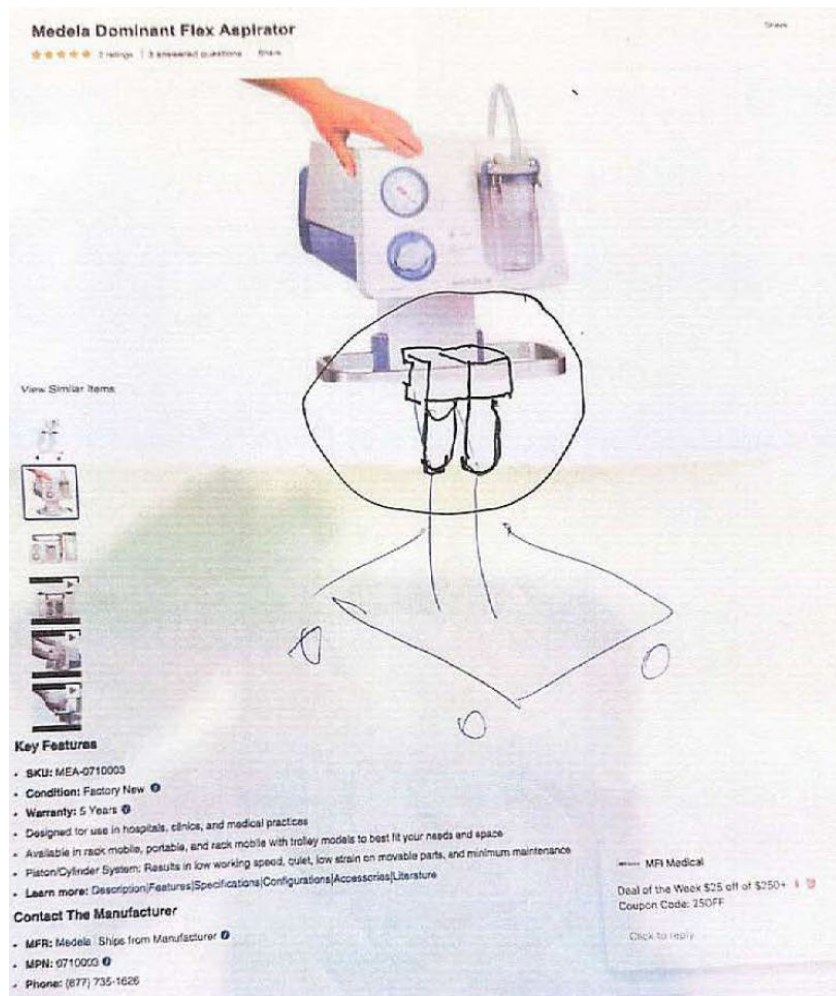
⁴² It is undisputed that the earliest priority date for all claims of the '287 patent is December 30, 2005. (JSUI at 2.). Thus, the critical date is December 30, 2004, which is also not disputed. (*Id.*).

10; RX-0014C (Roger Ignon Dep. Tr.)⁴³ at 138:17-140:17.). The Medela Prototype 1 used an existing Medela vacuum system, added a handpiece, and included a single fluid supply container. (RX-0014C (Ignon Dep. Tr.) at 138:17-140:17.).

Mr. Ignon testified that the inventors started moving toward a multi-supply container device, which resulted in the Medela Prototype 2. (*Id.* at 144:6-146:9.). The Medela Prototype 2 included a manifold hanging from a rail on front of the Medela and allowed two (2) fluid bottles to be used with the system. (RX-0014C (Ignon Dep. Tr.) at 144:19-23, 145:12-23.). The Medela Prototype 2 is shown below in Figure 58.

⁴³ Mr. Roger Ignon was a co-founder of Edge Systems/HydraFacial. (RX-0014C (Ignon Dep. Tr.) at 11:4-12.). Mr. Ignon is also a named inventor of the '287 patent. (*See* JX-0001 at (72).).

Figure 58: Medela Prototype 2



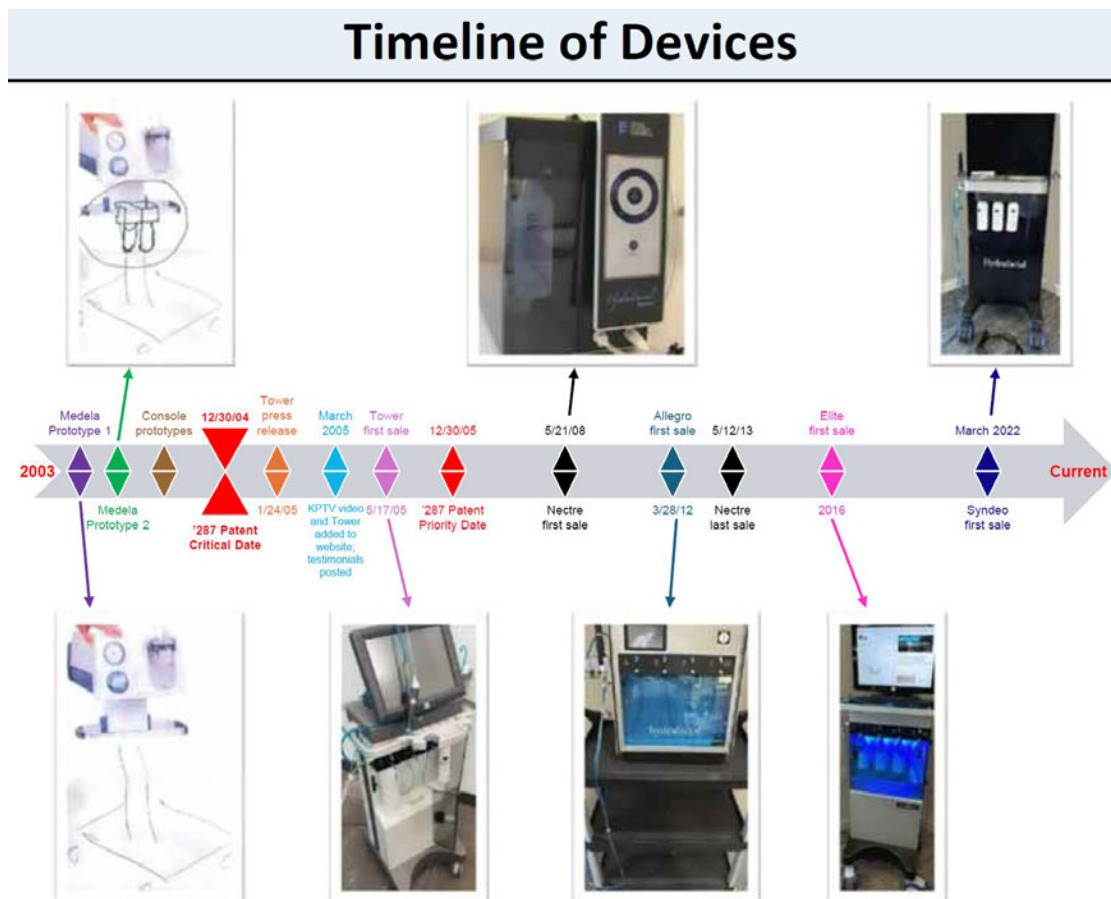
(RX-0259 (annotated by Mr. Ignon during his deposition (*see* RX-0014C (Ignon Dep. Tr.) at 145:12-18))).

Mr. Ignon, one of the '287 patent inventors, testified that in parallel with the Medela Prototype 2, the inventors were developing the concept of the “console system” or “tower system.” (RX-0014C (Ignon Dep. Tr.) at 149:14-21.). Mr. Ignon confirmed that the start of the development of the console system took place after the start of the Medela 2 testing. (*Id.* at 149:25-150:3.). According to HydraFacial, the “Console Prototypes,” sometimes referred to as the “Tower,” were “early versions of what would become the HydraFacial and HydraFacial

MD,” i.e., the “Commercial Tower Devices.” (CRBr. at 33 (citing RX-0014C (Ignon Dep. Tr.) at 149:14-21)).

Mr. Leinsing, HydraFacial’s expert, provided a timeline of the development of the various prototype devices that are relevant to the development of the inventions claimed in the ’287 patent. The timeline is copied below in Figure 59.

Figure 59: Leinsing Demonstrative Showing Timeline of Edge Systems/HydraFacial Devices



(CDX-0007C.0078.).

HydraFacial’s co-founder, Mr. William Cohen,⁴⁴ testified that the difference between the

⁴⁴ Mr. William Cohen was a co-founder of HydraFacial and a named inventor of the ’287 patent. (RX-0016C (Cohen Dep. Tr.) at 12:1-12; JX-0001 at (72)).

HydraFacial (for spa units) and HydraFacial MD (for medical units) are the power level, the solutions that can be used, and the tips; the latter being more aggressive for medical use. (RX-0016C (Cohen Dep. Tr.) at 111:3-6, 116:14-25, 117:2-4.). The Tower obtained its official name of HydraFacial and HydraFacial MD in or around March of 2005. (*See* RX-0302C (“The device/product was originally put out under a ‘different name’ (Hydraderm), in January 2005. . . . [T]he new name was announced on 3/31/2005”); RX-0016C (Cohen Dep. Tr.) at 75:7-14 (explaining that Hydraderm was the original name, and that the name changed to HydraFacial).). Consistent with the identified timing, in February 2005, HydraFacial sought a trademark for HydraFacial MD. (RX-0302C; RX-0016C (Cohen Dep. Tr.) at 75:7-14.).

Cartessa’s expert, Dr. Jensen, analyzed/examined the Tower that was later marketed as the HydraFacial MD system. (Tr. (Jensen) at 901:20-23; RX-0238C; RDX-0002C.0159).). Cartessa acknowledged that “the unit inspected purports to be manufactured in May 2005 and that it was the 18th commercial unit manufactured.” (RBr. at 82 (citing RX-0016C (Cohen Dep. Tr.) at 111:11-17; RX-0202.0009).). Cartessa argued that the commercial HydraFacial MD system, which Dr. Jensen analyzed/inspected, “had no material differences to the Tower prototype and was functionally equivalent.” (RBr. at 82.). Dr. Jensen’s demonstrative, which depicts the HydraFacial MD system he inspected, is copied below in Figure 60.

Figure 60: Jensen Demonstrative Showing the HydraFacial MD System He Inspected



(RDX-0002C.0159 (citing JX-0073C.0001; RX-0202C.0002); *see also* RX-0238C.).

3. Cartessa's Uncorroborated Testimony Evidence Is Insufficient to Prove Which Devices Were Publicly Used Before the Critical Date

To establish prior public use, Cartessa relied on the testimonies, and memories from some 20 years before, of the following third-party witnesses: (i) Ms. Janine Sevy; (ii) Ms. Elmina Pangan; (iii) Ms. Pei Pei Wang; and (iv) Ms. Betsy Whiteley. (RBr. at 83-85.). Based on their testimonial evidence, Cartessa contended that the Tower, i.e., HydraFacial MD, was used to perform treatments or facials on these witnesses at least as early as November 2004.⁴⁵ (*Id.* at 80.). Ms. Sevy, Ms. Pangan, and Ms. Wang worked at Windes & McClaughry

⁴⁵ All four (4) witnesses testified that Ms. Sheri Sallenbach, an employee of Edge Systems, performed their facial treatments. (Tr. (Sevy) at 640:13-17; RX-0022C (Pangan Dep. Tr.) at 11:18-20; Tr. (Wang) at 824:12-21; RX-0020C (Whiteley Dep. Tr.) at 10:21-25.).

(“Windes”), a company that performed work for Edge Systems, during the relevant time period.⁴⁶ (Tr. (Sevy) at 639:6-24 (Sevy); RX-0022C (Pangan Dep. Tr.) at 8:1-16; Tr. (Wang) at 823:4-14.). Ms. Whiteley was a friend of Mr. Cohen’s wife. (RX-0020C (Whiteley Dep. Tr.) at 9:10-21.).

Although their testimonies were credible and it was clear that none of the witnesses had any financial interest in Cartessa or in the outcome of this Investigation (Tr. (Sevy) at 653:1-9; Tr. (Wang) at 833:21-834:3; RX-0022C (Pangan Dep. Tr.) at 28:17-29:6; RX-0020C (Whiteley Dep. Tr.) at 50:24-51:18), the recollections of each of the four (4) witnesses about treatments that occurred approximately 20 years ago were, not surprisingly, vague and lacked sufficient detail to amount to clear and convincing evidence of prior use. Their testimonies also were not corroborated by direct evidence that clearly supported which of the various machines was used to administer the treatments to the witnesses; when the witnesses received their facial treatments; and which treatments they received, that is with water alone, with serums, or some combination thereof.

For the reasons discussed below, the testimonies of the third-party witnesses are insufficient to establish: (i) the prior use of any device before December 30, 2004; or (ii) any use of the HydraFacial MD that Dr. Jensen and Cartessa analyzed.

Ms. Sevy testified that the first facial treatment she received was after her October 25, 2004 [REDACTED] January 28, 2005. (Tr. (Sevy) at 642:24-643:7, 643:17-22; *see also id.* at 644:13-645:21; RX-0219C (a [REDACTED] in which Ms. Sevy documented [REDACTED])). Ms. Sevy also testified that

⁴⁶ Ms. Wang testified that she was introduced to Mr. Ignon of Edge Systems by Windes’ tax department, which was hired by Edge Systems to do some work for them. (Tr. (Wang) at 838:16-24.).

by the time she [REDACTED] on January 28, 2005, she believed she had received more than one facial treatment and had been receiving facial treatments for two (2) to three (3) months. (*Id.* at 643:23-644:3.). However, during cross-examination, Ms. Sevy confirmed that her recollection of the timing of her treatments, which occurred 20 years ago, was just a guess and that she could not be certain that she received any treatments before December 30, 2004.

Q. And you've been asked about the details of certain treatments that you received roughly 20 years ago, correct?

A. Correct.

Q. And you've been asked about the timing of when you started receiving these treatments that would have occurred roughly 20 years ago, right?

A. Right.

Q. Ms. Sevy, you [REDACTED] on January 28th, 2005; is that right?

A. Right.

Q. And you believe you started to receive these treatments at Edge Systems at some point before January 28th, 2005; is that correct?

A. Correct.

Q. But you also think it was sometime after your October 2004 [REDACTED] that you started receiving these treatments; is that correct?

A. Correct.

Q. But you would agree that it was just a **guess** as to when you started receiving these treatments at Edge Systems prior to learning of [REDACTED] on January 28th, 2005, correct?

A. **Yes.**

Q. So you would agree that you don't know **for certain** that you received **any** treatments **before** December 30th, 2004, correct?

A. **For certain, no.**

(Tr. (Sevy) at 654:17-655:19 (emphases added)).

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Although Ms. Sevy acknowledged that she could not say for “certain” that her first treatment was prior to December 30, 2004, Cartessa pointed to her testimony that it was “very likely” that her first treatment was in November 2004. (RBr. at 83 (citing Tr. (Sevy at 655:16-19, 662:9-17.)). As significant as her two (2) milestone dates must have been for Ms. Sevy, i.e., a [REDACTED], the accuracy of which is not doubted, as HydraFacial noted, her uncertain testimony about the dates of the *treatments* do not sufficiently demonstrate that she actually received one (1) or more of the treatments before December 30, 2004.

Additionally, Cartessa relied on Ms. Sevy’s testimony that she had two (2) or three (3) facial treatments before she learned that [REDACTED], and that she had facial treatments monthly. (RBr. at 83 (citing Tr. (Sevy) at 647:6-13).). However, when read in the context of the rest of the line of questioning, which is reproduced below, Ms. Sevy did not recall how often she received facial treatments some 20 years ago. Ms. Sevy’s responses were based on her thoughts about the likelihood of when her facial treatments occurred.

Q. When you were receiving facials from Edge Systems, how often did you receive a facial?

A. *I don’t recall.*

Q. Do you think it was *more likely* that you had them monthly?

A. Yes.

Q. Weekly?

A. No.

Q. Approximately how many facials do you *think* you had before learning that [REDACTED]?

A. Two or three.

(Tr. (Sevy) at 647:3-13 (emphases added).).

Moreover, Ms. Sevy confirmed that her eyes were closed during her facial treatments; she did not examine or touch the machine that was used; she was not certain whether the same machine was used during each facial treatment; and she did not know which fluids were used (water or serum). (Tr. (Sevy) at 659:1-660:7.). In other words, too many essential details were missing. Accordingly, Ms. Sevy's testimony does not clearly and convincingly demonstrate ***when*** Ms. Sevy received facial treatments, with ***which device*** she was treated, and ***which fluids*** were applied to her skin during the treatments.

Cartessa also relied on Ms. Pangan's testimony that her level of confidence that her HydraFacial treatments began in 2004 would "[p]robably [be] 90 percent." (RBr. at 83 (citing RX-0022C (Pangan Dep. Tr.) at 31:17-19).). However, Ms. Pangan's testimony was rife with assumptions and beliefs that renders her "90 percent" confidence level unpersuasive and unsupported by either her own testimony, let alone by any other documentary evidence.⁴⁷

⁴⁷ The blue and yellow highlighting indicate the Parties' designations of Ms. Pangan's deposition testimony.

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Q. When do you believe you had that first conversation with Ms. Wang about the free treatments at Edge Systems?

A. Well, I am assuming it's between 2003 and '04, around there.

Q. Why do you think it was that time frame?

A. Well, for some reason I thought it was before I was 30, so around there, even though I was 28. So that's why.

Q. Do you mind if I ask when you turned 30?

A. In 2003, in June 2003. So around there.

But then I also know Janine Sevy was, like -- I think had a milestone, whether -- she was either getting married or divorced. So that's kind of -- that's what I remember.

Q. Do you think that you started receiving the free treatments of HydraFacial at Edge Systems around Ms. Sevy's major milestone?

A. I thought it was before that, before she -- she was pregnant -- even before she knew she was pregnant, for some reason.

Q. I realize this might be hard, given how long it's been, but if you had to assign a degree of confidence -- just say percentage of confidence that you think you began receiving free treatments at Edge Systems in 2003, what percentage do you think that would be?

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A. Level of confidence, 50 percent.

Q. What about in 2004? What would your level of confidence be?

A. Probably 90 percent.

Q. Other than your 30th birthday and Ms. Sevy's pregnancy milestone, do you have any other basis for why you believe you started receiving those treatments at that time?

A. I just thought I had great skin around that time. That's why. After -- yeah. I just thought...

Q. Was there a time period where you thought you no longer had great skin?

A. I don't know. I even thought I was 28. So that's why I was like -- I had to kind of narrow down the time frame, but I thought it was...

I think it's just looking at the video and I thought "Oh, I look like I'm 29, 30 at that time." That's why -- that's what...

Q. But it's difficult to know how long it's been?

A. Yeah, but I don't want to assume. Just because of the way I look, I thought it was around that time.

(RX-0022C (Pangan Dep. Tr.) at 30:12-31:1-13, 31:16-32:13.).

Like Ms. Sevy, Ms. Pangan had no recollection of whether water versus some type of serum was used. (*Id.* at 18:16-19:7 ("Q. Did you have any understanding of what type of liquid Sheri was applying during the treatments? A. I don't remember. Q. You mentioned earlier that -- you mentioned earlier having used water. A. Uh-huh. Q. Do you know whether it was water

versus some type of serum. A. No, I don't. I know it's liquid.") (referencing the picture of a machine shown in RX-0217.0001).). For these reasons, Ms. Pangan's testimony does not amount to clear and convincing evidence that demonstrates or supports a finding: (i) that she received facial treatments before December 30, 2004; (ii) about which device was used (and whether the same device was used) for each facial treatment she had; or (iii) about which fluids were applied to her skin during her facial treatments.

Additionally, Cartessa relied on Ms. Wang's testimony in support of its assertion that the Tower device, i.e., HydraFacial MD, was used prior to December 30, 2004. (RBr. at 83-84.). Like Ms. Sevy and Ms. Pangan, Ms. Wang did not recall with any certainty the timing of her facial treatments, but she testified they could have begun at the beginning of 2005.

Q. Okay. Are you able to pinpoint whether it was late 2004 or early 2005 when you started receiving your treatments?

A. Not a hundred percent, no.

Q. So it could have been the ***beginning of 2005*** when you started receiving your treatments?

A. ***It could have been***, yeah.

(Tr. (Wang) at 835:7-13 (emphases added).).

