

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

**Before the Honorable Monica Bhattacharyya
Administrative Law Judge**

In the Matter of

**CERTAIN DISPOSABLE VAPORIZER
DEVICES**

Inv. No. 337-TA-1410

RESPONDENTS' OPENING CLAIM CONSTRUCTION BRIEF

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I. INTRODUCTION

The TEO phase of this investigation exposed Complainants' challenge of mapping the claims of their nearly 20-year-old patent onto both Respondents' accused products and Complainants' domestic industry products, while at the same time preserving valid claims. Simply put, the invention disclosed in the '202 patent almost 20 years ago does not map neatly onto current products on the market, and so Complainants have been forced to advance unsupported claim constructions under the guise of "plain and ordinary meaning" to allow them the flexibility to morph their claims to suit their litigation purposes.

Respondents seek constructions that are grounded in the intrinsic evidence and comport with the understanding of persons skilled in the art, while Complainants' proposed constructions often conflict with the intrinsic evidence and would yield claims lacking written description support. For the reasons set forth herein, Respondents respectfully request adoption of their proposed constructions.

II. OVERVIEW OF THE '202 PATENT

The '202 patent, entitled "Tobacco-Containing Smoking Article," issued on March 12, 2024. JX-0001 at Cover. "The smoking article possesses at least one form of tobacco." *Id.* Abstract; *see also id.* 1:28-29, 4:65-67, 5:17-18, 8:66-67.

The '202 patent explains that cigarette-shaped tobacco products, which employ tobacco in a form that is not intended to be burned, already were known. *Id.* 3:55-4:16 (citing examples). Still other products attempted to deliver vapors, sprays, or aerosols that include flavors and/or nicotine. *Id.* 4:17-29. The '202 patent alleges that these articles had not enjoyed widespread commercial success. *Id.* 4:30-34. The '202 patent proposes adding tobacco to such devices as a solution:

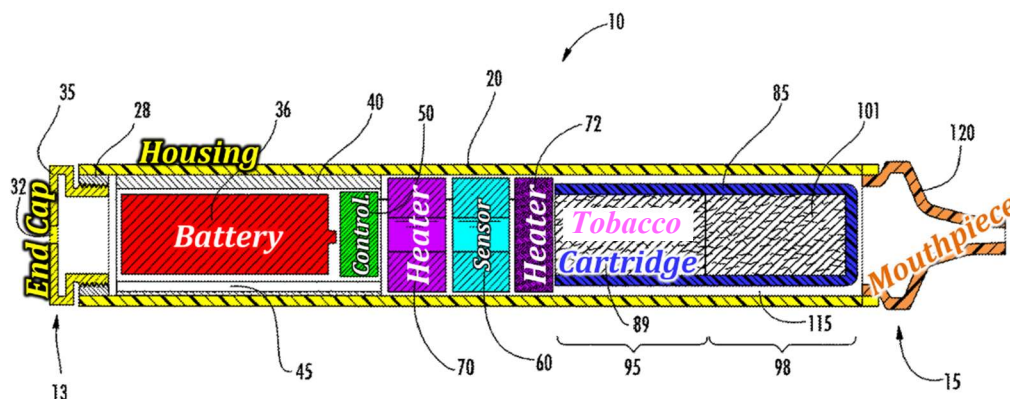
[I]t would be highly desirable to provide a smoking article that provides a smoker with an ability *to enjoy using tobacco* without the necessity of burning any significant amount of tobacco.

Id. 4:34-37 (emphasis added).

The Summary of the Invention section of the '202 patent specification unequivocally states that “the ***present invention*** relates to articles that produce aerosols incorporating components derived from or provided by tobacco.” *Id.* 4:48-53 (emphasis added). “In one embodiment, the present invention relates to a cigarette that is smoked by coupling that cigarette to an electrically powered aerosol generating device that acts as a holder for that cigarette.” *Id.* 5:13-16. “In another embodiment, the present invention relates to a smoking article that is smoked by incorporating that tobacco within an electrically-powered, aerosol-generating device.” *Id.* 5:41-43. But, in either case, the “***smoking article of the present invention incorporates tobacco.***” *Id.* 8:66-67; *see also id.* 5:16-17, 5:57-58.

The '202 patent devotes over seven columns of text describing different ways that tobacco can be incorporated into a smoking article. *See id.* 8:66-13:21, 15:3-44, 15:61-16:45, 17:53-19:24. Various types and blends of tobacco may be used (*id.* 8:67-9:4, 10:43-11:2), as can various forms of tobacco (*id.* 9:28-61). Tobacco “extracts,” defined as “components separated from, removed from, or derived from, tobacco using tobacco extraction processing conditions and techniques,” also can be used. *Id.* 12:31-36. On this latter, issue, however, the '202 patent states that “[p]referred tobacco extracts incorporate numerous components that are separated from, removed from, or derived from, tobacco; and are not obtained using tobacco extraction processes conditions that are highly selective to a single component (e.g., preferred extracts are not high nicotine content extracts, or extracts that can be characterized as relatively pure nicotine compositions).” *Id.* 12:53-59. Thus, single-component extracts such as pure nicotine are not the types of tobacco proposed for use with the smoking article.

The '202 patent illustrates various embodiments of the smoking article in FIGS. 1-3. The smoking article 10 of FIG. 1 has a battery 36 (*red*), a controller 40 (*green*), a sensor 60 (*bright blue*), a pair of heaters 70, 72 (*purple*), and a cartridge 85 (*blue*) including tobacco 89 (*pink*), contained within a housing 20 (*yellow*):



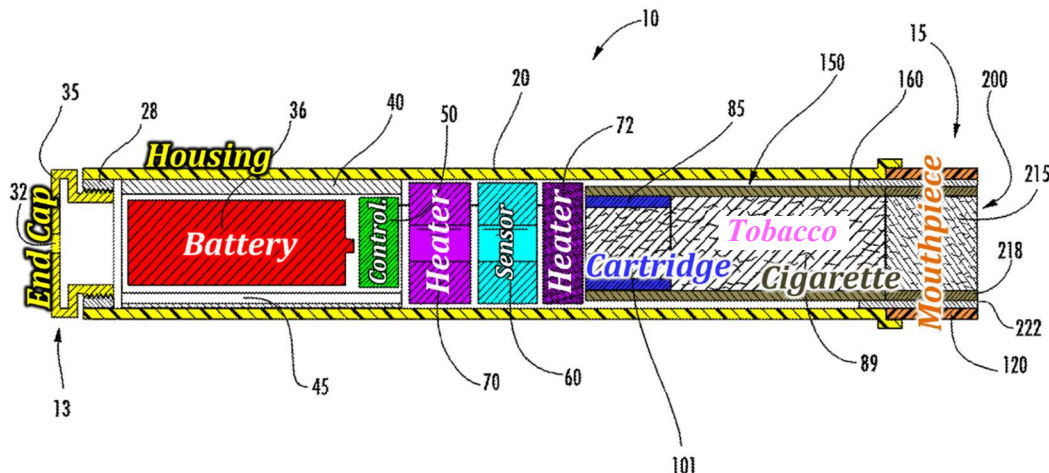
'202 Pat. (JX-0001), FIG. 1 (annotated)

See JX-0001, 19:49-24:29. The housing 20 has a tubular shape (*id.* col. 19:58-62), and it ends in a removable mouthpiece 120 (*orange*) at a mouth-end 15 of the smoking article 10 and an end cap 35 (also *yellow*) at a distal end 13. *Id.* 24:15-31).

