No. _____

United States Court of Appeals for the Federal Circuit

RAI STRATEGIC HOLDINGS, INC., R.J. REYNOLDS VAPOR COMPANY, R.J. REYNOLDS TOBACCO COMPANY, RAI SERVICES COMPANY

Appellants

v.

INTERNATIONAL TRADE COMMISSION

Appellee.

Appeal from the United States International Trade Commission Investigation No. 337-TA-1410

PETITION FOR REVIEW

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Pursuant to 28 U.S.C. § 1295(a)(6), 19 U.S.C. § 1337(c), Federal Rule of Appellate Procedure 15(a), and Federal Circuit Rule 15(a), RAI Strategic Holdings, Inc., R.J. Reynolds Vapor Company, R.J. Reynolds Tobacco Company, and RAI Services Company (collectively, "Reynolds") hereby petition this Court for review of the final determination of the United States International Trade Commission (the "Commission") in *Certain Disposable Vaporizer Devices*, Inv. No. 337-TA-1410, and all underlying orders, to the extent they are adverse to Reynolds, regarding U.S. Patent No. 11,925,202 ("the '202 patent"), including (1) Notice of Final Commission Determination of No Violation; Termination of Investigation, dated March 10, 2026 (Exhibit A), (2) Commission Opinion, dated March 10, 2026 and served March 11, 2026 (Exhibit B), and (3) Notice of a Commission Determination to Review in Part the Final Initial Determination and to Request Written Submissions on the Issues Under Review and Remedy, Bond, and the Public Interest, dated January 9, 2026 (Exhibit C).

The Commission issued its Final Determination on March 10, 2026, and this petition is filed within the 60-day period under 19 U.S.C. § 1337(c). Reynolds has submitted payment of the $600 filing fee in connection with the filing of this petition.

Dated: March 13, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on March 13, 2026 and a copy of the foregoing was served upon the following parties as indicated:

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EXHIBIT A

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN DISPOSABLE VAPORIZER DEVICES**	**Investigation No. 337-TA-1410**

NOTICE OF FINAL COMMISSION DETERMINATION OF NO VIOLATION; TERMINATION OF INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission ("Commission") has determined to reverse the violation findings of the final initial determination ("FID") issued by the presiding administrative law judge ("ALJ") in this investigation and find that asserted claims 4 and 12, and claim 1 on which they depend, of U.S. Patent No. 11,925,202 ("the 202 patent") are invalid as obvious under 35 U.S.C. 103 ("section 103"), and thus there is no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("section 337"). The Commission has also determined to take no position on whether the complainants satisfied the economic prong of the domestic industry requirement. The Commission otherwise adopts the findings of the FID to the extent they do not conflict with the attached opinion, with some modifications to supplement its finding that claims 4 and 12 are not anticipated under 35 U.S.C. 102 ("section 102"). This investigation is hereby terminated with a finding of no violation.

FOR FURTHER INFORMATION CONTACT: Carl Bretscher, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, D.C. 20436, telephone 202-205-2382. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 22, 2024, based on a complaint, as supplemented, filed by R.J. Reynolds Vapor Company; R.J. Reynolds Tobacco Company; RAI Strategic Holdings, Inc.; and RAI Services Company of Winston-Salem, North Carolina (collectively, "Reynolds" or "Complainant") accusing the respondents of violating section 337 by importing into the United States, selling for importation, or selling in the United States after importation certain disposable vaporizer devices that infringe one or more of the asserted claims of the '202 patent. 89 FR 59158-60 (Jul. 22, 2024). The complaint further alleges that a domestic industry exists in the United States.

The Commission's notice of investigation names thirty-five (35) named respondents, of which eighteen (18) respondents participated in the investigation, fifteen (15) respondents were

found in default, and two (2) respondents were terminated on the basis of consent orders and consent order stipulations. The eighteen (18) respondents that participated in this investigation are: Breeze Smoke, LLC of Southfield, Michigan; Dongguan (Shenzhen) Shikai Technology Co., Ltd. of Dongguan, China; Guangdong Qisitech Co., Ltd. of Dongguan City, China; Guangdong Fewo Intelligent Manufacturing Ltd. of Dongguan City, China; Guangdong Cellular Workshop Electronics Technology Co., Ltd. of Dongguan City, China; Zhuhai Qisitech Co., Ltd. of Zhuhai, China; Shenzhen Han Technology Co., Ltd. of Shenzhen, China; Shenzhen IVPS Technology Co., Ltd. of Shenzhen, China; Maduro Distributors d/b/a The Loon of Fridley, Minnesota; Shenzhen Yanyang Technology Co., Ltd. of Huizhou, China; Pastel Cartel, LLC of Austin, Texas; American Vape Company, LLC of Pflugerville, Texas; Affiliated Imports, LLC of Austin, Texas; Shenzhen Kangvape Technology Co., Ltd. of Shenzhen, China; Shenzhen Pingray Technology Co., Ltd. of Shenzhen City, China; SV3, LLC d/b/a Mi-One Brands of Phoenix, Arizona; Price Point Distributors Inc. d/b/a Price Point NY of Farmingdale, New York; and TheSy, LLC d/b/a Element Vape of El Monte, California (collectively, "Respondents"). FID at 6-9. The Office of Unfair Import Investigations ("OUII") is also as a party. 89 FR at 59160.

The fifteen (15) respondents found in default are: Vapeonly Technology Co. Ltd. of Hong Kong; iMiracle (Shenzhen) Technology Co., Ltd. of Shenzhen, China; Nevera (HK) Ltd. of Hong Kong; Wonder Ladies Ltd. of British Virgin Islands; Sailing South Ltd. of British Virgin Islands; Marea Morada Ltd. of British Virgin Islands; Social Brands, LLC of Dallas, Texas; Palma Terra Ltd. of British Virgin Islands; Heaven Gifts International Ltd. of Hong Kong; Shenzhen LC Technology Co., Ltd. of Shenzhen, China; LCF Labs, Inc. of Ontario, California; Flumgio Technology Ltd. of Hong Kong; Flawless Vape Shop Inc. of Anaheim, California; Flawless Vape Wholesale & Distribution Inc. of Anaheim, California; and VICA Trading Inc. d/b/a Vapesourcing of Tustin, California (collectively, "Defaulting Respondents"). *See* Order No. 17 (Sept. 16, 2024), *unreviewed by* Comm'n Notice (Oct. 8, 2024).

The two (2) respondents that were terminated from this investigation are: Kimsun Technology (HuiZhou) Co., Ltd. of Shenzhen, China and Bidi Vapor, LLC of Orlando, Florida. Order No. 10 (Aug. 28, 2024), *unreviewed by* Comm'n Notice (Sept. 23, 2024); Order No. 26 (Nov. 5, 2024), *unreviewed by* Comm'n Notice (Dec. 5, 2024).

On June 11, 2024, the same date it filed its complaint, Reynolds filed a motion for a temporary exclusion order ("TEO"). Respondents filed a joint memorandum in opposition to Reynolds's motion for a TEO on August 12, 2024. The presiding ALJ held an evidentiary hearing on September 26 and 27, and October 8, 2024. On November 19, 2024, the ALJ issued an ID denying Reynolds's motion for a TEO, which the Commission determined not to review. Order No. 28 (Nov. 19. 2024), *unreviewed by* Comm'n Notice (Dec. 18, 2024).

On May 1, 2025, the Commission partially terminated the investigation with respect to claims 3, 8, 10, 13, 17-27, and 29-30 of the '202 patent due to voluntary withdrawal of the claims. Order No. 44 (Apr. 7, 2025), *unreviewed by* Comm'n Notice (May 1, 2025).

On March 14, 2025, the presiding ALJ issued a *Markman* order construing the disputed claim terms. Order No. 34 (Mar. 14, 2025). The ALJ held an evidentiary hearing from April 7-

11, 2025, with an additional day of testimony on domestic industry on June 11, 2025. By that time, Reynolds was asserting claims 1, 4, 9, 11, 12, and 15 of the '202 patent for purposes of infringement, and claims 1, 2, 4, 5, 7, 9, and 14-16 for purposes of domestic industry.

On August 29, 2025, the ALJ issued the present FID, finding that Respondents violated section 337 by way of infringing claims 4 and 12 of the '202 patent, and that neither claim is invalid as anticipated or obvious under 35 U.S.C. section 102 or section 103, respectively. FID at 189-90. The FID found that Respondents also infringed claims 1, 11, and 15, but those claims are invalid as anticipated. *Id*. The FID also found that Reynolds satisfied both the technical and economic prongs of the domestic industry requirement. *Id*. at 98, 117, 121, 182.

On September 12, 2025, the ALJ issued a Recommended Determination on Remedy, Bonding, and Public Interest ("RD"), recommending that the Commission issue a general exclusion order ("GEO") in the event a violation is found, or, in the alternative, a limited exclusion order covering infringing articles imported by or on behalf of each respondent found to have violated section 337 and each defaulting respondent. RD at 3, 26, 30. The ALJ also recommended that the Commission issue cease and desist orders against certain respondents and set a bond of 136% of the entered value of infringing articles imported during the period of Presidential review. *Id*. at 3, 40, 44. The ALJ further recommended finding that the public interest factors do not preclude issuance of a remedy. *Id*.

On September 15, 2025, the Commission issued a notice requesting submissions on public interest issues raised by the recommended relief, should the Commission find a violation. 90 Fed. Reg. 45056 (Sept. 18, 2025). The Commission issued a second notice on November 18, 2025, and extended the deadline for responses because the original deadline expired during the shutdown of the Federal Government. 90 FR 52700 (Nov. 21, 2025).

On September 15, 2025, Respondents filed a petition for review of the FID, including its construction of the claim term "smoking article" and its findings that claims 4 and 12 are infringed, literally or by equivalence, as well as its findings that claims 4 and 12 are neither anticipated nor obvious over the prior art.

On September 23, 2025, Reynolds and OUII filed their respective responses to Respondents' petition for review. Neither Reynolds nor OUII filed a petition for review of their own and have thus waived any objections they may have had to the FID's findings that claims 1, 9, 11, and 15 of the '202 patent are invalid as anticipated, per Commission Rule 210.43(b)(4), 19 CFR 210.43(b)(4).

On January 9, 2026, the Commission determined to review the FID in part, including its findings that: (i) claims 4 and 12 are not invalid as anticipated under section 102; (ii) claims 4 and 12 are not invalid as obvious under section 103; and (iii) Reynolds satisfied the domestic industry requirement. 91 FR 1555-57 (Jan. 14, 2026). The Commission did not review, and has thus adopted, the FID's findings on claim construction, infringement, and invalidity of claims 1, 9, 11, and 15 (except to the extent that claims 4 and 12 depend on claim 1). *See id.* at 1556.

On January 23, 2026, Reynolds, Respondents, and OUII filed their initial submissions in response to the Commission's January 9, 2026, notice. On January 30, 2026, Reynolds, Respondents, and OUII submitted their respective replies in each other's submissions.