Cartessa argued that because Ms. Wang was the person who invited Ms. Sevy and Ms. Pangan to have the facial treatments, and because Ms. Wang thought she had the first facial treatment among them, and because Ms. Sevy and Ms. Pangan believed that they likely had facials in 2004, Ms. Wang's treatment would have likely pre-dated December 30, 2004. (RBr. at 84 (citations omitted).). Cartessa also asserted that this was "corroborated by Mr. Cohen, who testified that it was likely that Ms. Wang had treatments in 2004." (*Id.* (citing RX-0016C (Cohen Dep. Tr.) at 33:2-13).). However, Cartessa's assertion is not an accurate characterization of Mr.

Cohen's testimony, which is reproduced below.

Q. Do you remember Pei Pei Wang having treatments early on?

A. Yes.

Q. Do you recall when her treatments were?

A. Pretty early on. I think she was with the Medela unit way early, you know. And then I think she was one that wanted more. And she brought in other people from Windes, from the accounting company.

Q. So you think she may have had treatments in 2003, 2004?

A. Probably '04, I think. Yeah.

(RX-0016C (Cohen Dep. Tr.) at 33:2-13.).

In his testimony above, Mr. Cohen is clearly referring to the Medela, which he identified by name. Thus, his testimony does not support Cartessa's assertion that the HydraFacial MD, or some Console Prototype, was used to administer Ms. Wang's treatments before December 30, 2004.

With respect to the treatment fluids that were used at that time, although Ms. Wang testified that "I *think* there was serum connected with the water," and not just water, she also testified that "I don't know *exactly*. [Sheri Sallenbach] didn't go into the technical of how it actually worked, but I know that there was something together to clean my face, and then they also vacuum it out at the same time." (Tr. (Wang) at 837:14-838:2 (emphases added).).

Cartessa also relied on Ms. Whiteley's testimony for support of its public use argument. Cartessa contended that:

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While she could not recall if her treatments were in December 2004 or January 2005, she provided a testimonial that was posted on HydraFacial's website no later than March 4, 2005 (RX-0225 ("Besty B."); RX-0233.0001-.0006), which stated that she had three treatments, further supporting that her first monthly treatment likely would have predated the critical date. RX-0020C, Whiteley Dep. Tr. at 17:8-19:1.

(RBr. at 84 (emphasis in original).)

Again, like Ms. Sevy, Ms. Pangan, and Ms. Wang, when asked if it was "highly likely that you started with HydraFacial treatments before December 30, 2004," Ms. Whiteley responded that "***I actually would think no.*** I would think January, February, March, because I'd only had three." (RX-0020C (Whiteley Dep. Tr.) at 31:17-32:8 (emphasis added).). When probed further about a video testimonial that Edge Systems created using some of the witnesses' praise about their facial treatments, and made available no later than March 4, 2005, she testified that she "couldn't say one way or the other whether it was December or January. ***I don't remember the exact date.*** It could have been December. It could have January." (*Id.* at 32:9-15 (emphases added).). She also could not recall whether her first facial treatment was before or after Christmas. (*Id.* at 32:22-25.).

Even if Ms. Whiteley was given facial treatments prior to the critical date, there is no evidence which device was used to treat her. (RX-0014C (Ignon Dep. Tr.) at 153:10-16 ("Q. For any given non-employee test subject, for any. Let's say, a single potential non-employee who was tested on, is it possible that they were tested on with multiple different machines at different times? A. Yes. To get information back as to how they experienced the serums."); RX-0016C (Cohen Dep. Tr.) at 144:2-5 ("Q. To your knowledge, would Betsy have been treated with multiple prototypes of the device? A. I believe so. Because she had a lot of treatments, and I believe she had -- yeah.")).

Cartessa argued that the testimonies of the third-parties are “reliable and credible” because: (i) they “have no interest in the litigation or Cartessa” (RBr. at 85 (citing Tr. (Sevy) at 653:1-9; Tr. (Wang) at 833:21-834:3; RX-0022C (Pangan Dep. Tr.) at 28:17-29:6)); and (ii) “the witnesses were able to recall details like the office being located on Redondo in the Signal Hill area of Long Beach” (*id.* (citing Tr. (Sevy) at 640:7-10; Tr. (Wang) at 848:6-10; RX-0020C (Whiteley Dep. Tr.) at 9:4-6; RX-0022C (Pangan Dep. Tr.) at 10:7-11; RX-0016C (Cohen Dep. Tr.) at 39:14-40:8.)). While this may be the case, neither point overrides the overwhelmingly vague testimonial evidence concerning **when** the witnesses received their facial treatments, **which** machine(s) was used to administer their facial treatments, and **what** type of treatments the witnesses received, i.e., water alone or with serums.

Additionally, Cartessa argued that Ms. Wang, Ms. Pangan, and Ms. Whiteley identified the device that was used to give them facial treatments in a promotional video (JX-0021), which included their testimonials, as the machine (RX-0213; RX-0215) that was “used on them for their treatments.” (RBr. at 87 (citing Tr. (Wang) at 831:7-17; RX-0020C (Whiteley Dep. Tr.) at 41:10-24, 42:3-16; RX-0022C (Pangan Dep. Tr.) at 18:1-8); *see also* RX-0217.). Cartessa also contended that HydraFacial’s corporate witness, Ms. Nancy Parash,⁴⁸ and HydraFacial’s co-founder, Mr. Cohen, identified this device as “the Tower.” (RBr. at 87 (citing RX-0008C (Parash Dep. Tr.) at 145:19-146:6; RX-0215; RX-0216; RX-0016C (Cohen Dep. Tr.) at 61:23-62:2; RX-0210.)). Even assuming, *arguendo*, that the machine the witnesses recognized and was purportedly used to administer their facial treatments was “the Tower,” as discussed above,

⁴⁸ At the time of her deposition, Ms. Nancy Parash was Vice President of customer experience, technical support, and sales operations of HydraFacial. (RX-0008C (Parash Dep. Tr.) at 20:4-6.). She began working at HydraFacial December 2018. (*Id.* at 19:12-14.).

Cartessa did not present evidence corroborating that the Tower was the machine that was used to give the witnesses their facial treatments before the critical date. Moreover, Cartessa failed to show that whatever Tower or “Console Prototype” was used did not have any material differences from the Commercial Tower Device Dr. Jensen analyzed, as Cartessa argued, because Dr. Jensen only inspected the 2005 HydraFacial MD system. (RBr. at 82.). In other words, it is possible that another prototype was used to give the third-party witnesses their facial treatments other than the model that Dr. Jensen analyzed. There is no contemporaneous documentation that corroborates the witnesses’ uncertain testimonies.

Given Cartessa’s reliance on uncorroborated witness testimony, Cartessa failed to prove by clear and convincing evidence that the Commercial Tower Devices were used prior to the critical date. *Finnigan Corp.*, 180 F.3d at 1366; *Juicy Whip, Inc.*, 292 F.3d at 737-38. Additionally, there is insufficient and consistent evidence against giving Cartessa the benefit of an inference in its favor. Because Cartessa did not present facts sufficient to establish a *prima facie* case of prior public use, HydraFacial is not required to point to or come forward with convincing evidence to counter that showing. *TP Labs.*, 724 F.2d at 971.

4. Any Public Use Prior to the Critical Date Was Experimental and Not an Invalidating Prior Public Use

Even assuming, *arguendo*, that Cartessa proved the Commercial Tower Devices were used before the critical date, Cartessa’s proof of use is insufficient to invalidate the Asserted Claims because experimental use is not an invalidating public use. *See City of Elizabeth v. Am. Nicholson Pavement Co.*, 97 U.S. 126, 135 (1877) (“The use of an invention by the inventor himself, or any other person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded as [an invalidating public use].”); *see also TP*

Labs., 724 F.2d at 971 (“if a use is experimental, even though not secret, ‘public use’ is negated” (discussing the Supreme Court’s reference to “experimental use” in *City of Elizabeth* as a “negation” and not an “exception” to the public use bar). Experimental uses include “tests needed to convince [the inventors] that the invention is capable of performing its intended purpose in its intended environment.” *EZ Dock v. Schafer Sys., Inc.*, 276 F.3d 1347, 1352 (Fed. Cir. 2002).

The Federal Circuit has identified factors which may be helpful in analyzing the question of public use, including “the nature of the activity that occurred in public; the public access to and knowledge of the public use; [and] whether there was any confidentiality obligation imposed on persons who observed the use[.]” *Netscape Commc’ns Corp. v. Konrad*, 295 F.3d 1315, 1320 (Fed. Cir. 2002). For example, “when disclosure is limited to a small number of uninformed observers there may be no reason to believe ‘that a viewer . . . could thereby learn anything of [the later-patented invention]’ and disclose the invention to others.” *Dey, L.P. v. Sunovion Pharms., Inc.*, 715 F.3d 1351, 1356 (quoting *W.L. Gore & Assocs. V. Garlock, Inc.*, 721 F.2d 1540, 1549 (Fed. Cir. 1983)).

Consistent with the types of circumstances the Federal Circuit recognized in *Netscape Communications* and *Dey*, evidence adduced in this Investigation demonstrates that any use by HydraFacial was experimental and, thus, negates the public use bar.

For example, the named inventors repeatedly testified that the testing was confidential. (RX-0014C (Ignon Dep. Tr.) at 109:13-17 (“They were all instructed it was purely confidential.”), 110:4-7 (“they were all instructed that this was confidential”), 147:19-148:1 (Ms. Sallenbach was directed to “instruct the people that were being treated that this was a confidential project that we were working on”), 150:12-18 (“I told [Ms. Sallenbach] we had to

keep this confidential. I was afraid that competitors would find out about what we were doing ahead of time.”); RX-0016C (Cohen Dep. Tr.) at 135:5-9 (“Q. To your knowledge, were non-employees on whom the single-container Medela unit was tested informed to keep the testing confidential? A. The people I talked to I would mention that, yeah.”), 138:24-139:1 (“Q. And to your knowledge, were they informed to keep their treatments confidential? A. Yes.”), 141:1-3 (“Q. And did -- were they expected to keep what they learned during this testing confidential? A. Yes.”).

Additionally, the third-party test subjects comprised a small number of uninformed observers who did not: (i) operate the test devices; (ii) examine the devices; (iii) observe the inner workings; or (iv) understand how they worked. (RX-0014C (Ignon Dep. Tr.) at 109:13-17: (“Q. What was their relationship with Edge Systems? A. I don’t know how I would put that. They were independent. They were just a handful.”); RX-0016C (Cohen Dep. Tr.) at 140:13-25 (“A. . . . [W]e would do employees and other people, you know, friends and family-type thing. Q. And the persons on whom the prototype of the Tower was tested, did they know that this was testing of a machine still in development? A. Yes.”), 139:2-5 (“Q. Were any of the persons on which the testing was conducted allowed to operate the multi-bottle hydrodermabrasion -- A. No.”), 142:4-13 (“Q. And so during the testing of the prototype Tower devices, were non-Edge employees allowed to operate the device? A. operate, no. No. Q. . . . During the testing of the prototype Tower devices, were non-Edge employees allowed to examine the device? A. . . . So through all what I would call development, the answer is no.”), 143:8-13 (“Q. And prior to 2005, would any non-Edge employee have been allowed to examine the interior, I believe we called in plumbing earlier, the interior mechanics of the device? A. No. No one was allowed to do that until they bought the machine and it was theirs.”); *see also* Tr. (Wang) at 839:6-13,

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841:6-11 (testifying that she did not examine the device or see any internal plumbing or components).).

Moreover, Ms. Sevy and Ms. Wang confirmed that their facial treatments were performed in a private room at Edge Systems. Ms. Sallenbach was the only person present during the witnesses' facial treatments. Ms. Sevy and Ms. Wang also testified that they understood the devices used for their facial treatments were under development. For example, Ms. Sevy provided the following credible and detailed testimony.

Q. And all of your treatments took place at the Edge Systems office building, correct?

A. Correct.

* * *

Q. And you went to a treatment room; is that right?

A. Yes.

Q. And the treatments were always performed within the same room, correct?

A. Yes.

Q. And it was Ms. Sallenbach who administered these treatments; is that right?

A. Yes.

Q. And Ms. Sallenbach was the only person present during your treatment sessions, correct?

A. Yes. Correct.

Q. And no one else was present during your treatment sessions, right?

A. Correct.

* * *

Q. And you were informed by Ms. Sallenbach that the treatments were for testing purposes, correct?

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A. Correct.

* * *

Q. And it was your understanding that the machine or the machines used during the treatment you received were still being developed between those treatments?

A. Correct.

Q. And it was your impression that the machines were in the testing process before they were going to be offered for sale, correct?

A. Correct.

Q. And it was your impression that Edge Systems would have been upset if you told its competitors about the treatments you were receiving, correct?

A. Correct.

Q. And that's because it was your impression at the time that Edge was still working on the product and wanted to finish testing before it brought it to market, correct?

A. Correct.

(Tr. (Sevy) at 655:20-22, 656:3-16, 657:2-4, 657:11-658:1.).

Ms. Wang provided similar testimony.

Q. And you testified that all your treatments took place at the offices for Edge Systems, correct?

A. Yes.

* * *

Q. Okay. And Ms. Sallenbach, she would meet you in the reception area; is that correct?

A. I think so. Yeah, I think she did come out to the reception to get me.

Q. And she would lead you back to the treatment room; is that right?

A. Yes.

Q. Okay. And the treatment room had a closed door; is that correct?

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A. Yes, absolutely.

Q. And the treatments were always performed within the same room; is that right?

A. Correct.

Q. And was it Ms. Sallenbach that was present in performing the treatments?

A. Yes.

Q. And was Ms. Sallenbach the only person present during your treatment sessions?

A. Yes.

Q. And no one else was present during those treatments, correct?

A. No.

* * *

Q. And you knew that the company was testing these prototypes, correct?

A. I knew they were going to -- they were trying to sell it, obviously, so they were doing, you know -- yes, testing too, yes.

Q. And you were serving as one of their test subjects, correct?

A. Correct.

(Tr. (Wang) at 835:14-16, 836:13-837:9, 842:23-843:5.).

Ms. Eva Chang,⁴⁹ a former HydraFacial employee who took many of the before and after photographs of the witnesses who were treated, also testified that the testing took place in a locked room at the HydraFacial building. (RX-0318C (Chang Dep. Tr.) at 125:11-126:18.).

Additionally, an analysis of the relevant Federal Circuit factors demonstrates that the testing, i.e., the facial treatments the witnesses were given, was an experimental use.

First, the nature of the claimed invention required public testing to evaluate it under

⁴⁹ From February 2003 to December 2009, Ms. Eva Chang was Head of Marketing for Edge Systems. (RX-0318C (Chang Dep. Tr.) at 6:19-25.).

conditions of actual use. (*See* JX-0001 at Abstract, cls. 1, 11, 22.). One of the inventors of the '287 patent, Mr. Ignon, testified that since the patented device is directed to medical treatments, it was necessary for the inventors to determine that the device would be safe, effective, and could work with serums. (RX-0014C (Ignon Dep. Tr.) at 142:24-143:13, 148:21-149:3, 151:20-152:5, 152:20-153:9; RX-0016C (Cohen Dep. Tr.) at 135:10-136:11, 139:13-24, 141:6-142:3.).

HydraFacial's expert, Dr. Dubois, a medical doctor who is Board certified in facial reconstruction and plastic surgery, also testified that testing is "definitely required" to determine if a new skin rejuvenation system works for its intended purpose. (Tr. (Dubois) at 163:25-164:12 ("We have to look at the immediate response to the instrument. We like to see what the delay in response were [sic], intermediate response.")). He opined that three (3) to six (6) months of testing would be a reasonable period. (*Id.*).

Second, testimonial evidence confirmed that the inventors maintained complete control over the invention, and did not allow the test subjects to use, operate, or examine the device. (Tr. (Sevy) at 656:5-16; Tr. (Wang) at 836:8-837:9; RX-0014C (Ignon Dep. Tr.) at 141:18-142:1, 151:9-18; RX-0016C (Cohen Dep. Tr.) at 108:16-20, 137:20-138:3, 139:2-5, 142:4-6, 143:8-13; RX-0022C (Pangan Dep. Tr.) at 35:1-4, 35:8-20, 36:1-24; RX-0020C (Whiteley Dep. Tr.) at 59:8-15, 58:3-6, 72:3-25, 72:3-25; RX-0318C (Chang Dep. Tr.) at 125:11-126:18.). *See, e.g., Barry*, 914 F.3d at 1330 (discussing the importance of not placing a product invention outside the inventor's control; *id.* (finding use was experimental where "there was no loss of control" by the inventor because "[n]o person left the operating room with the (method) invention, and no person learned the method without an obligation of confidentiality . . . there was no placing of the invention in the public domain that is inconsistent with experimentation").

Third, HydraFacial did not receive payments from the test subjects for the experimental

facials that were performed on them. (Tr. (Wang) at 838:3-7; Tr. (Sevy) at 656:24-657:1; RX-0022C (Pangan Dep. Tr.) at 13:12-14; RX-0020C (Whiteley Dep. Tr.) at 9:7-9; RX-0014C (Ignon Dep. Tr.) at 148:1-7.). Ms. Wang also testified that there was no *quid pro quo* arrangement when she was offered the facial treatments. (Tr. (Wang) at 843:8-10.).

Fourth, as Messrs. Ignon and Cohen repeatedly testified and discussed above, there was a secrecy obligation. (RX-0014C (Ignon Dep. Tr.) at 109:13-17, 110:4-7, 147:19-148:1 (“Q. Did -- you instruct Sheri in any way about confidentiality when testing this machine? A. All the time. Q. What was your instruction? A. To not talk about the system and not -- instruct the people that were being treated that this was a confidential product that we were working on.”), 150:12-18 (“Q. Did you speak to Ms. Sallenback about confidentiality? A. Yes, absolutely. Q. What did you tell her? A. I told her we had to keep this confidential. I was afraid that competitors would find out about what we were doing ahead of time.”); RX-0016C (Cohen Dep. Tr.) at 135:5-9, 138:24-139:1, 141:1-3.).

Cartessa argued that there were no secrecy obligations because there was no evidence that the third-parties signed a non-disclosure agreement. (RBr. at 94-95.). As Cartessa noted, Ms. Pangan, Ms. Wang, and Ms. Sevy did not recall being told that they could not share information about the treatments. (RX-0022C (Pangan Dep. Tr.) at 22:2-6; Tr. (Wang) at 829:23-830:2; Tr. (Sevy) at 650:5-12.). Ms. Whiteley also testified that she had no recollection “one way or the other” about such an instruction. (RX-0020C (Whiteley Dep. Tr. at 20:11-21:1.). As Cartessa also pointed out, the women who were treated each discussed their treatments with one or more family members or friends, and in Ms. Wang’s case, her co-workers. (RX-0022C (Pangan Dep. Tr.) at 22:7-12; Tr. (Wang) at 830:3-9; Tr. (Sevy) at 650:13-17; RX-0020C (Whiteley Dep. Tr.) at 21:8-11.). While this may be the case, none of the third-

parties explained exactly what they shared beyond the fact they were receiving the facial treatments. It is also not clear that any of the third-parties specifically mentioned they were receiving hydrodermabrasion treatments from Edge Systems.

Furthermore, Ms. Sevy testified that it was her impression Edge Systems would have been upset if she told its competitors about the facial treatments she was receiving. (Tr. (Sevy) at 657:11-658:1.). Ms. Whiteley also testified that although she did not remember being told not to talk about the treatments, “because it was research, they would not -- they would have requested that I don’t share[.]” (RX-0020C (Whiteley) at 21:2-7; *see also id.* at 56:3-7 (“Q. And why is it that you don’t think you would have shared that kind of information with a competitor? A. Well, because if – because it wasn’t my information to share. Q. Did you understand that it was Edge Systems’ experimental information? . . . A. Okay. I mean, I understood that they were in the process of developing something that was uniquely theirs at the time.”)). More importantly, Messrs. Ignon and Cohen repeatedly provided unequivocal testimony that the testing was intended to be confidential and that they informed Ms. Sallenbach about the confidential nature of the testing.

