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UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of **CERTAIN HYDRODERMABRASION SYSTEMS AND COMPONENTS THEREOF**	Inv. No. 337-TA-1408

RESPONDENT'S PETITION FOR REVIEW OF INITIAL DETERMINATION OF VIOLATION

Aesthetic Management Partners, LLC et al. v. HydraFacial LLC
IPR2025-01217
HydraFacial Ex. 2162

[redacted]

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Table of Abbreviations

'287 Patent	U.S. Patent No. 11,865,287
Accused Products	Skinwave and SKNLAB (collectively)
Cartessa	Respondent Cartessa Aesthetics, LLC
CBr.	Complainant's Initial Post-hearing Brief (EDIS Doc. ID 850642)
CPBr.	Complainant's Pre-hearing Brief (EDIS Doc. ID 845728)
CRBr.	Complainant's Responsive Post-hearing Brief (EDIS Doc. ID 851278)
DI Products	Elite, Allegro, and Syndeo (collectively)
DI Tech	domestic industry, technical prong
Eunsung	Eunsung Global Corp.
Greenberg	U.S. Patent App. Publication No. 2003/0093089 A1
ID	Initial Determination of August 26, 2025, finding violation of Section 337(b) (EDIS Doc. ID 860421)
Petition	Respondent Cartessa Aesthetics, LLC's Petition for Review ("Petition") of the Initial Determination dated August 26, 2025
RBr.	Cartessa's Initial Post-hearing Brief (EDIS Doc. ID 850638)
RPBr.	Cartessa's Pre-hearing Brief (EDIS Doc. ID 845717)
RRBr.	Cartessa's Reply Post-hearing Brief (EDIS Doc. ID 851282)
Trial Tr.	Evidentiary Hearing Transcript

[redacted]

I. INTRODUCTION

Respondent Cartessa Aesthetics, LLC ("Cartessa") submits this Petition for Review ("Petition") of the Initial Determination dated August 26, 2025, finding violation of Section 337(b) (EDIS Doc. ID 860421 (hereinafter the "ID")). The ID incorrectly found infringement of claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 of U.S. Patent No. 11,865,287 (the "'287 Patent"). ID at 276. The ID also incorrectly found that the domestic industry, technical prong ("DI Tech") was established. ID at 277. The remaining claim, claim 32, was correctly found to be indefinite. *See*, *e.g.*, ID at 2, 53-59; Order No. 29.

This Petition seeks review of the Order denying Caressa's Motion to Strike (Motion Docket No. 1408-045, Order No. 57); review of the ID's construction of fluid communication for claim limitations 11[c], 22[d][i], and, contingently, 26[e]; and review of the ID's infringement and DI Tech determinations for claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 of the '287 Patent, and contingently for claim 32, which depends from claim 26, *if* the Commission reviews and reverses the indefiniteness finding of claim 32.

The sequence of events is as follows:

- Prior to the Hearing, HydraFacial contended that: (1) the claim term "fluid" meant "liquid," in an effort to distinguish prior art, and (2) the claim language in every independent claim (claim limitations 11[c], 22[d][i], and 26[e]) required "fluid communication" between a handpiece and a vacuum source.
- At the Hearing, Cartessa proved, ***through the testimony of HydraFacial's own expert***, that the Accused Products[1] do not infringe and the DI Products[2] do not

[1] The Accused Products are the Skinwave and SKNLAB.

[2] The DI Products are the Elite, Allegro, and Syndeo.

[redacted]

practice any of the '287 Patent claims under HydraFacial's reading because ***liquids cannot flow to the vacuum source*** in any of the Accused Products or DI Products.

- ***After the Hearing***, in its Post-hearing Brief, HydraFacial proposed a new reading of the fluid communication requirement, contending, for the first time, that the claims do not require fluid communication extending to the vacuum source. This new position was ***not*** in HydraFacial's Pre-hearing Brief.
- The ID adopted HydraFacial's new claim construction position and relied upon it to find infringement and DI Tech.

The ID's adoption of HydraFacial's revised claim construction position was procedural, legal, and substantive error. Cartessa respectfully requests that the Commission grant this Petition and find that: (1) all the independent claims require liquid communication to the vacuum source; (2) there is no infringement of the '287 Patent; and (3) no domestic industry exists.

II. ISSUES FOR COMMISSION REVIEW

While Cartessa contends there are numerous errors in the ID, this Petition focuses on the following:

1) Infringement of claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 of the '287 Patent, and contingently of claim 32 of the '287 Patent, which depends from claim 26, should the Commission review and reverse the indefiniteness finding of claim 32 of the '287 Patent; and

2) DI Tech finding of claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 of the '287 Patent, and contingently of claim 32 of the '287 Patent, which depends from claim 26, should the Commission review and reverse the indefiniteness finding of claim 32 of the '287 Patent.

[redacted]

The ID erroneously determined that the Accused Products infringed and that the DI Products practiced the '287 Patent. Cartessa's Petition addresses the following issues:

1) The ID and Order No. 57 erred by permitting HydraFacial to present a new claim construction argument for the first time ***after*** the evidentiary hearing.

2) The ID erred by construing claims 11[c], 22[d][i], and 26[e] to ***not*** require of fluid communication—liquid communication— to the vacuum source.

3) The ID erred in finding that the Accused Products infringe '287 Patent because the Accused Products do not have fluid communication to the vacuum source.

4) The ID erred in finding DI Tech was established because DI Products do not practice the '287 Patent because they do not have fluid communication to the vacuum source.

III. STANDARD FOR COMMISSION REVIEW

Commission Rule 210.43(b)(1) provides that the Commission may review an ID for one of the following reasons:

(i) That a finding or conclusion of material fact is clearly erroneous;
(ii) That a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or
(iii) That the determination is one affecting Commission policy.

19 C.F.R. § 210.43(b)(1). A petition for review will be granted "if it appears that an error or abuse of the type described [above] is present or if the petition raises a policy matter connected with the [ID], which the Commission thinks it necessary or appropriate to address." *Id.* at § 210.43(d)(2). Once the Commission has granted review, it "may affirm, reverse, modify, vacate, or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge." 19 C.F.R. § 210.45(c). The review is conducted *de novo*. *Certain Magnetic Data Storage Tapes and Cartridges Containing the Same*, Inv. No. 337-TA-1012, Comm'n Op. at 12 (Apr. 2, 2018).

[redacted]

IV. CONCISE STATEMENT OF FACT AND PROCEDURAL BACKGROUND

HydraFacial filed the underlying Complaint in this Investigation on June 11, 2024, alleging that Cartessa and Eunsung Global Corp. ("Eunsung")[3] violated Section 337 by importing, selling for importation, and/or selling after importation certain hydrodermabrasion systems and components thereof that infringe at least one claim of the '287 Patent. The Commission issued and published the Notice of Investigation in the Federal Register on July 17, 2024. EDIS Doc. ID 826133. On March 15, 2025, claim 32 was found to be indefinite. Order No. 29. A five-day evidentiary hearing was held on April 9-11, 2025 and April 14-15, 2025. Prehearing briefs were filed on March 12, 2025. Initial and reply post-hearing briefs were filed on May 7, 2025 and May 19, 2025, respectively. On May 16, 2025, Cartessa filed a Motion for Leave to file a Motion to Strike HydraFacial's new fluid communication to the vacuum source argument. EDIS Doc. ID 851469. The Motion for leave was granted (Order No. 54), but the Motion to Strike was denied (Order No. 57). On August 26, 2025, the ID issued, finding a violation of Section 337, finding infringement of claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 and finding a domestic industry. ID at 276-277.