The Commission has also received submissions from two third parties. On December 1, 2025, non-parties NJOY, LLC, Altria Group Distribution Company, and Altria Client Service LLC (collectively, "NJOY") submitted a response to the Commission's second request for public interest submissions. On January 23, 2026, NJOY submitted a second submission in response to the Commission's notice of partial review and request for public submissions. On the same date, the Commission received a submission from Vapor Technology Association, a U.S. trade association representing manufacturers, distributors, retailers, wholesalers, suppliers, and other vapor technology businesses in the United States.

Upon review of the FID, the parties' submissions, and the evidence of record, the Commission has determined to reverse the FID and find that claims 4 and 12, and claim 1 on which they depend, are invalid as obvious under 35 U.S.C. section 103, as set forth in the attached opinion. The Commission has also determined to take no position on whether Reynolds satisfied the economic prong of the domestic industry requirement. The Commission otherwise adopts the remaining findings of the FID, with some modifications to supplement its finding that Respondents failed to prove by clear and convincing evidence that either claim 4 or claim 12 is invalid as anticipated under section 102. Accordingly, this investigation is terminated with a finding of no violation of section 337.

The Commission vote for this determination took place on March 10, 2026.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: March 10, 2026

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the parties listed have entered an appearance in the above captioned investigation, and a copy of the PUBLIC CERTIFICATE OF SERVICE was served upon the following parties via first class mail and air mail where necessary.

Document	Security	Document Type	Official Rec'd	Title
874978	Public	Notice	03/10/2026 01:41 PM	Final Commission Determination of No Violation; Termination of Investigation

Service Date: March 11, 2026

/s

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EXHIBIT B

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN DISPOSABLE VAPORIZER DEVICES**	**Investigation No. 337-TA-1410**

COMMISSION OPINION

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I. INTRODUCTION

On January 9, 2026, the Commission determined to review in part the final initial determination ("FID") issued on September 2, 2025 by the presiding administrative law judge ("ALJ") in this investigation. 91 Fed. Reg. 1555-57 (Jan. 14, 2026). The FID found there was a violation of section 337 of the Tariff Act of 1930, as amended ("section 337"), because asserted claims 4 and 12 of U.S. Patent No. 11,925,202 ("the '202 patent") were infringed and not invalid, and Reynolds satisfied both the technical and economic prongs of the domestic industry ("DI") requirement. FID at 190. The Commission determined to review the FID's findings that: (a) claims 4 and 12 are not anticipated by U.S. Patent No. 6,155,268 to M. Takeuchi ("Takeuchi") under 35 U.S.C. § 102 ("section 102"); (b) claims 4 and 12 are not invalid as obvious over U.S. Patent App. Pub. No. 2006.0016453, to In Young Kim, ("Kim") in combination with International Patent Publication WO 00/28843 to T. Pienemann ("Pienemann") under 35 U.S.C. § 103 ("section 103"); and (c) the complainants satisfied the domestic industry requirement. 91 Fed. Reg. at 1556. The Commission did not review, and thus adopted, the FID's claim constructions and findings that asserted claims 1, 4, 9, 11, 12, and 15 are infringed but claims 1, 9, 11, and 15 are invalid as anticipated.[1] FID at 190; 91 Fed. Reg. at 1556.

On review, the Commission has determined to reverse the FID and find that claims 4 and 12, and claim 1 on which they depend, are invalid as obvious under section 103.[2] Accordingly,

[1] No party petitioned for review of the FID's finding that claims 1, 9, 11, and 15 are invalid. Thus, any party's objections to those findings are waived, pursuant to Commission Rules 210.43(b)(2), (4) (19 C.F.R. §§ 210.43(b)(2), (4)). The only claims still at issue for infringement purposes are claims 4 and 12, and claim 1, due to the dependency of claims 4 and 12 on claim 1.

[2] Claims 4 and 12 depend from claim 1. The review of the obviousness findings for claims 4 and 12 therefore necessarily includes review of claim 1, as the independent claim. The FID found that claim 1 was not obvious in view of Kim in combination in Pienemann. As explained herein, the Commission reverses that finding for claim 1 as well as dependent claims 4 and 12.

the Commission finds no violation of section 337. The Commission has determined to take no position on whether the complainants satisfied the economic prong of the domestic industry requirement. The Commission otherwise adopts the remaining findings of the FID on review, with some modifications to supplement its finding that Takeuchi does not anticipate claims 4 and 12 under section 102. This investigation is hereby terminated with a finding of no violation.

This opinion sets forth the Commission's reasoning in support of its determination.

II. BACKGROUND

A. Procedural History

On July 22, 2024, the Commission instituted the present investigation based on a complaint, as supplemented, filed by Complainants R.J. Reynolds Vapor Company, R.J Reynolds Tobacco Company, RAI Strategic Holdings, Inc., and RAI Services Company, all of Winston-Salem, North Carolina (collectively, "Reynolds" or "Complainants") accusing the respondents of violating section 337 by importing into the United States, selling for importation, or selling in the United States after importation certain disposable vaporizer devices that allegedly infringe one or more of the asserted claims of the '202 patent. 89 Fed. Reg. 59158-60 (July 22, 2024); FID at 1, 9-10. By the time the evidentiary hearing occurred and the FID issued, Reynolds was asserting claims 1, 4, 9, 11, 12, and 15 for infringement purposes and claims 1, 2, 4, 5, 7, 9, and 14-16 for domestic industry purposes. FID at 5; *see* Order No. 44 (Apr. 7, 2025), *unreviewed by* Comm'n Notice (May 1, 2025) (terminating certain claims due to withdrawal).

The Commission instituted the investigation against thirty-five (35) named respondents, of which eighteen (18) respondents participated in the investigation, fifteen (15) respondents were found in default, and two (2) respondents were terminated on the basis of consent orders. FID at 2-3, 6-9; *see also* Order No. 17 (Sept. 16, 2024) (entering default), *unreviewed by* Comm'n Notice (Oct. 8, 2024); Order No. 10 (Aug. 28, 2024) (entering consent order),

unreviewed by Comm'n Notice (Sept. 23, 2024); Order No. 26 (Nov. 5, 2024) (entering consent order), *unreviewed by* Comm'n Notice (Dec. 6, 2024). The Office of Unfair Import Investigations ("OUII") is also a party. 89 Fed. Reg. at 59159.

The eighteen (18) respondents that participated in this investigation are: Breeze Smoke, LLC of Southfield, Michigan; Dongguan (Shenzhen) Shikai Technology Co., Ltd. of Dongguan, China; Guangdong Qisitech Co., Ltd. of Dongguan City, China; Guangdong Fewo Intelligent Manufacturing Ltd. of Dongguan City, China; Guangdong Cellular Workshop Electronics Technology Co., Ltd. of Dongguan City, China; Zhuhai Qisitech Co., Ltd. of Zhuhai, China; Shenzhen Han Technology Co., Ltd. of Shenzhen, China; Shenzhen IVPS Technology Co., Ltd. of Shenzhen, China; Maduro Distributors d/b/a The Loon of Fridley, Minnesota; Shenzhen Yanyang Technology Co., Ltd. of Huizhou, China; Pastel Cartel, LLC of Austin, Texas; American Vape Company, LLC of Pflugerville, Texas; Affiliated Imports, LLC of Austin, Texas; Shenzhen Kangvape Technology Co., Ltd. of Shenzhen, China; Shenzhen Pingray Technology Co., Ltd. of Shenzhen City, China; SV3, LLC d/b/a Mi-One Brands of Phoenix, Arizona; Price Point Distributors Inc. d/b/a Price Point NY of Farmingdale, New York; and TheSy, LLC d/b/a Element Vape of El Monte, California (collectively, "Respondents"). FID at 6-9.

The fifteen (15) respondents found in default are: Vapeonly Technology Co. Ltd. of Hong Kong; iMiracle (Shenzhen) Technology Co., Ltd. of Shenzhen, China; Nevera (HK) Ltd. of Hong Kong; Wonder Ladies Ltd. of British Virgin Islands; Sailing South Ltd. of British Virgin Islands; Marea Morada Ltd. of British Virgin Islands; Social Brands, LLC of Dallas, Texas; Palma Terra Ltd. of British Virgin Islands; Heaven Gifts International Ltd. of Hong Kong; Shenzhen LC Technology Co., Ltd. of Shenzhen, China; LCF Labs, Inc. of Ontario, California;

Flumgio Technology Ltd. of Hong Kong; Flawless Vape Shop Inc. of Anaheim, California; Flawless Vape Wholesale & Distribution Inc. of Anaheim, California; and VICA Trading Inc. d/b/a Vapesourcing of Tustin, California (collectively, "Defaulting Respondents"). *See* Order No. 17 (Sept. 16, 2024), *unreviewed by* Comm'n Notice (Oct. 8, 2024).

The two (2) respondents that were terminated from this investigation are: Kimsun Technology (HuiZhou) Co., Ltd. of Shenzhen, China and Bidi Vapor, LLC of Orlando, Florida. Order No. 10 (Aug. 28, 2024), *unreviewed by* Comm'n Notice (Sept. 23, 2024); Order No. 26 (Nov. 5, 2024), *unreviewed by* Comm'n Notice (Dec. 5, 2024).

On March 14, 2025, the presiding ALJ issued a *Markman* order construing the disputed claim terms. Order No. 34 (Mar. 14, 2025). The ALJ held an evidentiary hearing from April 7-11, 2025, with an additional day of testimony on domestic industry on June 11, 2025. FID at 4.

On August 29, 2025, the ALJ issued the present FID, which found that Respondents violated section 337 by way of infringing claims 4 and 12 of the '202 patent, which the FID found are not invalid. *Id.* at 144, 152, 189-90. The FID found that Respondents also would have infringed claims 1, 11, and 15, but those claims are invalid as anticipated. *Id.* The FID also found that Reynolds satisfied both the technical and economic prongs of the domestic industry requirement. *Id.* at 98, 117, 121, 182.

On September 12, 2025, the ALJ issued the Recommended Determination on Remedy, Bond, and the Public Interest ("RD"). The RD recommended that, if a violation is found, the Commission issue a general exclusion order as to claims 4 and 12 of the '202 patent, or, in the alternative, a limited exclusion order covering each respondent found to have violated section 337 and each defaulting respondent. *Id.* at 3, 26, 30. The RD recommended finding that the public interest factors do not preclude issuance of a remedy. *Id.* In addition, the RD

recommended that the Commission issue cease and desist orders against certain respondents that possess commercially significant domestic inventories or have significant domestic sales or operations. *Id*. at 3, 40. The RD also recommended setting a bond of one hundred and thirty-six percent (136%) of entered value during the period of Presidential review. *Id*. at 3, 44.

On November 18, 2025, the Commission issued a notice requesting submissions on public interest issues raised by the recommended relief, should the Commission find a violation of section 337.[3] 90 Fed. Reg. 52700 (Nov. 21, 2025).

On September 15, 2025, Respondents filed a petition for review of the FID, including its construction of "smoking article" and its findings that claims 4 and 12 are infringed but not invalid as anticipated or obvious. On September 23, 2025, Reynolds and OUII filed their respective responses to Respondents' petition for review. However, neither Reynolds nor OUII filed their own petition for review; thus, they waived any objections they may have had to the FID's findings that claims 1, 9, 11, and 15 are invalid, pursuant to Commission Rule 210.43(b)(2), (4) (19 C.F.R. §§ 210.43(b)(2), (4)).