The '202 patent describes the component parts of the smoking article 10 with reference to an “Atomizing Electronic Cigarette” product of Ruyan SBT Technology and Development Co., Ltd. from China, which the '202 patent identifies as “available through Atlanta Imports Inc., Acworth, Georgia, USA.” *Id.* 19:37-48; *see also id.* col. 14:29-38. All structural aspects of the '202 patent device essentially mimic the Ruyan device. *Id.* 20:1-4, 24:20-23 (external structure), 20:38-43 (power source), 20:55-60 (controller), 20:64-67 (sensor), 21:58-61 (resistance heater), 22:19-26 (cartridge). The '202 patent’s only proposed novel feature is to modify the Ruyan device’s cartridge to add tobacco. *Id.* 22:19-26, 22:46-49. For example, the '202 patent proposes to replace a segment of the Ruyan fibrous substrate and aerosol-forming material with a segment

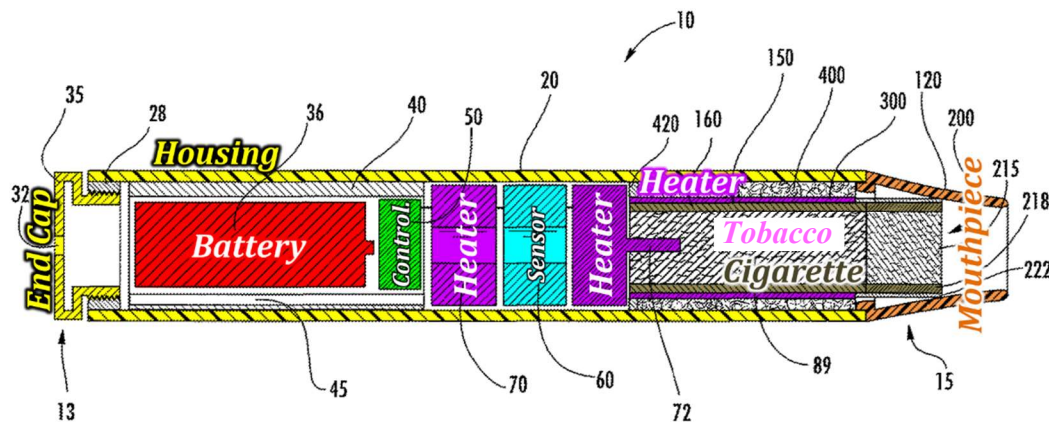
composed of tobacco cut filter saturated with glycerin and spray-dried tobacco extract. *Id.* 22:49-55. Alternatively, the Ruyan cartridge could be replaced with a web of tobacco sheet treated with a mixture of propylene glycol, flavoring agent, and tobacco extract. *Id.* 22:54-58.

Other embodiments adapt the same housing, battery, controller, sensors, and heaters to incorporate a cigarette 150 (*brown*) including tobacco 89 (*pink*):



'202 Pat. (JX-0001), FIG. 2 (annotated)

Id. 24:60-67.



'202 Pat. (JX-0001), FIG. 3 (annotated)

Id. 27:45-65.

The FIG. 3 embodiment has a third resistance heating element 300 (*purple*), which is powered by the battery 36 and controlled by the controller 50. *Id.* 27:66-28:23. The third resistance heating element 300 has a cylindrical shape that fits around a tobacco rod 89 (*pink*) inserted

therein. *Id.* Additionally, in the FIG. 3 embodiment, the second resistance heating element 72 has an elongated portion that extends downstream within the housing 20. *Id.* 28:44-52. This elongated shape causes the second resistance heater 72 to “extend into the tobacco segment 89 ... in close contact with a significant amount of substrate and aerosol-forming material within the tobacco.” *Id.*

All three embodiments (FIG. 1-3) heat the tobacco and aerosol-forming material when a smoker draws on the mouthpiece. *See id.* 24:30-59, 27:25-44, 29:10-35. During a draw, air is drawn into the article via openings in the end cap 35 through the outer housing 20 past the battery 36, control components 50, the sensor 60, the heating elements 70, 72 and (if present) 300. *Id.* An aerosol is generated by the action of heat by heating element 72 upon the aerosol-forming material, which may contain flavors and other components provided by the tobacco. *Id.*

III. PERSON OF ORDINARY SKILL IN THE ART

Respondents submit that a Person of Ordinary Skill in the Art (“POSA”) would have had a bachelor’s degree in mechanical engineering, electrical engineering, chemistry, physics, or a related field, three to four years of experience in their respective field, and familiarity with electrically powered smoking articles, their components, and underlying technologies or similar components and technologies. Alternatively, a POSA would have had a master’s degree in mechanical engineering, electrical engineering, chemistry, physics, or a related field, one to two years of experience in their respective field, and familiarity with electrically powered smoking articles, their components, and underlying technologies or similar components and technologies.

IV. CLAIM CONSTRUCTION LEGAL PRINCIPLES

The claims of a patent define the protected invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (*en banc*). When the parties dispute the proper scope of an asserted

patent claim, the Commission must resolve that dispute as a matter of law. *O2 Micro International Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996).

A. Intrinsic Evidence

When determining the scope of a claim term or phrase, the primary consideration is the intrinsic evidence, which consists of the words of the claims, the patent specification, and the patent’s prosecution history. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314; *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996).

1. *The words of the claims*

The claim construction “that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.” *Phillips*, 415 F.3d at 1316; see also *Vitronics*, 90 F.3d at 1582; *Phillips*, 415 F.3d at 1313, 1321 (“Properly viewed, the ‘ordinary meaning’ of a claim term is its meaning to the ordinary artisan after reading the entire patent.”). Additionally, the differences between claims—known as claim differentiation—is a “useful guide in understanding the meaning of particular claim terms.” *Phillips*, 415 F.3d at 1314; see also *Becton, Dickinson & Co. v. Tyco Healthcare Grp., LP*, 616 F.3d 1249, 1254 (Fed. Cir. 2010) (“Where a claim lists elements separately, ‘the clear implication of the claim language’ is that those elements are ‘distinct component[s]’ of the patented invention.” (quoting *Gaus v. Conair Corp.*, 363 F.3d 1284, 1288 (Fed. Cir. 2004))); *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1538 (Fed. Cir. 1991); see also *Kyocera Senco Indus. Tools Inc. v. Int’l Trade Comm’n*, 22 F.4th 1369, 1382 (Fed. Cir. 2022) (“There is ... a presumption that those components [separately listed] are distinct.”). And “[t]he presence of a **dependent** claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the

independent claim.” *Knowles Elecs. LLC v. Iancu*, 886 F.3d 1369, 1375 (Fed. Cir. 2018) (brackets omitted, emphasis added) (quoting *Phillips*, 415 F.3d at 1315).

2. *The specification*

A patentee may choose to be his own lexicographer by defining a claim term. *Phillips*, 415 F.3d at 1313. Therefore, “it is always necessary to review the specification to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning.” *Vitronics*, 90 F.3d at 1582. “[T]he specification is always highly relevant to the claim construction analysis. Usually it is dispositive; it is the single best guide to the meaning of a disputed term.” *Phillips*, 415 F.3d at 1315-16.

3. *The prosecution history*

A patent’s prosecution history may be considered when construing disputed claim language. *Vitronics*, 90 F.3d 1582. The prosecution history is the complete public record of the application proceedings before the United States Patent and Trademark Office, including representations, claim amendments and arguments made by the applicant regarding the scope of the claims. *Id.* “[T]he prosecution history can often inform the meaning of claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be.” *Phillips*, 415 F.3d at 1317. In addition, “[s]tatements about a claim term made by an examiner during prosecution of an application may be evidence of how one of skill in the art understood the term at the time the application was filed.” *Salazar v. Proctor & Gamble Co.*, 414 F.3d 1342, 1347 (Fed. Cir. 2005).

B. Extrinsic Evidence

When needed to understand complex technical issues, scientific principles, or the meanings of technical terms of art, the court may also rely on extrinsic evidence, which consists of all evidence external to the patent and its prosecution history. *Phillips*, 415 F.3d at 1322-23. Prior art patents or printed publications, for example, can often help to demonstrate how a disputed claim term was generally used by those skilled in the art at the time of the invention. *Vitronics*, 90 F.3d at 1584. Consequently, the Federal Circuit has stated that “a court in its discretion may admit and rely on prior art proffered by one of the parties, whether or not cited in the specification or the file history.” *Id.* Extrinsic evidence, however, should not be used to change the meaning of claim language that is apparent from the intrinsic evidence. *Phillips*, 415 F.3d at 1319.

V. **DISPUTED CLAIM TERMS**

A. Storage compartment [being configured for storage of a liquid aerosol-forming material]

Claim Term	Claims	Complainants’ Proposed Construction	Respondents’ Proposed Construction	Staff’s Proposed Construction
“storage compartment [being configured for storage of a liquid aerosol-forming material]”	1, 3-5, 8-9	Plain and ordinary meaning, which is an area where something is stored	Plain and ordinary Meaning, which is an enclosure where something is stored ¹	Plain and ordinary meaning, which is an area where something is stored

The parties disputed the proper construction of “storage compartment” during the TEO phase. As of the filing of this opening brief, no construction rulings have been issued from the

¹ Respondents maintain the construction offered by Respondents in the Temporary phase is correct. and reserve the right to rely upon said construction should the ALJ adopt Respondents’ TEO phase construction of “storage compartment.”