Cartessa petitions for review of the denial of Cartessa's Motion to Strike a claim construction argument raised for the first time after the evidentiary hearing; the ID's construction of "fluid communication," including what is required to be in "fluid communication" (e.g., the requirement that liquid be able to pass) and whether claims 11, 22, and 26 require fluid communication to the vacuum source (claim 26 is contingent); and the determinations of (a) infringement of claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 (and contingent claim 32) based on

[3] On October 15, 2024, 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, EDIS Doc. ID 841387 (Jan. 21, 2025).

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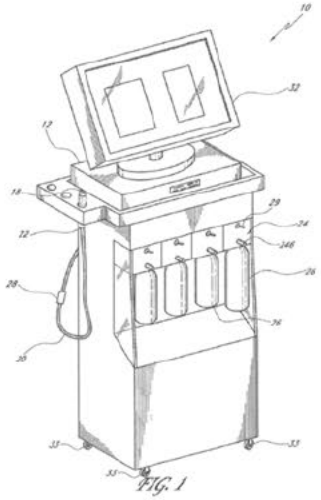
the proper construction of "fluid communication" and (b) DI Tech of claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 (and contingent claim 32) based on the proper construction of fluid communication.

A. OVERVIEW OF THE TECHNOLOGY

This Investigation concerns skin treatment devices. JX-0001 at 1:30-32. The devices in question perform dermabrasion, which involves applying a substance to skin to remove portions of the epidermis. *Id.* at 1:48-51. The body interprets this as a mild injury and creates a new outer layer of skin, improving the skin's appearance. *Id.* at 1:41-45.

1. The '287 Patent

The '287 Patent, entitled "Devices and Methods for Treating Skin," was filed on January 9, 2023. JX-0001.0002. It claims priority to U.S. Prov. App. No. 60/755,310, filed on December 30, 2005. *Id.* at .0003. The '287 Patent claims a system for treating skin that includes a console with a user input interface, handpiece, vacuum source, and a set of containers. JX-0001.0002 at Abstract, Claim 1. The specification describes a console that features a manifold system that holds multiple fluid sources, which can be selected and released via user controls to supply specific fluids to the handpiece. *See*, *e.g.*, JX-0001.0002 at Abstract, .0028 at 3:11-21. Fig. 1 is reproduced below:



JX-0001 at FIG. 1.

[redacted]

The '287 Patent alleges that traditional methods like dermabrasion and microdermabrasion, which mechanically remove skin layers to treat imperfections, often cause pain, create mess, and necessitate lengthy recovery. JX-0001.0038 at 1:36-64. The '287 Patent purportedly aims to streamline these treatments by incorporating fluid delivery and suction capabilities, which are expected to manage debris and provide hydration simultaneously, allegedly improving comfort and cleanliness. *Id.* at 1:36-2:22

The two independent claims found to be infringed are reproduced below, with the limitations at issue in this Petition in bold.

> **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.
>
> **22.** A system for treating skin, the system comprising:
> a console configured to receive a first container and at least one additional container;

[redacted]

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.

In addition, claim 32 was found invalid for indefiniteness. Order No. 29; ID at 2, 52-59. In the event the Commission reviews and alters the indefiniteness finding of the term "block," independent claim 26, from which asserted claim 32 depends, should be treated the same as independent claims 11 and 22. That is, claim 26, and dependent claim 32, likewise require a handpiece in fluid (liquid) communication with the vacuum source:

26. 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;

[redacted]

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;

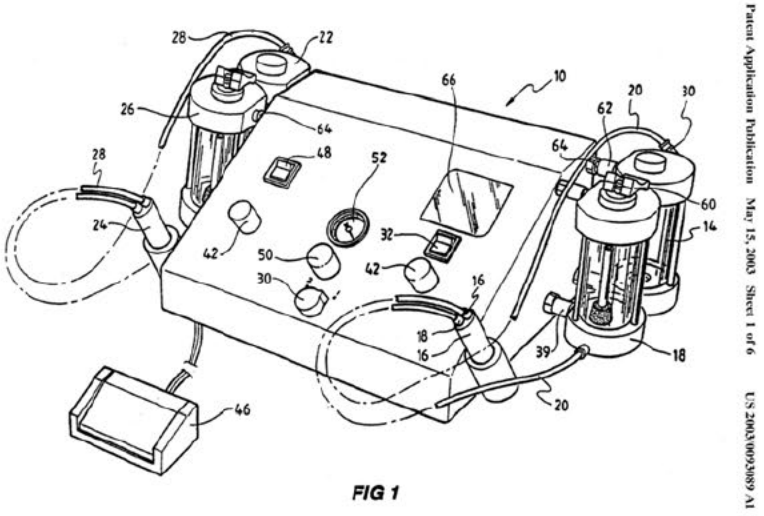
wherein the at least one additional container comprises a second container and a third container such that the console is configured to receive at least three containers; and

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.

2. The Greenberg Prior Art

While validity is not at issue in this Petition, a brief description of the primary prior art reference, U.S. Patent App. Publication No. 2003/0093089 A1 ("Greenberg"), will be helpful to understanding how the claim construction dispute regarding "fluid communication" arose.

Greenberg describes a system for conducting microdermabrasion procedures using a hand tool to apply treatment materials to a targeted area of skin. JX-0010 at Abstract, ¶¶[0049]-[0064], FIG. 1.



JX-0010 at FIG. 1.

[redacted]

Greenberg's system includes: "a pneumatic source operatively connected to a recovery container and to a hand tool;" "a plurality of supply containers including particulates;" and "a valve selectively connecting said pneumatic source, recovery container and hand tool to a selected one of said supply containers." *Id.* at ¶¶[0014]-[0016]. In operation, the pneumatic source "provides for an air flow through the recovery container, hand tool and the selected supply container in communication with same, drawing said particles from the supply container through the hand tool and into the recovery container." *Id.* at ¶[0017]; *see id.* at ¶¶[0026], [0004], [0049]-[0059], [0066], FIGS. 1-4.

According to HydraFacial, one difference between Greenberg's system and the Accused Products is the type of treatment material used for skin abrasion. *See* CRBr. at 8-12. Greenberg uses abrasive particles of "aluminum oxide" or "hard organic material that is sufficiently dried" (JX-0010 at ¶¶[0068], [0072]), which can optionally be mixed with various oils, such as tea tree oil (JX-0010 at ¶[0087]), while the Accused Products use liquids. Dr. Jensen testified that when particles are carried by air, they are part of a fluid. Trial Tr. (Jensen) at 1019:19-25; RBr. at 10-11.

Complainant alleged, and the ID agreed, that the "fluid" and "treatment material" limitations could not be established by Greenberg because Greenberg's "fluid" (abrasive particles carried by air) are not liquids. CRBr. at 3, 8-12; ID at 109 ("the '287 patent does not even remotely suggest that "dry particles" are liquids or fluids."); ID at 113-114 ("Greenberg's disclosure of dry particles cannot satisfy the Fluid Limitations." "According to Mr. Leinsing, Greenberg's system is structurally different from the container design of the '287 patent that accommodates and conveys liquids."); *see* ID at 106-117.

[redacted]

Thus, one of the main reasons that Greenberg was found not to invalidate certain claim limitations is because it taught dry particles suspended by air as the treatment material, and it was held that this could not be considered a "fluid." ID at 106-117.

B. THE ACCUSED PRODUCTS

There are two Accused Products: the Skinwave and the SKNLAB.



CX-0829C (Skinwave, left); CX-0200 (SKNLAB, right).

Below, Cartessa sets forth the relevant facts regarding the structure of the Accused Products' waste (or second) conduit, which is the conduit(s) that runs from the handpiece (or handpiece assembly) to the vacuum source.