On January 9, 2026, the Commission determined to review the FID in part, as mentioned above, and asked for written submissions on the issues under review and on remedy, public interest, and bonding. Reynolds, Respondents, and OUII filed their initial submissions in

[3] The Commission issued a similar request on September 18, 2025, but the deadline expired during the government shutdown in autumn 2025. *See* 90 Fed. Reg. 45056 (Sept. 18, 2025).

response to the Commission's January 9, 2026, notice on January 23, 2026.[4] They filed their respective replies to the other parties' submissions on January 30, 2026.[5]

The Commission has also received submissions from two third parties. On December 1, 2025, non-parties NJOY, LLC, Altria Group Distribution Company, and Altria Client Service LLC (collectively, "NJOY") submitted a response to the Commission's second request for public interest submissions. On January 23, 2026, NJOY submitted a second submission in response to the Commission's notice of partial review and request for public submissions. On the same date, the Commission received a submission from Vapor Technology Association, a U.S. trade association representing manufacturers, distributors, retailers, wholesalers, suppliers, and other vapor technology businesses in the United States.

B. The '202 Patent

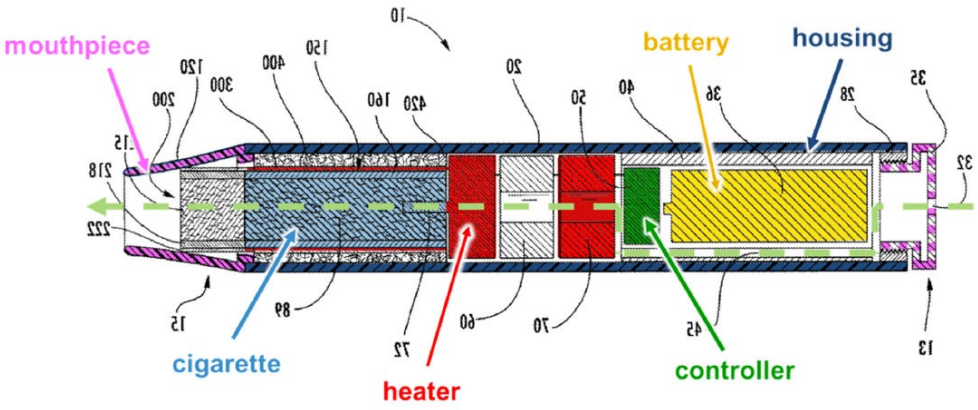
The '202 patent, titled "Tobacco-Containing Smoking Article," issued on March 12, 2024, and will expire on October 18, 2026. C.Resp. at 40 (citing Complaint, ¶ 110); '202 patent, cover. The '202 patent is subject to the patent laws that predated the "America Invents Act"

[4] *See* Complainants' Initial Submission in Response to Commission Determination to Review in Part a Final Initial Determination Finding a Violation Under Section 337 and the Request for Written Submissions on the Issues Under Review and on the Public Interest, Remedy, and Bonding ("C.Resp."); Respondents' Initial Submission on Certain Issues Under Review, and on Remedy, Bond, and the Public Interest ("R.Resp."); and The Office of Unfair Import Investigations' Response to the Commission's January 9, 2026, Questions and Request for Written Submissions on Remedy, the Public Interest, and Bonding ("OUII Resp.").

[5] *See* Complainants' Responsive Submission in Response to Commission Determination to Review in Part a Final Initial Determination Finding a Violation Under Section 337 and the Request for Written Submissions on the Issues Under Review and on the Public Interest, Remedy, and Bonding ("C.Reply"); Respondents' Reply Submission on Certain Issues Under Review and Remedy ("R.Reply"); and The Office of Unfair Import Investigations' Reply to the Responses to the Commission's January 9, 2026, Questions and Request for Written Submissions on Remedy, the Public Interest, and Bonding ("OUII Reply").

("AIA") because it claims priority to a grandparent application filed on October 18, 2006, which was filed before the effective date of the AIA. *See* '202 patent, cover.

The '202 patent is directed to an electrically-powered, aerosol-generating "smoking article," *e.g.*, a vaporizer or electric cigarette. '202 patent, Abstract. The basic components of the claimed "smoking article" include a cigarette-shaped "outer housing" **20**, which contains a "storage compartment" **85** for holding a "liquid aerosol-forming material," a longitudinal "air passageway" **45**, an "electrical power source" **36** (*e.g.*, a battery) connected to "electrical resistance heater" elements **70**, **72**, and a "controller" **50**. *See id.* at Abstract, 19:49-62, 20:4-9, 20:22-35, 20:45-52, 21:28-23:3, 33:1-6 (limitation 1[e]). These components are identified in the annotated version of the '202 patent's Figure 3, below:[6]



RDX-0102.25 (annotating JX-0001, Fig. 3)

R.Pet. at 4 (reproducing RDX-0102.25 (annotating reversed image of '202 patent, Fig. 3)).

When the user draws on the device's mouthpiece, the controller senses the inhalation and activates the heater, which vaporizes nearby liquid in the storage compartment (*i.e.*, turns the liquid to drops suspended in vapor). *See* '202 patent at 24:30-41, 29:10-40. A suspension of fine particles or droplets of liquid in a gas is generally referred to as an "aerosol." FID at 136 (citing

[6] The numerals appear backwards because Respondents reversed the '202 patent's Figure 3.

Hr'g Tr. (Dean) at 742:24-743:10, 773:23-774:14). The vaporized liquid mixes with outside air drawn into the device, and this mixture of vaporized liquid and air is inhaled by the user to simulate the experience of smoking a cigarette. *See* '202 patent at 5:5-12, 30:21-45. As the heater consumes the available liquid, fresh liquid is "wicked" toward the heater (*i.e.*, moved by capillary action) to replenish the supply and keep the device in operation. *See id.* at 21:44-57, 22:32-36; FID at 163-65.

The only claims at issue on review are claims 4 and 12, both of which depend on claim 1. These claims are recited below, with bracketed letters added for identification (as in the FID) and claim terms of interest set forth in italics:

1. [pre] An electrically-powered, aerosol-generating smoking article comprising:

   [a] an outer housing having two ends;

   [b] a mouthpiece defined at one of the two ends;

   [c] an electrical power source arranged within the outer housing;

   [d] an electrical resistance heater positioned within the outer housing, the electrical resistance heater being configured for electrical connection with the electrical power source;

   [e] a storage compartment defined within the outer housing, the storage compartment being configured for storage of a liquid aerosol-forming material and being arranged such that the liquid aerosol-forming material *can be wicked into contact* with the electrical resistance heater to volatilize the liquid aerosol-forming material;

   [f] 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; and

[g] 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.

4. The electrically-powered, aerosol-generating smoking article of claim 1, wherein *the aerosol that is produced passes at least partially through the storage compartment* before exiting through the mouthpiece.

12. The electrically-powered, aerosol-generating smoking article of claim 1, wherein the electrical resistance heater is configured *to allow airflow therethrough*.

'202 patent at 32:58-33:18, 33:25-28, 33:53-55 (emphasis added).

III. COMMISSION REVIEW OF THE FINAL ID

When the Commission reviews an initial determination, in whole or in part, it reviews the determination *de novo*. *Certain Electronic Stud Finders, Metal Detectors and Electrical Scanners*, Inv. No. 337-TA-1221, Comm'n Op. at 9 (Feb. 15, 2022) (citations omitted), *aff'd, Zircon Corp. v. Int'l Trade Comm'n*, 101 F.4th 817 (Fed. Cir. 2024). Upon review, the "Commission has 'all the powers which it would have in making the initial determination,' except where the issues are limited on notice or by rule." *Certain Electronic Devices, Including Streaming Players, Televisions, Set Top Boxes, Remote Controllers, and Components Thereof* ("*Streaming Players*"), Inv. No. 337-TA-1200, Comm'n Op. at 7 (Nov. 10, 2021) (citations omitted), *aff'd, Roku, Inc. v. Int'l Trade Comm'n*, 90 F.4th 1367 (Fed. Cir. 2024). With respect to the issues under review, "the Commission may affirm, reverse, modify, vacate, or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge," and "may make any finding or conclusions that in its judgment are proper based on the record in the proceeding." 19 C.F.R. § 210.45(c). In addition, the Commission "may take no position on specific issues or portions of the initial determination." *Id.*; *see also Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir. 1984).

IV. ANALYSIS

The Commission's findings, conclusions, and supporting analysis follow. The Commission affirms and adopts the FID's findings, conclusions, and supporting analysis that are not inconsistent with this opinion.

The Commission determined to review the FID's findings on anticipation and obviousness. 91 Fed. Reg. at 1556. Both anticipation (35 U.S.C. § 102) and obviousness (35 U.S.C. § 103) are theories of patent invalidity, which are affirmative defenses to an action for infringement before the Commission. 35 U.S.C. § 282(b); 19 U.S.C. § 1337(c) ("All legal and equitable defenses may be presented in all cases."); *Guangdong Alison Hi-Tech Co. v. Int'l Trade Comm'n*, 936 F.3d 1353, 1359 (Fed. Cir. 2019)). A party cannot be held liable for infringement if the patent claim at issue is invalid. *See Pandrol USA, LP v. AirBoss Railway Prods., Inc*., 320 F.3d 1354, 1365 (Fed. Cir. 2003). Also, each patent claim is presumed valid. 35 U.S.C. § 282. Accordingly, the respondents to an investigation bear the burden of proving all factual propositions and inferences underlying an invalidity defense by clear and convincing evidence. *Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 95 (2011).

A. Claims 1, 4, and 12 Are Invalid as Obvious Over Kim With Pienemann

Upon review of the FID, the parties' submissions on review, and the evidentiary record, the Commission has determined to reverse the FID and find that claims 1, 4 and 12 are invalid as obvious over the combination of Kim with Pienemann. The Commission adopts the FID's findings with respect to Kim and Pienemann, except where they are reversed below.

If a patent claim is not disclosed in a single piece of prior art, it may still be invalid if the differences between the claimed invention and the prior art are such that the invention as a whole would have been obvious to a person of ordinary skill in the art at the time of the invention. *See*

35 U.S.C. § 103 (pre-AIA).[7] Obviousness is a question of law based on underlying factual inquiries, including: (1) the scope and content of the prior art; (2) the difference between the prior art and the claimed invention; (3) the level of ordinary skill in the field of the invention; and (4) any relevant objective considerations of non-obviousness. *Norgren Inc. v. Int'l Trade Comm'n*, 699 F.3d 1317, 1322 (Fed. Cir. 2012) (citing *Graham v. John Deere Co*., 383 U.S. 1, 17-18 (1966)). "The common sense and ordinary creativity of a person having ordinary skill in the art are also part of the analysis." *Id.* (citing *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 420-21 (2007)). The burden is on the challenger to the patent to prove by clear and convincing evidence that the claims are invalid. *Id.*

Unlike anticipation, which rests on the express or inherent disclosures of a single prior art reference, obviousness may be proved by a combination of prior art references, provided the party challenging validity can prove by clear and convincing evidence that a skilled artisan would have been motivated to combine the teachings of the prior art to achieve the claimed invention, and would have had a reasonable expectation of success in doing so. *See OSRAM Sylvania, Inc. v. Am. Induction Techs., Inc*., 701 F.3d 698, 706-707 (Fed. Cir. 2012). For example, an invention that combines known elements according to known methods may be obvious if it "unites old elements with no change in their respective functions" or "does no more than yield predictable results," whereas a combination may avoid obviousness if those known elements "worked together in an unexpected and fruitful manner." *See KSR*, 550 U.S. at 416.