TEO phase. Thus, rather than repeat their TEO phase arguments (which could become moot upon the issuance of the Initial Determination on Temporary Relief), Respondents attempted to narrow the claim construction disputes for the *Markman* proceedings by proposing to construe “storage compartment” as plain and ordinary meaning, while reserving the right to rely upon any construction adopted by the ALJ in the Initial Determination on Temporary Relief. In response, Complainants indicated their belief that the plain and ordinary meaning of “storage compartment” is “an area where something is stored.” As explained below, Respondents disagree that a POSA would understand the plain and ordinary meaning of “storage compartment” as proposed by Complainants.

Complainants’ construction, under which a “compartment” can be any unbounded, unenclosed “area,” is unduly broad in light of the invention disclosed in the ’202 patent. Although the ’202 patent never uses the term “storage compartment,” the exemplary storage structures described in the specification (e.g., cartridge 85 or liquid storage container 85 or even cigarette 150) are all separate enclosure structures, not merely some amorphous “area” as proposed by Complainants. Indeed, the cartridge/liquid storage containers are enclosed by “a variety of materials, such as metal (e.g., aluminum or stainless steel), paper (e.g., paperboard or paper coated with a hydrophobic film or coating), plastic (e.g., polyester, polypropylene, nylon, polycarbonate, or the like).” JX-0001 at 22:10-14. Likewise, cigarette 150 is enclosed by wrapping material 160. *Id.* at 25:1-4. Thus, for the purposes of *Markman* in the Permanent phase, Respondents propose that the plain and ordinary meaning of “storage compartment” is an *enclosure* where something is stored.

B. Heater

Claim Term	Claims	Complainants' Proposed Construction	Respondents' Proposed Construction	Staff's Proposed Construction
"heater"	1, 9-12, 14, 18, 25-26	Plain and ordinary meaning, which is a heating element	Plain and ordinary meaning, which is an assembly configured to heat	Plain and ordinary meaning, which is an assembly configured to heat

Staff and Respondents agree that the plain and ordinary meaning of “heater” is “an assembly configured to heat.” The dispute hinges on whether a “heater” is limited to a single component, namely, a heating element. It is not, and Complainants’ construction is unduly narrow. Rather, the plain and ordinary meaning of “heater” to a POSA is an assembly—a plurality of components—configured to heat. Indeed, “heater” is a well-understood term. For example, an electric space *heater* that is used in a garage or under a desk is an assembly made of numerous components: electrical resistance elements, heat deflection plates, a front safety grate, internal wiring, and a housing that supports and encloses these components. An electric space *heater* is not just the electrical resistance elements through which electric current passes.

The plain and ordinary meaning of “heater” as an assembly, not a single heating element component, is consistent with the claim language, patent specification, dictionary definitions, and tellingly the testimony of Complainants’ technical expert in another proceeding about the same term in a related patent.

Although the specification uses “heating *element*” throughout, the claims recite “an electrical resistance *heater*,” *see, e.g.*, JX-0001, 32:64 (claim 1), 34:12 (claim 18), *not* “an electrical resistance *heating element*.” This word choice for the claims demonstrates that the ’202 patent applicant intentionally decided not to use the narrower heating element term, but instead the broader heater term. Because different words or phrases are used, a difference in meaning is presumed. *See Bd. of Regents of the Univ. of Tex. Sys. v. BENQ Am. Corp.*, 533 F.3d 1362, 1371

(Fed. Cir. 2008) (finding that the term “data channel” used in the claims did not have the same meaning as the term “data feed” used in the specification). Moreover, the specification also indicates that the heating element is a component of a collective heating device. *See, e.g.*, JX-0001, Abstract (“a *heating device* (e.g., at least one electrical resistance heating element)”; 5:34-3 (“at least one *heating device* (e.g., an electrical resistance heating unit)”; 5:54-55 (“at least one *heating device* (e.g., an electrical resistance heating unit)”).

Dictionary definitions confirm that the plain and ordinary meaning of *heater* is an assembly or device configured to heat, not simply a heating element. *See, e.g.*, **Ex. 1**, “heater,” Cambridge Advanced Learner's Dictionary & Thesaurus, <https://dictionary.cambridge.org/us/dictionary/english/heater> (“a device that produces heat: a gas heater/electric heater”) (last accessed Oct. 31, 2024); **Ex. 2**, “heater,” Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/heater> (“one that heats: especially : a device that imparts heat or holds something to be heated”) (last accessed Oct. 31, 2024).

Perhaps most telling, the testimony of Complainant RAI Strategic Holdings’ own technical expert in another proceeding contradicts Complainants’ proposed plain and ordinary meaning and instead supports Respondents’ proposed plain and ordinary meaning. In a Post-Grant Review proceeding at the Patent Office, Dr. Charles Clemens testified on behalf of RAI Strategic Holdings that the disclosed “heating element” in related U.S. Patent No. 7,726,320 (referred to as “Robinson” in the testimony) was a *component of* a heater and not the heater *itself*. The ’202 patent claims priority to the ’320 patent through a series of continuation applications, such that the disclosure of the ’320 patent is substantially identical to the ’202 patent’s disclosure. For example, Dr. Clemens testified that the heating element was not synonymous with heater:

Q I think the question is, what does Robinson mean by “heating element”?

Heating element, isn’t that a synonym for heater?

MR. NIGHTINGALE: Objection to form.

A No. I wouldn’t think so.

Ex. 3, Dep. Tr. of Charles Clemens (June 16, 2021) at 71:14-19 (emphasis added), PRG2020-00071, Ex. 1065-001; *see also id.* at 66:4-18, 76:17-20 (“**Q** And by ‘heating elements itself,’ you don’t think [Robinson is] referring to an entire heater, correct? **A** Correct.”). Dr. Clemens further testified that a skilled artisan would have understood that there is a difference between a heater and a heating element:

Q Would one of skill in the art understand how to implement the heater based on this disclosure?

A I believe that **a person skilled in the art would understand the distinction between a heating element and a heater.**

Id. at 78:5-10 (emphasis added).

Consistent with the heater being an assembly, Dr. Clemens testified that the heating element described in the shared specification of the ’320 and ’202 patents is a *part of* the heater:

Q Does -- well, let’s take a look at how Robinson uses the term [heating element]. We’ve got it right here. Does Robinson mention a resistance heater or a heater that is -- has a component that is a resistance heating element 72?

A In this section that we’re referring to, that you’re pointing me to, **he does make reference to heating elements**, and so, usually, **when there’s a reference to an element, that is typically meant to be used in terms of, you know, a part, an element of it.**

Q An element of what?

A Well, in this case, **the heater.**

Id. at 71:20-72:10; *see also id.* at 75:15-20 (“**So the heating element has got to be part of a heater.** So, yes, [Robinson is] referring to the heating element there. But, again, [Robinson is]

calling it an ‘element’ because it’s -- I mean, that’s what he’s just referring to right there. But it doesn’t exist on its own, **[heating element] has to be part of a heater.**” (emphasis added)). Dr. Clemens also testified that a skilled artisan reading the shared specification of the ’320 and ’202 patents would understand that the heater is an assembly that includes other components in addition to the heating element:

Q Does that sentence include any disclosure of any larger heater that includes components other than heating element 72?

A It’s not expressly stated. But, again, you know, you’ve got to get power and, you know, you’ve got to support the heating element somehow, right? **So, yes, it’s not expressly stated in there, but it’s got to be there in order for it to function.**

Id. at 81:14-22 (emphasis added); *see also id.* at 82:7-13 (“A Well, you’ve got to be able to have the electrical connections to [the heating element]. You have to be able to supply current, [the heating element] has to have, you know, the ability to mount and support within the device itself. You know, there’s, you know, **the heater, as an -- you know, more of an assembly, would need to exist in order for the heating element to work.**” (emphasis added)).

Accordingly, the intrinsic and relevant extrinsic evidence dictate that the term “heater” should be construed to have its plain and ordinary meaning, which is an assembly configured to heat.