Fifth, the testing was performed by a single HydraFacial employee, Ms. Sallenbach, under the instruction of the inventors to aid the inventors in developing the technology. (RX-0014C (Ignon Dep. Tr.) at 143:4-18, 148:17-149:3, 152:16-153:9.).

Sixth, despite Cartessa’s assertion that the experimental treatments were for the purpose of commercial exploitation (RBr. at 92-94), the evidence demonstrates that the facial treatments were performed for free, without any *quid pro quo*, and the test subjects understood the treatments were experimental. (RX-0022C (Pangan Dep. Tr.) at 39:11-17 (“it was experimental”), 40:2-7 (“I feel like me, Pei Pei, and Janine are test subjects”); RX-0020C

(Whiteley Dep. Tr.) at 20:11-21:7 (“I know they were still doing research” and “I would think, because it was research, they would not -- they would have requested that I don’t share.”), 9:20-21 (“someone who they got to test things on”), 10:8-10 (“they were look for, you know, people to be test people. And I’m like, I’ll be a guinea pig-type thing.”), 56:3-7, 56:8-17 (“I understood they were in the process of developing something that was uniquely theirs”). As HydraFacial pointed out, HydraFacial does not perform facial treatments on customers; it sells devices to aestheticians or medical practitioners. (RX-0014C (Ignon Dep. Tr.) at 109:1-5.).

Lastly, the test subjects were friends or employees of HydraFacial or Windes, HydraFacial’s accounting firm. (RX-0016C (Cohen Dep. Tr.) at 32:3-5, 138:12-15; RX-0022C (Pangan Dep. Tr.) at 8:14-9:4; RX-0020C (Whiteley Dep. Tr.) at 9:10-15.).

For the foregoing reasons, it is a finding of this ID that any alleged prior use of the Commercial Tower Devices was experimental and not an invalidating prior public use.

5. The Commercial Tower Devices Are Not Prior Art to the ’287 Patent

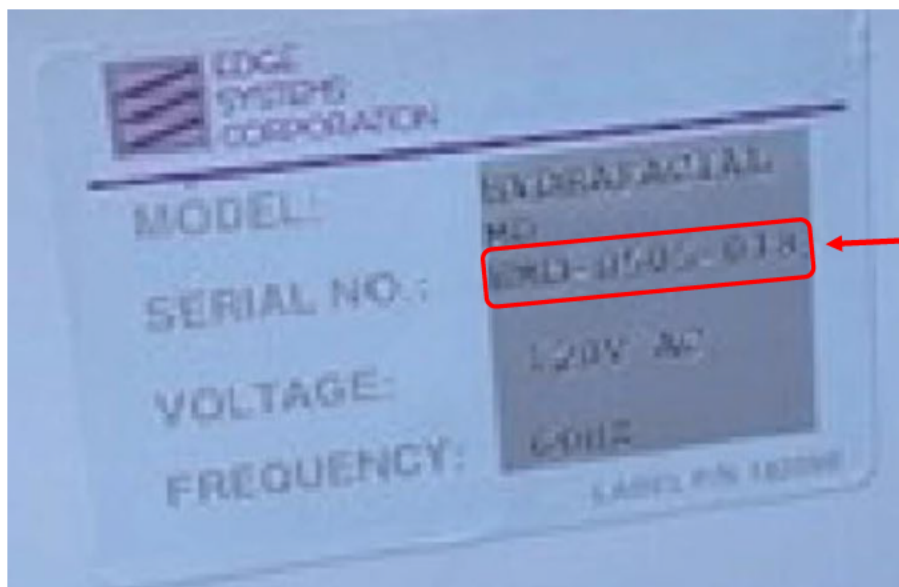
Cartessa’s invalidity analysis is based only on the Commercial Tower Devices.⁵⁰ (*See* RBr. at 80-96.). Dr. Jensen based his opinions on: (i) the HydraFacial MD Owner’s Manual; and (ii) the HydraFacial Tower MD & Spa Design History File. (Tr. (Jensen) at 1154:18-1155:1,

⁵⁰ At the end of the Hearing, the Parties were asked to briefly explain why the testimony of either party’s expert on the issue of the date of public use should be admitted “since it’s fact-bound and it’s a decision for the trier of fact.” (Tr. at 1312:7-18.). HydraFacial stated in its Reply Post-Hearing Brief that its “position is that no expert opinion on public use should be admitted. . . . Mr. Leinsing did not provide testimony on the proper date for prior use analysis, but instead provided testimony adding context to and rebutting Dr. Jensen’s testimony regarding the date of public use.” (CRBr. at 29 n.6.). In its Initial Post-Hearing Brief, Cartessa stated that “expert testimony regarding the dates was provided to help explain what characteristics may have been present. Nevertheless, the factfinder, the ALJ, is the decisionmaker who should decide what characteristics are present in the pre-priority dated product.” (RBr. at 82.). The opinions of both experts on this issue were given little, if any, weight. “The question of public use is a legal question informed by facts, and as such it is not readily susceptible to expert testimony.” *Marine Travelift Inc. v. ASCOM SpA*, Case No. 14-C-443, 2015 WL 9008254 (E.D. Wis. Dec. 15, 2015).

1155:14-17.).

As an initial matter, the Commercial Tower Device Dr. Jensen inspected (RX-0238C; RX-0202) was manufactured in May 2005, which Cartessa did not dispute. (RBr. at 82 (“Cartessa acknowledges that the unit inspected purports to be manufactured in May 2005 and that it was the 18th commercial unit manufactured.”); JSUI at 5.). Figure 61, below, shows the manufacturing date that is part of the labeling on the back of the Tower model that Dr. Jensen inspected.

Figure 61: Image of HydraFacial MD Showing the HMD-0505-018 Serial Number of the HydraFacial MD Dr. Jensen Inspected



(RX-0202.0009 (annotated); RX-0016C (Cohen Dep. Tr.) at 111:11-17 (explaining that the first four digits, 0505, is the month and year, and the second three digits, 018, is the lot number).).

Thus, it is a finding that the Commercial Tower Device was only available *after* the critical date and the Commercial Tower Device is not prior art to the '287 patent.

Moreover, the HydraFacial MD Owner's Manual has a copyright date of 2005. (Tr. (Jensen) at 1155:11-13; JX-0073C.0002.). Additionally, the HydraFacial Tower MD & Spa

Design History File includes an internal memo dated January 13, 2005 that indicates HydraFacial's plan to submit one unit from one of the *first* scheduled units. (JX-0043C.0036; Tr. (Jensen) at 1155:18-1156:3.).

Cartessa also relied on email correspondence with respect to a product release and attempted to argue that it supports Cartessa's argument and is proof that the Commercial Tower Device was available and in public use prior to the critical date. (RBr. at 82 (citing JX-0091C.0001-.0003 (Cartessa described this exhibit as "Jan. 24, 2005 email to EditorPCI@aol.com sending a copy of the HydraDerm MD product release, including photos")).). However, as HydraFacial pointed out, the correspondence, which is dated January 24, 2005 (after the critical date) explicitly indicates that a proposed product release was being circulated for "review and consideration." (CRBr. at 37; JX-0091C.0002.). The same correspondence also referenced the HydraDerm MD, and not the HydraFacial or HydraFacial MD. (*Id.*). Moreover, the press release that is marked "FOR IMMEDIATE RELEASE" is dated March 31, 2005, months after the critical date. (JX-0091C.0006.).

The additional evidence upon which Cartessa relied are all dated or occurred in 2005, months *after* the December 30, 2004 critical date. For example, the KPTV⁵¹ marketing material of "the Tower" (RX-0211) aired on or around March 1, **2005**. (RBr. at 87.).⁵² Ms. Kathy Nesen⁵³ testified that she was in the KPTV video performing the treatment on the patient in the

⁵¹ KPTV was a television station in Portland, Oregon. (*See, e.g.*, RBr. at 87.).

⁵² Cartessa cited a declaration KPTV provided, RX-0212, which Cartessa did not include as part of the evidentiary record.

⁵³ At the time of her deposition, Ms. Kathy Nesen was employed at Bridgeport Laser & Wellness Center. (RX-0023 (Nesen Dep. Tr.) at 6:9-10.). Ms. Nesen testified that she previously worked as a medical esthetician at the Key Laser institute in Portland, Oregon. (*Id.* at 6:11-13.).

video and that her recollection is that the video was recorded on or before March 1, **2005**. (RX-0023 (Nesen Dep. Tr.) at 10:18-21, 12:1-3, 14:9-11.). HydraFacial's website first advertised the Tower in early March **2005**. (RBr. at 87 (citing RX-0224; RX-0225; RX-0226; RX-0228; RX-0229; RX-0233).). Furthermore, Ms. Chang, who was a HydraFacial employee from 2003 to 2005 and was responsible for HydraFacial's website updates in 2005, testified that the early 2005 advertisements were only placed on HydraFacial's website by March **2005**. (*Id.* (citing RX-0318C (Chang Dep. Tr.) at 6:19-25, 16:23-17:7, 19:2-6, 78:3-6, 79:5-23; RX-0319).). She did not give exact dates.

Because the evidence does not support a finding that the Commercial Tower Devices were prior art, they cannot and do not invalidate the Asserted Claims.

6. Cartessa Did Not Analyze Any of the Earlier Prototypes

As discussed above in Section IX.D.2, HydraFacial created a number of different prototypes prior to the Commercial Tower Devices that comprised varying features and designs. These included the Medela Prototype 1, Medela Prototype 2, and Console Prototypes.

Cartessa contended that the Commercial Tower Devices "had no material differences to the Tower prototype and was functionally equivalent." (RBr. at 82.). However, it is not clear to which "Tower prototype" Cartessa is referring. Moreover, Dr. Jensen did not analyze any of the prototypes leading up to the Commercial Tower Devices to see whether they fall within the scope of the '287 patent. (Tr. (Jensen) at 1148:11-1149:8.). Dr. Jensen testified that he only analyzed the Commercial Tower Device that was not manufactured until May 2005, which again, is undisputed. (*Id.* at 1149:12-17; JSUI at 5.).

Because Cartessa and Dr. Jensen failed to analyze whether any of the referenced, earlier prototypes were publicly used and/or met the limitations of the Asserted Claims, Cartessa failed

to demonstrate that the Asserted Claim are invalid based on any of the prototypes that were made and allegedly used prior to the critical date.

7. A Limitation-by-Limitation Analysis of Claims 11, 12, 14, 16, 18, 22, 24, and 25 Is Not Necessary

The Parties did “not dispute that the HydraFacial Tower system manufactured in May of 2005 meet all limitations of asserted claims 11, 12, 14, 16, 18, 22, 24, and 25, with the exception that the Tower may not fulfill the following limitations depending on claim construction:” (i) “[t]he disposable tip contacts the skin of a subject” (claim elements 11[b] and 22[c] reciting “handpiece assembly” and “handpiece,” respectively); and (ii) “[f]luid communication to the vacuum source, if this requires liquid communication” (claim elements 11[c] and 22[d] reciting “fluid communication”). (JSUI at 5.). Accordingly, a limitation-by-limitation analysis of whether the Commercial Tower Devices satisfy the claim elements of claims 11, 12, 14, 16, 18, 22, 24, and 25, other than claim elements 11[b], 11[c], 22[c], and 22[d], is not necessary.

With respect to “handpiece” and “handpiece assembly” recited in claim elements 11[b] and 22[c], the claim terms were given the same plain and ordinary meaning, i.e., the part that is designed to be held by hand. (*See* Order No. 29 at 9; *Markman* Order at 14.). As explained in the *Markman* Order, the handpiece/handpiece assembly is not limited to a unitary device, as Cartessa proposed during the *Markman* proceedings, and can include a removable tip. (*Markman* Order at 15-17.). Cartessa agreed that “[t]he Tower practices [claim element 11[b]] if the disposable tip is considered to be part of the area designed to be held by hand[.]” (RBr. at 100; *see also id.* at 113 (with respect to claim element 22[c], “the analysis for claim 11[b] applies hereto”).). Thus, there is no dispute that the Commercial Tower Devices meet claim elements 11[b] and 22[c].

Additionally, Mr. Leinsing explained that the handpiece/handpiece assembly in the Commercial Tower Devices is designed to be held by hand while the tip of the handpiece assembly is configured to contact skin. (Tr. (Leinsing) at 243:4-12, 243:25-244:7, 244:22-25.). HydraFacial presented documentary evidence demonstrating that the handpiece/handpiece assembly of the Commercial Tower Devices is intended to be held in the hand and placed in contact with the skin via its tip. (CDX-0004C.0043, .0046; JX-0034.0004; JX-0073.0001-.0003; JX-0093.).

With respect to “fluid communication” recited in claim elements 11[c] and 22[d], as discussed in Sections VII.C.4 and VII.E.5-6 above, components of the claimed skin treatment apparatus/system for treating skin do not require *direct* connection. Cartessa agreed that “[a] handpiece is present . . . and is “connected to the console,” if an *indirect* connection is *permitted*, via the first conduit.” (RBr. at 101 (emphases added) (citations omitted).).

Moreover, HydraFacial provided testimonial and documentary evidence that the handpiece/handpiece assembly of the Commercial Tower Device has two (2) tubes, each of which connect to the console. (Tr. (Leinsing) at 245:5-250:21; CDX-0004C.0055-.0056; JX-0073C.0010.) The evidence demonstrates that the first tube connects the handpiece to the block/collection lumen/fluid control member via the console (Tr. (Leinsing) at 245:5-250:21; CDX-0004C.0055-.0056.). The second tube (the waste conduit) places the handpiece assembly in fluid communication with the vacuum source via the console (Tr. (Leinsing) at 245:5-250:21; CDX-0004C.0055-56). Thus, the Commercial Tower Devices meet claim elements 11[c] and 22[d].

For these reasons, the Commercial Tower Devices practice asserted claims 11, 12, 14, 16,

18, 22, 24, and 25.⁵⁴

E. The Asserted Claims of the '287 Patent Do Not Lack Written Description

Cartessa argued that the Asserted Claims are invalid for failure to comply with the written description requirement of 35 U.S.C. § 112, ¶ 1, because the claim terms “block,” “fluid control member,” and “collection lumen” are not adequately disclosed in the '287 patent. (RBr. at 126-129.).⁵⁵ A patent is presumed to have adequate written description. *Novartis*, 38 F.4th at 1019. To overcome the presumption of adequate written description requires clear and convincing evidence. *Ariad*, 598 F.3d at 1354.

As a threshold matter, in Order No. 29, the claim term “block” was construed to be indefinite, and so that claim term is not addressed here in the context of Cartessa’s lack of written description defense. (*See* Order No. 29 at 7.). Additionally, Cartessa advanced the following three (3) arguments for its lack of written description defense, which fail for the following reasons.

Cartessa’s first argument is that the foregoing claim terms do not appear anywhere in the '287 patent except the Asserted Claims. (RBr. at 126.). The problem with Cartessa’s first argument is that it is based on the erroneous legal theory that patent claim terms must be recited *ipsis verbis* in the patent specification to satisfy the written description requirement. (RBr. at 126 (“The [claim terms] do not appear in the '287 Patent other than in the claims.”)). Under binding and long-standing Federal Circuit precedent, *ipsis verbis* presence of patent claim

⁵⁴ HydraFacial argued that even if Cartessa could prove that the Commercial Tower Devices were publicly used before the critical date, the Commercial Tower Devices do not practice claims 19 and 32 and claims 19 and 32 would not be invalidated. (CRBr. at 43.). Because it is a finding of this ID that there has been no invalidating prior public use, a limitation-by-limitation analysis of claims 19 and 32 is not warranted.

⁵⁵ HydraFacial’s Post-Hearing Briefs did not address Cartessa’s lack of written description defense.

language in the patent specification is neither sufficient nor necessary to satisfy the written description requirement of 35 U.S.C. § 112, ¶ 1. *Rai Strategic Holdings, Inc. v. Philip Morris Prods. S.A.*, 92 F.4th 1085, 1090 (Fed. Cir. 2024) (stating that the claimed invention “does not have to be described in *ipsis verbis* in order to satisfy the description requirement of § 112”) (internal citations and quotations omitted); *Nuvo Pharms. (Ireland) Designated Activity Co. v. Dr. Reddy’s Lab’ys Inc.*, 923 F.3d 1368, 1380 (Fed. Cir. 2019) (stating that the written description requirement is not necessarily met as a matter of law because the claim language appears “*in ipsis verbis* in the specification”) (internal quotations and citations omitted). Therefore, it is a finding of this ID that Cartessa’s first argument is contrary to binding legal precedent.

Cartessa’s second argument is that HydraFacial inserted the foregoing claim terms during prosecution of the application that ultimately issued as the ’287 patent for improper strategic purposes. (RBr. at 126-129.). Specifically, on June 6, 2023, in *Edge Systems LLC v. Cartessa Aesthetics, LLC*, No. 20-cv-6082 (E.D.N.Y) (“*Edge. v. Cartessa*”), the district court granted summary judgment of non-infringement, on claims of a patent that shares a specification with the ’287 patent, based on the district court’s determination that the Skinwave product did not satisfy the “manifold” limitation of the claims. (RX-0078.0010 (district court order granting Cartessa’s motion for summary judgment of non-infringement and denying HydraFacial’s motion for summary judgment of infringement).⁵⁶ About five (5) weeks later, on July 12, 2023, the pending claims in the application leading to the ’287 patent were canceled and replaced with new claims that did not recite “manifold,” but did recite the claim terms “fluid control member” and

⁵⁶ The *Edge. v. Cartessa* case is described in more detail in the section of this ID that addresses Cartessa’s prosecution laches defense. (See Section X.B-C.).

“collection lumen.” (JX-0002.0089-.0094.). The problem with Cartessa’s second argument is that Cartessa did not cite a single legal precedent where adding claim terms for improper strategic reasons supports a written description defense. In the absence of supporting legal precedent, it is a finding of this ID that the propriety of HydraFacial’s actions during prosecution of the patent application leading to the ’287 patent is irrelevant to Cartessa’s written description defense.

Cartessa’s third argument is that “[d]ifferent claim terms are presumed to have different meanings.” (RBr. at 128-29.). Specifically, Cartessa argued that, because HydraFacial canceled claims containing “manifold” right after an adverse infringement decision based on the “manifold” claim language, and introduced in their place claims containing “fluid control member” and “collection lumen,” the claim terms “fluid control member” and “collection lumen” should have a meaning that is different than “manifold.” (*Id.*).

With respect to Cartessa’s third argument, Cartessa did not introduce evidence that, if “fluid control member” and “collection lumen” have a meaning that is different than “manifold,” then “fluid control member” and “collection lumen” would not be adequately disclosed in the ’287 patent specification. To the contrary, as explained in the *Markman* order issued in this Investigation, the ’287 patent discloses structures and functions for the claimed “fluid control member” other than the “manifold system 24” depicted in Figures 15A-15D of the ’287 patent. (*Markman* Order at 4-9.). With respect to the claim term “collection lumen,” it is readily understood by one of ordinary skill reading the ’287 patent because the ’287 patent discloses “‘lumens’ generally, even if it does not call any one of them a ‘collection lumen.’” (*Id.* at 10-13.).

Cartessa also failed to introduce documentary evidence or fact witness testimony to

support its theory that the '287 patent fails to inform a skilled artisan that the inventor was in possession of the claimed subject matter related to the claim terms “fluid control member” and “collection lumen.” Moreover, although expert testimony is not necessarily always required, it is notable that Cartessa did not cite any supporting testimony from its expert either.

For these reasons, Cartessa failed to prove by clear and convincing evidence that the Asserted Claims lack written description.