[7] Section 103 (pre-AIA) provides: "A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made[.]" 35 U.S.C. § 103 (pre-AIA).

In this case, Respondents relied primarily on Kim for its teachings on the structure and operation of an electric cigarette (including the claim limitations at issue, below), and on Pienemann for its control system, including a controller, puff detector, and switching device. FID at 167-68. The Commission adopts the FID's finding that a person skilled in the art would have found it obvious to incorporate Pienemann's control system into Kim (in satisfaction of limitation 1[g]), and would have had a motivation to do so and a reasonable likelihood of success. *Id.* at 168-74. The Commission further notes that Reynolds has not asserted any objective evidence of non-obviousness, such as commercial success, unexpected results, industry praise, or other secondary indicia. *See id.* at 122 n.64 (finding that Reynolds has not identified any objective indicia); *see also* Complainants' Response to Respondents' Petition for Commission Review at 53-62 (making no reference to objective indicia); C.Resp. at 1-17 (same); C.Reply at 1-19 (same). Accordingly, the analysis below will focus primarily on the teachings of Kim and not on Pienemann or the combining of those two references.

1. Respondents Did Not Waive Obviousness

Before turning to the merits of obviousness, the Commission will address Reynolds's argument that Respondents waived certain arguments on review by not raising them first before the ALJ or in their petition for review. C.Resp. at 1, 3-4, 8-9, 13 (citing Order No. 2, Ground Rules 9.2, 13.1 (July 18, 2024)[8]; 19 C.F.R. § 210.42(b)(3)). In each case, Reynolds argues that

[8] The ALJ's Ground Rule 9.2 states: "Any contentions 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 at 18 (Ground Rule 9.2).

Ground Rule 13.1 states: "The post-hearing brief shall discuss the issues and evidence tried within the framework of the general issues determined by the Commission's Notice of Investigation and those issues that are included in the pre-hearing brief and any permitted amendments thereto. All other issues shall be deemed waived." *Id.* at 29-30 (Ground Rule 13.1).

Respondents relied on what Kim actually or inherently discloses and did not actually argue obviousness. *See id.* at 2-4, 9, 13-14. For example, with respect to claim 1, Reynolds contends that Respondents previously argued that Kim's porous chip inherently wicks, per limitation 1[e], but Respondents allegedly did not argue that it would have been obvious to modify Kim to select a wicking material. *Id.* at 3-4. With respect to claim 4, Reynolds contends that Respondents originally argued that Kim inherently discloses that "at least some aerosol generated during operation of the device passes through Kim's porous chip 5," per claim 4, but Respondents allegedly did not argue that it would have been obvious to modify Kim's porous chip so as "to achieve aerosol passage through the chip." *Id.* at 9. Finally, with respect to claim 12, Reynolds contends that Respondents previously argued that "Kim's **existing structure** provides for airflow," per claim 12, but Respondents allegedly did not argue it would have been obvious to design a central channel or heater configuration to permit airflow. *Id.* at 13 (emphasis added by Reynolds). Reynolds also quotes the FID's finding that "**Respondents do not assert an obviousness argument for the added limitation of claim 12**." *Id.* (quoting FID at 186 n.105 (emphasis added by Reynolds)).

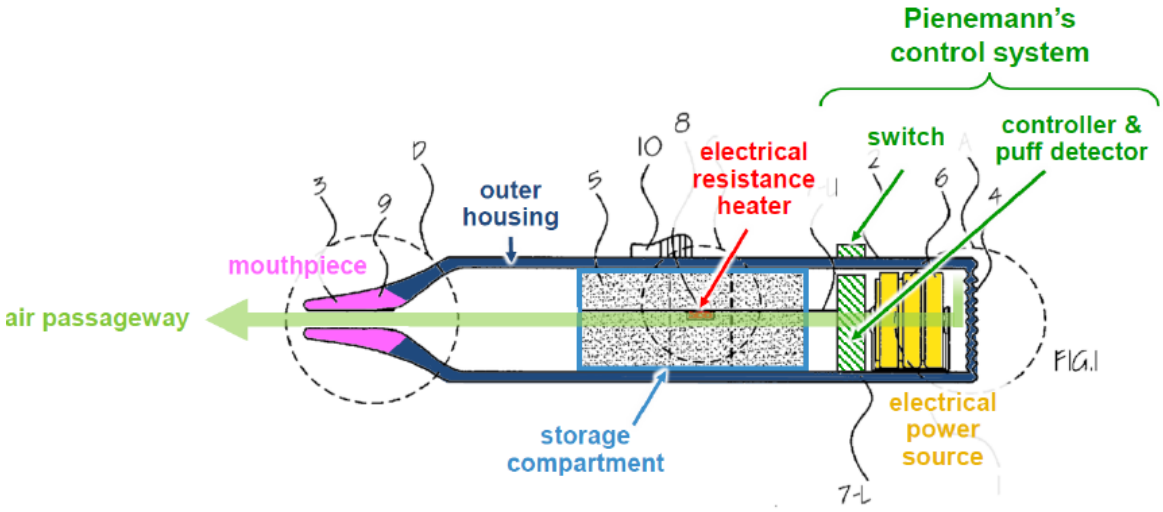
The Commission disagrees. Respondents and their expert, Dr. Dean, consistently asserted that they were arguing obviousness. *See, e.g.*, Hr'g Tr. (Dean) at 740:10-17, 825:20-826:1, 875:1-9. This is not a case, for example, where a respondent failed to raise or pursue a key issue (*e.g.*, claim construction or motivation to combine) or changed theories during the investigation. The Commission also finds that the FID's assertion that "Respondents do not assert an obviousness argument for the added limitation of claim 12" is incorrect or at least overstated. *See* FID at 186 n.105. That statement contradicts the FID's own summary of Respondents' obviousness argument, which acknowledges that Respondents argued that the

porous chip and heater coil could be designed to permit some airflow through the central channel, and that claim 12 does not impose any minimum threshold for the amount of airflow. *See id.* at 181-82. While Respondents' briefing sometimes described what Kim discloses rather than what was obvious, it is clear that Respondents and their expert, Dr. Dean, made those statements in the context of their argument that asserted claims 1, 4, and 12 of the '202 patent (among others) are invalid as obvious over Kim in combination with Pienemann. *See, e.g.,* Hr'g Tr. (Dean) at 740:10-17, 875:1-9. In this context, the expert testimony and prior art demonstrate that the elements Respondents were seeking to establish (*e.g.*, wicking, airflow) were well-known to persons skilled in the art and that the use of those elements in Kim was motivated by and fully consistent with Kim's own teachings. *See* Hr'g Tr. (Dean) at 807:8-812:17, 827:11-828:19, 860:4-865:12, 867:18-871:8; Kim at [0004], [0012], [0014], [0015], [0017]-[0019].

Moreover, Respondents' obviousness theories do not require "modifying" Kim, as Reynolds asserts. *See, e.g.*, C.Resp. at 3-5, 8, 9, 12, 16. Kim expressly and repeatedly discloses a "porous chip" that can store liquid, bring that liquid into proximity with a heating coil located in a central channel through that chip, and "easily" release the evaporated mixture after the liquid has been vaporized by the heating coil. *See* Kim at [0014], [0015], [0017], [0019]. The analysis below also examines what a person skilled in the art would have found obvious in using known elements (*e.g.*, a wicking material in a porous chip) within that person's technical grasp to achieve predictable results to respond to a design need or market incentives. *See Norgren*, 699 F.3d at 1322-23 (discussing, *inter alia*, *KSR*, 550 U.S. at 416, 421). These principles must be taken into consideration in examining what a person skilled in the art would have found obvious in fabricating the porous chip, heating coil, and central channel that Kim explicitly discloses.

2. Claim 1 Is Obvious

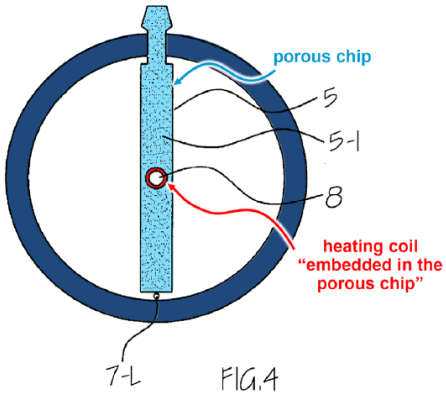
The FID found that the combination of Kim with Pienemann expressly discloses all of the limitations of claim 1, with the exception of limitation 1[e], discussed below. In particular, the FID found that Kim discloses a cigarette-shaped tobacco-containing "smoking article" (limitation 1[pre]) with an "outer housing" (1[a]) that contains a "mouthpiece" (1[b]), an "electrical power source" (1[c]), an "electrical resistance heater" (1[d]), an "air passageway" (1[f]), and a "controller" incorporated from Pienemann (1[g]). FID at 154-62, 166-67. These elements are identified in Respondents' annotated version of Kim's Figure 1, below:



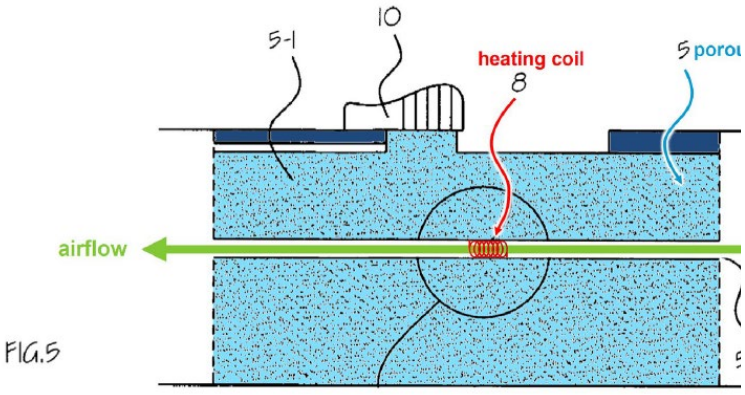
Id. at 154, 167-74 (reproducing RDX-0202.72 (annotating Kim, Fig. 1)). The Commission adopts the FID's findings on these points.