1. Skinwave

The Skinwave is a skin treatment system that treats skin using various serums and other treatment modalities. *See generally* RX-0089C. The Skinwave contains at least four different conduits between the handpiece and the vacuum source with breaks at the air filter, vacuum port, and waste container. CBr. at 40-41; CX-0763C; JX-0051C; JX-0046C; CX-0765C; JX-0045C; and JX-0055C; RRBr. at Exhibit 3 (illustrating the path of the waste (or second) conduit).

[redacted]

HydraFacial admits that the waste (or second) conduit breaks at the waste container. CBr. at 39-40 (showing JX-0046C, annotations note where the waste conduit breaks at the waste container); Trial Tr. (Leinsing) at 333:23-334:8; CDX-0004C.206. The Skinwave schematic illustrates the plurality of conduits relevant to the transport of waste from the handpiece. JX-0028C.0039. There are two structures (vacuum control and liquid waste container) in the conduit between the handpiece and the "vacuum source" (AC motor (pump)). *Id.*

At the Hearing, HydraFacial's expert, Mr. Leinsing, admitted that treatment liquid stops at the waste container. Trial Tr. (Leinsing) at 305:18-306:15 (stating that the treatment material gets "trapped" in the SKNLAB's waste container and that the Skinwave is functionally the same); *see also* Trial Tr. (Jensen) at 688:2-689:4, 696:13-697:9.[4] HydraFacial never alleged that there is or could be liquid in the conduit that runs between the waste container and the vacuum source. Trial Tr. (Leinsing) at 407:25-408:3 ("Q. But nowhere in your testimony today did you provide any evidence of liquid traveling to a vacuum source, correct? A. That's correct. . . ."); *id.* at 408:-9 ("And you provided no evidence that liquid could ever even reach a vacuum source, correct? A. No . . . ."). There is no liquid due to gravity pulling the liquid down into the waste container. *See* JX-0028C.0039; RPBr. at 5, 20-21, 27, 33-34, 36; RRBr. at 21-27, 31-32, 37-38.

The Skinwave also contains a [redacted] and a [redacted] in the plumbing that [redacted]. *See* Trial Tr. (Leinsing) at 333:8-18 (citing CX-0765C); RRBr. at 25-26. When [redacted], the vacuum stops. Trial Tr. (Leinsing) at 333:8-18 (citing CX-0765C) and 409:6-10; RRBr. at 25-26. When the vacuum stops, then "fluid no longer goes into the waste container," meaning the liquid stops at

[4] A finding of non-infringement for both Accused Products can be based on HydraFacial's expert (Mr. Leinsing's) testimony alone, without reference to Dr. Jensen's (Cartessa's expert) testimony, but it is provided for additional support.

[redacted]

and travels no further than the waste container. *See* Trial Tr. (Leinsing) at 409:6-10; RRBr. at 25-26.

2. SKNLAB

The SKNLAB is a skin treatment system that Cartessa recently brought to market; it provides a wide variety of skin therapies. *See generally* JX-0009C. The SKNLAB has at least three different conduits and multiple couplings and other components between the handpiece and the vacuum source. CX-0284C; CX-0285C; CX-0286C; JX-0077C; RRBr. at Exhibit 4 (illustrating the path of the waste (or second) conduit). Within these breaks, there is a waste container between the handpiece and the vacuum source. CX-0285C; Trial Tr. (Leinsing) at 337:24-338:13; CDX-0004C.211; RRBr. at Exhibit 4. Like the Skinwave, in the SKNLAB, liquid stops at the waste container, and liquid cannot flow to the vacuum source. Trial Tr. (Leinsing) at 305:18-306:15 (stating that the treatment material gets "trapped" in the SKNLAB's waste container); *see* RPBr. at 5, 20-21, 27, 33-34, 36; RRBr. at 21-27, 31-32, 37-38.

Mr. Leinsing admitted that he did not provide evidence of any liquid going to the vacuum source. Trial Tr. (Leinsing) at 407:25-408:3. He also admitted that the SKNLAB has a [redacted] that ***prevents liquid from leaving the waste container***, preventing liquid from ever reaching the SKNLAB's vacuum source. Trial Tr. (Leinsing) at 410:2-410:4 ("The SKNLAB has a [redacted] that prevents fluid from -- or treatment material getting back to the vacuum container."); *see* JPX-0002.0005 (showing the [redacted]); RRBr. at 26.

C. THE DOMESTIC INDUSTRY PRODUCTS

The three Domestic Industry Products are the Elite, Allegro, and Syndeo. The DI Products are systems that are configured to deliver various liquid solutions to the skin of a patient during treatment. ID at 14.

[redacted]

Figure 3: Pictures of the DI Products



CPX-0001 (Elite, top left); CPX-00003 (Syndeo, top right); CPX-0002 (Allegro, bottom).

Below, Cartessa sets forth the relevant facts regarding the structure of the DI Products' waste (or second) conduit, which is the conduit(s) that runs from the handpiece (or handpiece assembly) to the vacuum source.

1. Syndeo

The Syndeo appears to have at least four conduits, or four breaks in the conduit, between the handpiece and vacuum source. JX-0044C; CDX-0004C.49; RRBr. at Exhibit 6. Within the breaks of the waste (or second) conduit, there is a waste container. Trial Tr. (Jensen)[5] at 714:3-

[5] Dr. Jensen's testimony is not needed to find that there is no DI Tech, because Mr. Leinsing's admissions alone are sufficient, but it is provided for additional support.

[redacted]

716:10; JX-0044C. When the liquid (serum) reaches the waste container it stops. Trial Tr. (Jensen) at 716:6-10; *see also* RPBr. at 47-48, 52, 56, 58; RRBr. at 40-44, 45-46, 47-48.

On direct examination, Mr. Leinsing discussed a schematic (JX-0044C) that purported to show the "fluid communication" of the Syndeo. Trial Tr. (Leinsing) at 245:5-23. The schematic shows a "float/shutoff" valve in the waste container. JX-0044C; CDX-0004C.49. Mr. Leinsing testified that "the float/shutoff stops the fluid, the treatment material, from going into the vacuum source. So once the waste container is full, it then stops the treatment fluid with any skin particles from going into the vacuum source." Trial Tr. (Leinsing) at 391:23-392:3. He confirmed that all three DI Products contain this float/shutoff valve. *Id.* at 392:4-17; *see also* Elite: CPX-0001.0007-11; Allegro: CPX-0002.0005, .0008-12; Syndeo: CPX-0003.0004-5, .0011-13.

2. Elite

The Elite has at least four conduits, or four breaks in the conduit, between the handpiece and vacuum source. Trial Tr. (Jensen) at 715:10-716:1, CX-0815C, CX-0816C, RRBr. at Exhibit 7. Within one of these breaks of the waste (or second) conduit, there is a waste container. Trial Tr. (Jensen) at 714:3-716:10; CX-0815C, CX-0816C. When the liquid (serum) reaches the waste container it stops. Trial Tr. (Jensen) at 716:6-10; *see also* RPBr. at 47-48, 52, 56, 58; RRBr. at 40-44, 45-46, 47-48. Mr. Leinsing testified that a "float/shutoff stops the fluid, the treatment material, from going into the vacuum source. So once the waste container is full, it then stops the treatment fluid with any skin particles from going into the vacuum source." Trial Tr. (Leinsing) at 391:23-392:3. He confirmed that the Elite contains this float/shutoff valve. *Id.* at 392:4-17; *see also* CPX-0001.0007-11.

3. Allegro

The Allegro has at least four conduits, or four breaks in the conduit, between the handpiece and vacuum source. Trial Tr. (Jensen) at 715:10-17, CX-0813C, JX-0058C, RRBr. at Exhibit 8.