X. UNENFORCEABILITY DUE TO PROSECUTION LACHES

A. Legal Standard

Prosecution laches is an equitable defense that bars the enforcement of patent claims when there has been an unreasonable and unexplained delay in prosecution, even if the applicant complied with statutory and regulatory requirements. *Cancer Research Tech. Ltd. v. Barr Lab'ys, Inc.*, 625 F.3d 724, 728 (Fed. Cir. 2010) (“*Cancer Research*”). The doctrine applies when such a delay constitutes an “egregious misuse of the statutory patent system under the totality of the circumstances.” *Id.* at 728 (quoting *Symbol Techs., Inc. v. Lemelson Med.*, 422 F.3d 1378, 1385-86 (Fed. Cir. 2005) (“*Symbol Techs.*”) (noting also that unreasonable and inexcusable delay is not limited to the circumstances surrounding the particular patent applications at issue and can include “the prosecution history of all of a series of related patents and overall delay in issuing claims.”)). In other words, to establish prosecution laches, an accused infringer must demonstrate: (1) the patent holder’s delay in prosecution was unreasonable and inexcusable under the totality of circumstances; and (2) the accused infringer suffered prejudice attributable to the delay. *Cancer Research*, 625 F.3d at 729. The determination of unreasonable delay is not limited to the specific patent applications at issue but may consider the prosecution history of related patents and overall delay in issuing claims.

Symbol Techs., 422 F.3d at 1385-86.

Prejudice requires a showing that the accused infringer or others invested in, worked on, or used the claimed technology during the period of delay. *Cancer Research*, 625 F.3d at 729. Additionally, material prejudice requires proof of economic or evidentiary harm resulting from delay. *See Hynix Semiconductor Inc. v. Rambus Inc.*, 2007 WL 4209386, at *3 (N.D. Cal. Nov. 26, 2007).

B. The Nature of the Dispute and the Course of the Prosecution of the '287 Patent

1. Cartessa's Wide-Angled View of the Patent Prosecution of the '287 Patent Is That It Was Unreasonable and Prejudicial

In Cartessa's Response to the Complaint and NOI ("Response"),⁵⁷ Cartessa asserted an affirmative defense that HydraFacial's '287 patent is invalid, and hence barred, by the doctrine of prosecution laches. (Resp. at 13-26, ¶¶ 60-85; *see also* Tr. at 83:3-85:20; RBr. at 129-35.). Cartessa has contested *the manner in which* HydraFacial has prosecuted the '287 patent (which was part of the "Ignon family of patents"), and which is based on U.S. Patent Application No. 18/094,884 ("the '884 application") that was filed on January 9, 2023. (JX-0001 at (21), (22); *see also* RBr. at 30; CRBr. at 68.). As noted elsewhere previously, the '287 patent issued on January 9, 2024, one year after the filing of the '884 application. (CRBr. at 68-69; JX-0001 at (45).).

The gravamen of Cartessa's argument for the application of prosecution laches is that HydraFacial engaged in unreasonable delay as it prosecuted what became the '287 patent. Cartessa argued that the nearly 17-year delay between HydraFacial's December 30, 2005

⁵⁷ Verified Response of Cartessa Aesthetics, LLC to the Complaint and Notice of Investigation. (Doc. ID No. 830010).

Provisional Application No. 60/755,310 and a March 29, 2006 non-provisional application, U.S. Patent Application No. 8,048,089, back to which HydraFacial claimed the '287 patent has priority, and the issuance on January 9, 2024 of the '287 patent, prejudiced Cartessa and others of HydraFacial's competitors. (RBr. at 130-33.).

Cartessa contended that the nearly 17-year delay in the prosecution of the '287 patent was part of HydraFacial's "serial prosecution strategy" that HydraFacial used as a tactic to continue to write claims on previously unclaimed material. To that end, Cartessa claimed that HydraFacial kept filing serial continuation patents only after HydraFacial had observed the moves of its competitors. (Resp. at 13-14, ¶¶ 61-62; RBr. at 131.). Cartessa noted that HydraFacial filed at least nine (9) continuation applications prior to filing the '884 application while "relying on placeholder claims that it made no meaningful effort to advance." (RBr. at 131 (citing JX-0002; RX-0035; RX-0036; RX-0039; RX-0043; RX-0046; RX-0052; RX-0062; RX-0063); *see also* Resp. at 13, ¶ 61.).

According to Cartessa's thesis and observations about HydraFacial's patent-related filings, as HydraFacial's applications approached allowance by the PTO, HydraFacial filed yet another continuation application that would claim priority back to 2006, often relying "on placeholder claims that it made no meaningful effort to advance." (RBr. at 130 (citing JX-0002; RX-0035; RX-0036; RX-0039; RX-0043; RX-0046; RX-0052; RX-0062; RX-0063); *see also* RX-0011C (Papagiannis Dep. Tr.) at 78:4-10, 80:24-81:12, 103:5-12, 104:13-25, 106:15-107:2, 107:13-23, 109:19-110:23, 113:5-114:3, 115:20-117:2, 117:3-120:18, 123:4-124:16.). While Cartessa acknowledged that continuation patents are allowed as part of a 20-year statutory term that may cover additional material pursuant to 35 U.S.C. ¶ 154(a)(2), Cartessa nonetheless described HydraFacial's patent prosecution practice as unreasonable and prejudicial. (RBr. at

131, 135.).

To that end, Cartessa suggested that HydraFacial had an improper motive by quoting the testimony of Mr. Theodore Papagiannis,⁵⁸ a seasoned patent prosecution attorney who worked with HydraFacial on its patent filings since approximately 2005. Mr. Papagiannis testified that HydraFacial's continuation patents were filed for "strategic" reasons, including to maintain priority, but that those strategic reasons were privileged. (Tr. (Papagiannis) at 1074:12-17, 1082:17-23; RX-0006; RX-0011C (Papagiannis Dep. Tr.) at 41:11-19, 43:13-48:1, 79:11-22, 141:2-4, 141:7-24, 142:2-5.).

As another example of HydraFacial's allegedly improper prosecution of the '287 patent, Cartessa noted that a single placeholder claim was drafted in time for continuity, then cancelled six (6) months later, on July 12, 2023. As Cartessa argued, HydraFacial made no attempt to advance the placeholder claim toward issuance. (Resp. at 13, ¶ 62.). According to Cartessa, on that date, HydraFacial then introduced new, bona fide claims and attempted to advance them toward issuance. "As such, the first claims that HydraFacial showed any intent to advance to prosecution were initially proposed after prosecution would have otherwise ended because of a six-month break in the continuity chain." (*Id.*; RBr. at 131.).

With respect to the '287 patent, the "placeholder" claim, which according to Cartessa,

⁵⁸ Mr. Theodore Papagiannis provided testimony by deposition on November 8, 2024 in both his individual capacity and as a corporate designee on behalf of HydraFacial. (RX-0014C.). He also testified during the Hearing. At the time he testified, Mr. Papagiannis was an attorney and partner in the law firm of Knobbe, Martens, Olson & Bear, LLP ("Knobbe") who was involved in the patent prosecution of the Ignon family of patents, including the '287 patent. (RX-0011C (Papagiannis Dep. Tr.) at 2:2-5.). Among other topics, Mr. Papagiannis was called to testify on: the prosecution of the '287 patent; its chain of title and the inventors (*id.* at 45: 17-46: 1-23); the facts and circumstances surrounding the priority date of the '287 patent (*id.* at 45:17-46: 1-3); the application that became the '287 patent; and the related patents and their claims; applications and relation to the '287 patent; and prosecution laches. (*Id.* at 46:12-48:2.).

HydraFacial held out to the public as part of its invention, was the claim term “manifold” which appeared in the claims of the ’052 patent. (Resp. at 13, ¶ 61; RBr. at 132-133.). Cartessa’s argument (about the Ignon family of patents), and specifically about the ’287 patent and its relationship to the ’052 patent, is that for the first time in some 17 years in 2023, HydraFacial filed first the ’884 application, then the ’287 patent in which the claims of the invention need not have a “manifold.”⁵⁹ (RBr. at 130-34.).

In other words, as Cartessa argued, the ’287 patent did not contain the claimed “manifold” of the ’052 patent because HydraFacial needed to find a way around the summary judgment litigation loss in which the Federal District Court in *Edge Systems, LLC v. Cartessa Aesthetics, LLC*, 2:20-cv-06082 (E.D.N.Y.) (“*Edge v. Cartessa*”) found that Cartessa’s Skinwave product did not infringe the ’052 patent. The ’052 patent shares a specification with the ’287 patent. (Resp. at 13-19, ¶¶ 64-71; RBr. at 132-35; JX-0001; JX-0002; RX-0011C.).

Cartessa contended that HydraFacial amended the claims of the ’884 application, which resulted in the ’287 patent, removed the “manifold” limitation from a system claim for the first time in the almost 20-year history of the Ignon family of patents, and replaced it with the terms

⁵⁹ See Order No. 29 that construed the term “block” contained in claims 1, 26, and 37 of the ’287 patent to be indefinite. (Order No. 29 at 7.). As noted in Section II.A, during the *Markman* proceedings, HydraFacial attempted to claim that the word “block” in the claim terms identified above, effectively was equivalent to or defined by a “manifold system 24” which was contained in the patent specification that was shared with another Roger Ignon patent, U.S. Patent No. 9,550,052 (“the ’052 patent”). (JX-0001 at 17:17-18:37, Figs. 15A-15D). However, according to Cartessa, the term “manifold” was deleted and changed to “block” in the ’287 patent to accommodate the legitimacy of the ’287 patent only after HydraFacial lost a summary judgment decision of “non-infringement” to Cartessa over the “manifold limitation” as well as all other claims of the ’052 patent in *Edge v. Cartessa*. (Resp. at 14-16, ¶¶ 63-67; RBr. at 135 (HydraFacial trying to distance itself from ’052 patent); RBr. at 130, 132.). According to Cartessa, HydraFacial’s attempt to have the ’287 patent issued as a continuation of a previous placeholder while changing the substantive claims to eliminate the originally claimed “manifold,” to avoid the problems caused by the *Edge v. Cartessa* litigation, is one of the bases for Cartessa’s arguments that HydraFacial’s ’287 patent is barred by prosecution laches.

“block,” “collection lumen,” and “fluid control member” to get around its litigation loss, which potentially undermined HydraFacial’s patents. (RBr. at 133 (citing RX-0078.0010; JX-0002.0043, .0103; RX-0011C (Papagiannis Dep. Tr.) at 78:4-10, 80:24-81:12, 97:11-22); JX-0001 at cls. 1-45).).

From Cartessa’s wide-angled lens of time, i.e., nearly 17 years, Cartessa offered that Mr. Papagiannis could not explain why the “manifold” limitation was removed—other than it was an opportunity to diversify the claim. Mr. Papagiannis also could not identify who specifically made the decision to amend the claims. (RX-0011C (Papagiannis Dep. Tr.) at 98:7-8, 98:15-99:4, 99:6-9, 99:13-14).). Mr. Papagiannis also testified that it was “unlikely” that he interacted with the inventors (i.e., Mr. Ignon and Mr. Cohen) when he prosecuted the ’287 patent or discussed prosecution strategy with them. (Tr. (Papagiannis) at 1086:5-15; RX-0011C (Papagiannis Dep. Tr.) at 75:17-19, 75:23, 142:12-15.). One implication of Cartessa’s argument and the testimony cited is that HydraFacial made a corporate decision to file continuation patents that may have had little or nothing to do with how the inventors saw the patents involved, and so their input was largely irrelevant.

Additionally, according to Cartessa, to expedite the issuance of the ’287 patent, with the preliminary amendment for the application that led to the ’287 patent, and in a move that Cartessa called “suspicious,” HydraFacial filed with the PTO a “Petition to Make Special” pursuant to 37 C.F.R. § 1.102(c)(1) because Mr. Ignon, one of the ’287 patent inventors, was over the age of 65. (RBr. at 133 (citing Tr. (Papagiannis) at 1080:10-23 Tr. at 1078:2-14, 1080:3-6).). According to Cartessa, HydraFacial’s filing of the “Petition to Make Special” occurred shortly after HydraFacial’s loss in the *Edge v. Cartessa* summary determination finding. (RBr. at 133 (citing Tr. (Papagiannis) at 1080:18-1081:8, 1078:2-14, 1080:3-6).). Then,

as Cartessa described, HydraFacial filed its new claims of the '287 patent against Cartessa in this Investigation. (RBr. at 134.).

In support of its arguments, Cartessa relied, in part, on the deposition testimonies of the inventors, Roger Ignon (RX-0014C) and William Cohen (RX-0016C). Mr. Ignon and Mr. Cohen testified that they were unaware of any reason why the '287 patent claims could not have been pursued earlier. (RX-0014C (Ignon Dep. Tr.) at 9:19-22, 11:11-14, 74:22-25, 75:3-12; RX-0016C (Cohen Dep. Tr.) at 11:21-22, 12:1-12:12, 16:7-10, 100:1-2, 100:5-11, 100:14-18, 100:21-24.). Mr. Ignon noted that every year since 2005, attorneys handled patent matters for HydraFacial and that HydraFacial had actively prosecuted and funded patents for the “majority” of those years. (RX-0014C (Ignon Dep. Tr.) at 118:24-119:4, 120:24-121:3).).

Cartessa ultimately described HydraFacial’s more than 17 year-long patent prosecution of the '287 patent as “unreasonable and inexcusable” and the type of conduct to which prosecution laches applies. (RBr. at 130, 131, 135.). To that end, Cartessa cited to a recent Northern District of California case in which the court held that a nearly thirteen-year delay was unreasonable and noted that the Supreme Court has found unenforceability based on eight- and nine-year delays. *Sonos v. Google*, No. C-20-06754 WHA, 2023 WL 6542320, at *16 (N.D. Cal. Oct. 6, 2023) (citing *Hyatt v. Hirshfeld*, 998 F.3d 1347, 1366 (Fed. Cir. 2021)) (“*Sonos v. Google*”), appeal pending, *Google LLC v. Sonos, Inc.*, C.A. Docket No. 2024-1097 (Fed. Cir.).

According to Cartessa, HydraFacial’s nearly 17-year delay, exceeded the delay in *Sonos v. Google* by nearly five (5) years and surpassed other cases cited in *Sonos v. Google*, which involved delays of eight (8), nine (9), and ten (10) years, respectively. (RBr. at 130 (citing *Personalized Media Commc’ns, LLC v. Apple Inc.*, 57 F.4th 1346, 1355 (Fed. Cir. 2023) (citing *Hyatt*, 998 F.3d at 1368); *In re Bogese*, 303 F.3d 1362, 1369 (Fed. Cir. 2002); *see also Sonos v.*

Google, 2023 WL 6542320 at *14.).

Part of Cartessa’s argument is that because of HydraFacial’s serial continuation filings, HydraFacial’s competitors, including Cartessa, were materially prejudiced by not knowing what HydraFacial’s invention claimed. (RBr. at 130, 135, 140 (citing *Default Proof Credit Card Sys., Inc. v. Home Depot U.S.A., Inc.*, 412 F.3d 1291, 1302-03 (Fed. Cir. 2005) (patent claims “give notice to the public of the extent of the legal protection afforded by the patent, so that interested members of the public, e.g., competitors of the patent owner, can determine whether or not they infringe.”) (quotations omitted).).

Additionally, Cartessa argued that by delaying nearly 17 years before asserting its chosen claims, HydraFacial “undermined the principle that businesses should be able to rely on the public record of patent applications to determine which inventions are available for public use.” (RBr. at 140 (citing *Vectra Fitness, Inc. v. TNWK Corp.*, 162 F.3d 1379, 1384 (Fed. Cir. 1998) (“This reliance [on the public record] enables businesses, as well as others, to plan their future conduct in as certain an environment as possible.” (citations omitted); *Default Proof Credit Card Sys.*, 412 F.3d at 1302).).

2. HydraFacial’s Narrow View of Its Patent Prosecution of the ’287 Patent Is That It Acted Swiftly and the ’287 Patent Was Issued According to the Statutory Framework

Not surprisingly, HydraFacial hotly contested Cartessa’s analysis by narrowly focusing on the facts that HydraFacial filed the ’884 application that led to the ’298 patent on January 9, 2023, and obtained issuance of the ’287 patent on January 9, 2024, exactly one year after filing the application. (CRBr. at 68; JX-0001; JX-0002.). By that process, HydraFacial noted that the time frame from the filing of the ’884 application to issuance of the ’287 patent was swift and procedurally proper. (CRBr. at 68.). *See* 35 U.S.C. §§ 154(a)(2), 120. In part, HydraFacial

focused on its best argument that it did not delay if only the most recent filings of the '884 application in January 2023, and the issuance of the '287 patent in January 2024 are viewed—apart from all the continuation patents.

Additionally, HydraFacial argued that if Cartessa's "wide-angled" argument that HydraFacial strategically delayed for 17 years was accepted, it would obviate the 20-year term allowed post-1995 GATT utility patent filings, which can include and cover patent innovation through continuation claims that may cover a competitor's products.⁶⁰ (CRBr. at 70 (citing *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 909 n.2 (Fed. Cir. 2004) (citing *Kingsdown Med. Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 874 (Fed. Cir. 1988))). Moreover, "the mere passage of time and/or intent to cover after arising technology is insufficient to demonstrate prosecution laches[.]" *Certain Semiconductor Chips & Prods.*, Inv. No. 337-TA-753, FID at 248 (Mar. 2, 2012), *aff'd* Comm'n Op. (Aug. 17, 2012).

Finally, and correctly, HydraFacial noted that "the **only** case applying prosecution laches to a post-GATT utility patent is *Sonos v. Google*," in which the court found that Sonos abused the patent system. (CRBr. at 73-74 (emphasis in original) (citing *Sonos v. Google*, 2023 WL 6542320 at *1, 19.).

C. Prosecution Laches Does Not Apply to the Facts of the Prosecution of the '287 Patent

1. The Federal Circuit Has Not Yet Adopted the *Sonos v. Google* Holding to Post-GATT Patents

The motives that Cartessa ascribed to Hydra-Facial's nearly 17-year prosecution of the

⁶⁰ The General Agreement on Tariffs and Trade ("GATT") through TRIPS (Trade-Related Aspects of Intellectual Property Rights) introduced changes as of June 8, 1995 to the patent system, such as: (i) a 20-year patent term from filing; (ii) broadening the scope of patentable subject matter; and (iii) establishing a provisional patent application system to secure early priority dates without immediately triggering the patent term.

Ignon patent family that lead to the '287 patent by quoting the testimonies of Mr. Papagiannis, Mr. Ignon and Mr. Cohen are largely irrelevant. Nonetheless, surely there can be little doubt that the 17-year prosecution history of the '287 patent and its related patents was a long one. Whether a 17-year long prosecution with the number of continuation patents that were filed in this case is allowable or “egregious” under the current patent law is the only genuine issue. Moreover, HydraFacial has drawn the issue narrowly around its one-year process between the filing of the '884 application and the issuance of the '287 patent, that is from January 9, 2023 to January 9, 2024.

As the law is now, whatever other problems the '287 patent might face, HydraFacial's prosecution of the '287 patent was allowed under current patent prosecution standards. 35 U.S.C. § 120. Cartessa appears to have avoided quite carefully in its descriptions and use of language any implication that HydraFacial's actions were wrongful or illegal—just generally inexcusable and egregious, i.e., the language of prosecution laches cases that appears to have been sparingly applied since 1995.

At this time, 35 U.S.C. § 154(a)(2) provides for a 20-year term for utility patents such as the '287 patent, which issued after 1995, or as HydraFacial described, “post-GATT.” (CRBr. at 37.). As HydraFacial also has observed, the Federal Circuit “has never endorsed the use of prosecution laches on a post-GATT patent.” (CRBr. at 73.).

Cartessa did not cite to a single precedential decision issued by the Federal Circuit that applies to a post-GATT utility patent or that would apply to the facts of this case. (CRBr. at 72; *see generally* RBr. at 130-37.). Moreover, the *Sonos v. Google* decision that Cartessa would have apply here is currently pending before the Federal Circuit; it is not applicable precedent. *See Google LLC v. Sonos, Inc.*, C.A. Docket No. 2024-1097. While the *Sonos v. Google* case

reportedly involved a strategy of filing continuation patents for some 13 years to keep the patent family alive, clearly a shorter period than here, there are other issues with applying the *Sonos v. Google* decision that require forbearance until the Federal Circuit issues its decision.

Alternatively, even without waiting for the Federal Circuit's decision, it is a finding here that prosecution laches does not apply to the facts of this case, and certainly not when compared with the facts found in the *Sonos v. Google* decision.