Turning to limitation 1[e], according to the FID, Respondents argued that the "storage compartment" limitation is satisfied by Kim's "porous chip," which is formed of a "porous polymer" or "a porous polymeric material, preferably in the form of polymeric fibers," and fabricated in the form of a "slim plate or rod." Kim at [0014], [0015], [0018]. The porous chip stores an "[a]queous mixture of Nicotine and volatile palatability enhancing agents are absorbed

in [its] pores." *Id.* at [0014], [0015], [0017]. A plate-like "porous chip" **(5)** is identified below in light blue, with the outer housing identified in dark blue:



Cross-sectional view of "porous chip" from the front of the device FID at 177 (reproducing RDX-0202.77 (annotating Kim, Fig. 4))



Cross-sectional view from the side of the "porous chip" FID at 181 (reproducing RDX-0202.78 (annotating Kim, Fig. 5))

Kim also discloses a "cylindrical hole **(8)**," or channel, that runs lengthwise through the porous chip. *Id.* at [0015]. Inside the channel is a stationary heating coil or other heating element, depicted in red above. *Id.* When the user draws on the device, the heating coil is activated and vaporizes the surrounding liquid, causing that vaporized liquid to be expelled from the porous chip and to mix with air drawn into the device. *Id.* at [0004], [0019]; Hr'g Tr. (Dean) at 860:13-864:15. Kim states that the porous chip may be designed as a thin 3-millimeter plate to "allow the evaporated Nicotine mixture [to] come out of the chip **(5)** easily," in order to simulate the taste and aroma of smoking a cigarette. Kim at [0004], [0012], [0014], [0017].

Kim also teaches that the porous chip is connected to a slider knob **(10)**, as shown above. The slider knob is used to move the chip in a horizontal direction, relative to the fixed heating coil, so that different portions of the chip can be exposed to the heating coil as the liquid is depleted. *Id.* at [0012], [0014]. In the preferred embodiment, Kim's device is sold with the

porous chip positioned toward the rear of the device, so that the heating coil evaporates and consumes the liquid located at the front of the chip first. *Id.* at [0019]. When the available liquid is consumed, the user slides the knob **10** toward the front of the device to bring fresh liquid into proximity with the heating coil and continue the vaporization/inhaling process. *Id.* Kim states that the porous chip may store an amount of liquid "equivalent to about two weeks need for average smokers who smoke[] a pack of 20 cigarettes a day." *Id.* at [0004].

Respondents argued that the "porous chip" in Kim satisfies the "storage compartment" limitation of 1[e], which is recited below:

> a storage compartment defined within the outer housing, the storage being configured for storage of a liquid aerosol-forming material and being arranged such that the liquid aerosol-forming material can be wicked into contact with the electrical resistance heater to volatilize the liquid aerosol-forming material

'202 patent at 33:1-6 (discussed at Hr'g Tr. (Dean) at 807:6-810:6).

The FID, however, found that Respondents failed to clearly and convincingly prove that Kim's "porous chip" is "arranged such that the liquid aerosol-forming material *can be wicked into contact* with the electrical resistance heater to volatilize the liquid aerosol-forming material," as required by limitation 1[e]. FID at 164-66 (quoting '202 patent at 33:1-6 (emphasis added)). According to the FID, Respondents argued that the liquid nicotine in Kim's chip is necessarily wicked (*i.e.*, migrates via capillary action) toward the heating coil to refill the pores closer to the heating coil as the liquid within them is vaporized and expelled. *Id.* at 162-63. The FID, however, found that Kim contains no discussion of wicking or liquid movement, while Dr. Dean testified only "generically and vaguely to 'the laws of physics' without identifying sufficient support or explanation." *Id.* at 165-66 (citing Hr'g Tr. (Dean) at 811:3-16, 890:6-891:5). Additionally, the FID agreed with Reynolds that the slider knob means that "Kim's device is designed such that liquid does not need to be wicked anywhere." *Id.* (discussing Kim

at [0015], [0019]). As a result, the FID found that claim 1 is not obvious because the evidence "fails to clearly and convincingly show that Kim discloses" limitation 1[e]. *Id.* at 166, 174.

The Commission disagrees. The question is not limited to whether "Kim discloses" wicking or whether Dr. Dean demonstrated that wicking "necessarily" occurs in Kim, as the FID found. *See id.* at 164-66. Nor does the liquid "*need* to be wicked anywhere" to demonstrate obviousness.[9] *See id.* at 165 (finding that Kim contains "no discussion" of wicking or that liquid is "necessarily" wicked) (emphasis added). As noted above, obviousness is not limited to what is expressly or inherently disclosed in Kim itself, but must also consider whether a person skilled in the art would have found it obvious to use a wicking material to fabricate Kim's "porous chip" in the context of the prior art, the problem to be solved, and "logic, judgment, and common sense." *See Intercontinental Great Brands LLC v. Kellogg North America Co.*, 869 F.3d 1336, 1344, 1348 (Fed. Cir. 2017); *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1360 (Fed. Cir. 2006) ("It is important in this inquiry to distinguish between the references sought to be combined and 'the prior art,' as the latter category is much broader").

The Commission finds a person skilled in the art would have found it obvious to use a wicking material in the porous chip, in view of Kim's teaching that the porous chip should be formed specifically to absorb liquid into its pores, to allow that liquid to be vaporized by a local heating coil, and to allow those vaporized liquid droplets to exit the chip "easily." Kim at

[9] The FID confused obviousness with "inherent anticipation, which cannot rely on probabilities or possibilities, but rather requires that the element is 'necessarily' present." FID at 166 n.87. A single prior art reference anticipates a patent claim under 35 U.S.C. § 102 only if it expressly or inherently (*i.e.*, necessarily) discloses each and every claim limitation. *Sigray, Inc. v. Carl Zeiss X-Ray Microscopy, Inc.*, 137 F.4th 1372, 1376 (Fed. Cir. 2025). While an obviousness analysis *may* take into account a prior art reference's inherent teachings, the lack of inherency does not necessarily defeat obviousness. *See PAR Pharmaceutical, Inc. v. TWI Pharmaceuticals, Inc.*, 773 F.3d 1186, 1194-95 (Fed. Cir. 2014) (application of inherency in obviousness is limited).

[0012], [0014], [0015], [0017]. Wicking materials were well-known in the art by the time the grandparent application for '202 patent was filed in 2006, for certain basic principles were understood by the mid-1850's. *See* Hr'g Tr. (Dean) at 740:22-742:5. Thus, "logic, judgment, and common sense" would direct a skilled artisan to consider the use of wicking materials in Kim's porous chip. *See Intercontinental Great Brands*, 869 F.3d at 1348.

Both Dr. Dean and Mr. Alarcon identified reasons for using wicking materials. Dr. Dean explained that wicking enables "new" liquid farther from the heater to migrate toward that heater and refill the pores left empty as the liquid closer to the heater is vaporized, in an ongoing process. *See* Hr'g Tr. (Dean) at 807:6-808:3, 809:7-811:7. Wicking would be particularly helpful in a chip with an elongated cross-section, as in Kim, because the liquid located farther from the heater coil would be less susceptible to vaporization. Hr'g Tr. (Alarcon) at 1012:22-1013:14. Mr. Alarcon acknowledged that if there was any liquid remaining at the top of Kim's porous chip that remained unvaporized, due to its distance from the heater, then that liquid would remain there, unused, in the absence of wicking. *Id.* at 1013:15-17. Thus, wicking would likely improve the efficient storage and use of liquid in Kim, which is supposed to contain the nicotine equivalent of "about two weeks needs for average smokers who smoke[] a pack of 20 cigarettes a day." *Id.* at [0004]. Given that the express purpose of Kim's porous chip is to absorb, hold, and release liquid as it is vaporized, a person skilled in the art either would have understood that Kim's porous chip practices wicking or would have been motivated to use a wicking material, so that liquid throughout the chip can be more efficiently wicked toward the heater and vaporized rather than wasted. *See* Kim at [0012,] [0014,] [0015], [0017]. These factors, *e.g.*, using wicking without changing its known function, predictable results from wicking, market

incentives, known design choices, and relative ease of implementation, all support a finding that using a wicking material in Kim's porous chip was obvious. *See KSR*, 550 U.S. at 415-17.

The Commission is unpersuaded by Reynolds's argument that Kim imposes "multiple demanding constraints—the material must not degrade when exposed to heat or nicotine; must not impart foul taste or unwanted chemicals (such as plasticizers) to the nicotine formulation; must hold enough nicotine for 'about two weeks needs for average smokers who smoke a pack of 20 cigarettes a day.'" C.Reply at 11 (quoting Kim at [0004]). While that may be the case in a commercial setting, those performance measures are not required by claims 1, 4, or 12. For example, claim 1 requires only an unspecified degree of wicking toward the heater, while claim 4 requires "the aerosol that is produced passes at least *partially* through the storage compartment" and claim 12 requires only that the "heater is configured *to allow airflow* therethrough" to some unstated degree.[10] *See* '202 patent at 33:25-28 (claim 4), 33:53-55 (claim 12) (emphasis added). Thus, the concerns expressed by Reynolds would not have limited what a person skilled in the art would have found obvious regarding Kim's need for a porous chip for absorbing the nicotine liquid, making that liquid available to a heater, and then releasing the vaporized liquid "easily." Kim at [0014], [0015], [0019]; *see also Sisvel S.p.A. v. TCT Mobile Internat'l Ltd.*, 2024 WL 1173047, at *3 (Fed. Cir. Mar. 19, 2024) ("The law only requires that a

[10] The Commission notes that claims 1, 4, and 12 are device claims, even though the limitations added by claims 4 and 12, *supra*, include seemingly functional language. A device claim is normally interpreted to mean the device must be capable of performing the alleged function, not that it must perform that function, to practice the claim. *See MasterMine Software, Inc. v. Microsoft Corp*., 874 F.3d 1307, 1315-16 (Fed. Cir. 2017) (finding that functional language reflects the capabilities of the claimed device, citing cases in support). The Commission, however, finds that the parties have treated these functional terms as limitations, and have thus waived any alternative or broader construction of the claims. *See* 19 C.F.R. §§ 210.43(b)(2), (4).

person of ordinary skill in the art have a reasonable expectation of success, not an absolute one," citing *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1364 (Fed. Cir. 2007)).

The Commission also finds that the FID took too narrow a view in finding that wicking is somehow inconsistent with Kim's slider. FID at 164-65. As noted above, wicking would allow liquid from the more distant portions of the chip to be drawn toward the heater, which may reduce the frequency at which the slider would need to be moved and potentially maximize the use of liquid throughout the chip. *See* Hr'g Tr. (Dean) at 807:25-808:3, 810:7-811:16; Hr'g Tr. (Alarcon) at 1013:5-17. Even Reynolds's expert, Mr. Alarcon, admitted that "if it was wicking, you could just leave [the slider] stationary." *See* Hr'g Tr. (Alarcon) at 956:16-957:11. Thus, to answer Mr. Alarcon's question, "how would the user know where to position the slider if the liquid was wicking and moving within the system?," the answer is the same as in Kim – the user would leave the slider stationary as long as there is liquid to consume, and move the slider when the user believes the available liquid has been consumed. *See id.*; Kim at [0019]. Also, the Commission agrees with OUII's original assertion before the ALJ that the slider does not interfere with the "basic laws of physics," while wicking will cause the liquid "to reoccupy the vacant spaces that are in the porous structure." Commission Investigative Staff's Initial Post-Hearing at 42 (citing Hr'g Tr. (Dean) at 811:3-7). For these reasons, a person skilled in the art would not necessarily limit the design options to wicking *or* a slider but would have been motivated to combine wicking *and* a slider and would have had a reasonable expectation of success in doing so. *See Norgren*, 699 F.3d at 1322-23 (combining known elements to achieve a predictable result is likely obvious, citing *KSR*, 550 U.S. at 416, 421)); *DyStar*, 464 F.3d at 1360-61 (common knowledge, the prior art as a whole, or the nature of the problem itself may provide a motivation to combine).