[redacted]

Within one of these breaks of the waste (or second) conduit, there is a waste container. CX-0813C; JX-0058C. When the liquid (serum) reaches the waste container it stops. Trial Tr. (Jensen) at 716:6-10; *see also* RPBr. at 47-48, 52, 56, 58; RRBr. at 40-44, 45-46, 47-48. Mr. Leinsing, HydraFacial's expert, testified that a "float/shutoff stops the fluid, the treatment material, from going into the vacuum source. So once the waste container is full, it then stops the treatment fluid with any skin particles from going into the vacuum source." Trial Tr. (Leinsing) at 391:23-392:3. He confirmed that the Allegro contains this float/shutoff valve. *Id.* at 392:4-17; *see also* CPX-0002.0005, .0008-12.

D. FLUID COMMUNICATION

Mr. Leinsing, HydraFacial's expert, testified that "fluid communication" requires "a state that ***makes the passage of fluid possible***," confirming his prior testimony regarding the "fluid communication" requirement from the 337-TA-1417 investigation. Trial Tr. (Leinsing) at 400:24-401:25 (emphasis added). He further clarified that this means that "the fluid communication would be possible. It doesn't mean that it necessarily has to flow a liquid. It just means that that's possible, basically that it's plumbed -- that they are plumbed together." *Id.* Thus, according to HydraFacial's expert, for there to be "fluid communication," ***it must be possible for liquid to flow***, even if it does not actually flow. *See id.*

As noted above (Section IV.B-C), Mr. Leinsing testified that it is structurally ***impossible for liquid to flow*** to the vacuum source due to [redacted]. *See* Section IV.B-C.

[redacted]

Further, HydraFacial alleges that when the '287 Patent uses the term "fluid" or "treatment material," these terms require a liquid, alleging disavowal[6] of all non-liquids from the term "fluid." CBr. at 13; *see*, *supra*, Section IV.A.2 (discussion of the fluid limitation) and *infra* Section IV.E. Mr. Leinsing was clear that when he was discussing what needed to be able to pass, regardless of whether passage actually occurred, it needed to be a ***liquid.*** Trial Tr. (Leinsing) at 401:6-25 ("the fluid communication would be possible. It doesn't mean that it necessarily has ***to flow a liquid***. ***It just means that that's possible***, basically that it's plumbed -- that they are plumbed together." (emphasis added)). Thus, fluid communication should be construed to require liquid communication based on Mr. Leinsing's testimony.

E. RELEVANT PROCEDURAL HISTORY – FLUID COMMUNICATION

For purposes of this Petition, the critical procedural history is HydraFacial's shifting position on the Asserted Patent's "fluid" and "fluid communication" language.

In its invalidity contentions, Cartessa alleged that the Greenberg prior art anticipated and rendered obvious certain asserted claims, alone or in combination with other references. Cartessa maintained that Greenberg's treatment material—dry particles suspended in air, optionally mixed with oils—constituted a "fluid." *See*, *e.g.*, CX-0134C.0221, .0227, .0229, .0238 (discussing Greenberg's use of abrasive particles); CX-0138C.0363-68, .0378-89. Cartessa supported this position with testimony from its expert, Dr. Jensen, who testified accordingly in his invalidity report, deposition, and at the hearing. *See*, *e.g.,* Jensen Invalidity Rpt. (EDIS Doc. ID 843345-2318708) at 146-68; Jensen Dep. Tr. (EDIS Doc. ID 846232-2345827) at 265:3-14, 267:7-269:2,

[6] Cartessa does not believe that there was disavowal, but for purposes of this petition, and for the consistent treatment of the term "fluid," it treats "fluid" to mean a liquid.

[redacted]

282:12-286:16; Trial Tr. (Jensen) at 724:23-725:4, 730:5-15, 730:25-731:22; *see also* RPBr. at 79-80; RBr. at 10-12, 13-14.

In response to Dr. Jensen's invalidity report and deposition, HydraFacial argued that a "fluid" must be a liquid (i.e., it could not be a gas with suspended particles), and that Greenberg was thereby distinguished. Specifically, HydraFacial argued for the first time in opposition to Cartessa's Motion for Summary Determination that during prosecution, ***all non-liquids were disclaimed from the terms "fluid," "treatment fluid," and "treatment material.***" HydraFacial's Opp. to Cartessa's Motion for Summary Determination (EDIS Doc. ID 844286) at 11-12, 22-24. Since "fluid" and "treatment material" were not previously construed, after HydraFacial made its disclaimer argument, Cartessa reached out to HydraFacial and suggested the parties jointly raise the issue with the Administrative Law Judge in advance of the hearing, and HydraFacial declined. *See* Cartessa's Opposition to Motion to Strike (EDIS Doc. ID 850847) at 4; *see also id.* at Exs. 3-4.

While HydraFacial's interpretation of "fluid" to mean "liquid" would indeed boost its invalidity defense, it undercuts HydraFacial on infringement and domestic industry. Specifically, if "fluid" means only "liquid," then the Accused Products and DI Products lack "fluid communication" between the handpiece assembly and the vacuum source, as required by all of the asserted claims due to the structures (float valve for all of the DI Products [redacted] between the handpiece assembly and vacuum source that interrupt the flow, preventing liquid from reaching the vacuum source. Skinwave: CBr. at 40-41, JPX-0002.0005, CX-0763C, JX-0028C.0039, JX-0051C, JX-0046C, CX-0765C, JX-0045C, and JX-0055C, RPBr. at 5, 20-21, 27, 33-34, 36, RRBr. at 21-27, 31-32, 37-38, RRBr. at Exhibit 3, Trial Tr. (Leinsing) at 407:25-408:9; SKNLAB: CX-0284C, CX-0285C, CX-0286C, JX-0077C, RPBr.

[redacted]

at 5, 20-21, 27, 33-34, 36, RRBr. at 21-27, 31-32, 37-38, RRBr. at Exhibit 4, Trial Tr. (Leinsing) at 305:18-306:15, 407:25-408:3, 410:2-4; Syndeo: CPX-0003.0004-5, .0011-13, JX-0044C, CDX-0004C.49, RPBr. at 47-48, 52, 56, 58, RRBr. at 40-44, 45-46, 47-48, RRBr. at Exhibit 6, Trial Tr. (Leinsing) at 245:5-23, 391:23-392:17; Elite: CPX-0001.0007-11, CX-0815C, CX-0816C, RPBr. at 47-48, 52, 56, 58, RRBr. at 40-44, 45-46, 47-48, RRBr. at Exhibit 7, Trial Tr. (Leinsing) at 391:23-392:17; Allegro: CPX-0002.0005, .0008-12, CX-0813C, JX-0058C, RRBr. at 40-44, 45-46, 47-48, RRBr. at Exhibit 8, Trial Tr. (Leinsing) at 391:23-392:17.

In its Prehearing Brief, Cartessa clearly and expressly presented its noninfringement and domestic industry defense based on there being no liquid communication to the vacuum source, applying HydraFacial's own interpretation of "fluid" and "fluid communication." RPBr. at 5, 20-21, 27, 33-34, 36 (non-infringement); *id.* at 47-48, 52, 56, 58 (domestic industry); *see also* Cartessa Submission Regarding Certain Claim Limitations (EDIS Doc. IDs 848586, 848587).