The comparison between HydraFacial's nearly 17-year patent prosecution with the 13 years of patent prosecution in *Sonos v. Google* is seemingly a close one, at least as Cartessa argued. However, there are certain critical differences, including in the facts. Among the facts that lead to the court's decision in *Sonos v. Google* was that Google was prejudiced because Sonos waited some five (5) years to patent the invention after a discussed collaboration with Google fell through that was aimed at producing together the same invention that Sonos later patented. *Sonos v. Google*, 2023 WL 6542320 at *10-11. During the period that the two (2) parties were discussing a collaboration, the court found that Google "decisively disclosed" to Sonos certain of Google's propriety and confidential information about Google's conception for the invention that Sonos' own products "were incapable of practicing." *Id.* at *10. By the time Sonos filed its patent with the invention it claimed, Google had already, some four (4) years earlier, released into commerce a product with the functionality that Sonos' patents-in-suit then claimed. *Id.* at *2. In addition to applying prosecution laches on the totality of the facts, the court found that Sonos' patents at issue were unenforceable as anticipated by the Google accused products. *Id.* at *30. There is no clear parallel here with HydraFacial's conduct with the "sleight of hand" by Sonos which the court found occurred in *Sonos v. Google*. *Id.*

Another reason that the *Sonos v. Google* decision should not apply now is suggested by a

footnote in that decision. In the *Sonos v. Google* decision, the court suggested that “delays” of more than six (6) years in prosecuting a patent, including to add new and later material, might be “presumed” to be “unreasonable, inexcusable and prejudicial.” *Id.* at *30 n.7. There is no such presumption now. While prosecution laches may be a judicial creation, a presumption of a shorter duration for its application and what might be considered “unreasonable” might implicate and, possibly be at variance with, the 20-year term for filing continuations in utility patents (from the date on which the earliest application was filed) now considered to be law. 35 U.S.C. §§ 120, 121, 365(c) or 386(c).

A final consideration is the standard for the “burden of proof.” As the *Sonos v. Google* decision noted: “The Federal Circuit has not expressly clarified an accused infringer’s burden of proof for prosecution laches, so this order errs on the side of caution and applies clear and convincing evidence, consistent with what is required for other unenforceability defenses.” *Sonos v. Google*, 2023 WL 6542320 at *16 (citing *Cancer Research*, 625 F.3d at 732 (applying clear and convincing standard to inequitable conduct); *Personalized Media Commc’ns, LLC v. Apple, Inc.*, 552 F. Supp. 3d 664, 684–85 (E.D. Tex. 2021); *aff’d*, 57 F.4th 1346 (Fed. Cir. 2023) (applying clear and convincing evidence for prosecution laches). It may be that the Federal Circuit will clarify the burden of proof that applies to prosecution laches. Nonetheless, whether the standard is “clear and convincing” or a preponderance of evidence, Cartessa has not met its burden of proof.

2. Cartessa Did Not Prove It Was Materially Harmed or Prejudiced by HydraFacial’s Prosecution of the ’287 Patent

In this instance, HydraFacial is correct that Cartessa has not established with evidence the material prejudice that Cartessa claims it suffered because of HydraFacial’s alleged patent

prosecution delays. Material prejudice requires proof of economic or evidentiary harm resulting from delay. *See Hynix Semiconductor Inc. v. Rambus Inc.*, 2007 WL 4209386, at *3 (N.D. Cal. Nov. 26, 2007). As HydraFacial observed, Cartessa asserted that it invested significantly in expanding the market for the Skinwave and SKNLAB products. (RBr. at 137-38.). That may be true. However, Cartessa did not offer evidence of a total dollar value of its investments for Skinwave and SKNLAB, or how its investments have been diminished to date. Moreover, as HydraFacial noted, and as Mr. Banks testified, Cartessa began phasing out the Skinwave product before the '287 patent issued because it believed the Skinwave product was approaching the end of its lifecycle and sales were waning. (CRBr. at 69 (citing Tr. (Banks) at 484:7-16).). As noted in Section XII.C, it is not clear whether Cartessa still has Skinwave inventory in the United States, or how much, if any, SKNLAB inventory Cartessa has in the United States. Cartessa's [REDACTED] may have mitigated the material prejudice Cartessa may have suffered. That, however, is speculative.

Ultimately, Cartessa did not prove that prosecution laches applies.

XI. ECONOMIC PRONG OF THE DOMESTIC INDUSTRY REQUIREMENT

A. Legal Standard

The Commission may only find a violation of Section 337 “if an industry in the United States relating to the articles protected by the patent . . . exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2) (emphases added). Typically, a complainant must show that a domestic industry existed at the time the complaint was filed. *See Motiva LLC v. Int’l Trade Comm’n*, 716 F.3d 596, 601 n.6 (Fed. Cir. 2013).

The domestic industry requirement consists of a “technical prong” and an “economic prong.” *See, e.g., Certain Elec. Devices, Including Wireless Commc’n Devices, Portable Music*

& Data Processing Devices, & Tablet Computs., Inv. No. 337-TA-794, Order No. 88, 2012 WL 2484219, at *3 (June 6, 2012); *Certain Unified Commc'ns Sys., Prods. Used with Such Sys., and Components Thereof*, Inv. No. 337-TA-598, Order No. 9 at 2 (Sept. 5, 2007) (“*Communications Systems*”). A complainant satisfies the “technical prong” of the domestic industry requirement when it proves that its activities relate to an article “protected by the patent.” *See Communications Systems*, Order No. 9 at 2. A complainant satisfies the “economic prong” of the domestic industry requirement when it demonstrates that the economic activities set forth in subsections (A), (B), and/or (C) of Section 337(a)(3) have taken place or are taking place with respect to the protected articles. *See id.*

Subsection 337(a)(3) states that:

(3) For purposes of paragraph (2), and industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned –

- (A) significant investment in plant and equipment;
- (B) significant employment of labor, or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3).

Because the criteria are listed in the disjunctive, satisfaction of any one of them will be sufficient to meet the economic prong of the domestic industry requirement. *Lashify, Inc. v. Int'l Trade Comm'n* (“*Lashify*”), 130 F.4th 948, 957 (Fed. Cir. 2025).

Establishment of the “economic prong” is not dependent on any “minimum monetary expenditure” and there is no need for a complainant “to define the industry itself in absolute mathematical terms.” *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (May 16, 2008) (“*Stringed Instruments*”). However, a

complainant must substantiate the nature and the significance of its activities with respect to the articles protected by the patent at issue. *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm’n Op. at 30 (Feb. 17, 2011) (“*Imaging Devices*”).

The Commission has interpreted Sections 337(a)(3)(A) and (B) to concern “investments in plant and equipment and labor and capital with respect to the **articles** protected by the patent.” *Certain Ground Fault Circuit Interrupters and Prods. Containing Same*, Inv. No. 337-TA-739, 2012 WL 2394435, at *50, Comm’n Op. at 78 (June 8, 2012) (“*Circuit Interrupters*”) (emphasis in original) (quoting 19 U.S.C. §§ 1337(a)(3)(A), (B)).

When a complainant proceeds under Section 337(a)(3)(C), it is not sufficient for the “substantial investment” under subsection (C) to merely relate to articles protected by the asserted patents. Rather, “the complainant must establish that there is a nexus between the claimed investment and asserted patent regardless of whether the domestic-industry showing is based on licensing, engineering, research and development.” *Certain Integrated Circuit Chips & Prods. Containing*, Inv. No. 337-TA-845, FID, 2013 WL 3463385, at *14 (June 7, 2013) (“*Certain Integrated Circuit Chips*”).

In addition, the Commission has definitively stated that investments in plant and equipment or labor and capital that relate to engineering and research and development (“R&D”) (that are expressly identified under subsection (C)), are properly considered under subsections (A) and (B):

The statutory text of section 337 does not limit sections 337(a)(3)(A) and (B) to investments related to manufacturing or any other type of industry. It only requires that the domestic investments in plant and equipment, and employment of labor or capital be “with respect to the articles protected by the patent.” 19 U.S.C. § 1337(a)(3). Moreover, even though subsection (C) expressly identifies “engineering” and “research and development” as exemplary investments in the “exploitation” of the patent, that language does not unambiguously narrow

subsections (A) and (B) to exclude those same types of investments.

Certain Solid State Storage Drives, Stacked Elecs. Components, and Prods. Containing Same, Inv. No. 337-TA-1097, Comm’n Op. at 8 (June 29, 2018) (“*Storage Drives*”); *see also, e.g., Certain Marine Sonar Imaging Devices, Including Downscan and Sidescan Devices, Prods. Containing the Same, and Components Thereof*, Inv. No. 337-TA-921, Comm’n Op. at 57-64 (Jan. 6, 2016) (“*Sonar Imaging Devices*”).

There is no mathematical threshold test or a “rigid formula” for determining whether a domestic industry exists. *Certain Male Prophylactic Devices, Inc.*, Inv. No. 337-TA-292, Comm’n Op. at 39, USITC Pub. 2390 (June 1991) (“*Male Prophylactic Devices*”). However, to determine whether investments are “significant” or “substantial,” the actual amounts of a complainant’s investments or a quantitative analysis must be performed. *Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879, 883-84 (Fed. Cir. 2015). Even after *Lelo*, which requires some quantification of a complainant’s investments, there is still no bright line as to a threshold amount that might satisfy the economic prong of the domestic industry requirement.

B. HydraFacial May Rely on Pre-Issuance Investments

A threshold legal dispute between the Parties is whether investments in the DI Products that pre-date issuance of the ’287 patent are cognizable under Sections 337(a)(3)(A) and 337(a)(3)(B). (CBr. at 96-97; RRB. at 49-50.). HydraFacial argued that the statutory text and Commission precedent allow for inclusion of pre-issuance investments. (CBr. at 96-97.). In contrast, Cartessa argued that, with respect to the statutory text, the language “articles protected by the patent” precludes inclusion of investments that predate the patent because, at the time of those investments, there is no “article protected by the patent.” (RRBr. at 49-50.).

In support of its argument, HydraFacial cited to Commission precedent stating that pre-issuance investments are cognizable under Section 337(a)(3)(C). *Certain Video Game Systems and Controllers* (“*Video Game Systems*”), Inv. No. 337-TA-743, Comm’n Op. at 7 (Apr. 13,

2011). In support of its holding in *Video Game Systems*, the Commission reasoned “[n]either the language of the statute nor the legislative history preclude[sic] from consideration engineering and research and development investments that precede the issuance of the patent in determining whether a domestic industry exists or is in the process of being established.” *Id.* In connection with its reasoning in *Video Game Systems*, the Commission cited to an administrative law judge (ALJ) decision on a motion for summary determination in *Certain Battery-Powered Ride-On Toy Vehicles and Components Thereof* (“*Battery-Powered Ride-On Toy Vehicles*”), Inv. No. 337-TA-314, USITC Pub. 2420 (Aug. 1991). *Video Game Systems*, 337-TA-743, Comm’n Op. at 7.

In *Battery-Powered Ride-On Toy Vehicles*, the ALJ addressed two (2) issues relevant to the timing of the complainant’s domestic investments: (i) whether the complainant’s past investments in production of the domestic industry product were non-cognizable because domestic manufacturing of the product ceased before infringement occurred; and (ii) whether the complainant’s current investments were sufficient to establish a domestic industry even though they were not related to domestic manufacturing of the domestic industry product. *Battery-Powered Ride-On Toy Vehicles*, USITC Pub. 2420, FID at 18-19. With respect to the first issue, the ALJ determined that domestic investments that pre-issuance investments are cognizable. *Id.* at 19-20. Part of the ALJ’s reasoning for its determination is quoted by the Commission in *Video Game Systems*. Specifically, in *Video Game Systems* the Commission quoted the following reasoning from the ALJ’s decision in *Battery-Powered Ride-On Toy Vehicles*: “[o]ften the lion’s share of the research and development costs are incurred ***before a patent is obtained.***” *Video Game Systems*, Inv. No. 337-TA-743, Comm’n Op. at 7 (emphasis added) (quoting *Battery-Powered Ride-On Toy Vehicles*, Inv. No. 337-TA-314, FID at 20).

Both Parties cited to a decision in *Certain Smart Wearable Devices, Sys., and*

Components Thereof (“*Smart Wearable Devices*”), Inv. No. 337-TA-1389, FID at 118-123 (Apr. 18, 2025). (CBr. at 97; RRB. at 50.). The *Smart Wearable Devices* decision addressed several issues related to the timing of Section 337 investments, one of which is whether investments that predate issuance of the patent are cognizable under subsections (a)(3)(A) and (a)(3)(B). *Smart Wearable Devices*, FID at 119. The *Smart Wearable Devices* decision determined that investments that predate issuance of the patent are cognizable under subsections (a)(3)(A) and (a)(3)(B). *Id.* The *Smart Wearable Devices* decision’s determination that investments that predate issuance of the patent are cognizable under subsections (a)(3)(A) and (a)(3)(B) was based in part on the Commission’s holding in *Video Game Systems*. *Id.* The *Smart Wearable Devices* decision provided the following three (3) reasons for why the Commission’s holding in *Video Game Systems* applies to subsections (a)(3)(A) and (a)(3)(B): (i) “there is nothing in the language of the statute or the Commission’s analysis that would permit pre-patent issuance expenses [under subsection (a)(3)(C)] but preclude them under subsections (a)(3)(A) and (a)(3)(B);” (ii) all three (3) subsections relate to “articles protected by the patent;” and (iii) the analysis in the *Battery-Powered Ride-On Toy Vehicles* decision, which the Commission relied upon in its *Video Game Systems* decision, did not limit the applicability of its analysis to subsection (a)(3)(C). *Id.* With respect to reason number two (2), the *Smart Wearable Devices* decision rejected the same statutory text argument advanced by Cartessa in the present Investigation. *Id.*

HydraFacial also cited to a decision in *Certain Coenzyme Q10 Prods. and Methods of Making Same* (“*Coenzyme Q10 Prods.*”), Inv. No. 337-TA-790, FID (Sept. 27, 2012). (CBr. at 96-97.). The *Coenzyme Q10 Prods.* decision addressed the issue of whether investments that predate issuance of the patent are cognizable under subsection (a)(3)(A). Inv. No 337-TA-790,

FID at 334-336. The *Coenzyme Q10 Prods.* decision determined that pre-issuance investments are cognizable under subsection (a)(3)(A) and, in making that determination, relied on the Commission's decision in *Video Game Systems*. *Id.* at 336.

HydraFacial argued that the decisions in *Smart Wearable Devices* and *Coenzyme Q10 Prods.* correctly applied the Commission's *Video Game Systems* holding to subsections (a)(3)(A) and (a)(3)(B). (CBr. at 96-97.).

Cartessa argued that *Smart Wearable Devices* was incorrectly decided because it is inconsistent with the text of Section 337. (RRBr. at 49-50.). According to Cartessa's argument, pre-issuance investments are not cognizable because "without an article protected by an asserted patent, there can be no domestic industry." (*Id.* at 49.). There is only one supporting authority Cartessa cited for its argument. The only supporting authority Cartessa cited to is an ALJ decision in *Certain Oil Vaporizing Devices, Components Thereof, and Prods. Containing Same* ("*Oil Vaporizing Devices*"), Inv. No. 337-TA-1392, FID (Mar. 6, 2025). (RRBr. at 49.).

According to the *Oil Vaporizing Devices* FID, the ALJ determined that pre-issuance investments are not cognizable under subsections (a)(3)(A) and (a)(3)(B). Inv. No. 337-TA-1392, FID at 109-111. The *Oil Vaporizing Devices* decision's determination reasoned that, before the patent issues, there are no "articles protected by the patent." *Id.* at 110 (citing the ALJ's prior decision on the same issue, *Certain Compact Wallets & Components Thereof* ("*Compact Wallets*"), 337-TA-1355, FID at 69 (Mar. 15, 2024)). Therefore, the *Oil Vaporizing Devices* decision agreed with the same argument Cartessa advanced in the present Investigation.

However, on May 14, 2025, two (2) days after Cartessa filed its Reply Post-Hearing Brief in this Investigation, the Commission determined to review in part the FID in *Oil Vaporizing Devices* and, upon review, to vacate the ALJ's decision on the economic prong and remand for

further proceedings. Inv. No. 337-TA-1392, Comm’n Notice (May 16, 2025). The Commission determined that the ALJ’s decision in *Oil Vaporizing Devices* erred “by stating as a bright-line rule that ‘preissuance investments are not cognizable under subparagraphs (A) and (B) of section 337(a)(3).’” *Id.* at 3. In its remand order, the Commission provided the following reasoning:

nothing in the statute suggests that the Commission can consider only investments in those articles that occur after the articles are legally protected under the Patent Act. Consistent with the statute, the Commission has credited pre-patent issuance investments towards a showing of domestic industry in several previous investments under subparagraphs (A), (B), and (C).

Oil Vaporizing Devices, Comm’n Order Remanding the Initial Determination in Part at 3 (May 16, 2025) (string-citing a series of decisions, including *Sonar Imaging Devices*, *Coenzyme Q10 Prods.*, and *Video Game Systems*).

On July 18, 2025, the ALJ in *Oil Vaporizing Devices* issued a remand initial determination finding that the economic prong of the domestic industry requirement had been satisfied based at least in part on pre-issuance investments. *Oil Vaporizing Devices*, Remand ID at 5-23 (July 18, 2025). Neither Cartessa nor HydraFacial notified the ALJ of the Commission’s decision to vacate Cartessa’s only supporting authority.

Since the Commission vacated the FID in *Oil Vaporizing Devices*, the inclusion of pre-issuance investments in analysis of the economic prong of domestic industry is no longer subject to reasonable dispute, if it ever was to begin with. The Commission’s decision in *Oil Vaporizing Devices* controls the outcome of the Parties’ dispute in the present Investigation. Investments under subsections (a)(3)(A) and (a)(3)(B) that predate issuance of the patent are cognizable. *Oil Vaporizing Devices*, Comm’n Order at 3. Therefore, HydraFacial may rely on pre-issuance investments under subsections (a)(3)(A) and (a)(3)(B) in the present Investigation.

C. HydraFacial Proved a Domestic Industry Exists

As described below and as detailed in HydraFacial’s Initial Post-Hearing Brief,

HydraFacial provided credible, persuasive evidence of HydraFacial's domestic investments in plant and equipment under subsection 337(a)(3)(A) and in labor or capital under subsection 337(a)(3)(B). (CBr. at 79-87.). Also, as described below, HydraFacial proved by a preponderance of the evidence that its domestic investments in plant and equipment under subsection 337(a)(3)(A) and in labor or capital under subsection 337(a)(3)(B) are significant. (CBr. at 79-87.).

1. HydraFacial's Plant and Equipment Under Subsection 337(a)(3)(A)

During the Hearing, HydraFacial proved, through the testimony of its fact witness Mr. Vipul Savsani⁶¹ and a spreadsheet HydraFacial produced in this litigation that contains information relevant to its domestic industry, that HydraFacial operates a [REDACTED] square foot building at 3600 E. St, Long Beach, CA (the "Burnett Building") where HydraFacial conducts manufacturing and other activities for the DI Products. (Tr. (Savsani) at 129:12-14 (testifying that the size of the Burnett building is [REDACTED] square feet); CX-0166C (HydraFacial's economic domestic industry spreadsheet ("HEDIS").

HydraFacial also proved during the Hearing that it leases a [REDACTED] square foot building at 2165 Spring Street, Long Beach, California (the "Spring Street Building") that is dedicated to training related the DI Products and consumables. (Tr. (Savsani) at 130:22-131:8; CDX-0002C.0007; Tr. (Seth) at 424:25-424:7; CDX-0005C.0008; CX-0166C.).

⁶¹ At the time of the Hearing, Mr. Vipul Savsani was the Vice-President of Financial Planning and Analysis for Beauty Health ("VP."). (Tr. (Savsani) at 119:21-25.). As VP, Mr. Savsani's duties included the annual budgeting process, quarterly forecasting, earnings, and "any ad hoc analysis that's needed." (*Id.* at 120:1-5.).

a) HydraFacial's Allocation of its Plant and Equipment to the DI Products

i. The Burnett Building

Mr. Savsani and HydraFacial's economics expert Dr. Pallavi Seth⁶² testified that, in 2023, [REDACTED] of the Burnett Building was dedicated to R&D, quality control, and manufacturing, [REDACTED] to G&A and finance, and the remaining [REDACTED] to HR, training, tech support, and customer support. (Tr. (Savsani) at 129:15-20; CDX-0002C.0006; Tr. (Seth) at 424:7-24; CDX-0005C.0007; CX-0166C.0015-17.). As described and supported, approximately [REDACTED] of the manufacturing floor of the Burnett building is dedicated to the DI Products. (Tr. (Seth) at 129:21-130:3; CX-0166C.0016.). During 2021 and through April 2022, approximately [REDACTED] of the Burnett building was dedicated to R&D, quality control, and manufacturing. (Tr. (Seth) at 130:4-8; CX-0166C.0015.). Mr. Savsani testified that he relied on HydraFacial's real estate expert, Matt Vannucci, who tracks the square footage of HydraFacial's facilities by their function, for the foregoing information about allocation percentages for the Burnett Building. (Tr. (Seth) at 130:9-21.).