For the foregoing reasons, the Commissions reverses the FID and finds that the use of a wicking material required by limitation 1[e] would have been obvious in view of Kim in the context of the prior art and the skilled artisan's logic and common sense. Given that claim 1's other limitations are either disclosed by or obvious over Kim combined with Pienemann, as discussed in the FID (at 155-62, 166-74), the Commission finds that claim 1 is invalid as obvious, as an alternative basis to finding that claim 1 is invalid as anticipated. *See* FID at 190.

3. Claim 4 is Obvious

Claim 4 depends on claim 1 and adds the following limitation: "wherein the aerosol that is produced *passes at least partially through* the storage compartment before exiting through the mouthpiece." '202 patent at 33:25-28 (emphasis added). The FID interpreted the term "the aerosol that is produced" to refer back to claim 1, limitation 1[f], which states 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." FID at 138-41 (quoting '202 patent at 33:8-13) (emphasis added). In so finding, the FID rejected Respondents' argument that "the aerosol that is produced" in claim 4 can refer to the volatilized liquid alone, without any mixing with outside air.[11] *See id.* at 136-37, 140-41.

The FID, however, found that Dr. Dean's invalidity opinions rested on the erroneous interpretation of "aerosol" in claim 4, which did not require mixing the vaporized liquid with outside air. *Id.* at 176 ("Dr. Dean's testimony relies on an interpretation of the claimed aerosol that is at odds with the plain language of the claim"). On that basis, the FID found that Respondents failed to prove that claim 4 is obvious over Kim with Pienemann. *Id.*

[11] In other words, even though the evaporated liquid is technically an "aerosol," it is not "the aerosol that is produced" recited in claim 4, which depends on and incorporates claim 1.

The Commission finds that the FID's interpretation of Dr. Dean's testimony is too narrow. Dr. Dean testified about the mixing of evaporated liquid with outside air in the central channel as well as outside the porous chip. *See* Hr'g Tr. (Dean) at 811:18-812:6, 827:18-828:19, 861:17-865:12; *see also* RDX-0202.76 (annotated version of Kim, Fig. 4). He further testified that there is nothing in Kim's porous chip to block passage of the vaporized liquid. *See id.* at 863:24-864:6, 868:13-869:22. Dr. Dean also testified that a person skilled in the art would have known how to design the central channel and heater coil to permit air flow, *e.g.*, by varying the type of wire, the diameter of the wire, the number of coils, and the proximity of the heater coil to the porous chip, and would have been motivated to do so to produce the desired vaporization effect. *Id.* at 798:7-800:15, 809:7-14, 865:22-866:12, 869:23-871:8, 889:2-23.

The Commission also finds that enabling the mixture of vaporized liquid and outside air to pass through the central channel promotes the very purpose of Kim, which is to enable the user to inhale a mixture of vaporized liquid and air in a manner that simulates smoking a cigarette. Kim at Abstract, [001], [004], [0019]. Kim does not disclose any means or motivation to prevent airflow through the chip or to make any portion of the device, including the channel, airtight. *See* Hr'g Tr. (Dean) at 863:24-864:6, 868:13-869:5. Thus, a person skilled in the art would have found it obvious to design Kim's device such that it can draw a mixture of vaporized liquid and air down the channel, and would have been motivated to do so with a reasonable likelihood of success to promote Kim's stated purpose. *See id.* at 868:13-871:8; *KSR*, 550 U.S. at 417 (market forces or design incentives may motivate predictable variations).

The FID, on the other hand, accepted the testimony of Reynolds's expert, Mr. Alarcon, that winding the heater coil tightly enough to fit within the central channel would lead to crimping and solder joints that would block airflow through the heater or channel. C.Resp. at 16

(discussing Hr'g Tr. (Alarcon) at 967:14-21). The FID adopted this theory in connection with claim 12, discussed below, and not claim 4. *Cf.* FID at 184-87 (claim 12) *with id.* at 176 (claim 4). The Commission will return to this issue in more detail with respect to claim 12.

For the time being, the Commission notes that the porous chip in Kim is not necessarily limited to 3 millimeters in thickness, as Mr. Alarcon assumed. *See* Kim at [0014]. Kim itself states that the device need only "*approximate* the size of a conventional combustible cigarette." *See id.* at [0012] (emphasis added). Thus, a person skilled in the art would understand that the dimensions of the porous chip, its central channel, and the heating coil may be varied to some degree. *See* Hr'g Tr. (Dean) at 798:7-800:15, 869:23-871:8. Even Mr. Alarcon acknowledged that skilled artisans were aware of the design parameters for the coil and central channel that Dr. Dean identified. *See* Hr'g Tr. (Alarcon) at 1004:3-16. Moreover, the FID itself recognized that Kim is disclosing only a non-limiting "preferred embodiment," as follows:

> Kim's Figure 1 is a '*preferred embodiment*' and Mr. Alarcon did not show that adjusting design parameters to provide a successful heating coil would prevent any other limitations of claim 1 from being met by the combination of Kim and Pienemann. *See also* Tr. (Dean) at 800:4-15 (one of ordinary skill could create a device with increased dimensions that would still fulfill the "design objective" of Kim to "create something that simulates a cigarette physically").

FID at 162 n.84 (discussing limitation 1[d] on "electrical resistance heater").

Likewise, adjusting the dimensions of the heating coil, central channel, or porous chip would not prevent the other limitations from being performed. Thus, the Commission finds that a person skilled in the art would have understood that the mixture of vaporized liquid and outside air can pass through the central channel in Kim's porous chip, or at least would have found it obvious to design Kim's central channel and heating coil to enable the "aerosol that is produced" to pass through, as required by claim 4. Such a design would have used known elements according to their known functions to achieve a predictable result, while promoting Kim's very

purpose in mixing vaporized liquid and air to simulate the experience of smoking a cigarette. *See* Kim at [0004].

The Commission further notes that claim 4 merely requires that "the aerosol that is produced [*i.e.*, the mixture of vaporized liquid plus outside air] passes *at least partially* through the storage compartment before exiting through the mouthpiece." '202 patent at 33:25-28 (claim 4) (emphasis added). The FID examined only whether the "aerosol that is produced" passes "*through*" Kim's porous chip, without consideration of the term "partially." *See* FID at 175 (emphasis added). Kim expressly discloses a porous chip, which, by definition, would admit outside air into its many pores and interconnecting structures. *See* Kim at [0014], [0015], [0017], [0019]; Hr'g Tr. (Dean) at 807:8-24, 827:11-828:19, 860:8-19, 861:24-864:18. Kim also expressly teaches that the vaporized liquid can be "easily" expelled from that porous chip. Kim at [0015]. A person skilled in the art would have found it obvious, if not unavoidable, that the vaporized liquid would mix with outside air within the numerous pores and interconnected structures within the porous chip as that vaporized liquid exits the chip. As a result, "the aerosol that is produced" travels at least "partially" through the porous chip as it exits the chip, in satisfaction of claim 4. *See* Hr'g Tr. (Dean) at 809:19-810:2, 861:17-865:12.

For the foregoing reasons identified for claims 1 and 4, the Commission has determined to reverse the FID and find that claim 4 is obvious over Kim in combination with Pienemann.

4. Claim 12 is Obvious

The Commission has also determined to reverse the FID and find that claim 12 is obvious over Kim in combination with Pienemann.

Claim 12 depends on claim 1 and adds that "the electrical resistance heater is configured to allow airflow therethrough." '202 patent at 33:53-55. The FID found that Respondents failed to prove that claim 12 is obvious because Kim contains "no language discussing airflow through

the heater within the hole in the chip or providing any functional reason why there would need be airflow through the heater." FID at 184-85. The FID also found that a heating coil constructed to fit in the small central channel running through the porous chip would have to be wound so tightly that it would have crimps or solder joints, which would block any airflow through the heating coil. *Id.* at 185-87 (citing Hr'g Tr. (Alarcon) at 967:18-21, 969:11-19). The FID found that although Dr. Dean testified that the heater coil need not be wound so tightly, he provided no parameters, calculations, or analysis to "show that airflow through the heating coil would necessarily occur in the Kim and Pienemann combination." *Id.* at 185-86 (citing Hr'g Tr. (Dean) at 870:7-871:4, 889:8-890:4, 895:8-24). The FID concluded that "Dr. Dean's testimony regarding undetermined heating coil parameters required . . . to jam" the heater into Kim's porous chip did not provide clear and convincing evidence that Kim discloses airflow through a heater coil in the chip. *Id.* at 185-86 (citing Hr'g Tr. (Dean) at 895:18).

The Commission has determined to reverse the FID and find that claim 12 is obvious over Kim in combination with Pienemann. As explained above in connection with claim 4 (*see* Section IV(A)(3)), there is nothing in Kim to suggest that the "porous chip" should somehow be airtight around the heating coil or central channel, such that all airflow through them would be blocked, if such a thing were even possible in a porous chip. *See* Hr'g Tr. (Dean) at 863:24-864:6, 868:13-869:5. To the contrary, the specification explicitly states that there is "[a] cylindrical hole **(5-2)** [] developed at the center of the chip **(5)** throughout the whole length of the chip **(5)** for allowing the chip **(5)** [to] move front and back according to the sliding knob **(10)'** movement." Kim at [0015]. In other words, the chip is not only porous, it contains a hole running through it that is wide enough to allow the chip to slide past the heating element to expose different parts of the chip to that heating element. *Id.* at [0015], [0019]. At the same

time, the heating coil must remain close enough to the porous chip to vaporize the liquid. *See* Hr'g Tr. (Dean) at 869:7-871:8. Kim further explains:

> *The heat from the spark evaporates the mixture of the Nicotine and volatile palatability enhancing agents out of the porous chip **(5)** from the pores **(5-1)** therein*. As the smoker puffs, the evaporated mixture is delivered to the smokers [*sic*] mouth by the air stream which comes from the outside through the porous hemi circle **(11)** developed just behind the red color LED **(4)**. When a smoker purchases the cigarette substitute device **(1)** from a market, the porous chip **(5)** is placed at the most rearward of the device. Therefore, the nicotine mixtures absorbed at the most front side of the porous chip evaporates and is consumed first. As the Nicotine mixture is consumed, slide the knob **(10)** to the front side of the device **(2)** to make the unevaporized Nicotine mixture with the sparking spot **(8).**

Kim at [0019] (emphasis added).

The Commission finds a skilled artisan would not have designed the heating coil to interfere with the movement of the chip by the slider, as Reynolds argues (C.Resp. at 17), or designed it to be so small that the heating coil would block all airflow, as the FID found (FID at 185-87). To the contrary, the alleged problems identified by Reynolds would have motivated a person skilled in the art to vary the well-known parameters of the heating coil and central channel (*e.g.*, the wire's material, thickness, number and diameter of the coils, heat output, distance between coil and the chip, etc.) to allow some airflow while avoiding direct contact, as Dr. Dean testified.[12] *See* Hr'g Tr. (Dean) at 798:7-800:15, 809:7-14, 865:22-866:12, 869:23-871:8, 889:2-23. Thus, a person skilled in the art would also have been motivated to vary somewhat the overall size of Kim's electric cigarette as needed to accommodate such a design. *See id.* at 822:12-15.