At the Hearing, Cartessa proved conclusively that the Accused Products lacked the required "fluid communication" ***using the testimony of HydraFacial's own expert***. Specifically, Cartessa proved that the Accused Products were not plumbed to provide fluid (liquid) communication from the handpiece assembly to the vacuum source. *See* Skinwave: CBr. at 40-41, JPX-0002.0005, CX-0763C, JX-0028C.0039, JX-0051C, JX-0046C, CX-0765C, JX-0045C, and JX-0055C, RPBr. at 5, 20-21, 27, 33-34, 36, RRBr. at 21-27, 31-32, 37-38, RRBr. at Exhibit 3, Trial Tr. (Leinsing) at 407:25-408:9; SKNLAB: CX-0284C, CX-0285C, CX-0286C, JX-0077C, RPBr. at 5, 20-21, 27, 33-34, 36, RRBr. at 21-27, 31-32, 37-38, RRBr. at Exhibit 4, Trial Tr. (Leinsing) at 305:18-306:15, 407:25-408:3, 410:2-4; Syndeo: CPX-0003.0004-5, .0011-13, JX-0044C, CDX-0004C.49, RPBr. at 47-48, 52, 56, 58, RRBr. at 40-44, 45-46, 47-48, RRBr. at Exhibit 6, Trial Tr. (Leinsing) at 245:5-23, 391:13-392:17; Elite: CPX-0001.0007-11, CX-0815C, CX-0816C, RPBr. at 47-48, 52,

[redacted]

56, 58, RRBr. at 40-44, 45-46, 47-48, RRBr. at Exhibit 7, Trial Tr. (Leinsing) at 391:13-392:17; Allegro: CPX-0002.0005, .0008-12, CX-0813C, JX-0058C, RRBr. at 40-44, 45-46, 47-48, RRBr. at Exhibit 8, Trial Tr. (Leinsing) at 391:13-392:17.

In the SKNLAB, there is [redacted] in the waste container that prevents fluid (liquid) from flowing to the vacuum source. RRBr. at 26; Trial Tr. (Leinsing) at 410:2-4. In the Skinwave, there is [redacted] that prevents fluid (liquid) from flowing to the vacuum source. RRBr. at 25-26; Trial Tr. (Leinsing) at 333:8-18, 409:7-10. There was no evidence to the contrary. Thus, applying HydraFacial's own interpretation of the claims, the Accused Products do not infringe.

Similarly, HydraFacial's expert demonstrated that the DI Products were not plumbed to provide fluid (liquid) communication from the handpiece assembly to the vacuum source because all three DI Products have a float valve in the waste container that prevents fluid (liquid) from flowing to the vacuum source. RRBr. at 41-44; Trial Tr. (Leinsing) at 391:13-392:17.

Realizing after the Hearing that its invalidity tactic had gutted its infringement and DI Tech positions, HydraFacial raised a new argument. In post-Hearing briefing, HydraFacial argued, for the first time, that claim 11 does not require that the handpiece assembly be in fluid communication with the vacuum source. HydraFacial proposed a new grammatical reading of claim element 11(c) that excluded the vacuum source from the "fluid communication" plumbing. Under this new reading, HydraFacial argued that the Accused Products still infringed, and DI Products still practiced, even if the fluid must be liquid. CBr. at 41.

Cartessa timely moved to strike HydraFacial's new claim construction position, pointing out that it was not disclosed in—and inconsistent with—HydraFacial's Prehearing Brief. Cartessa's Motion to Strike (EDIS Doc. ID 851225); Cartessa's Amended Motion to Strike (EDIS Doc. ID 851469). HydraFacial opposed, arguing that it was not offering a new claim interpretation,

[redacted]

but was merely applying the language of the claim. HydraFacial's Opposition to Cartessa's Motion to Strike and Amended Motion to Strike (EDIS Doc. ID 852118). The Motion to Strike was denied, and the order agreed with HydraFacial "that the claim construction argument that Cartessa claims as 'new' is merely a recitation of claim 11." Order No. 57 at 5. The Order on the Motion to Strike did not provide any analysis of the claim language or address HydraFacial's prior positions—it simply summarized the parties' positions and stated, in one sentence, that it agreed with HydraFacial. *Id.*

The ID concluded that "the claim language does ***not*** require the 'waste conduit' to be in 'fluid communication' with the 'vacuum source.'" ID at 36 (emphasis in original). Oddly, this was also applied to claims 22 and 26, even though the claim language for those claims expressly state: "the [working end of the handpiece/handpiece] is configured to be placed in fluid communication with a vacuum source." JX-0001 at claims 22 and 26. Applying HydraFacial's construction of "fluid" as requiring liquid, and HydraFacial's new interpretation of "fluid communication" as not requiring fluid to flow to the vacuum source, the ID attempted to thread the needle, finding infringement but no invalidity.

The denial of the Motion to Strike (Order No. 57) and its infringement ruling were erroneous. HydraFacial's post-hearing position on "fluid communication" was a new argument that should have been struck from HydraFacial's Posthearing Brief. Moreover, that new argument could not apply to claims 22 and 26 given the difference in claim language. Furthermore, substantively, HydraFacial's new interpretation, adopted in the ID, is wrong. The claim ***does*** require fluid communication to the vacuum source. *See*, *infra*, Section V.A-B.

[redacted]

V. COMMISSION REVIEW IS NECESSARY TO CORRECT LEGAL AND CLEAR FACTUAL ERRORS

The ID erroneously determined that the '287 Patent was infringed and that DI Tech was established due to three errors: (1) allowing HydraFacial to change its claim construction position ***after the evidentiary hearing***; (2) an erroneous interpretation of fluid communication; and (3) an erroneous determination that "fluid communication" in claim limitations 11[c], 22[d][i], and 26[e] was found to be present in the Accused Products and DI Products.

A. THE ID ERRONEOUSLY PERMITTED HYDRAFACIAL TO CHANGE ITS CLAIM INTERPRETATION OF "FLUID COMMUNICATION" AFTER THE HEARING

HydraFacial's post-hearing interpretation of the "fluid communication" requirement was a new argument not raised prior to the Hearing. The relevant language from independent claims 11, 22, and 26 (claim 26 is contingent based on whether the Commission reviews and revises the indefiniteness finding) is reproduced below.

> **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";
>
> **22[d][1]:** "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";
>
> **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."

[redacted]

The claim construction dispute (which only arose after the Hearing, when HydraFacial changed positions) concerns whether the phrase "configured to be in fluid communication with" in 11[c] applies to the handpiece ***and*** the vacuum source, or just to the handpiece. In short, is it the waste conduit that moves waste away from the handpiece assembly, or just the vacuum source? Color coding of claim limitation 11[c] makes the issue clear:

> Pre-hearing Interpretation: 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
>
> Post-hearing Interpretation: 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

Prior to and during the Hearing, HydraFacial clearly understood the first interpretation to apply (as did Cartessa). In its Prehearing Brief, it mapped the "fluid communication" for claim 11 to the handpiece *and* to the vacuum source for both the Accused and DI Products:

- The second tube (the waste conduit) places the ***handpiece assembly in fluid communication with the vacuum source*** via the console. CPBr. at 57 (emphasis added).
- Even if the claim required a ***single tube*** to be the only structure ***placing the handpiece in fluid communication with the vacuum source***—which it does not— this limitation is met under the doctrine of equivalents. *Id.* (emphasis added) (disputing only that a single tube was needed for fluid communication, not that it did not need to be to the vacuum source).
- This ***limitation is also met because the waste conduit is fulfilled by the pathway between the vacuum source and the handpiece*** in each of the Accused Products. *Id.* (emphasis added).
- Respondent argues there is no single conduit placing the handpiece assembly in fluid communication with the vacuum source. As described above, ***the waste conduit forms a pathway that places the handpiece assembly in fluid communication with the vacuum source***. However, even if a "conduit" is a single tube, the Accused Products meet this limitation. *Id.* at 58 (emphasis added).

[redacted]

- The ***handpiece assembly is configured to be in fluid communication with the vacuum source through a waste conduit*** because the waste conduit of each of the DI Products is a pathway between the vacuum source and the handpiece assembly. *Id.* at 97 (emphasis added).