To further allocate the portion of the Burnett building devoted to R&D, quality control, and manufacturing down to just the DI Products, Dr. Seth did two (2) things. First, Dr. Seth used

⁶² Dr. Pallavi Seth was HydraFacial's expert on the "economic prong of the domestic industry, public interest, remedy, bonding, and certain aspects of secondary considerations of non-obviousness." (CPst. at 2; Tr. (Seth) at 417:10-418:24.). Dr. Seth holds a bachelor's degree in economics and mathematics from Mount Holyoke College and a Ph.D. in economics from Boston College. (Tr. (Seth) at 417:10-16.). At the time of the Hearing, Dr. Seth was a principle and cochair of the intellectual property practice the Brattle Group, where he had worked for over 16 years. (*Id.* at 417:17-22.). Dr. Seth's responsibilities included evaluating economic issues related to intellectual property. (*Id.* at 417:23-418:2.). Dr. Seth has worked on over 60 Section 337 Investigations. (*Id.* at 418:3-8.). HydraFacial tendered Dr. Seth as an "expert in economics, economic prong of domestic industry, and commercial success." (Tr. (Seth) at 418:9-18; CX-0004 (Dr. Seth's CV).). Cartessa stated that it did not object to HydraFacial's tender of Dr. Seth as an expert. (Tr. (Seth) at 418:19-20.). Therefore, Dr. Seth was accepted as an expert witness on the subject matter for which she had been called to testify. (*Id.* at 418:21-25.).

an internal HydraFacial's R&D tax credit study to determine the percentage of HydraFacial's R&D investments that should be allocated to the DI Products. Dr. Seth testified that, according to HydraFacial's internal R&D tax credit studies, [REDACTED] of HydraFacial's R&D expenditures were devoted to the Syndeo DI Product in 2021 while [REDACTED] of HydraFacial's R&D expenditures were devoted to the Syndeo DI Product in 2022. (Tr. (Seth) at 427:7-23; CDX-0005C.0011; Tr. (Savsani) at 132:11-134:7 (testifying that HydraFacial's R&D tax credit summary, CX-0718C, was for "IRS R&D tax filing purposes"); CX-0718C (HydraFacial's R&D Tax Credit Study)). Dr. Seth provided a summary of her analysis of HydraFacial's R&D tax credit study in her demonstrative, CDX-0005C.0011. Her demonstrative lists each of HydraFacial's product development categories for the Syndeo DI Product and the corresponding dollar amount that HydraFacial invested in 2021 and in 2022. (CDX-0005C.0011.). Dr. Seth's demonstrative is reproduced in Table 5 below.

Table 5: Dr. Seth's Summary of Her Allocation of HydraFacial's R&D Expenditures to the DI Products Based on HydraFacial's R&D Tax Credit Study

Tax Credit Study Allocation		
TABLE 9: HYDRAFACIAL R&D TAX CREDIT STUDY SUMMARY		
	Product Development Category	2021 2022
[1]	Syndeo Labor	
[2]	Syndeo Contract Research	
[3]	Early Stage Project Labor	
[4]	Early Stage Project Contract Research	
[5]	DWH Total Labor	
[6]	DWH Total Contract Research	
[7]	HF Nation App Total Labor	
[8]	HF Nation App Total Contract Research	
[9]	Cumulus Cloud Total Labor	
[10]	Cumulus Cloud Total Contract Research	
[11]	Total	
[12]	Syndeo Total	
[13]	Syndeo Percent of Total	

(Tr. (Seth) at 427:7-23; CDX-0005C.0011; CX-0718C (HydraFacial's R&D Tax Credit Study)).

Second, Dr. Seth multiplied the percentage of the Burnett Building devoted to R&D, quality control, and manufacturing from Mr. Savsani's testimony and HEDIS (█ in 2021 and through April 2022, █ in 2023) by the R&D allocation percentage Dr. Seth calculated from HydraFacial's R&D Tax Credit Study (█ in 2021 and █ in 2022). (Tr. (Seth) at 428:19-429:9; CDX-0005C.0012-13.). To illustrate, the 2021 calculation is as follows:

█.⁶³ For 2022, Dr. Seth's calculation is as follows:

⁶³ The square footage shown in Dr. Seth's demonstrative, CDX-0005C.0013, is █ instead of █. It is not clear if some rounding error or other approximation accounts for the difference. Regardless, the difference is small enough that it does not adversely affect HydraFacial's domestic industry analysis.

██████████⁶⁴*██████████ = ██████████.⁶⁵ For 2023, Dr. Seth's calculation is as follows:

66* 67.

Dr. Seth also allocated the portion of the Burnett Building devoted to Human Resources (“HR”), training, technical support, and customer care for the DI Products only. To allocate the portion of the Burnett Building devoted to HR, training, technical support, and customer care to the DI Products, Dr. Seth applied a sales-based allocation as follows. First, Dr. Seth determined HydraFacial’s worldwide sales of the DI Products as a percentage of HydraFacial’s worldwide sales of both DI Products and consumables using sales revenues provided by Mr. Savsani from HEDIS. (Tr. (Savsani) at 134:8-23; CDX-0002C.0008; CX-0166C.0018.). The relevant sales percentage is [REDACTED] for the year 2022 and [REDACTED] for the year 2023. (Tr. (Savsani) at 134:8-23; CDX-0002C.0008; CX-0166C.0018.). Dr. Seth testified that she multiplied the relevant sales percentage by the square footage of the Burnett Building that is allocated to HR, training, technical support, and customer care ([REDACTED] in 2023) to calculate the square footage of the Burnett Building that is allocated to the DI Products, *i.e.* for 2023 the calculation would be:

⁶⁴ The allocation of the Burnett Building to R&D, quality control, and manufacturing was 21% through April 2022, whereas the allocation was [REDACTED] in 2023. So, to allocate the Burnett Building to R&D, quality control, and manufacturing in 2022, Dr. Seth and HydraFacial appear to have used a weighted average of [REDACTED] for four (4) months and [REDACTED] for eight (8) months, i.e. [REDACTED]

⁶⁵ The square footage shown in Dr. Seth's demonstrative, CDX-0005C.0013, is [REDACTED] instead of [REDACTED]. It is not clear if some rounding error or other approximation accounts for the difference. Regardless, the difference is small enough that it does not adversely affect HydraFacial's domestic industry analysis.

⁶⁶ For 2023, HydraFacial used the same [REDACTED] allocation as for 2022 that came from the Tax Credit Study.

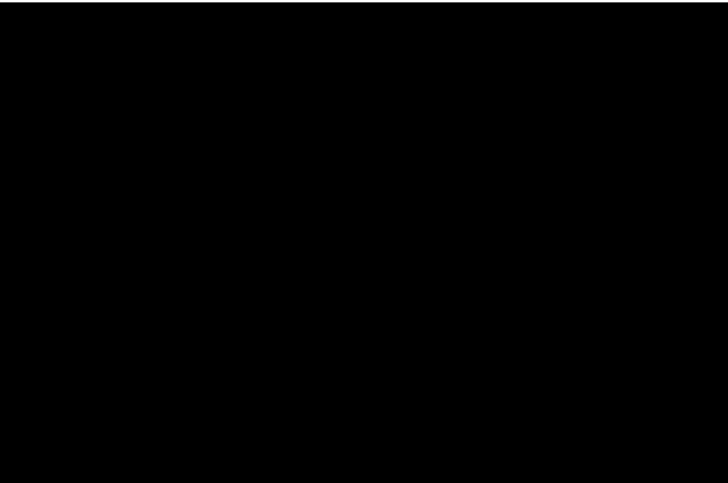
⁶⁷ The square footage shown in Dr. Seth's demonstrative, CDX-0005C.0013, is [REDACTED] instead of [REDACTED]. It is not clear if some rounding error or other approximation accounts for the difference. Regardless, the difference is small enough that it does not adversely affect HydraFacial's domestic industry analysis.

██████████⁶⁸ (Tr. (Savsani) at 129:15-20; CDX-0002C.0006; Tr. (Seth) at 424:7-24, 429:10-25; CDX-0005C.0007, .0013; CX-0166C).).

Dr. Seth's total allocated square footage for the Burnett Building based on the foregoing methodology is depicted on her demonstrative CDX-0005C.0013. Dr. Seth's demonstrative lists the Spring Street Building and the Burnett Building for the years 2021, 2022, and 2023. For each year and each building, Dr. Seth's demonstrative contains the information used in her calculations and the results of those calculations. Dr. Seth's demonstrative is reproduced in Table 6 below.

⁶⁸ The square footage shown in Dr. Seth's demonstrative, CDX-0005C.0013, is ██████████ instead of ██████████. It is not clear if some rounding error or other approximation accounts for the difference. Regardless, the difference is small enough that it does not adversely affect HydraFacial's domestic industry analysis.

Table 6: Dr. Seth's Summary of Her Allocation of HydraFacial's Facilities to the DI Products

Facilities Dedicated to the DI Products						
TABLE 10: HYDRAFACIAL FACILITIES DEDICATED TO R&D, MANUFACTURING AND TRAINING AND SUPPORT OF DI PRODUCTS (2021 TO 2023)						
	Spring Street			Burnett Street		
	2021	2022	2023	2021	2022	2023
[A]	[B]	[C]	[D]	[E]	[F]	[G]
Inputs and Adjustments						
[1] Total Floor Space						
[2] Headcount For Adjustment						
[3] Preliminary Category Allocation						
[4] Adjusted Category Allocation						
HR, Training, Tech. Support, and Cust. Care						
[5] Total Square Footage						
[6] DI Share of Activities						
[7] DI Square Footage						
R&D, Production, QC and Manufacturing						
[8] Total Square Footage						
[9] DI Share of Activities						
[10] DI Square Footage						
[11] Total Allocated Square Feet						

(Tr. (Seth) at 428:19-429:25; CDX-0005C.0013.).

ii. The Spring Street Building

Mr. Savsani testified that  of the Spring Street Building is dedicated to training related to the DI Products and consumables. (Tr. (Savsani) at 130:22-131:11.). To further allocate the Spring Street building to just the DI Products, Dr. Seth applied the same sales-based allocation that she applied for the Burnett building, which is also summarized in her demonstrative depicted in Table 6 above. (Tr. (Seth) at 429:10-25; CDX-0005C.0013.). So, for 2023, the Spring Street Building square footage allocated to training related to the DI Products

would be: [REDACTED]⁶⁹

b) The Value of HydraFacial's Plant and Equipment Investments in Articles Protected by the '287 Patent

Dr. Seth multiplied the percentage of HydraFacial's facilities that she allocated to the DI Products by HydraFacial's rent and other property-related expenses to calculate the dollar value of HydraFacial's investments in articles protected by the patent. (Tr. (Seth) at 430:1-431:8; CDX-0005C.0014-15.). For example, in 2023 HydraFacial's rent and other property related expenses were [REDACTED] for the Burnett Building and [REDACTED] for the Spring Street Building. (Tr. (Seth) at 430:1-431:8; CDX-0005C.0014-15; CX-0166C.0015.). For 2023, the calculation for HydraFacial's alleged investments in plant and equipment for products protected by the patents is: [REDACTED]

[REDACTED].⁷⁰ Applying this calculation to every year since 2021, Dr. Seth calculated the total value of HydraFacial's investments in the DI Products as approximately [REDACTED]. (Tr. (Seth) at 430:1-431:8; CDX-0005C.0014-15; CX-0166C.0015). Dr. Seth summarized her allocations and calculations in her demonstrative, which is reproduced in Table 7 below.

⁶⁹ The square footage shown in Dr. Seth's demonstrative, CDX-0005C.0013, is [REDACTED] ft² instead of [REDACTED] ft². It is not clear if some rounding error or other approximation accounts for the difference. Regardless, the difference is small enough that it does not adversely affect HydraFacial's domestic industry analysis.

⁷⁰ Again, these numbers are slightly different than the numbers depicted on Dr. Seth's demonstrative CDX-0005C.0015, possibly due to rounding errors.

Table 7: Dr. Seth's Summary of Her Allocation of HydraFacial's Facilities to the DI Products

TABLE 12: SUMMARY OF HYDRAFACIAL'S DOMESTIC INDUSTRY INVESTMENTS IN PRONG A (2021 TO 2023)

	Spring Street			Burnett Street				Total (\$)
	2021	2022	2023	2021	2022	2023	Cap Imp. Proj.	
[A]	[B]	[C]	[D]	[E]	[F]	[G]	[H]	[I]
[1] Total Floor Space								
[2] Total Expenditure								
HR, Training, Tech. Support, and Cust. Care								
[3] Total Square Footage								
[4] DI Share of Activities								
[5] DI Square Footage								
[6] Allocation								
R&D, Production, QC and Manufacturing								
[7] Total Square Footage								
[8] DI Share of Activities								
[9] DI Square Footage								
[10] Allocation								
[11] Total Allocated Square Feet								
[12] Total Allocated \$								

(Tr. (Seth) at 430:1-431:8; CDX-0005C.0015.).

2. HydraFacial's Labor and Capital Under Subsection 337(a)(3)(B)

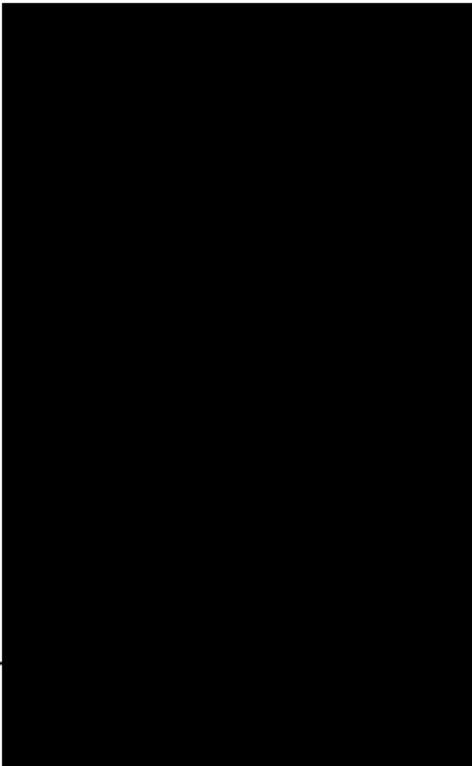
HydraFacial proved during the Hearing that since 2021 it has employed from [REDACTED] to [REDACTED] individuals in the U.S, approximately [REDACTED] of whom are dedicated to R&D and manufacturing. (Tr. (Seth) at 431:9-19; CDX-0005C.0016; CX-0166C.0016-17, 0038-41.). To allocate HydraFacial's manufacturing and R&D employees to only the DI Products, Dr. Seth multiplied the number of HydraFacial's employees dedicated to R&D and manufacturing by the percentage of the Burnett Building production floor that is dedicated to manufacturing the DI Products [REDACTED]). (Tr. (Seth) at 431:20-432:7.). For activities other than manufacturing and R&D, related to the DI Products, Dr. Seth multiplied the same sales-based allocation percentages she used under subsection (a)(3)(A) by the number of HydraFacial's employees dedicated to each activity. (*Id.* at 432:8-18; CDX-0005C.0017; CX-0166C. 0016-17, .0038-41.). Dr. Seth's allocation of HydraFacial's headcount is depicted in her demonstrative CDX-0005C.0017. Dr. Seth's

demonstrative lists HydraFacial's departments and, for years 2022, 2023, and 2024 the employee headcounts, allocation percentages, and the resulting number of employees working on the DI Products in each department. Dr. Seth's demonstrative is reproduced in Table 8 below.

Table 8: Dr. Seth's Summary of Her Allocation of HydraFacial's Employees to the DI Products

Labor Dedicated to the DI Products

TABLE 13: HYDRAFACIAL FULL-TIME LABOR DEDICATED TO R&D; MANUFACTURING G&A; AND TRAINING AND SUPPORT OF THE DI PRODUCTS IN THE UNITED STATES (2022 TO Q2 2024)

Department	2022	2023	2024 (Thru Q2)
[A]	[B]	[C]	[D]
Manufacturing			
[1] Total Headcount			
[2] Activities Related to DI			
[3] DI Allocation			
Operations (non-Mfg.)			
[4] Total Headcount			
[5] Activities Related to DI			
[6] DI Allocation			
G&A			
[7] Total Headcount			
[8] Activities Related to Sales			
[9] Activities Related to DI			
[10] DI Allocation			
R&D			
[11] Total Headcount			
[12] Activities Related to DI			
[13] DI Allocation			
Sales Support, Cust Care and Training			
[14] Total Headcount			
[15] Activities Related to DI			
[16] DI Allocation			
[17] Total Headcount			
[18] Total Allocated			

(Tr. (Seth) at 432:8-18; CDX-0005C.0017.).

Dr. Seth multiplied her allocated headcount by HydraFacial's employees' salary and benefits to calculate HydraFacial's total investment in labor dedicated to the DI Products: of approximately . (Tr. (Seth) at 432:19-433:3; CDX-0005C.0018; CX-0166C.0016-

17, .0038-41.).

D. HydraFacial's Investments are Significant

The Parties disputed whether HydraFacial's investments were significant. HydraFacial argued that the DI Products are nearly the entirety of its business and that nearly all of HydraFacial's investments in the DI Products are in the United States. (CBr. at 88-95.) Cartessa argued, in a single paragraph spanning less than a single page, that HydraFacial's investments are not significant under either subsection (A) or subsection (B). (RRBr. at 53.). Cartessa provided two (2) reasons why HydraFacial's investments allegedly are not significant. First, Cartessa argued that HydraFacial's subsection (A) investments in plant and equipment are only approximately [REDACTED] of HydraFacial's total net revenue. (*Id.*). Second, Cartessa argued that HydraFacial's subsection (B) investments in labor are approximately [REDACTED] of HydraFacial's net revenue. (*Id.*).

The problem with Cartessa's argument is that there is no precise numerical cutoff for proving a domestic industry. Regardless of the exact numbers in any single Investigation, the Commission considers the entirety of the facts and circumstances, including qualitative factors, in determining the significance of a complainant's domestic industry. Here, HydraFacial's witnesses Dr. Seth and Dr. Savsani proved through their testimony that virtually all of HydraFacial's manufacturing of the DI Products and R&D for the DI Products occurs in the United States. (Tr. (Savsani) at 127:7-128:3; Tr. (Seth) at 422:16-20.). In other words, HydraFacial's activities with respect to the DI Products are almost entirely in the United States. HydraFacial's DI investments are qualitatively and quantitatively significant.

E. HydraFacial May Rely on HydraFacial’s Economic Domestic Industry Spreadsheet (CX-0166C) to Support its Domestic Industry

Cartessa argued that HydraFacial’s reliance on CX-0166C “calls into question the accuracy of HydraFacial’s claimed investments and allocations.” (RRBr. at 52.). This is because some of the information was entered into the spreadsheet by outside counsel. Mr. Savsani testified that he did not personally confirm all of the information on the spreadsheet. (Tr. (Savsani) at 138:25-145:21.). However, Cartessa did not cite legal precedent or factual evidence that establishes that a spreadsheet created in part by counsel is inherently unreliable or inadmissible. There is no evidence that CX-0166C is inaccurate. It is a finding of this ID that HydraFacial’s reliance on the information contained in CX-0166C does not undermine HydraFacial’s domestic industry arguments.

F. HydraFacial May Rely on the Tax Credit Study (CX-0718C) to Support its Domestic Industry

Cartessa argued that there are “serious questions” about the reliability of HydraFacial’s Tax Credit Study, (CX-0718C). (RRBr. at 51.). Cartessa gave three (3) reasons.