C. Air passageway through at least a portion of the outer housing

Claim Term	Claims	Complainants’ Proposed Construction	Respondents’ Proposed Construction	Staff’s Proposed Construction
“air passageway through at least a portion of the outer housing”	1, 18	Plain and ordinary meaning, which is not limited to an opening in the outer housing	Plain and ordinary meaning, which is an opening in the outer housing through which air can flow	Plain and ordinary meaning, which is an opening in the outer housing through which air can flow

Staff and Respondents agree that the plain and ordinary meaning of “air passageway through at least a portion of the outer housing” is “an opening in the outer housing through which air can flow.” Complainants disagree, but do not set forth a construction beyond arguing the plain and ordinary meaning should not be limited to an opening in the outer housing. Arguing that the construction is not limited to an opening in the outer housing does not state what the claimed “air passageway” does include, however, and only introduces ambiguity into the term which defeats the entire purpose of claim construction. The ’202 patent specification uses the terms “air passageway” and “opening” interchangeably with respect to air being drawn into the outer housing, such that Staff and Respondents’ proposed construction is consistent with the specification.

1. The claim language

The entire clause in which this claim term appears is “an air passageway through at least a portion of the outer housing, the air passageway being arranged so that air drawn into the outer housing combines with volatilized liquid aerosol-forming material to produce an aerosol that can be drawn into the mouth of a user of the electrically-powered, aerosol-generating smoking article through the mouthpiece.” JX-0001, claims 1, 18. Accordingly, the context of the recited “air passageway” requires that the air passageway be arranged at least so that air is “drawn into the outer housing.” Respondents’ proposed construction is consistent with the claim language.

2. The specification

When referring to air passageways in which air is drawn into the outer housing, the ’202 patent uses the terms “opening” and “air passageways” interchangeably.² Indeed, in multiple

² Although the ’202 patent does refer to other air passageways (e.g., air passageway 45 and air passageway 115), these air passageways are *within* the outer housing, not *through* at least a portion of the outer housing as claimed in independent claims 1 and 18.

places, the '202 specification mentions these two terms in the very same sentence. JX-0001 at 24:31-34 (“[a]ir is drawn through the air passageways or openings 32 ... into the outer container 20.”); *id.* at 27:26-29 (“[a]ir is drawn through the air passageways or openings 32 ... into the outer container 20.”); *id.* at 29:11-14 (“[a]ir is drawn through the air passageways or openings 32 ... into the outer container 20.”). The '202 patent also states that “the outer housing 20 includes ... an opening adapted for intake of air into the smoking article 10” (*id.* at 20:4-9) and “at least one air passageway 32 to allow drawn air to enter the inner region of the outer container 20” (*id.* at 20:17-20).

From the last citation (*i.e.*, Col. 20, lines 17-20 of the '202 patent), it is clear that the '202 patent even uses the same numeric identifier (e.g., 32) for both air passageway and opening. This is common in patent drafting to ensure that differences in nomenclature can be used to refer to the same thing. Indeed, the '202 patent contemplates this by stating “[l]ike numbers refer to like elements throughout.” *Id.* at 8:63. It is clear from the specification, that the plain and ordinary meaning of air passageway (arranged to allow air to be drawn into the outer housing) in claims 1 and 18 is an “opening.” And it follows that in order for air to be drawn into the outer housing through the air passageway (or opening), air must be allowed to flow therethrough. Thus, a POSA would understand the plain and ordinary meaning of “air passageway through at least a portion of the outer housing” that is consistent with the specification to be “an opening in the outer housing through which air can flow.”

While Complainants' construction may allow for an opening in the outer housing to be part of the claimed “air passageway,” Complainants go further by insisting that the term should not be limited to the opening in the outer housing but their construction fails to state what other structure *is* included in the “air passageway.” This renders the construction vague and ambiguous, failing

to provide the clarity that the claim construction process is designed to accomplish. Under Complainants’ construction, how does one know if it is practicing the scope of the claim without knowing what structure the claimed “air passageway” includes? This is a fatal flaw in Complainants’ construction, compelling its rejection in favor of Respondents’ and Staff’s accurate construction that comports with the intrinsic evidence.

Accordingly, the term “air passageway through at least a portion of the outer housing” should be construed to be an opening in the outer housing through which air can flow.

D. Smoking article

Claim Term	Claims	Complainants’ Proposed Construction	Respondents’ Proposed Construction	Staff’s Proposed Construction
“smoking article”	All claims	Plain and ordinary meaning, which does not require presence of tobacco	A smoking device that possesses tobacco	Plain and ordinary meaning, which does not require presence of tobacco

The dispute between the parties is whether “smoking article,” as it appears in the preamble, and in the body of the claims, requires the presence of tobacco. The specification clearly and unequivocally states that the smoking article of the “*present invention*” requires the presence of tobacco. The specification then describes every embodiment of the invention consistent with this characterization, informing a POSA and the public that the claimed “smoking article” requires tobacco.³

1. *The claim preamble is limiting*

Because the term “smoking article” appears both in the body and in the preamble of the claims, it is unnecessary to determine whether the preamble is limiting. The preamble, however,

³ Respondents maintain that the claims, as drafted, are invalid under 35 U.S.C. § 112 for lack of written description. If not found invalid, the claims should be construed to limit “smoking article” to a smoking device that possesses tobacco for the reasons set forth herein.

is limiting for a number of reasons. “Whether to treat a preamble as a limitation is a determination ‘resolved only on review of the entire[] . . . patent to gain an understanding of what the inventors actually invented and intended to encompass by the claim.’” *Shoes by Firebug LLC v. Stride Rite Children's Grp., LLC*, 962 F.3d 1362, 1367 (Fed. Cir. 2020), citing *Catalina Mktg. Int'l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002). “If the claim preamble, when read in the context of the entire claim, recites limitations of the claim, or, if the claim preamble is ‘necessary to give life, meaning, and vitality’ to the claim, then the claim preamble should be construed as if in the balance of the claim.” *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305 (Fed. Cir. 1999); *Jansen v. Rexall Sundown, Inc.*, 342 F.3d 1329, 1333 (Fed. Cir. 2003). Any terminology in the preamble that limits the structure of the claimed invention must be treated as a claim limitation. See *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1257 (Fed. Cir. 1989). Furthermore, “dependence on a particular disputed preamble phrase for antecedent basis may limit claim scope because it indicates a reliance on both the preamble and claim body to define the claimed invention.” *Shoes by Firebug LLC v. Stride Rite Children's Grp., LLC*, 962 F.3d 1362, 1367 (Fed. Cir. 2020) (citing *Bell Communications Research v. Vitalink Communications Corp.*, 55 F.3d 615, 620 (Fed. Cir. 1995); see also *Catalina Mktg. Int'l v. Coolsavings.com, Inc.*, 289 F.3d 801, 808-811 (Fed. Cir. 2002). And “use of preamble terms to define positive limitations in the body of claims can evince an inventor's intent that the preamble limit the scope of the claim.” *Id.* at 1368.

Here, the preamble 1) recites limitations of the claim when read in the context of the entire claim, 2) is “necessary to give life, meaning, and vitality” to the claim, 3) limits the structure of the invention, 4) provides antecedent basis for terms in the body of the claims, and 5) defines positive limitations in the body of the claims. Indeed, many of the elements of claim 1 are triggered

by or produce an output in relation to the electrically-powered, aerosol-generating smoking article. See JX-0001, 33:7-13 (“produce an aerosol that can be drawn into the mouth of a user of the electrically-powered, aerosol-generating smoking article”), 33:14-17 (“in response to a draw on the electrically-powered, aerosol-generating smoking article”). In *Corning Glass Works*, a claim was limited to “[a]n optical waveguide” recited in the preamble because the specification was limited to solving the particular problem of an effective optical communication system and not on general improvements in conventional optical fibers. Similarly, claim 1 of the ’202 patent should be limited to a “smoking article” as recited in the preamble because the specification is limited to tobacco-containing smoking articles, not general improvements to aerosol generation or electrically-powered devices. Furthermore, each appearance of electrically-powered, aerosol-generating smoking article in the body of the claims obtains antecedent basis from the electrically-powered, aerosol-generating smoking article recited in the preamble. And, like claim 25 in *Catalina Mktg. Int’l*, which included the preamble language later in the body of the claim and rendered the preamble limiting, the term “smoking article” from the preamble appears later in the body of the claims, and likewise should be found limiting. Accordingly, the preamble of claim 1 is limiting.