- Respondent argues there is no single conduit placing the handpiece assembly in fluid communication with the vacuum source. As explained above, the waste conduit of the ***DI Products forms a pathway that places the handpiece assembly in fluid communication with the vacuum source***. *Id.* at 98 (emphasis added).

- However, even if a "conduit" is somehow limited to a single tube, the DI Products would still meet this limitation, as ***the handpiece assembly is configured to be in fluid communication with the vacuum source*** through the tubing from the console coupling to the handpiece assembly (the "(4)" tubing) for each of the DI Products. Nothing in the claim language requires that the tube to be the ***only*** structure connecting the handpiece directly to the vacuum source. *Id.* at 98 (first emphasis added, second emphasis in original) (disputing only that a single tube was needed for fluid communication, not that it did not need to be to the vacuum source).

- And even under Respondent's understanding that a single tube must be the *only* structure placing the handpiece assembly in fluid communication with the vacuum source, this limitation is met by the DI Products under the doctrine of equivalents. …. In both instances, ***the conduits perform the function of providing a fluid pathway between the vacuum source and the handpiece***, do so in the same way—through tubing connecting the vacuum source to the handpiece, ***with the result of fluid communication between the vacuum source and the handpiece*** such that fluid can be drawn from the skin surface to the waste container. *Id.* at 99 (emphasis added).

HydraFacial's Prehearing Brief ***never*** contended that the fluid communication required in claim 11 (or claims 22 or 26) was limited to the handpiece. HydraFacial clearly agreed that there needed to be fluid communication all the way to the vacuum source; otherwise, instead of conducting a doctrine of equivalents analysis (as it did), it would have stated that fluid communication was not required to the vacuum source. *See* CPBr. at 57-58, 98-99.

[redacted]

It was not until ***after*** the Hearing that HydraFacial advanced a new interpretation of claim 11, in which "fluid communication" applied only the handpiece, and the vacuum source was the component for moving waste, rather than the waste conduit. HydraFacial needed this new interpretation to avoid admissions by its expert that established noninfringement under its pre-hearing interpretation.

The Order permitted HydraFacial to advance this new position, holding, in denying the Motion to Strike, "that the claim construction argument that Cartessa claims as 'new' is merely a recitation of claim 11." Order 57 at 5. This conclusion does not hold up to scrutiny. As explained above, there are two different grammatical readings of the claim language. This is the essence of claim construction—interpreting claim language to determine claim scope. *See Nature Simulation Sys. Inc. v. Autodesk, Inc.*, 50 F.4th 1358, 1363 (Fed. Cir. 2022) (claim construction occurs "[w]hen the meaning or scope of a patent claim is disputed"). HydraFacial switched from the first grammatical interpretation to the second. In its ruling on the Motion to Strike, the Order does not address the numerous statements cited above from HydraFacial's Prehearing Brief, in which HydraFacial applies the first grammatical interpretation, before switching to the second interpretation for the first time ***after the Hearing***.

It has long been emphasized that contentions which do not appear in a pre-hearing brief cannot be advanced after the Hearing and that such arguments are waived. For instance, in *Certain Fitness Devices, Streaming Components Thereof, and Systems Containing the Same*, Inv. No. 337-TA-1265, Comm'n Op. at 19-20 (Mar. 23, 2023), the Commission found that the complainant waived an indirect practice theory that was not raised in its pre-hearing brief, but was only raised in its post-hearing briefs. In that Investigation, the ground rules provided the pre-hearing brief must include:

[redacted]

> [A] statement of the issues to be considered at the hearing that sets forth with particularity a party's contentions on each of the proposed issues, including citations to supporting facts and legal authorities, e.g., proposed exhibits. Incorporation by reference is not allowed. Any contentions not set forth in detail as required therein shall be deemed abandoned or withdrawn, except for contentions of which a party is not aware and could not be aware in the exercise of reasonable diligence at the time of filing the prehearing statement.

Id. Similarly, in this Investigation, the Ground Rules provide that: "Any contentions and theories of the case not set forth in detail as required herein shall be deemed abandoned or withdrawn, except for contentions of which a party is not aware and could not be aware in the exercise of reasonable diligence at the time of filing the pre-hearing brief." Order No. 2 (Ground Rules) at 7.2 (footnote omitted).

Given the clear Ground Rules and Commission precedent, it was erroneous to permit this new contention after the Hearing. *See Certain Fitness Devices*, Inv. No. 337-TA-1265, Comm'n Op. at 19-20, 25; *Certain Integrated Circuit Chips and Prods. Containing the Same*, Inv. No. 337-TA-859, Comm'n Op. at 23 (Aug. 22, 2014).

B. THE ID ERRONEOUSLY CONSTRUED THE "FLUID COMMUNICATION" LANGUAGE

In addition to the procedural error of allowing HydraFacial to change contentions after the Hearing, the ID substantively erred in adopting HydraFacial's new claim construction. The proper construction of the "fluid communication" language is the pre-hearing interpretation: the fluid communication applies to both the handpiece and the vacuum source.

Claim constructions in an ID are subject to *de novo* review. *See Certain Computing Devices Utilizing Indexed Search Sys. and Components Thereof*, Inv. No. 337-TA-1389, Comm'n Op. at 10 (Oct. 25, 2024) (initial determinations are reviewed *de novo* by the Commission); *Certain Audio Processing Integrated Circuits and Prods. Containing Same*, Inv. No. 337-TA-538, Comm'n Op. at 4 (July 12, 2006) ("[c]laim construction is a matter of law and is reviewed *de novo*"). The ID's

[redacted]

construction of the fluid communication language of limitations 11[c], 22[d][1], and 26[e] was erroneous and must be reversed.

Limitation 11[c] is again reproduced below:

> **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"

The claim requires "***a waste conduit*** configured to be ***in fluid communication with*** the handpiece assembly ***and a vacuum source***." JX-0001 at claim 11 (emphasis added).

The ID's construction—that the "fluid communication" extends only to the handpiece—is grammatically tortured. Color-coded below, this incorrect reading splits the single limitation into two separate components:

> ID's Construction: "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"

Under the ID's interpretation, the claim would have presented the "waste conduit" and "vacuum source" as separate paragraphs, separated by a semicolon, rather than as a single limitation. That the language is presented as a single limitation makes the proper reading clear: the entire limitation is about the waste conduit. The waste conduit is "configured to be in fluid communication with the handpiece assembly and a vacuum source," and its purpose is "to move waste away from the handpiece assembly when the waste conduit and handpiece assembly are connected to the console."

With respect to independent claims 22 and 26, there is even less ambiguity:

> **22[d][1]:** "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"

[redacted]

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"

Claims 22 and 26 (claim 26 is contingently petitioned) expressly state that the handpiece is in fluid communication with the vacuum source. The parties and the ID treats claim elements 11[c], 22[d][i], and 26[e] as having the same impact. For instance, in the ID, in the analysis for claim 22[d][i], claim element 11[c] is cross-referenced. ID at 49, 79. Similarly, in analyzing claim limitation 26[e], the ID cross-references claim limitation 11[c]. *Id.* at 55, 85.

Likewise, in HydraFacial's Prehearing Brief, it repeatedly stated that the waste (or second) conduit ***places the handpiece (or handpiece assembly) in fluid communication with the vacuum source***, treating all three claims as requiring fluid communication ***to the vacuum source***:

- Claim limitation 11(c): "As explained above in Sections III.C.9 [claim limitation 26[e]] and III.C.10, the Accused Products comprise a waste conduit configured to be in fluid communication with the handpiece assembly and a vacuum source to move waste away …. The second tube (the waste conduit) ***places the handpiece assembly in fluid communication with the vacuum source*** via the console." CPBr. at 56 (emphasis added).
- Claim limitation 22(d): "As explained in Section III.C.9 [claim limitation 26[e]], ***the handpiece of the Accused Products is in fluid communication with the vacuum source*** (via the "second conduit") when the handpiece is connected to the console, ***the working end of which is also in fluid communication with the vacuum source***" CPBr. at 50 (emphasis added).