First, Cartessa argued that the Tax Credit Study includes both “Syndeo Labor” and “Syndeo Contract Research” in the calculation of the percentage of HydraFacial’s R&D to allocate to the Syndeo DI Product. (*Id.* (citing CX-0718C; Tr. (Seth) at 455:12-25 (testifying that HydraFacial’s contract research team was comprised of outside engineers).). However, HydraFacial relied on the Tax Credit Study’s percentages to allocate its internal plant and equipment. According to Cartessa, conflating internal and external expenses as HydraFacial allegedly did “overstates the internal investments attributable to the DI Products.” (RRBr. at 51.). The problem with Cartessa’s argument is that HydraFacial’s methodology need not be exact. *Stringed Instruments*, 337-TA-586, Comm’n Op. at 26. Assuming *arguendo* that

HydraFacial should have omitted costs associated with outside engineers, Cartessa did not produce evidence that the costs associated with hiring outside engineers were significant compared to HydraFacial's other costs included in the Tax Credit Study.

Second, Cartessa argued that HydraFacial applied the 2022 percentage from the Tax Credit Study [REDACTED] to years 2023 and 2024, even though the trajectory from 2021 to 2022 is downward ([REDACTED]). (RRBr. at 51.). Although Cartessa couched this as an argument against the reliability of the Tax Credit Study, it is really an argument against HydraFacial's allocation methodology. Cartessa's argument is that HydraFacial should have applied a downward revision to the [REDACTED] number reported in the Tax Credit Summary for 2022. Again, the problem with Cartessa's argument is that Cartessa did not produce evidence that applying a reasonable downward revision would reduce HydraFacial's investments significantly enough to alter the domestic industry analysis.

Third, Cartessa argued that the Tax Credit Summary is too unreliable because there is no evidence of how the number of R&D hours reported therein were determined, what quality controls were in place if any, or that it has ever been audited. (RRBr. at 51-52.). However, the Tax Credit Summary was created before this litigation commenced by HydraFacial's R&D and tax teams for the purpose of its IRS filings. (Tr. (Savsani) at 132:11-18.). Cartessa produced no evidence that the Tax Credit Summary is inaccurate or was made using faulty methodology.

It is a finding of this ID that the allocation percentages from HydraFacial's Tax Credit Study, (CX-0718C), i.e., [REDACTED] and [REDACTED], are sufficiently reliable to prove HydraFacial's domestic industry.

XII. RECOMMENDATION ON REMEDY AND BOND

A. Legal Standard

Pursuant to Commission Rule 210.42, an administrative law judge (“ALJ”) must issue a recommended determination on: (i) an appropriate remedy if the Commission finds a violation of Section 337, and (ii) an amount, if any, of the bond to be posted. 19 C.F.R. § 210.42(a)(1)(ii). When a Section 337 violation has been found, as here, “the Commission has the authority to enter an exclusion order, a cease and desist order, or both.” *Certain Flash Memory Circuits and Prods. Containing the Same*, Inv. No. 337-TA-382, Comm’n Op. on the Issues Under Review and on Remedy, the Public Interest and Bonding, at 26 (June 9, 1997).

Upon a finding of infringement, 19 U.S.C. § 1337(d) provides for a Limited Exclusion Order (“LEO”), directed to the products of named respondents, excluding any articles that infringe one or more claims of the asserted patents. 19 U.S.C. § 1337(d).

A Cease and Desist Order (“CDO”) is also appropriate where the evidence demonstrates the presence of commercially significant inventory in the United States. 19 U.S.C. § 1337(f); *see also Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, Comm’n Op., USITC Pub. No. 2391, 1991 WL 790061, at *30-32 (June 1991).

Infringing articles may enter the United States upon the payment of a bond during the sixty-day Presidential Review Period. 19 U.S.C. § 1337(j)(3). The bond is to be set at a level sufficient to “offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by persons benefiting from the importation.” *Certain Dynamic Random Access Memories, Components Thereof and Prods. Containing Same*, Inv. No. 337- TA-242, Comm’n Op., 1987 WL 450856 at 37 (Sept. 21, 1987).

B. A Limited Exclusion Order is Warranted

In the event of a finding of violation of Section 337, HydraFacial has requested that the Commission issue a LEO against the Skinwave and SKNLAB products, and components thereof. (CBr. at 98-99.). Since a violation has been found to have occurred, a LEO is appropriate and recommended.

Cartessa did not dispute that the appropriate remedy is a LEO against the Skinwave and SKNLAB products, and components thereof. (RRBr. at 54.). However, Cartessa argued that “consumables, such as tips, serums, solutions, and accessories should be excluded” from the scope of the LEO. (*Id.*). Similarly, Cartessa requested in a type of ‘blanket’ carve out that such consumables be “explicitly carved out of any LEO.” (*Id.*).

Cartessa advanced two (2) reasons that an issued LEO should include a carve out for “consumables, such as tips, serums, solutions, and accessories.” The first reason Cartessa advanced for a carve out is that HydraFacial failed to argue that a LEO should include “consumables, such as tips, serums, solutions, and accessories.” (*Id.*). The second reason Cartessa advanced is that HydraFacial’s own DI Products do not include “consumables, such as tips, serums, solutions, and accessories.” (*Id.*). To support its second argument, Cartessa cited to certain testimony that Mr. Savsani provided during the Hearing. (*Id.*). Specifically, Mr. Savsani testified that consumables such as tips, serums, solutions, and accessories are sold separately from the DI Products and, therefore, have not been included in HydraFacial’s domestic industry. (Tr. (Savsani) at 135:16-136:20.). In other words, Cartessa argued that if HydraFacial does not include “consumables” as part of the system for its DI Products, then Cartessa’s “consumables,” i.e., the tips, serums, solutions and accessories” that Cartessa sells with its Skinwave and SKNLAB products should not be included in a LEO. The arguments are mixed in effect and

somewhat contradicted by Cartessa's own evidence.

First, the scope of the articles covered by the Commission's LEO is generally "defined consistent with the Commission's notice of institution." *Certain Icemaking Machines and Components Thereof* ("Icemaking Machines"), Inv. No. 337-TA-1369, Comm'n Op. at 8 (U.S.I.T.C. Feb. 13, 2025). The Commission's LEO "covers products of the named respondents that infringe the asserted claims." *Id.* (quoting *Certain Fitness Devices, Streaming Components Thereof, and Systems Containing the Same* ("Fitness Devices"), Inv. No. 337-TA-1265, Comm'n Op. at 74 (Mar. 23, 2023) (citing *Certain Audio Players & Controllers, Components Thereof, & Prods Containing the Same* ("Audio Players"), Inv. No. 337-TA-1191, Comm'n Op. at 24 (Feb. 1, 2022))); *see also* *Certain Dermatological Treatment Devices and Components Thereof* ("Dermatological Treatment Devices"), Inv. No. 337-TA-1356, Comm'n Op. at 33-34 (U.S.I.T.C. June 3, 2025) (Commission remedial orders are "not limited to . . . specific products adjudicated in this Investigation").

Here, the NOI provides the following description of products and the scope of the investigation: "systems for treating the skin of an individual through mechanical and/or fluid-based abrasion or exfoliation." (NOI, Doc. ID No. 825706 at 2; *see also* JX-0001.0048 (cl. 1) at 21:25-57.).

Cartessa did not cite any Commission precedent where the Commission excluded certain products, such as "components," from the scope of a LEO because the complainant failed to request a LEO against those certain products. Cartessa also did not cite to Commission precedent in which the Commission excluded certain products from the scope of a LEO because those products were not included in the Complainant's domestic industry. Therefore, at least one problem with Cartessa's argument is that there is no precedent supporting it. Additionally,

HydraFacial did not have the burden of proof on the issue of what should be included in a LEO.

Second, the *Markman* Order explained that the handpiece and the handpiece assembly of the invention includes disposable tips. The handpiece assembly is not limited to a unitary handpiece (i.e., handheld device with tips integrated in one unitary assembly) as Cartessa proposed. (*Markman* Order No. 50 at 14-22; Order No. 29 at 9.). Without a “tip,” the claimed handpiece could not appropriately deliver the facial treatment of the system described in the NOI and taught by the invention. Copied below in Figure 62 is a table from a Cartessa Customer Purchase Agreement (“CPA”) for a Skinwave product, the only such document that Cartessa provided. (RX-0201C.). That exhibit seems to suggest that Cartessa’s Skinwave system is typically sold with at least some “consumables” such as tips, solution, and other “accessories.” (RX-0201C.0001; *see* excerpt below.). Since, as of the close of discovery and even the Hearing, it appears that SKNLAB systems were not being imported into the United States, Cartessa did not provide a purchase order for comparison.

However, for the Skinwave product, without “serums, solutions, and accessories,” the Accused Products, whether Skinwave (and possibly SKNLAB), are unlikely to provide the “systems for treating the skin of an individual through mechanical and/or fluid-based abrasion or exfoliation” as the NOI describes. In other words, “systems for treatment” may include the serums and other items necessary to provide the skin “abrasion and exfoliation” as the Cartessa systems promise and as described in the NOI.

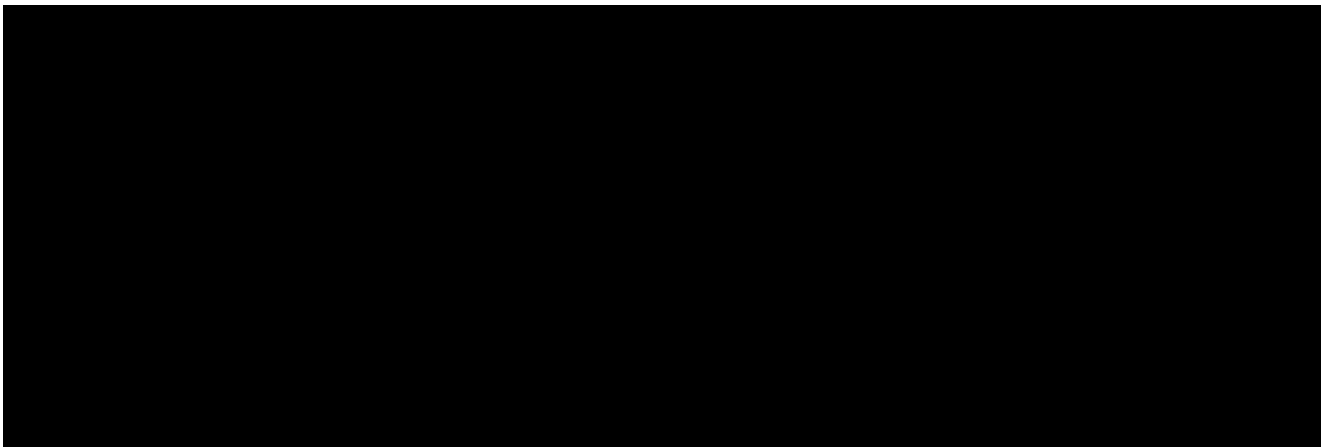
Therefore, in accordance with Commission precedent, it is a recommendation of this ID that if the Commission determines that there has been a violation, the Commission should issue a LEO that bars importation of products, by or on behalf of Cartessa, that fall within the scope of this Investigation and that infringe one or more of the Asserted Claims. The scope of products

barred from importation should be broad enough to include products imported with “consumables, such as tips, serums, solutions, and accessories” unless there is a carve out or an exemption for warranty, service or repair obligations.

1. A LEO Typically Includes an Exemption for Products Necessary to Meet Cartessa’s Warranty, Service, or Repair Obligations

Cartessa argued that a LEO should include an exemption for otherwise covered articles “that are necessary to meet a Respondent’s warranty, service, or repair obligations to is [sic] customers who obtained those articles prior to the issuance of any remedial order.” (RRBr. at 54.). Cartessa introduced uncontested and un rebutted evidence that the Accused Products are subject to service, repair, and warranty obligations. For example, RX-0201C is a Cartessa CPA, dated September 7, 2024, for the Skinwave product. (RX-0201C.). RX-0201C states that Cartessa provides to its customers a warranty that covers “ [REDACTED] [REDACTED] ” (RX-0201C.0001, .0002 (paragraph 10); Tr. (Jonathan Banks)⁷¹ at 474:16-24, 476:11-15.). Relevant excerpts from the CPA for the Skinwave product are reproduced in Figure 62 below.

Figure 62: Excerpts from a Cartessa CPA for Skinwave



⁷¹ At the time of the Hearing, Mr. Jonathan Banks was the President and Chief Strategy Officer for Cartessa, a role that he had held for “approximately one week.” (Tr. (Banks) at 473:16-474:6.). Previously, Mr. Banks was Cartessa’s Chief Financial Officer. (*Id.* at 474:7-8.).

* * *

(RX-0201C.0001, .0002 (paragraph 10); Tr. (Banks) at 474:16-24, 476:11-15.).

Two (2) aspects of the exhibit RX-0201C require attention. First, it appears that included in the purchase of a Skinwave “system” are a “H₂ Module,” which is the device that delivers the treatment, along with certain “Accessories” among which Cartessa included three (3) handpieces, a “starter kit,” which included a user guide, a “Starter Tip Package” that contains at least 10 tips, and a “Starter Aqua Kit Solution Package” with at least three (3) solutions. (RX-0201C.0001.).

Mr. Banks testified that Cartessa customers can purchase extended warranties covering longer time periods in increments of one year. (Tr. (Banks) at 476:25-477:8.). According to Mr. Banks, [REDACTED] of Cartessa’s Skinwave customers purchase extended warranties. (*Id.*). Mr. Banks also testified that Cartessa provides a warranty for the SKNLAB product with the same terms as Cartessa’s warranty for the Skinwave product. (*Id.* at 477:9-20.). Mr. Banks testified that Cartessa’s customers have told Mr. Banks that Cartessa’s warranties are important to them. (*Id.* at 477:21-478:6.).

However, there is an inconsistency between Cartessa’s argument for a “blanket” carve out and the sole Skinwave customer purchase agreement that Caressa provided. Paragraph 10 states that “‘Consumables and accessories’ are not covered under this warranty.” (RX-

0201C.0002.). Then the customer purchase agreement defines consumables and accessories as follows: “Consumables and accessories include, but are not

[REDACTED]

[REDACTED] (*Id.* at .0002, par. 10.).

HydraFacial did not address Cartessa’s warranty obligations in its post-hearing briefing.

Where there is evidence that the accused products are subject to existing service and/or warranty contracts, as here, the Commission has included in a LEO a service and repair exemption to mitigate harm to U.S. consumers. *Certain Robotic Floor Cleaning Devices and Components Thereof* (“*Robotic Floor Cleaning Devices*”), Inv. No. 337-TA-1252, Comm’n Op. at 71-73, 76-81 (U.S.I.T.C. Mar. 21, 2023). The Commission typically considers warranty exemptions in the context of its analysis of the effect the LEO will have on U.S. consumers under 19 U.S.C. § 1337(d) and (f). *Id.*; *see also Dermatological Treatment Devices*, Inv. No. 337-TA-1356, Comm’n Op. at 35, n.14, 40-45.

Here, Cartessa proved, through Mr. Banks’ testimony and Cartessa’s customer purchase agreement (RX-0201C), that Accused Products purchased by U.S. consumers are subject to warranty and service obligations for at least one year, and possibly longer, from the date of purchase. (RX-0201C; Tr. (Banks) at 474:16-20, 476:11-15, 476:16-478:6.). Based upon Cartessa’s customer purchase agreement and Mr. Banks’s testimony, it is a finding that “consumers expect these products to be repaired, if needed, while those products are under warranty.” *Robotic Floor Cleaning Devices*, Inv. No. 337-TA-1252, Comm’n Op. at 78.

Moreover, according to Mr. Banks’ undisputed testimony, the average sales price of a SKNLAB system product is approximately [REDACTED] and the average sales price of a Skinwave

system product is approximately [REDACTED].⁷² (Tr. (Banks) at 478:7-17.). The average prices are significant because the Commission has determined that, when the price of products that would otherwise be subject to a LEO is high, it is preferable to include a service, repair, and warranty carve out in a LEO rather than require consumers to pay a high price for a replacement product. *Robotic Floor Cleaning Devices*, Inv. No. 337-TA-1252, Comm’n Op. at 77-78 (issuing CDO with a service, warranty, and repair carve out for products with a lower price than the price of SKNLAB) (citing *Certain Movable Barrier Operator Systems & Components Thereof* (“*Movable Barrier Operator Systems*”), Inv. No. 337-TA-1209, Comm’n Op., 2022 WL 795701, at *44 (Mar. 11, 2022)).

Therefore, it is a recommendation of this ID that, upon finding a violation, the Commission should issue a LEO with an exemption for importation of Accused Products and components thereof that are necessary to satisfy Cartessa’s warranty obligations to consumers who purchased an infringing product before the date of the LEO. The scope of “Accused Products and components thereof that are necessary to satisfy Cartessa’s warranty obligations to consumers” should be broad enough to include “consumables, such as tips, serums, solutions, and accessories” or the Accused Products and components thereof that are imported *with* “consumables, such as tips, serums, solutions, and accessories.” However, to the extent that Cartessa sells its “consumables” or “accessories” separately or as stand-alone items, they should not be covered by the “carve out” Cartessa sought because the language of the sole customer purchase agreement that Cartessa provided would exempt seemingly separately sold “consumables and accessories” from the Commission’s ‘warranty exception. However,

⁷² According to one of Cartessa’s standard CPAs for the Skinwave product, the Skinwave product is typically sold with at least some consumables such as tips and solution. (RX-0201C.0001.).

information on whether Cartessa is currently importing and selling any Skinwave “packages” as part of its sold system, let alone stand-alone “consumables and accessories” requires updating.

2. The Commission’s LEO Should Include the Standard Certification Provision

Cartessa argued that a LEO should include the Commission’s standard certification provision. (RRBr. at 55.). The Commission’s standard certification provision, which provides that anyone seeking to import articles potentially subject to a LEO may be required to certify that they are familiar with the terms of the LEO, have made the appropriate inquiry, and to certify that to the best of their knowledge and belief the products being imported are not excluded from entry under the terms of the LEO. *See, e.g., Certain Cloud-Connected Wood-Pellet Grills and Components Thereof* (“*Cloud-Connected Wood-Pellet Grills*”), Inv. No. 337-TA-1237, Comm’n Order at 3 (U.S.I.T.C. May 12, 2022). Cartessa argued that Customs and Border Protection (“CBP”) may be unable to distinguish between an infringing SKNLAB system with hydrodermabrasion functionality and one of Cartessa’s other product lines. (RRBr. at 55.).

HydraFacial did not address Cartessa’s request for a standard certification provision.

Because it is a standard Commission practice to include a certification provision, and because it will aid CBP in its enforcement of the Commission’s remedial order, it is a recommendation of this ID that a LEO include the Commission’s standard certification provision. *See, e.g., Cloud-Connected Wood-Pellet Grills*, Inv. No. 337-TA-1237, Comm’n Order at 3. Yet again, information on the status of Cartessa’s imports and inventory should be updated.

C. A Cease and Desist Order Is Warranted

In the event of a finding of violation of Section 337, HydraFacial also has requested that

the Commission issue a permanent CDO prohibiting Cartessa from, *inter alia*, importing, selling for importation, marketing, advertising, offering for sale, offering for lease, selling, leasing, distributing, licensing, using, or otherwise transferring the infringing products within the United States. (CBr. at 99-100.).

“[T]he Commission generally issues CDOs when, with respect to the imported infringing products, respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by the exclusion order.” *Certain Blood Flow Restriction Devices with Rotatable Windlasses and Components Thereof* (“*Blood Flow Restriction Devices*”), Inv. No. 337-TA-1364, Comm’n Op. at 20 (U.S.I.T.C. Sept. 30, 2024). It is the complainant’s burden to prove that a CDO is necessary to address a violation so as not to undercut the relief provided by the exclusion order. *Id.* at 20-21.

Cartessa argued that a CDO should not issue because Cartessa does not maintain commercially significant inventory in the United States of the Accused Products. (RRBr. at 55-56.). Alternatively, Cartessa contended that if the Commission issues a CDO, then it should include an exemption for Cartessa “to provide continuing warranty, replacement, repair, and service support.” (*Id.* at 56.). Cartessa also repeated its request for, in the context of a LEO, a carve out for “consumables.” (*Id.*).