2. *The specification*

“Smoking article” should be construed to mean a “smoking device that possesses tobacco” because the specification repeatedly and consistently describes the invention as being limited to smoking articles including tobacco. Indeed, the Title, Summary of the Invention, and the Abstract (JX-0001, Title, Abstract, 4:46-8:40)) all describe ***the invention*** as an article for smoking tobacco. See *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 864 (Fed. Cir. 2004) (explaining that “[s]tatements that describe the invention as a whole, rather than statements that describe only

preferred embodiments, are more likely to support a limiting definition of a claim term" and "[s]tatements that describe the invention as a whole are more likely to be found in certain sections of the specification, such as the Summary of the Invention."); *UltimatePointer, L.L.C. v. Nintendo Co.*, 816 F.3d 816, 823 (Fed. Cir. 2016) (construing the term “handheld device” as “handheld direct pointing device” where the title of the invention explicitly states that the invention is an ‘Easily-Deployable Interactive *Direct Pointing* System’.”); *Hill-Rom Co. v. Kinetic Concepts, Inc.*, 209 F.3d 1337, 1341 n.* (Fed. Cir. 2000) (“We have frequently looked to the abstract to determine the scope of the invention” (citations omitted)).

This is not a scenario in which the Commission is being urged to read a *preferred* embodiment into the claims. Rather, this is a scenario in which “***the present invention***” is described as smoking articles that possess tobacco. JX-0001, Title (“*Tobacco-containing Smoking Article*.”), Abstract (“*The smoking article* possesses at least one form of *tobacco*.”), 1:25-30 (“*The present invention* relates to *tobacco* products, such as *tobacco-containing* smoking articles.”), 4:30-44, 4:48-67 (“*The present invention* relates to smoking articles for providing *tobacco* enjoyment, as well as manners and methods for providing *tobacco* enjoyment using such smoking articles. That is, *the present invention* relates to articles that produce aerosols incorporating components derived from, or provided by, *tobacco* ... As a result, *the present invention* relates to *tobacco* smoking articles that produce aerosols without experiencing any necessary burning of *tobacco* or other component materials during periods in which the articles are used. Thus, *the present invention* relates to smoking articles, and in particular, to smoking articles that incorporates [*sic*] tobacco in some form.”) (emphasis added), 5:5-17 (“preferred cigarettes generate mainstream aerosol, at least in part, by the action of heat upon some form of *tobacco* ... the present invention relates to a cigarette that ... possesses at least one form of *tobacco*.”), 5:21-24, 5:41-43 (“the present invention relates to a

smoking article that is smoked by incorporating that *tobacco* within an electrically-powered, aerosol-generating device.”), 5:62-6:16, 6:30-35, 6:44-50, 6:53-58, 6:62-7:19, 7:33-38, 7:44-8:2 (“the invention provides a *tobacco*-containing, electrically-powered smoking article comprising ... a *tobacco* material and an aerosol-forming material in fluid communication with the *tobacco* material such that air can be drawn through both the *tobacco* material and the aerosol-forming material.”), 8:12-17, 8:27-30, 8:47-49, 8:67-13:58, 13:59-64 (“*The smoking article of the present invention* further includes an aerosol-generating material, which can be in intimate contact with the *tobacco* material (e.g., in the form of an intimate mixture), or can be carried by a non-tobacco substrate and segregated from the *tobacco* in the smoking article (e.g., positioned in an adjacent region of the device).”), 17:53-19:24, 22:14-23:56, 25:1-29:40, Figs. 1-3 (each comprising “tobacco 89”).

Claim terms must be construed “in the context of the specification,” and a specification that exclusively refers to the present invention as tobacco-containing smoking articles, and fails to disclose any tobacco-free smoking articles, informs a POSA that the ordinary and customary meaning of smoking article consistent with the specification is a smoking device that possesses tobacco. *See Tippmann Eng'g, LLC v. Innovative Refrigeration Sys., Inc.*, No. 2022-1318, 2023 WL 18559, at *4 (Fed. Cir. Jan. 3, 2023) (construing the asserted claims to require a “negative-pressure arrangement” where “the specification's repeated disclosure of a negative-pressure arrangement, coupled with the figures illustrating a negative-pressure air flow, describes the invention, not a mere example of the invention.”).

Accordingly, the term “smoking article” should be construed to be a smoking device that possesses tobacco.

E. Controller

Claim Term	Claims	Complainants' Proposed Construction	Respondents' Proposed Construction	Staff's Proposed Construction
"controller"	1, 14	Plain and ordinary meaning and does not require further narrowing by importing any exclusionary language	Controller, distinct and separate from a sensor	Plain and ordinary meaning and does not require further narrowing by importing any exclusionary language

The dispute between the parties centers on whether the claimed "controller" is distinct from the separately claimed "sensor." For the reasons set forth below, the intrinsic evidence supports Respondents' proposed construction that the controller and sensor are separate and distinct structures.

1. *The claim language*

Independent claim 1 sets forth a "controller configured to activate current flow through the electrical resistance heater in response to a draw on the electrically-powered, aerosol-generating smoking article." Claim 13, which depends from claim 1, sets forth "[t]he electrically-powered, aerosol-generating smoking article of claim 1, *further comprising* a sensor adapted for sensing the draw by a user on the electrically-powered, aerosol-generating smoking article" (emphasis added). These claims illustrate that two separate structures (e.g., *controller* and *sensor*) and two separate functions (e.g., *activate current flow* and *sensing the draw*) are claimed. Because of how the applicant separately claimed a controller from a sensor in the first independent claim set, the doctrine of claim differentiation indicates that these separately listed components are *presumed* to be distinct, unless there is language in the claims or the written description to overcome that presumption. *Kyocera*, 22 F.4th at 1382.

In *Kyocera*, the court found that multiple disclosed embodiments did not overcome the presumption that separately listed components are distinct. *Id.* (“[t]he patentees were free to claim only the latter embodiment. See *TIP Sys., LLC v. Phillips & Brooks/Gladwin, Inc.*, 529 F.3d 1364, 1373 (Fed. Cir. 2008) (‘[T]he mere fact that there is an alternative embodiment disclosed in [a] patent that is not encompassed by [a] claim construction does not outweigh the language of the claim, especially when the court’s construction is supported by the intrinsic evidence.’).”). Like the patent in *Kyocera*, the ’202 patent discloses multiple controller alternatives, but the inventors were free to (and did) claim a controller that was separate and distinct from a sensor in independent claim 1. JX-0001, 20:45-21:26. Other disclosed embodiments fail to overcome this presumption. *Kyocera*, 22 F.4th at 1382.

2. *The specification*

The teachings of the specification do not overcome the *Kyocera* presumption. As set forth above, the ’202 patent specification describes multiple controller embodiments: a controller or control components 50, and a puff-actuated controller. The controller or control components 50 are described as being separate and distinct from a sensor. JX-0001 at 20:45-21:8 (noting that the sensors “are positioned within the outer container 20 in a location downstream from the electrically powered controller components.”). The puff-actuated controller is described as combining certain control circuitry from the controller 50 with a sensor. *Id.* at 21:8-12. Both of these controller alternatives, however, are captured by the claims of the ’202 patent. Indeed, claims 1 and 13 captures the controller that is separate and distinct from the sensor, whereas claims 18 and 19 capture the puff-actuated controller that combines control circuitry with the sensor. Respondents’ proposed construction is proper because it “stays true to the claim language and most naturally aligns with the patent’s description of the invention.” *Phillips*, 415 F.3d at 1316.

While Respondents have set forth a construction that is consistent with claim 1, consistent with claim 13, consistent with claim 18, consistent with claim 19, and consistent with the specification, Complainants’ construction seeks to ignore claim differentiation and limit all claims to a single embodiment (e.g., a puff-actuated controller). Complainants cannot overcome the *Kyocera* presumption and thus their proposed construction should be rejected.

Accordingly, the term “controller” should be construed as a separate and distinct component from a sensor.

F. Ends

Claim Term	Claims	Complainants’ Proposed Construction	Respondents’ Proposed Construction	Staff’s Proposed Construction
“ends”	1, 15	Plain and ordinary meaning	Plain and ordinary meaning, which is the part of an area that lies at the boundary	Plain and ordinary meaning, which is the part of an area that lies at the boundary

Independent claim 1 of the ’202 patent recites a smoking article comprising “an outer housing having two ends.” While all parties propose that “ends” take its plain meaning, discussions with the Complainants (and review of their TEO arguments) confirm that the Complainants’ proposal is more narrow. Complainants’ proposed construction seeks to revive the ’202 patent after the clear showing of its invalidity during the TEO. In doing so, Complainants’ proposal would improperly rewrite the patent claims to require a device that is elongated in shape and wherein the “ends” can only be at the “longitudinal” ends of this elongated shape. *See* Complainants’ Opening Post-Hearing Brief (EDIS No. 834043) at 61 (asserting that “the ’202 patent consistently uses the term ‘end’ to refer to *longitudinal* ends, and repeatedly describes the ‘ends’ as being positioned *lengthwise*”) (emphasis added, citing TEO Hearing Tr. (Alarcon) at 157:1-4); TEO Hearing Tr. (Alarcon) at 156:22–157:19 (EDIS No. 833468) (asserting in the

context of disputing anticipation by the prior art that the term “end” requires a “length-wise characteristic”). The plain meaning of “ends” requires no orientation-specific or shape-specific construction, and nothing in the intrinsic or extrinsic record supports such a narrowing. Instead, “ends” should take on its ordinary meaning: the part of an area that lies at the boundary.