[redacted]

- Claim limitation 26[e]: "The second ***tube places the handpiece in fluid communication with the vacuum source*** via the console." CPBr. at 50 (emphasis added).

How, then, can claim 11[c] be interpreted as excluding the vacuum source from fluid communication?

Further, in this Investigation, HydraFacial maintained that the "fluid" of the claims must be a liquid in order to distinguish the Greenberg prior art (*see*, *supra*, Section IV.A.2), which disclosed treatment materials composed of solid particles optionally mixed with oils, which are suspended in air. Specifically, HydraFacial argued that it disclaimed non-liquid materials during prosecution. Trial Tr. at 7:22-8:5. In ruling on validity, the ID adopted HydraFacial's position that non-liquids had been disclaimed. ID at 109-14.[7] Further, HydraFacial's expert unambiguously stated that fluid communication requires the ***ability for liquid to flow***, even if the liquid itself does not flow, it must be plumbed such that liquid flow is possible. Trial Tr. (Leinsing) at 401:6-25 ("the fluid communication would be possible. It doesn't mean that it ***necessarily has to flow a liquid. It just means that that's possible***, basically that it's plumbed -- that they are plumbed together." (emphasis added)). Thus, according to HydraFacial's expert, for there to be "fluid communication," ***it must be possible for liquid to flow*** through the product's plumbing.

[7] Cartessa does not agree that the patentee "disclaimed" treatment materials comprised of solid particle suspended in air, as disclosed in Greenberg, and believes the construction of "fluid" is wrong. However, as stated in post-hearing briefing, Cartessa will not dispute the ID's construction of "fluid" as limited to "liquid" for purposes of this Investigation, *provided "fluid communication"* is consistently construed, requiring "*liquid communication.*" RRBr. at 7.

[redacted]

C. THE ID ERRONEOUSLY FOUND INFRINGEMENT AND DI TECH WHEN THERE ARE NO FACTS TO SUPPORT A FINDING THAT LIQUID FLOWS TO THE VACUUM SOURCE

1. Claim Limitations 11[c], 22[d][1], and 26[e] Are Not Satisfied

With the fluid communication limitation properly construed—as requiring fluid (liquid) communication from the handpiece to the vacuum source—then there can be no finding of infringement and no finding of a domestic industry because all of the Accused Products and DI Products lack "fluid communication"—i.e., ***liquid*** communication—extending to the vacuum source. Specifically, in the Accused Products and DI Products, there are structures ([redacted] float valve for all of the DI Products) that interrupt the pathway between the handpiece and the vacuum source and in fact making it ***impossible for liquid to flow*** to the vacuum source.

a. The Accused Products Do Not Infringe the '287 Patent Because There is No Liquid Flow to the Vacuum Source

(i) No Infringement by the Skinwave

As discussed above, the Skinwave contains at least four different conduits with breaks at the air filter, vacuum port, and waste container. CBr. at 40-41; CX-0763C; JX-0051C; JX-0046C; CX-0765C; JX-0045C; and JX-0055C; RPBr. at Exhibit K; RRBr. at Exhibit 3. HydraFacial admits that the waste conduit breaks at the waste container. CBr. at 39-40 (showing JX-0046C, annotations note where the waste conduit breaks at the waste container); Trial Tr. (Leinsing) at 333:23-334:8; CDX-0004C.206. The Skinwave schematic illustrates the plurality of conduits relevant to the transport of waste from the handpiece. JX-0028C.0039. There are [redacted] conduit between the handpiece and the "vacuum source" (AC motor (pump)). *Id*. This design interrupts the claimed requirement of continuous

[redacted]

"fluid communication," as the waste container's two-port configuration prevents a direct and uninterrupted pathway between the handpiece assembly and the vacuum source. *See id.*

Further, HydraFacial's expert, Mr. Leinsing, admitted that as a result of these interruptions, ***liquid*** does not and ***cannot*** go from the handpiece to the vacuum source in Skinwave. Instead, treatment liquid stops at the waste container. Trial Tr. (Leinsing) at 305:18-306:15 (stating that the treatment material gets "trapped" in the SKNLAB's waste container and that the Skinwave is functionally the same). HydraFacial never alleges that there is or could be liquid in the conduit that runs between the waste container and the vacuum source. Trial Tr. (Leinsing) at 407:25-408:3 ("Q. But nowhere in your testimony today did you provide any evidence of liquid traveling to a vacuum source, correct? A. That's correct. . . ."); *id.* at 408:7-9 ("And you provided no evidence that liquid could ever even reach a vacuum source, correct? A. No . . . ."). There is no liquid due to gravity pulling the liquid down into the waste container. *See* JX-0028C.0039. Crucially, in the Skinwave, there is [redacted]. Trial Tr. (Leinsing) at 333:8-18 (citing CX-0765C); RRBr. at 25-26. When [redacted], the vacuum stops. Trial Tr. (Leinsing) at 409:7; RRBr. at 25-26. When the vacuum stops, then "fluid no longer goes into the waste container." Trial Tr. (Leinsing) at 409:7-10; RRBr. at 25-26.

Mr. Leinsing testified that "fluid communication" requires a state that makes the ***passage of liquid possible***. Trial Tr. (Leinsing) at 401:11-24. However, for the reasons discussed above, the Skinwave's plumbing does ***not*** allow for liquid passage all the way to the vacuum source, due to the interruptions, and, as Mr. Leinsing admitted, the [redacted] ***prevents liquid*** from ever traveling to the vacuum source. This admission is dispositive. Thus, the ID should be reversed as a matter of law because there is no evidence showing liquid communication to the vacuum source.

[redacted]

(ii) No Infringement by the SKNLAB

As set forth above, the SKNLAB has at least three different conduits and multiple couplings and other components between the handpiece and the vacuum source. CX-0284C; CX-0285C; CX-0286C; JX-0077C; RPBr. at Exhibit L; RRBr. at Exhibit 4. Within these breaks, there is a waste container between the handpiece and the vacuum source, which HydraFacial acknowledges. CX-0285C; Trial Tr. (Leinsing) at 337:24-338:13; CDX-0004C.211. Like the Skinwave, the liquid stops at the waste container, and the liquid does not and cannot flow to the vacuum source. Trial Tr. (Leinsing) at 305:18-306:15 (stating that the treatment material gets "trapped" in the SKNLAB's waste container).

Mr. Leinsing admits that he did not provide evidence of any liquid going to the vacuum source. Trial Tr. (Leinsing) at 407:25-408:3. Mr. Leinsing testified that "fluid communication" requires a state that makes the ***passage of liquid possible***. *Id.* at 401:11-24. However, for the reasons discussed above, the SKNLAB's plumbing does ***not*** allow for liquid passage all the way to the vacuum source. Critically, Mr. Leinsing admitted that in it is ***impossible*** for liquid to reach the vacuum source: "[t]he SKNLAB has a [redacted] that ***prevents fluid from -- or treatment material getting back to the vacuum container***." Trial Tr. (Leinsing) at 410:2-4; *see* JPX-0002.0005 (showing the [redacted]); RRBr. at 26.

These admissions are dispositive. The SKNLAB does not have "fluid communication" from the handpiece to the vacuum source, as required by limitations 11[c], 22[d][1], and 26[e]. HydraFacial's insistence that "fluid" means "liquid"—a position HydraFacial took to avoid prior art—dooms its infringement analysis. The ID should be reversed as a matter of law because there is no evidence showing liquid communication to the vacuum source.