HydraFacial provided uncontested and irrefutable evidence from Cartessa’s own documents that as of December 6, 2024, Cartessa maintained inventory of the Skinwave product in the United States. In support thereof, HydraFacial introduced into the record Cartessa’s verified interrogatory responses dated December 6, 2024. (CX-0139C.0148.). Cartessa’s verified interrogatory responses state that as of December 6, 2024, Cartessa “has [REDACTED] The Skinwave product in the [REDACTED], and [REDACTED] The Skinwave product at

Cartessa’s corporate offices located at 175 Broadhollow Road, Melville, New York 11747.” (*Id.* at .0007.). That is approximately [REDACTED] % of Cartessa’s sales over a 5-6 year period. (CX-0845C (Banks Dep. Tr.) at 40:6-10, 68:19-22 (testifying that Cartessa sold approximately [REDACTED] of the Skinwave product in the U.S. since either the end of 2019 or 2020).). According to Mr. Banks’ Hearing testimony, the Skinwave product had an average selling price of [REDACTED] per unit. (Tr. (Banks) at 478: 7-17.). At an average selling price of [REDACTED] per Skinwave system, that means that as a rough estimate, over a 5-6 year period, Cartessa had sales of over [REDACTED] of Skinwave units. Moreover, Cartessa’s President and Chief Operating Officer, Mr. A.J. Storrs,⁷³ testified that Cartessa views the number of Skinwave units present in its Roseville, Illinois warehouse as “significant for commercial purposes.” (Tr. (Storrs) at 60:14-61:2.).

Again, at an average selling price of [REDACTED] per Skinwave unit, as of December 6, 2024, the value of Cartessa’s inventory in the United States was approximately [REDACTED]. This figure, even if approximate, comports with the other metrics to which Mr. Storrs testified. In other words, it is a finding that Cartessa appears to have maintained commercially significant inventory of Skinwave products in the United States *on an annual basis*. See, e.g., *Certain Automated Put Walls and Automated Storage and Retrieval Sys., Associated Vehicles, Associated Control Software, and Component Parts Thereof* (“Automated Put Walls”), Inv. No. 337-TA-1293, Comm’n Op. at 36-37 (July 31, 2023) (finding a commercially significant inventory in the U.S. where the record proved the value of the U.S. inventory).

Based upon the uncontested evidence that Cartessa had inventory of the Skinwave product in the U.S. valued at [REDACTED] of Cartessa’s sales over a 5–6-year period, and

⁷³ Mr. A.J. Storrs provided deposition in both his individual capacity and as a corporate representative witness for certain designated topics on behalf of Cartessa. (CX-0847C (Storrs Dep. Tr.) at 10:22-11:6.).

worth some [REDACTED] at the last accounting provided, it is a recommendation of this ID that a CDO should issue. Failure to issue a CDO if a Section 337 violation is found would allow Cartessa to undercut the remedy provided by a LEO by permitting Cartessa to continue to sell its existing inventory of Skinwave products.

However, there is an issue of timing and accuracy of information. Although the evidence described above proves that Cartessa maintained a commercially significant inventory in the United States as of December 6, 2024, Mr. Banks, another Cartessa fact witness, testified that Cartessa [REDACTED], its Skinwave inventory. (CX-0845C (Banks Dep. Tr.) at 166:17-20.). Therefore, it is unclear what the status of Cartessa's Skinwave inventory in the U.S. is now or will be if the Commission agrees there has been a violation of Section 337.

With respect to Cartessa's SKNLAB product, although there is no record evidence that Cartessa has inventory in the United States, Mr. Banks testified that Cartessa [REDACTED] [REDACTED]. (CX-0845C (Banks Dep. Tr.) at 128:11-19.). Mr. Banks also testified that, for Cartessa [REDACTED] [REDACTED] [REDACTED] [REDACTED] for importation into the U.S. [REDACTED]. (*Id.* at 127:20-128:19.).

As previously noted, Mr. Banks also testified that Cartessa is in the process of [REDACTED]

⁷⁴ The Parties' briefs do not cite to an exhibit that corresponds to the contract to which Mr. Banks testified at his deposition. The contract could not be found either in exhibits to Mr. Banks' deposition or in the final exhibits submitted. Thus, the timeframe for [REDACTED] could not be determined.

[REDACTED]. (*Id.* at 166:17-20.). Moreover, Mr. Banks testified that the average sale price of SKNLAB is [REDACTED] per unit. (Tr. (Banks) at 478:7-17.). If Cartessa has a [REDACTED], at an average selling price of [REDACTED] per unit, then by the time the Commission issues a remedy in this Investigation, Cartessa *could* have inventory of SKNLAB products in the United States worth approximately [REDACTED] [REDACTED] per unit), [REDACTED] and the timing of the imports. (*See* CX-0029C, discussed below; *see also* (Tr. (Banks) at 478:7-17.). It is unclear what the status of Cartessa's SKNLAB inventory will be at the time this ID issues.

Ultimately, the purpose of a CDO is to prevent a respondent from undercutting the remedy provided by an exclusion order by, for example, selling existing inventory for some time after the products have been excluded from importation. *Blood Flow Restriction Devices*, Inv. No. 337-TA-1364, Comm'n Op. at 20. Unsurprisingly, there is no precedent for the Commission to issue a CDO when there is evidence of neither inventory in the U.S. nor of significant U.S. operations.

Although the information in the record, if it still accurately reflects Cartessa's inventory in the United States, would support a CDO directed to Skinwave and does not support a CDO directed to SKNLAB, before the Commission issues any CDO, additional evidence and information should be gathered and/or updated. Such additional evidence and information should include the timing of the flow of imports of SKNLAB units into the United States, and the inventory in existence in the United States at the time remedial orders issue, if they do.

Additionally, Cartessa should provide a copy(ies) of the standard contract terms it will use for its service, repair and warranty obligations for the SKNLAB product. Similarly, if

Cartessa has [REDACTED] as Mr. Banks testified, then that information, too, should be updated.

With respect to Cartessa's request for a carve out from the scope of the CDO for "consumables, such as tips, serums, solutions, and accessories," it is a recommendation of this ID that if the Commission issues a CDO, then the CDO should not include a carve out for standalone sales of "consumables, such as tips, serums, solutions, and accessories" that Cartessa sells, but that are not considered as part of Cartessa's warranty coverage, for the same reasons as were provided in the context of a LEO.

With respect to Cartessa's request for a carve out from the scope of the CDO for products and components to satisfy Cartessa's warranty, repair, and service obligations, for the same reasons as were provided in the context of a recommended LEO, it is a recommendation of this ID that, if the Commission issues a CDO, then the scope of the CDO should include a carve out for products and components necessary to satisfy Cartessa's warranty, repair, and service obligations. The scope of the products and components necessary to satisfy Cartessa's warranty, repair, and service obligations should be broad enough to include "consumables," if certain items are sold in conjunction with the Skinwave and/or SKNLAB units.

D. A Bond During the Presidential Review Period Is Not Warranted

The Commission frequently sets the bond based on the difference in sales prices between the patented domestic product and the infringing product. *See, e.g., Certain Microsphere Adhesives, Process for Making Same, and Prods. Containing Same, Including Self-Stick Repositionable Notes ("Microsphere Adhesives")*, Inv. No. 337-TA-366, USITC Pub. No. 3949, Comm'n Op. at 24 (Jan. 1996). In other instances where a direct comparison between a patentee's product and the accused product is not possible, the Commission has set the bond at a

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reasonable royalty rate. *See, e.g., Certain Integrated Circuit Telecommunication Chips and Prods. Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm. Op. at 41-43 (Aug. 3, 1993). Commission precedent allows for a 100 percent bond when it is not practical or possible to set the bond based on price differential. *Certain Voltage Regulators, Components Thereof and Prods. Containing Same*, Inv. No. 337-TA-564, Comm’n Op. at 79 (Public Version Oct. 19, 2007). The purpose of the bond is to protect the complainant from any injury caused by importation of infringing products during the Presidential Review Period (“PRP”). 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii), 210.50(a)(3).

Complainants bear the burden of establishing the need for a bond, including the amount of bond. *See, e.g., Certain Rubber Antidegradants, Components Thereof & Prods. Containing Same*, USITC Pub. No. 3975, Inv. No. 337-TA-533, Comm’n Op. at 40 (April 2008); *Certain Coenzyme Q10 Prods. and Methods of Making Same*, Inv. No. 337-TA-790, Initial and Recommended Determination (Sept. 27, 2012) (recommending Commission not impose a bond because complainant failed in its burden to demonstrate the appropriate bond amount); *Certain Mobile Telephones and Wireless Communication Devices Featuring Digital Cameras, and Components Thereof*, Inv. No. 337-TA-703, Recommended Determination (Jan. 24, 2011) (recommending no bond because complainant did not meet its burden of providing evidence on the necessity of a bond); *Certain Liquid Crystal Display Devices and Prods. Containing the Same*, Inv. No. 337-TA-631, Comm’n Op. at 27-28 (July 14, 2009) (setting zero bond because complainant “simply claimed that it was impossible to conduct a price differential analysis” and “should not benefit from a lack of any effort to identify” relevant pricing information, particularly that which is in its possession).

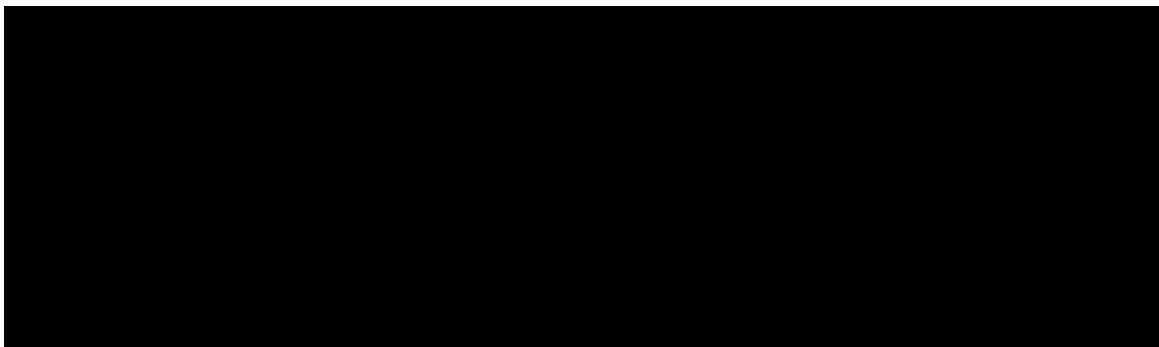
HydraFacial requested a recommendation that the Commission impose a bond of 100%

during the PRP. (CBr. at 100.). According to HydraFacial’s argument, a 100% bond is necessary for two (2) reasons. (*Id.*). First, HydraFacial is Cartessa’s largest competitor. (*Id.* (citing CX-0845C (Banks Dep. Tr.) at 70:13-15 (testifying that HydraFacial is Cartessa’s largest competitor for the Skinwave product)).). Second, Accused Products “have wide ranging sales prices (~[REDACTED] to ~[REDACTED]) making a price comparison difficult.” (*Id.*).

1. HydraFacial’s Arguments and Evidence on Bond

HydraFacial provided certain, albeit limited, evidence of the proposed selling prices of the SKNLAB Accused Products. HydraFacial cited CX-0029C, which is an August 9, 2024 internal Cartessa email. (CX-0029C.). CX-0029C contains a table titled “SKNLAB PROPOSED MATRIX – LIST PRICE [REDACTED].” (CX-0029C.0001.). That table, CX-0029C.0001, contains a proposed list of selling prices for SKNLAB and, for each selling price, an associated commission. (CX-0029C.0001.). The table contained in CX-0029C is reproduced in Table 9 below.

Table 9: Cartessa’s Proposed MATRIX: Prices and Commissions for SKNLAB from CX-0029C



(CX-0029C.0001.).

HydraFacial also relied on the following testimony from Mr. Banks:

Q. With regard to SKNLAB, what is the average sales price of the SKNLAB?

A. SKNLAB?

Q. SKNLAB, yes.

A. Approximately [REDACTED].

Q. What's the MSRP on the SKNLAB?

A. [REDACTED].

Q. What's the average sales price for the Skinwave?

A. Approximately [REDACTED].

Q. And the MSRP for the Skinwave?

A. [REDACTED].

(Tr. (Banks) at 478:7-17.).⁷⁵

Thus, HydraFacial had available to it not only certain information on average pricing for Cartessa's Skinwave and SKNLAB products, but also actual selling prices for Cartessa's Skinwave products. Despite having pricing information available for comparative purposes, HydraFacial did not even attempt to calculate a bond price and instead argued for a 100% bond.

2. Cartessa's Arguments and Evidence on Bond

Cartessa contested HydraFacial's arguments and position on bond. (RRBr. at 56-58.). Cartessa argued that a price comparison is possible, but that HydraFacial has "simply chosen not to do it." (*Id.* at 56-57.). Cartessa cited the following undisputed evidence of the prices for the DI Products and the prices for the Accused Products. Cartessa cited JX-0071C, which is titled

⁷⁵ HydraFacial also cited RX-0080C, which is an Excel spreadsheet that contains a list of every Skinwave purchase starting January 4, 2022 and ending on August 23, 2024. (RX-0080C; Tr. (Banks) at 478:25-479:17 (testifying that RX-0080C lists all Skinwave purchases starting January 4, 2022).). The lowest purchase price on that spreadsheet is \$[REDACTED] and the highest is \$[REDACTED]. (RX-0080C.). Cartessa did not provide testimony or documents to prove its total sales revenue of Skinwave products during the January 4, 2022 through August 23, 2024 period, although total sales revenue should be calculable from the spreadsheet.

“Hydrafacial Device Matrix.” (JX-0071C.0001.). JX-0071C lists features and prices of the Syndeo DI Product, Elite DI Product, and Allegro DI Product. (*Id.* at .0001-02.). JX-0071C lists the MSRP of the Syndeo DI Product as \$[REDACTED]. (*Id.* at .0001.). JX-0071C lists the MSRP of the Elite DI Product as [REDACTED]. (*Id.*). JX-0071C lists the MSRP of the Allegro DI Product as [REDACTED]. (*Id.* at .0002.).

With respect to pricing for the Accused Products, there is no dispute between the Parties that the average sales price of Skinwave is approximately \$[REDACTED] while the average sales price of SKNLAB is approximately \$[REDACTED]. (CBr. at 100; RRBr. at 57.). Cartessa also cited to the following user manuals for the Accused Products and DI Products: JX-0031 (Syndeo); JX-0032 (Elite); JX-0033 (Allegro); RX-0089C (Skinwave); and JX-0009C (SKNLAB). (RRBr. at 57.).

Cartessa argued that the requested 100% bond “would far exceed the amount necessary to protect HydraFacial from any injury and would effectively prevent importation during the Presidential review period.” (*Id.* at 57-58.). Cartessa cited Commission precedent in which the Commission stated that a 100% bond would be excessive because it would “effectively prevent importation during the period of Presidential Review given that Respondents are unlikely to post a 100% bond for each of the accused DTVs.” (*Id.* at 57-58 (citing *Certain Digital Televisions and Certain Prods. Containing Same and Methods of Using Same* (“*Digital Televisions*”), Inv. No 337-TA-617, Comm’n Op. at 18-19 (Apr. 23, 2009).).

3. A Bond Is Not Recommended

HydraFacial had the burden of establishing the need for a bond and the amount of the bond. *Rubber Antidegradants*, Inv. No. 337-TA-553, Comm’n Op. at 40. Where a complainant makes conclusory claims that a price differential analysis is impossible, the Commission has set the bond to zero. *Liquid Crystal Display Devices*, Inv. No. 337-TA-631, Comm’n Op. at 27-28.

First, HydraFacial did not provide a calculation of the average price of its DI Products. Instead, HydraFacial relied on Mr. Banks' testimony that HydraFacial is Cartessa's largest competitor for the Skinwave product. (CBr. at 100.). That may be true, but it does not obviate the problem that HydraFacial did not even attempt to calculate a bond on the evidence it had available. Second, while there may be price differentials and discounts both Parties offer to customers for their units or systems, HydraFacial did not explain why it would have been difficult or impossible for its expert to calculate the amount of a bond. Therefore, HydraFacial did not satisfy its burden of proving either the need for or the amount of a bond. *Rubber Antidegradants*, Inv. No. 337-TA-553, Comm'n Op. at 40; *Liquid Crystal Display Devices*, Inv. No. 337-TA-631, Comm'n Op. at 27-28. Accordingly, it is a recommendation of this ID that the Commission should set the amount of the bond to zero.

XIII. WAIVER OR WITHDRAWAL OF RESPONDENT'S DEFENSES

Cartessa did not raise in its Pre-Hearing Brief or offer any evidence during the Hearing to support the following Affirmative Defenses identified in its Response to the Complaint: (i) collateral estoppel, estoppel, issue preclusion, res judicata, collateral attack, and claim splitting; and (ii) failure to state a claim. (Resp. at 28-30.).

Consequently, it is a finding of this decision that Cartessa has withdrawn, waived and/or abandoned its these Affirmative Defenses consistent with Ground Rules 7.2 and 10.1. *Kinik Co. v. Int'l Trade Comm'n*, 362 F.3d 1359, 1367 (Fed. Cir. 2004).

XIV. CONCLUSIONS OF FACT OR LAW: THIS INITIAL DETERMINATION FINDS A SECTION 337 VIOLATION BASED UPON INFRINGEMENT OF U.S. PATENT NO. 11,865,287

1. Jurisdiction and standing requirements are satisfied.
2. Claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 of U.S. Patent No. 11,865,287 have

been found to be directly infringed.

3. HydraFacial's DI Products have been found to practice one or more claims of the Asserted Patent.
4. The Asserted Patent is valid.
5. HydraFacial's domestic activities with respect to their DI Products have been found to satisfy the economic prong of the domestic industry requirement under 19 U.S.C. § 337(a)(3)(A) and (B).
6. A Limited Exclusion Order and Cease and Desist Order are recommended based upon the evidence and findings of infringement.
7. A bond is not recommended.

The lack of discussion of any matter raised by the Parties, or any portion of the record, does not indicate that it has not been considered. Rather, any such matter(s) or portion(s) of the record has/have been determined to be irrelevant, immaterial or meritless. Arguments made on briefs, which were otherwise unsupported by record evidence or legal precedent, have not been given weight.

XV. CONCLUSION AND ORDER

This Initial Determination on Violation of Section 337 of the Tariff Act of 1930 is certified to the Commission. All orders and documents, filed with the Secretary, including the exhibit lists enumerating the exhibits received into evidence in this Investigation, that are part of the record, as defined in 19 C.F.R. § 210.38(a), are not certified, since they are already in the Commission's possession in accordance with Commission Rules. *See* 19 C.F.R. § 210.38(a). In accordance with 19 C.F.R. § 210.39(c), all material found to be confidential under 19 C.F.R. § 210.5 is to be given *in camera* treatment.

After the Parties have provided proposed redactions of confidential business information ("CBI") that have been evaluated and accepted, the Secretary shall serve a public version of this

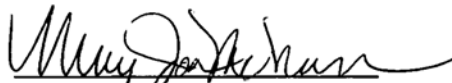
Public Version

ID upon all parties of record. The Secretary shall serve a confidential version upon counsel who are signatories to the Protective Order (Order No. 1) issued in this Investigation.

Pursuant to 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 pursuant to 19 C.F.R. § 210.43(a) or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination or certain issues therein.

Within fourteen (14) days of the date of this document, each party shall submit to the Office of the Administrative Law Judges through McNamara337@usitc.gov a statement whether it seeks to have any confidential portion of this document redacted. That is the courtesy copy pursuant to Ground Rule 1.3.2. Any party seeking redactions to the public version must submit to this office through McNamara337@usitc.gov a copy of a proposed public version of this document pursuant to Ground Rule 1.10 with yellow highlighting that clearly indicates any portion asserted to contain confidential business information. If the parties dispute whether a word, phrase, paragraph or any portion thereof should be redacted, they should cite specifically to 19 C.F.R. § 201.6, and any case law that interprets the same.

SO ORDERED.


MaryJoan McNamara
Administrative Law Judge