Other than in Complainants’ rebuttal to the invalidity case in this pending -1410 Investigation, everyone (including Complainants) agrees that the plain and ordinary meaning of the term “ends” is broader Complainants’ current interpretation. For example, Complainants’ infringement expert agreed that “an area that lies at the boundary” is the “plain and ordinary meaning of ‘end.’” TEO Hearing Tr. (Wensley) (EDIS No. 833468) at 285:17-19 (“Q. Would you agree with the plain and ordinary meaning of ‘end’ being an area that lies at the boundary? A. Yes.”). Likewise, in a pre-1410 Investigation IPR petition challenging a competitor’s patent, Complainants submitted that the claim term (in the challenged patent) “a first end of the housing” should be construed to mean “the outer extent of some portion of the housing.” *R.J. Reynolds Vapor Co. v. Fontem Holdings I B.V.*, IPR2018-00627, Paper 2 at 30 (P.T.A.B. Mar. 1, 2018). The challenged patent in that IPR, like the ’202 patent, also concerns electronic smoking devices. And in that context complainants cited two dictionary definitions, one (Merriam-Webster’s) “defining ‘end’ as ‘a point that marks the extent of something’” and another (Webster’s) “defining ‘end’ as ‘a point, line or limitation that indicates the full extent, degree, etc., of something; limit; bounds.’” *Id.* (citing *R.J. Reynolds*, IPR2018-00627, Exhibits 1037, 1038).

Other than the obvious effort to get around the prior art that Respondents presented at the TEO hearing, there is no reason why the same dictionary definitions would not be persuasive as to the ordinary meaning of “ends” in the ’202 patent. *See Phillips*, 415 F.3d at 1314 (“In some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily

apparent . . . and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words. In such circumstances, general purpose dictionaries may be helpful.”). Complainants also try to distance themselves from the construction they proposed in the *Fontem* IPR for the term “end,” contending that this meaning was only appropriate under the “broadest reasonable interpretation standard.” Complainants’ Opening Post-Hearing Brief (EDIS No. 834043) at 62. However, Complainants have failed to acknowledge that the broadest “reasonable” meaning can be the same as the plain and ordinary meaning of the term, and Complainants have provided no reason why the plain meaning of the term “end” is a narrower one. *See PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, 815 F.3d 747, 755 (Fed. Cir. 2016) (claim term’s proper construction can be the same under both the BRI and the *Phillips* standards); 37 C.F.R. § 42.100 (2018) (defining BRI standard as the “broadest reasonable meaning of [a claim’s] words *in their ordinary usage as they would be understood by one of ordinary skill in the art*” (emphasis added)). Indeed, where the plain meaning of a term is broad, maxims of claim construction “do not support prescribing a more particularized meaning unless a narrower construction is required by the specification or prosecution history.” *3M Innovative Properties Co. v. Tredegar Corp.*, 725 F.3d 1315, 1329 (Fed. Cir. 2013); *see also id.* at 1333 (“It is axiomatic that we will not narrow a claim term beyond its plain and ordinary meaning unless there is support for the limitation in the words of the claim, the specification, or the prosecution history.”); *Thorner v. Sony Computer Ent. Am. L.L.C.*, 669 F.3d 1362, 1367 (Fed. Cir. 2012) (“The patentee is free to choose a broad term and expect to obtain the full scope of its plain and ordinary meaning, unless the patentee explicitly redefines the term or disavows its full scope”).

There is no support in the ’202 patent for narrowing the meaning of the term “ends” to include unrecited directional-, geometrical-, or spatial- limitations, such as requiring the claimed

ends to be “longitudinal” or “lengthwise.” The ’202 patent never once uses either of these terms, nor refers to the “length” of the housing. Instead, repeatedly throughout the specification of the ’202 patent, the “ends” of the housing are defined with respect to the “mouth-end” and “end distal to the mouth-end,” *not* with respect to the shape or form factor of the device. *See, e.g.*, JX-0001 at 5:63-6:14, 6:35-43, 6:44-52, 6:61-7:13, 7:43-64, 19:56, 20:4-11, 21:29-33. The ’202 patent thus consistently discusses the “ends” of the “housing” in the smoking device with reference to the function of the device (intake of air and inhalation of aerosol by the user), in a way that is completely and intentionally agnostic as to the shape or form factor of the housing. Compellingly, the ’202 patent is explicit that the “dimensions and shape” of the housing “can vary.” *Id.* at 19:59-60. The intrinsic record is thus in direct conflict with Complainants’ proposed construction, which should not be adopted.

In sum, aside from Complainants’ self-serving expert testimony from the TEO hearing, all intrinsic and extrinsic evidence supports a plain meaning of “ends” that is broader than complainants’ shape-based interpretation. Respondents’ and Staff’s proposed plain meaning construction is the right one.

VI. CONCLUSION

For all of the foregoing reasons, Respondents request that the ALJ adopt Respondents’ proposed constructions as a matter of law.

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/s/ Eric Allen Zelepugas
Eric Allen Zelepugas
Andrew Himebaugh
THOMPSON HINE LLP
20 North Clark Street, Suite 3200
Chicago, Illinois 60602-5093
Phone: (312) 998-4240

/s/ Patrick J. McCarthy
Patrick J. McCarthy
Brian T. Burgess
Andrew Kim
Lori A. Gordon
Amanda E. Stephenson
Christopher J. Cassella

Fax: (312) 998-4245
Email: th-337-1410@thompsonhine.com

Eric N. Heyer
Meixuan (Michelle) Li
Joseph A. Smith
Krupa Patel
THOMPSON HINE LLP
1919 M Street, NW, Suite 700
Washington, DC 20036
Phone: (202) 331-8800
Fax: (202) 331-8330

Marla R. Butler
Clint King
THOMPSON HINE LLP
Two Alliance Center
3560 Lenox Road NE, Suite 1600
Atlanta, Georgia 30326
Phone: (404) 541-2900
Fax: (404) 541-2905

*Attorneys for Maduro Distributors, Inc.(d/b/a
The Loon) and TheSy, LLC (d/b/a Element
Vape)*

/s/ Elizabeth G.H. Ranks

Joseph V. Colaianni
FISH & RICHARDSON P.C.
1000 Maine Avenue, S.W., Suite 1000
Washington, D.C. 20024
Telephone: (202) 783-5070

Carl E. Bruce
Terry J. Stalford
FISH & RICHARDSON P.C.
1717 Main Street, Suite 5000
Dallas, Texas 75201
Telephone: (214) 747-5070

Elizabeth G.H. Ranks
FISH & RICHARDSON P.C.
One Marina Park Drive, Suite 1700,
Boston, MA 02210
Telephone: (617) 542-5070

Danielle Fong
Jacqueline Odum
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
Telephone: 202-346-4000
Facsimile: 202-346-4444
PMcCarthy@goodwinlaw.com
BBurgess@goodwinlaw.com
AndrewKim@goodwinlaw.com
LoriGordon@goodwinlaw.com
AS Stephenson@goodwinlaw.com
CCassella@goodwinlaw.com
DFong@goodwinlaw.com
JOdum@goodwinlaw.com

Molly Grammel
Kathleen McGuinness
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Telephone: (617) 570-1000
Facsimile: (617) 523-1231
MGrammel@goodwinlaw.com
KMcGuinness@goodwinlaw.com

Sanjeet K. Dutta
Goodwin Procter LLP
601 Marshall St.
Redwood City, CA 94063
Phone: (650) 752-3100
Fax: (650) 853-1038
SDutta@goodwinlaw.com

Ruchira De
GOODWIN PROCTER LLP
Three Embarcadero Center
San Francisco, CA 94111
Phone: (415) 733-6000
Fax: (415) 677-9041
RDe@goodwinlaw.com