[12] Dr. Dean's testimony regarding the various design parameters known to persons skilled in the art also belies Reynolds's assertion that he was testifying only about "Kim's existing structure," and not about "a design choice a POSA would make." *See* C.Resp. at 14-15.

Mr. Alarcon also acknowledged that the design parameters identified by Dr. Dean were known to skilled artisans, as noted earlier. *See* Hr'g Tr. (Alarcon) at 1004:3-16. As discussed in Sections IV(A)(2), (3), *supra*, the stated purpose of Kim is to enable mixing and inhaling of vaporized liquid and air in a manner that resembles a cigarette, which has no such obstructed channels. *See* Kim at [0004]. This goal would have motivated a person skilled in the art to allow airflow through the heating coil and central channel. *See id.* at [0014], [0015], [0019].

The Commission further finds that Reynolds seeks to impose too strict a standard when it asserts that Kim does not teach that it was "desirable, necessary, or even contemplated" to allow airflow through the heating coil. C.Resp. at 17. Obviousness is not limited to what was "desirable, necessary, or even contemplated" in a single reference, but must also consider what a skilled artisan would have found obvious from that reference in the context of the prior art, the problem to be solved, known elements and predictable results, and logic, judgment, and common sense. *See KSR*, 550 U.S. at 415-16; *Intercontinental Great Brands*, 869 F.3d at 1348. In this case, forming a heating coil and channel wide enough to permit airflow in claim 12, like using a wicking material to store and transport the liquid in an electric cigarette in claim 1, is obvious because it represents a combination of familiar elements that yields predictable results, with no change in their respective functions. *See KSR*, 550 U.S. at 415-16.

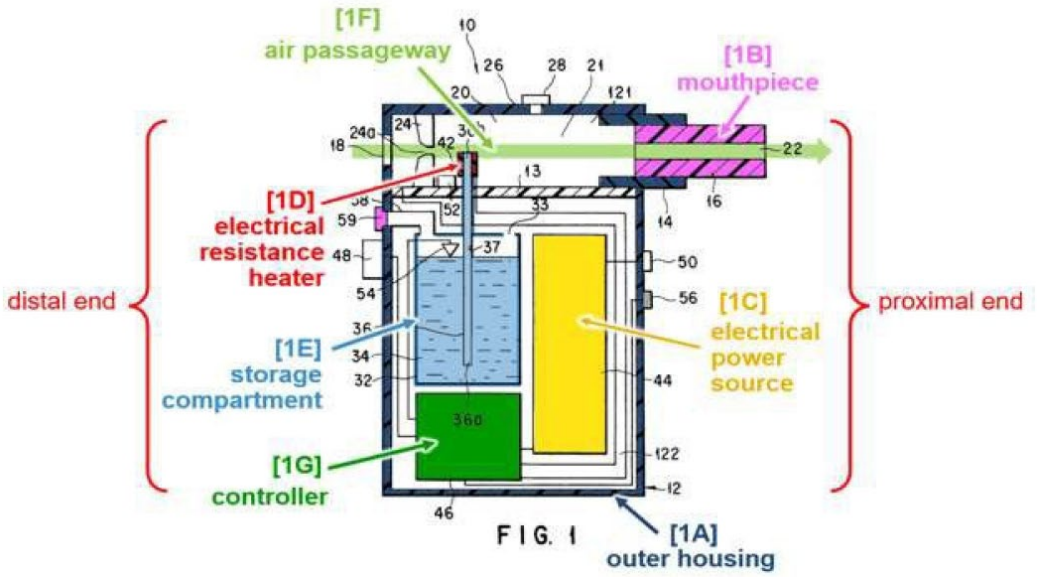
For the foregoing reasons, the Commission finds that claim 12, like claims 1 and 4, is invalid as obvious over Kim in combination with Pienemann. Accordingly, the Commission finds no violation of section 337.

B. Takeuchi Does Not Anticipate Claims 4 or 12

The Commission also determined to review the FID's finding that claims 4 and 12 are not anticipated by the prior art Takeuchi reference. *See* FID at 135-44 (claim 4), 146-52 (claim 12). A patent claim is invalid as anticipated when a single prior art reference discloses, expressly or

inherently, each and every limitation of that claim. 35 U.S.C. § 102 (pre-AIA);[13] *Sigray*, 137 F.4th at 1376. A limitation is inherently disclosed in a prior art reference if that reference necessarily includes or discloses the unstated limitation, regardless of whether a person skilled in the art would have recognized the presence of that limitation. *Id.* Upon review, the Commission has determined to adopt the FID's findings, as modified to include the supplemental findings below that there is no *de minimis* anticipation in this case. *See* 19 C.F.R. § 210.45(c).

The FID found, and the Commission agrees, that Takeuchi discloses all of the structural limitations of claim 1, which are identified in the annotated version of Takeuchi, Fig. 1, below:

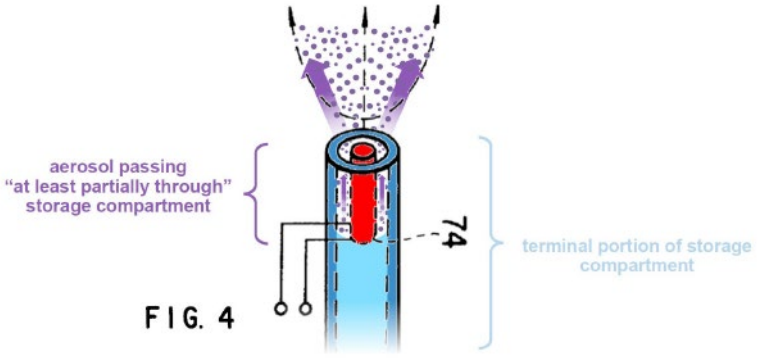


R.Pet. at 43-44 (reproducing RCX-0102.18 (annotating Takeuchi, Fig. 1)).

Takeuchi discloses two embodiments of the heater that are relevant to the validity of claims 4 and 12. In the first embodiment, *supra*, the heater (in red) has a doughnut-shaped

[13] Section 102 (pre-AIA) states that a patent is invalid as anticipated if: "(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant; (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for the patent in the United States[.]" 35 U.S.C. § 102 (pre-AIA).

(annular) design that surrounds the upper end of the vertical storage tube (in light blue), which is part of the liquid "storage compartment" (limitation 1[e]). In the second embodiment, below, the heater is positioned inside the storage tube to vaporize and expel the liquid (purple dots):

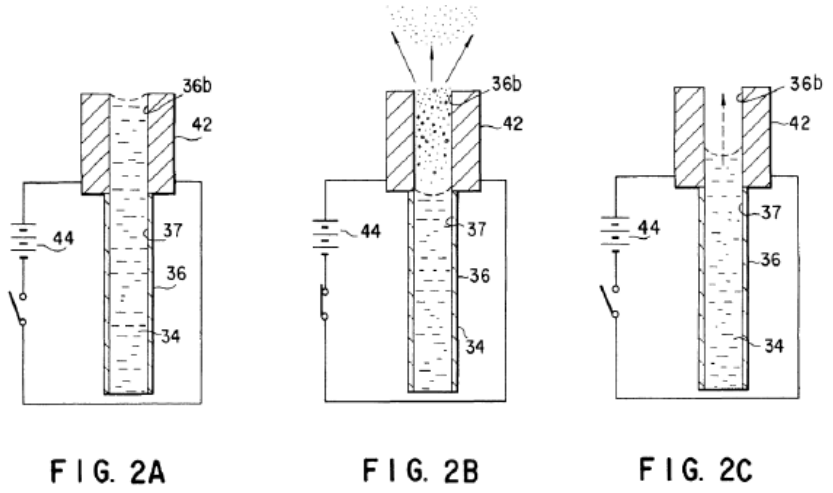


FID at 136 (reproducing RDX-0202.43 (annotating Kim, Fig. 4)).

Claim 4 depends on claim 1 and adds the following limitation: "wherein the *aerosol that is produced* passes at least partially through the storage compartment before exiting through the mouthpiece." '202 patent at 33:25-28 (emphasis added) (discussed in FID at 139, 144, 190). The FID, focusing on the second embodiment above, found that Respondents failed to prove that Takeuchi discloses this added limitation, and thus failed to prove that Takeuchi anticipates claim 4. FID at 135-44. The FID's conclusion rests primarily on its finding that Respondents' expert, Dr. Dean, erroneously interpreted "the aerosol that is produced" in claim 4 to refer to only the vaporized liquid (the purple dots, *supra*), and not the mixture of vaporized liquid and outside air, as set forth in limitation 1[e] of the '202 patent (*i.e.*, "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"). *See id.* at 135-44. The Commission adopts the FID's findings on claim 4.

The Commission notes, however, that the first embodiment, *supra*, is relevant to both claims 4 and 12. While claim 4 recites "the aerosol that is produced passes at least partially through the storage compartment," claim 12 requires airflow through the heating element, as

follows: "wherein the electrical resistance heater is configured *to allow airflow therethrough*." '202 patent at 33:53-55 (emphasis added). Referring back to the first (annular) heater embodiment discussed above, Respondents argue that that configuration has three phases. First, when the user is not inhaling on the device, the heater **42** is off, and the liquid rises to the top **36a** of storage tube **36**. FID at 146-47. This rest phase is depicted in Figure 2A, below:

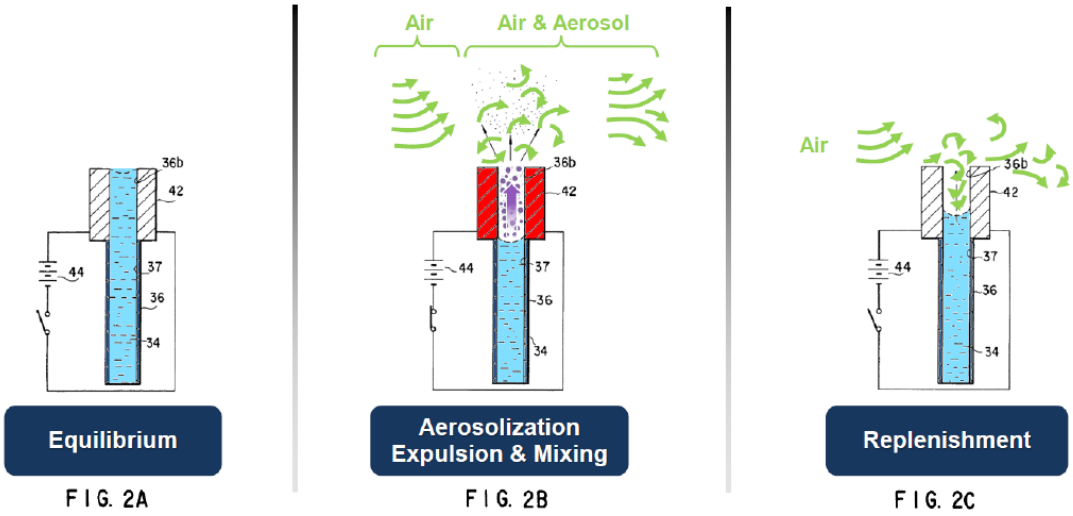


FID at 132, 147 (reproducing Takeuchi, Figs. 2A-2C).