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b. The DI Products Do Not Practice the '287 Patent Because There is No Liquid Flow to the Vacuum Source

Similarly, the DI Products also have multiple conduits and components between the handpiece and the vacuum source. RRBr. at 40-41.

The Syndeo appears to have at least four conduits, or four breaks in the conduit, between the handpiece and vacuum source. JX-0044C; CDX-0004C.49; RPBr. at Exhibit X; RRBr. at Exhibit 6. Within the breaks of the waste (or second) conduit, there is a waste container. Trial Tr. (Jensen) at 714:3-716:10; JX-0044C. When the liquid (serum) reaches the waste container it stops. Trial Tr. (Jensen) at 716:6-10. On direct examination, Mr. Leinsing discussed a schematic (JX-0044C) that purported to show the "fluid communication" of the Syndeo. Trial Tr. (Leinsing) at 245:5-23. The schematic shows a "float/shutoff" valve in the waste container. JX-0044C; CDX-0004C.49. Mr. Leinsing testified that "the float/shutoff stops the fluid, the treatment material, from going into the vacuum source. So once the waste container is full, it then stops the treatment fluid with any skin particles from going into the vacuum source." Trial Tr. (Leinsing) at 391:23-392:3. He confirmed that all three DI Products contain this float/shutoff valve. *Id.* at 392:1-17; *see also* Elite: CPX-0001.0007-11; Allegro: CPX-0002.0005, .0008-12; Syndeo: CPX-0003.0004-5, .0011-13.

The Elite has at least four conduits, or four breaks in the conduit, between the handpiece and vacuum source. Trial Tr. (Jensen) at 715:10-716:1; CX-0815C; CX-0816C; RPBr. at Exhibit Y; RRBr. at Exhibit 7. Within one of these breaks of the waste (or second) conduit, there is a waste container. Trial Tr. (Jensen) at 714:3-716:10; CX-0815C; CX-0816C. When the liquid (serum) reaches the waste container it stops. Trial Tr. (Jensen) at 716:6-10. Mr. Leinsing testified that a "float/shutoff stops the fluid, the treatment material, from going into the vacuum source. So once the waste container is full, it then stops the treatment fluid with any skin particles from going into

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the vacuum source." Trial Tr. (Leinsing) at 391:23-392:3. He confirmed that the Elite contains this float/shutoff valve. *Id.* at 392:4-17; *see also* CPX-0001.0007-11.

The Allegro has at least four conduits, or four breaks in the conduit, between the handpiece and vacuum source. Trial Tr. (Jensen) at 715:10-17; CX-0813C; JX-0058C; RPBr. at Z; RRBr. at Exhibit 8. Within one of these breaks of the waste (or second) conduit, there is a waste container. CX-0813C; JX-0058C. When the liquid (serum) reaches the waste container it stops. Trial Tr. (Jensen) at 716:6-10. Mr. Leinsing, HydraFacial's expert, testified that a "float/shutoff stops the fluid, the treatment material, from going into the vacuum source. So once the waste container is full, it then stops the treatment fluid with any skin particles from going into the vacuum source." Trial Tr. (Leinsing) at 391:23-392:3. He confirmed that the Allegro contains this float/shutoff valve. *Id.* at 392:4-17; *see also* CPX-0002.0005, .0008-12.

Mr. Leinsing admitted that all three DI Products have a float valve that prevents liquid from leaving the waste container, preventing fluid from ever reaching the vacuum source. RRBr. at 41; Trial Tr. at 391:23-392:17 (Leinsing). This admission is dispositive. The DI Products do not have "fluid communication" because it is impossible for liquid to flow from the handpiece to the vacuum source, as required by limitations 11[c], 22[d][1], and 26[e]. Thus, the ID should be reversed as a matter of law because there is no evidence showing liquid communication to the vacuum source.

2. There Is No Alternate Ground for Affirmance

At the conclusion of the discussion of claim element 11[c], the ID includes the following cryptic paragraph:

> 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

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necessary plumbing between them to provide the claimed communication. (Tr. (Leinsing) at 331:7-339:9.).

ID at 37. The referenced claim element 11[a], however, does not include fluid communication to the vacuum source, so the analysis for element 11[a] does not apply. Moreover, the ID's analysis of 11[a], like the ID's analysis of 11[c], does not address Mr. Leinsing's numerous admissions that that the Accused Products and DI Products are not plumbed for liquid to reach the vacuum source, or that the design makes it impossible for liquid to do so. *See*, *supra*, Section V.C.1.

The ID's discussion of element 11[a] also criticizes Cartessa's expert, Dr. Jensen, for applying different claim reads in his invalidity and noninfringement analysis and found that his "inconsistent positions . . . with respect to infringement and invalidity weighed heavily against his testimony on these issues." ID at 25. This is backwards. It is the ***patent owner*** who has the initial burden of demonstrating both infringement and validity without treating the claim language as a "nose of wax." *See Certain Ground Fault Circuit Interrupters and Prods. Containing* Same, Inv. No. 337-TA-739, Comm'n Op. at 13 (June 8, 2012); Amazon*.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001) ("A patent may not, like a 'nose of wax,' be twisted one way to avoid anticipation and another to find infringement."); *White v. Dunbar*, 119 U.S. 47, 52 (1886). It was entirely appropriate for Cartessa to apply its own proposed construction of "fluid" in its anticipation defense, while ***alternatively*** applying HydraFacial's proposed construction in its defense to infringement. Since the ID adopted HydraFacial's "disavowal" of nonliquid fluids, this disavowal construction must also be applied to infringement and domestic industry. Since the Accused Products and DI Products lack fluid (liquid) communication to the vacuum source (Section V.C.1), the ID should be reversed as a matter of law.

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VI. PRESERVATION OF ISSUES FOR DISTRICT COURT PROCEEDINGS

Cartessa contends that there are numerous additional errors in the ID, including rulings on claim construction, validity, and prosecution laches that it disputes. For clarity, Cartessa preserves its right to dispute these findings in ongoing and subsequent District Court proceedings. *Hyosung TNS Inc. v. Int'l Trade Comm'n*, 926 F.3d 1353, 1358 (Fed. Cir. 2019). For purposes of this Petition only, Cartessa focuses on the issues raised herein.

Furthermore, Cartessa will address the public interest issues on or before October 2, 2025, in accordance with the Notice of Request for Submissions on the Public Interest. EDIS Doc. ID 860875.

VII. CONCLUSION

For the reasons provided above, Cartessa submits that the Commission should review and reverse the following determinations: (1) the failure to strike the late claim construction of "fluid communication"; (2) the construction of the term "fluid communication"; (3) the finding of infringement of claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 of the '287 Patent, and contingently of claim 32 of the '287 Patent, which depends from claim 26, should the Commission review and reverse the indefiniteness finding of claim 32 of the '287 Patent; and (4) the finding of DI Tech for claims 11, 12, 14, 16, 18, 19, 22, 24, and 25 of the '287 Patent, and contingently of claim 32 of the '287 Patent, which depends from claim 26, should the Commission review and reverse the indefiniteness finding of claim 32 of the '287 Patent.

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Dated: September 8, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day, true and correct copies of the foregoing **CARTESSA'S PETITION FOR REVIEW OF INITIAL DETERMINATION OF VIOLATION** were filed with the Commission and served by means indicated to the persons at the addresses below:

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The Honorable MaryJoan McNamara Administrative Law Judge **U.S. INTERNATIONAL TRADE COMMISSION** 500 E Street, SW, Room 317 Washington, DC 20436	Via email: McNamara337@usitc.gov
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