Adam J. Horowitz
GOODWIN PROCTER LLP

David Hoffman
Nicholas H. Wang
FISH & RICHARDSON P.C.
111 Congress Avenue, Suite 2000
Austin, TX 78701
Telephone: (512) 472-5070

Yun Dong
FISH & RICHARDSON P.C.
12860 El Camino Real, Ste 400,
San Diego, CA 92130
Telephone: (858) 678-5070

*Counsel for Respondent
Shenzhen Kangvape Technology Co., Ltd.*

/s/ David F. Nickel
Barbara A. Murphy
David F. Nickel
Susan Koegel
Matthew N. Duescher
**FOSTER, MURPHY, ALTMAN &
NICKEL, PC**
1150 18th Street, N.W., Suite 775
Washington, D.C. 20036
Telephone: (202) 822-4100
Fax: (202) 822-4199
Email: FM-Pastel-1410@fostermurphy.com

Azim Chowdhury
Eric P. Gotting
KELLER AND HECKMAN LLP
1001 G Street NW, Suite 500 West
Washington, DC 20001
Telephone: (202) 434-4269
Fax: (202) 434-4646
Email: Pastel-1410-Patent@khlaw.com

Andrew Bochner
Serge Krimnus
Erick Robinson
Erik Dykema
Craig Uhrich
Meredith Lloyd
BOCHNER PLLC
1040 Avenue of the Americas, 15th Floor

The New York Times Building
620 Eighth Avenue
New York, New York 10018-1405
Phone: (212) 813-8800
Fax: (212) 355-3333
AHorowitz@goodwinlaw.com

*Counsel for Respondents Breeze Smoke, LLC
and Dongguan (Shenzhen) Shikai Technology
Co., Ltd.*

/s/ Daniel E. Yonan
Daniel E. Yonan
Uma N. Everett
Kyle E. Conklin
Kristina Caggiano Kelly
**STERNE, KESSLER, GOLDSTEIN & FOX
P.L.L.C.**
1101 K Street NW, 10th Floor
Washington, DC 20005
Tel: 202.371.2600

Eric N. Heyer
Michelle Li
Joe Smith
Krupa Patel
THOMPSON HINE LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036-3537
Tel: 202.331.8800

Marla R. Butler
Clint King
THOMPSON HINE LLP
3560 Lenox Rd. NE, Suite 1600
Atlanta, Georgia 30326
Tel: 404.407.3680

Eric A. Zelepugas
Andrew Himebaugh
THOMPSON HINE LLP

New York, New York 10018
Telephone: (646) 971-0685
Email: BochnerPastelITC@bochner.law

*Counsel for Respondents Pastel Cartel, LLC,
American Vape Company, LLC, Affiliated
Imports, LLC*

20 N. Clark Street, Suite 3200
Chicago, IL 60602-5093
Tel: 312.998.4240

Steven E. Adkins
FISHERBROYLES, LLP
1200 G Street N.W., Suite 800
Washington, DC 20005
Tel: 202.669.9630

Attorneys for Respondents SV3 LLC

/s/ Charles C. Carson
Charles C. Carson
T. Cy Walker
Robert Hails, Jr.
Elizabeth N. Sneitzer
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW, Suite 1100
Washington, D.C. 20036-5403
Telephone: (202) 861-1500
Facsimile: (202) 816-1783
Email: bidi@bakerlaw.com

Scott A. Skiles
BAKER & HOSTETLER LLP
312 Walnut Street, Suite 3200
Cincinnati, OH 45202-4074
Telephone: (513) 929-3400
Facsimile: (513) 929-0303
Email: bidi@bakerlaw.com

Counsel for Respondent Bidi Vapor, LLC.

/s/ P. Andrew Riley
P. Andrew Riley
Lei Mei
Edward J. Naidich
Robert Hall
Laurence M. Sandell
Jiwei Zhang
MEI & MARK LLP
818 18th Street NW, Suite 410
Washington, DC 20006
Telephone: 888-860-5678

/s/ Jason Xu
Jason Xu
RIMON PC
1050 Connecticut Ave NW, Suite 500
Washington, DC 20036
(202) 470-2141
SZYanYang337-1410@rimonlaw.com
SZPingray337-1410@rimonlaw.com
SZIVPS337-1410@rimonlaw.com

Eric C. Cohen

Facsimile: 888-706-1173

Counsel for Respondents Zhuhai Qisitech Co., Ltd., Guangdong Qisitech Co., Ltd., Guangdong Fuwo Intelligent Manufacturing Co., Ltd. and Guangdong Cellular Workshop Electronics Technology Co., Ltd.

RIMON PC

P.O. Box B113
150 Fayetteville St, Suite 2800
Raleigh, NC 27601-2960
(984) 960-2860
SZYanYang337-1410@rimonlaw.com
SZPingray337-1410@rimonlaw.com
SZIVPS337-1410@rimonlaw.com

Michael F. Heafey

RIMON PC

800 Oak Grove Avenue, Suite 250
Menlo Park, CA 94025
(650) 461-4433
SZYanYang337-1410@rimonlaw.com
SZPingray337-1410@rimonlaw.com
SZIVPS337-1410@rimonlaw.com

John Handy

RIMON PC

1765 Greensboro Station Place Tower I
Suite 900
McLean, VA 22102
(703) 559-7360
SZYanYang337-1410@rimonlaw.com
SZPingray337-1410@rimonlaw.com
SZIVPS337-1410@rimonlaw.com

Counsel for Respondents Shenzhen Yanyang Technology Co., Ltd., Shenzhen Pingray Technology Co., Ltd., and Shenzhen IVPS Technology Co., Ltd.

/s/ Gary M. Hnath

Gary M. Hnath
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006-1101
Tel.: (202) 263-3040
Fax: (202) 263-5340
ghnath@mayerbrown.com

/s/ Fan Liang

Alex Liang
ARCH & LAKE LLP
203 N LaSalle Street, Suite 2100

/s/ Erik Dykema

Erik Dykema
Andrew Bochner
Serge Krimnus
Erick Robinson
Craig Uhrich
Meredith Lloyd
BOCHNER PLLC
1040 Avenue of the Americas, 15th Floor
New York, New York 10018
Telephone: (646) 971-0685
Email: ppd-itc@bochner.law

Chicago, IL, 60601
Tel.: (312) 558-1368
Fax: (312) 614-1873
alexliang@archlakelaw.com

*Counsel for Respondent Price Point
Distributors, Inc.*

*Counsel for Respondent Shenzhen Han
Technology Co., Ltd.*

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2024, I caused the foregoing to be filed and served as follows:

The Honorable Lisa R. Barton Secretary U.S. International Trade Commission 500 E Street, SW Washington, DC 20436	<i>Via EDIS Electronic Filing</i>
The Honorable Monica Bhattacharyya Administrative Law Judge U.S. International Trade Commission 500 E Street, SW Washington, DC 20436 Bhattacharyya337@usitc.gov	<i>Via Electronic Mail to the indicated email address(es) (and with paper courtesy copy served via overnight FedEx)</i>
Steve Shahida Vu Bui Office of Unfair Import Investigations U.S. International Trade Commission 500 E Street, SW Washington, DC 20436 Vu.Bui@usitc.gov khashayar.shahida@usitc.gov	<i>Via Electronic Mail to the indicated email address(es)</i>
<i>Counsel for Complainants R.J. Reynolds Tobacco Company; R.J. Reynolds Vapor Company; RAI Services Company; and RAI Strategic Holdings, Inc.</i> David M. Maiorana Ryan B. McCrum Kenneth S. Luchesi	<i>Via Electronic Mail to the indicated email address(es)</i>

JONES DAY 901 Lakeside Avenue Cleveland, Ohio 44114 RJRITC1410@jonesday.com Stephanie E. Parker JONES DAY 1420 Peachtree Street, N.E. Suite 800 Atlanta, Georgia 30309 John A. Marlott JONES DAY 110 North Wacker Drive, Suite 4800 Chicago, Illinois 60606 Nicole M. Smith Alexis Adian Smith JONES DAY 555 South Flower Street, Fiftieth Floor Los Angeles, California 90071 Harold Davis GREENBERG TRAURIG, LLP 101 Second Street, Suite 2200 San Francisco, CA 94105 ITC1410@gtlaw.com	
<i>Counsel for Respondents Respondent Breeze Smoke, LLC; Dongguan (Shenzhen) Shikai Technology Co., Ltd.</i> Patrick J. McCarthy Brian T. Burgess Andrew Kim Lori A. Gordon Amanda E. Stephenson Danielle Fong Ruchira De Jacqueline Odum Goodwin Procter LLP 1900 N Street, NW Washington, DC 20036 DG-Breeze-ptnt-ITC@goodwinlaw.com Molly Grammel Kathleen McGuinness	<i>Via Electronic Mail to the indicated email address(es)</i>

Goodwin Procter LLP 100 Northern Avenue Boston, Massachusetts 02210 Sanjeet K. Dutta Goodwin Procter LLP 601 Marshall St. Redwood City, California 94063 Adam J. Horowitz Goodwin Procter LLP The New York Times Building 620 Eighth Avenue New York, New York 10018-1405	
<i>Co-Counsel for Respondents Respondent SV3, LLC d/b/a Mi-One Brands</i> Daniel E. Yonan Uma N. Everett Kyle E. Conklin Kristina Caggiano Kelly Robert E. Niemeier Ryan C. Richardson Sterne, Kessler, Goldstein & Fox 1100 New York Avenue, NW Washington, DC 20005 SV3-1410@sternekessler.com Steven E. Adkins FISHERBROYLES, LLP 1200 G Street N.W., Suite 800 Washington, DC 20005 steve.adkins@fisherbroyles.com James Lin FISHERBROYLES, LLP 530 Lytton Avenue Palo Alto, CA 94301 james.lin@fisherbroyles.com	<i>Via Electronic Mail to the indicated email address(es)</i>
<i>Counsel for Respondents Pastel Cartel, LLC, American Vape Company, LLC, Affiliated Imports, LLC, Price Point Distributors Inc.</i>	<i>Via Electronic Mail to the indicated email address(es)</i>

Barbara A. Murphy David F. Nickel Susan Koegel John F. Presper Matthew N. Duescher FOSTER, MURPHY, ALTMAN & NICKEL 1150 18th Street, N.W., Suite 775 Washington, D.C. 20036 FM-Pastel-1410@fostermurphy.com Azim Chowdhury Eric P. Gotting KELLER AND HECKMAN LLP 1001 G Street NW, Suite 500 West Washington, DC 20001 Pastel-1410-Patent@khlaw.com Andrew Bochner Serge Krimnus Erick Robinson Meredith Lloyd BOCHNER PLLC 1040 Avenue of the Americas, 15th Floor New York, New York 10018 BochnerPastelITC@bochner.law	
<i>Counsel for Respondent Bidi Vapor, LLC</i> Charles C. Carson T. Cy Walker Robert Hails, Jr. Elizabeth N. Sneitzer BAKER & HOSTETLER LLP 1050 Connecticut Avenue, NW, Suite 1100 Washington, D.C. 20036-5403 bidi@bakerlaw.com Scott A. Skiles BAKER & HOSTETLER LLP 312 Walnut Street, Suite 3200 Cincinnati, Ohio 45202-4074	<i>Via Electronic Mail to the indicated email address(es)</i>
<i>Counsel for Respondent Shenzhen Han Technology Co., Ltd.</i> Gary M. Hnath MAYER BROWN LLP	<i>Via Electronic Mail to the indicated email address(es)</i>

1999 K Street, NW Washington, DC 20006 ghnath@mayerbrown.com Alex Liang ARCH & LAKE LLP 203 N LaSalle Street, Suite 2100 Chicago, Illinois 60601 alexliang@archlakelaw.com	
<i>Counsel for Respondent Shenzhen Yanyang Technology Co., Ltd., Shenzhen IVPS Technology Co., Ltd., and Kimsun Technology (HuiZhou) Co., Ltd.</i> Jason Xu RIMON PC 1050 Connecticut Ave NW, Suite 500 Washington, DC 20036 SZYanYang337-1410@rimonlaw.com Eric C. Cohen RIMON PC P.O. Box B113 150 Fayetteville St, Suite 2800 Raleigh, NC 27601-2960 Michael F. Heafey RIMON PC 800 Oak Grove Avenue, Suite 250 Menlo Park, CA 94025 John Handy 1765 Greensboro Station Place Tower I Suite 900 McLean, VA 22102	<i>Via Electronic Mail to the indicated email address(es)</i>
<i>Counsel for Respondents Zhuhai Qisitech Co., Ltd., Guangdong Qisitech Co., Ltd., Guangdong Fuwo Intelligent Manufacturing Co., Ltd., and Guangdong Cellular Workshop Electronics Technology Co., Ltd.</i> P. Andrew Riley Lei Mei	<i>Via Electronic Mail to the indicated email address(es)</i>

Laurence M. Sandell Robert A. Hall Edward Naidich Guang-Yu Zhu Jiwei Zhang MEI & MARK LLP 818 18th Street NW, Suite 410 Washington, DC 20006 MeiMark-ITC-1410@meimark.com	
<i>Counsel for Respondent Shenzhen Kangvape Technology Co., Ltd.</i> Joseph V. Colaianni Fish & Richardson P.C. 1000 Maine Avenue, SW, Suite 1000 Washington, DC 20024 SERVICEFishKangvapeReynoldsITC@fr.com Carl E. Bruce Fish & Richardson P.C. 1717 Main Street, Suite 5000 Dallas, Texas 75201 Elizabeth G.H. Ranks Fish & Richardson P.C. One Marina Park Drive, Suite 1700, Boston, Massachusetts 02210 Shawn Bastani Nicholas H. Wang Fish & Richardson P.C. 111 Congress Avenue, Suite 2000 Austin, Texas 78701	<i>Via Electronic Mail to the indicated email address(es)</i>
Respondents Palma Terra Ltd. Sea Meadow House P.O. Box 116 Road Town, Tortola, VG1110, British Virgin Islands	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent Social Brands, LLC 9696 Skillman Street, Suite 385 Dallas, Texas 75243	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent LCF Labs, Inc. 895 S Rockefeller Avenue, Unit 103 Ontario, California 91761	<i>Via First-Class Mail, Postage Prepaid</i>

Respondent Flawless Vape Shop Inc. 5589 E Santa Ana Canyon Rd Anaheim, California 92807	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent Nevera (HK) Ltd. 19H, Maxgrand Plaza No.3 Tai Yau Street San Po Kong, Kowloon, HKG, Hong Kong	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent Flawless Vape Wholesale & Distribution Inc. 5589 E Santa Ana Canyon Rd Anaheim, California 92807	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent iMiracle (Shenzhen) Technology Co., Ltd. Unit 3510-37, Luohu Business Center, No. 2028 Shennan East Road Chengdong Community, Dongmen Street Luohu District, Shenzhen, 518001, China	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent Sailing South Ltd. Sea Meadow House P.O. Box 116, Road Town Tortola, VG1110, British Virgin Islands	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent Shenzhen LC Technology Co., Ltd. Room 301, 3rd Floor, Building 3 Changyi Industrial Factory, No. 1 Lirong Road, Xinshi Community Dalang Street, Longhua District Shenzhen, Guangdong Province, 518109, China	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent Heaven Gifts International Ltd. 19H, Maxgrand Plaza No.3 Tai Yau Street San Po Kong, Kowloon, HKG, Hong Kong	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent VICA Trading Inc. d/b/a Vapesourcing 3045 Edinger Avenue Tustin, California 92780	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent Flumgio Technology Ltd.	<i>Via First-Class Mail, Postage Prepaid</i>

Shop 185 G/F, Hang Wai Industrial Centre No. 6 Kin Tai Street Tuen Mun, N.T., HKG, Hong Kong	
Respondent Vapeonly Technology Co. Ltd. 19H Maxgrand Plaza No. 3 Tai Yau Street San Po Kong, Kowloon, HKG, Hong Kong	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent Wonder Ladies Ltd. Sea Meadow House P.O. Box 116, Road Town Tortola, VG1110, British Virgin Islands	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent Marea Morada Ltd. Sea Meadow House P.O. Box 116, Road Town Tortola, VG1110, British Virgin Islands	<i>Via First-Class Mail, Postage Prepaid</i>
Respondent Shenzhen Pingray Technology Floors 2, 3 and 4, Building G Wanfeng Western Entrepreneurship Park, Heyi Community, Shajing Street Bao'an District Shenzhen, Guangdong Province, 518125, China	<i>Via First-Class Mail, Postage Prepaid</i>

/s/ Eric Allen Zelepugas

Eric Allen Zelepugas