When the user inhales on the device, the heater is activated and vaporizes the liquid at the top **36a** of the tube **36**, causing the vaporized liquid to be expelled from the tube, which is depicted with the arrows at the top of Figure 2B, above. *Id.* at 132, 147 (citing Takeuchi at 7:57-63). When the user stops drawing on the device, the heater is deactivated, and the remaining liquid (which has not been vaporized) temporarily leaves a void at the top of storage tube (inside the heating element), as shown in Figure 2C, above. *Id.* The void is quickly filled from the bottom by a new supply of liquid **34**, which migrates via capillary action up the tube **36**, represented by the upward arrow in Fig. 2C. *Id.* (citing Takeuchi at 7:64-8:1, Fig. 2C).

Respondents argued that during this replenishment phase, outside air will be drawn into the storage tube, through the heater annulus, into the void, until that void is refilled by new

liquid, pursuant to laws of fluid mechanics and microfluidics. *Id.* at 148. Respondents depict this turbulent air motion by the green arrows in the annotated versions of Figs. 2A-2C, below:



F I G. 2A F I G. 2B F I G. 2C

FID at 148 (reproducing RDX-0202.50 (annotating Takeuchi, Figs. 2A-2C)). This outside air could mix with any vaporized liquid remaining in the tube, raising the hypothetical possibility that this admission of outside air might satisfy not only claim 12 (heater is configured "to allow airflow therethrough") but also claim 4 ("the aerosol that is produced passes at least partially through the storage compartment" before exiting). *See* '202 patent at 33:25-28, 33:53-55.

The FID, however, found that Dr. Dean did not perform any calculations or modeling to demonstrate that the turbulent airflow he described would "necessarily" be present in Kim. FID at 150-51. Accordingly, the FID concluded that Respondents failed to present clear and convincing evidence that Takeuchi inherently or necessarily operates in the manner described by Dr. Dean, and thus failed to show that Takeuchi anticipates claim 12. *Id.* at 143, 150-52, 190. The Commission agrees with and adopts the FID's analysis thus far.

The Commission supplements the FID as follows. Dr. Dean acknowledged that any alleged mixing of outside air and vaporized liquid would last only a few "milliseconds," until new liquid can flow up the tube and fill the void left by the previously vaporized liquid, as

shown in Fig. 2C, *supra*. *See* Hr'g Tr. (Dean) at 790:21-794:7, 858:14-860:2. Takeuchi itself teaches that "the inner diameter of the capillary tube **36** is set to within a range of 0.01 mm and 3 mm, more preferably a range of 0.05 mm to 1 mm, and particularly preferably 0.1 mm and 0.8 mm." Takeuchi at 5:53-57. Takeuchi's figures provide no scales, marks, figures, or other information from which one might demonstrate that the fluid level actually dips before it can be replenished by capillary action, or by what amount, if any. *See Nystrom v. TREX Co.*, 424 F.3d 1136, 1149 (Fed. Cir. 2005) ("arguments based on drawings not explicitly drawn to scale in issues patents are unavailing"). Dr. Dean, then, is alleging no more than that some unspecified, unverified trace amounts of the vaporized liquid-outside air mixture might pass through the storage compartment (claim 4) or that some unspecified, unverified trace amounts of air might flow through the heating element (claim 12), but without proving that even those minute amounts ever exist, as the FID properly found. *See* FID at 135-44, 150-52.

The Commission recognizes that even trace amounts of a substance that is the necessary result of a prior art product or process may suffice in some circumstances to anticipate a later patent on that substance. *See, e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.,* 403 F.3d 1331, 1344-46 (Fed. Cir. 2005) (cited favorably in *Allergan, Inc. v. Apotex Inc.*, 754 F.3d 952, 961 (Fed. Cir. 2014) ("inherent anticipation can be found based on a trace amount," provided the product is the "natural result flowing from the operation as taught in the prior art")). In this case, in contrast, there is no evidence that even trace amounts of outside air would actually enter the alleged void during the replenishment phase (claim 12) or mix with any vaporized liquid remaining within the heating element (claim 4) before more liquid can refill that void by means of capillary action, as the FID found. *See* FID at 135-44, 150-52. Anticipation requires more than "the presence of an unrecognized *de minimis* quantity of claimed substance in the prior art,"

and "more than a mere probabilistic inherency." *See Crown Packaging Technology, Inc. v. Ball Metal Beverage Container Corp.*, 635 F.3d 1373, 1383 (Fed. Cir. 2011) (citing *In re Seaborg*, 339 F.2d 996, 998-99 (C.C.P.A. 1964) (finding no anticipation because "the claimed product [americium-241], if it was produced in the Fermi process [a graphite-moderated nuclear reactor], was produced in such minuscule amounts and under such conditions that its presence was undetectable")). Because the alleged entry of outside air into the upper portion of the storage tube and its alleged mixing with vaporized liquid are entirely hypothetical, without any modeling or calculations to prove their existence, the Commission affirms the FID's finding that Respondents failed to prove by clear and convincing evidence that Takeuchi discloses the limitations added by either claim 4 or claim 12.

For the foregoing reasons, as well as those expressed in the FID, the Commission affirms the FID's finding that Takeuchi does not anticipate either claim 4 or claim 12 of the '202 patent.

C. Domestic Industry

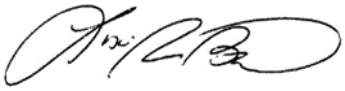
The Commission also determined to review the FID's determination that Reynolds satisfied the domestic industry ("DI") requirement. The FID found that Reynolds's DI products practice one or more of claims 1, 2, 4, 5, 7, 9, and/or 14-16 of the '202 patent. FID at 190. Respondents did not challenge the validity of DI-only claims 2, 5, 7, 14 and 16. *See id.* Thus, Reynolds practices at least five valid claims of the '202 patent, regardless of whether claims 1, 4, 9, 12, and 15 are invalid. *See id.* The Commission adopts the FID's finding that Reynolds satisfies the technical prong of the domestic industry requirement.

The Commission takes no position on whether Reynolds satisfied the economic prong of the domestic industry requirement because the Commission has determined there is no violation. *See Beloit*, 742 F.2d at 1423; 19 C.F.R. § 210.45(c).

V. CONCLUSION

The Commission has considered all of the other arguments and does not find them persuasive. Therefore, for the reasons set forth herein, the Commission concludes that Reynolds has not established that Respondents violated section 337 by way of infringing the '202 patent because all of the claims asserted for infringement purposes (including claims 4 and 12) are invalid. The Commission takes no position on whether Reynolds satisfied the economic prong of the domestic industry requirement. The Commission adopts the remaining findings in the FID, as modified to supplement its finding that Takeuchi does not anticipate either claim 4 or claim 12, as explained above. This investigation is hereby terminated with a finding of no violation of section 337.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: March 10, 2026

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the parties listed have entered an appearance in the above captioned investigation, and a copy of the PUBLIC CERTIFICATE OF SERVICE was served upon the following parties via first class mail and air mail where necessary.

Document	Security	Document Type	Official Rec'd	Title
874979	Public	Opinion, Commission	03/10/2026 01:42 PM	Commission Opinion

Service Date: March 11, 2026

/s

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EXHIBIT C

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN DISPOSABLE VAPORIZER DEVICES**	**Investigation No. 337-TA-1410**

NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART THE FINAL INITIAL DETERMINATION AND TO REQUEST WRITTEN SUBMISSIONS ON THE ISSUES UNDER REVIEW AND REMEDY, BOND, AND THE PUBLIC INTEREST

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the presiding administrative law judge's ("ALJ") final initial determination ("FID") and to solicit briefing on the issues under review, as well as remedy, bonding, and the public interest.

FOR FURTHER INFORMATION CONTACT: Carl Bretscher, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, D.C. 20436, telephone 202-205-2382. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 22, 2024, based on a complaint filed on behalf of RAI Strategic Holdings, Inc.; R.J. Reynolds Vapor Company; R.J. Reynolds Tobacco Company; and RAI Services Company (collectively, "Reynolds" or "Complainant"), all of Winston-Salem, North Carolina. 89 FR 59,158-60 (Jul. 22, 2024). The complaint, as supplemented, alleges that the respondents violated section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, by importing into the United States, selling for importation, or selling in the United States after importation certain disposable vaporizer devices that infringe one or more of the asserted claims of U.S. Patent No. 11,925,202 ("the 202 patent"). *Id.* at 59,159. The complaint further alleges that a domestic industry exists in the United States.

The Commission's notice of investigation names thirty-five (35) respondents, of which eighteen (18) respondents participated in this investigation. They are Breeze Smoke, LLC of West Bloomfield, Michigan; Dongguan (Shenzhen) Shikai Technology Co., Ltd. of Shenzhen, China; Guangdong Qisitech Co., Ltd. of Dongguan, China; Fewo Intelligent Manufacturing Ltd. of Dongguan,City, China; Guangdong Cellular Workshop Electronics Technology Co., Ltd. of Dongguan,City, China; Zhuhai Qisitech Co., Ltd. of Zhuhai, China; Shenzhen Han Technology

Co., Ltd. of Shenzhen, China; Shenzhen IVPS Technology Co., Ltd. of Shenzhen, China; Maduro Distributors d/b/a The Loon of Minneapolis, Minnesota; Shenzhen Yanyang Technology Co., Ltd. of Shenzhen, China; Pastel Cartel, LLC of Austin, Texas; American Vape Company, LLC of Pflugerville, Texas; Affiliated Imports, LLC of Austin, Texas; Shenzhen Kangvape Technology Co., Ltd. of Shenzhen, China; Shenzhen Pingray Technology Co., Ltd. of Shenzhen, China; SV3, LLC d/b/a Mi-One Brands of Phoenix, Arizona; Price Point Distributors Inc. d/b/a Price Point NY of Farmingdale, New York; and TheSy, LLC d/b/a Element Vape of Alhambra, California (collectively, "Respondents"). *Id.* at 59, 159-160. The Office of Unfair Import Investigations ("OUII") is also named as a party. *Id.* at 59, 160.

Fifteen (15) respondents were subsequently found in default: Vapeonly Technology Co. Ltd. of Hong Kong; iMiracle (Shenzhen) Technology Co., Ltd. of Shenzhen, China; Nevera (HK) Ltd. of Hong Kong; Wonder Ladies Ltd. of British Virgin Islands; Sailing South Ltd. of British Virgin Islands; Marea Morada Ltd. of British Virgin Islands; Social Brands, LLC of Dallas, Texas; Palma Terra Ltd. of British Virgin Islands; Heaven Gifts International Ltd. of Hong Kong; Shenzhen LC Technology Co., Ltd. of Shenzhen, China; LCF Labs, Inc. of Ontario, California; Flumgio Technology Ltd. of Hong Kong; Flawless Vape Shop Inc. of Anaheim, California; Flawless Vape Wholesale & Distribution Inc. of Anaheim, California; and VICA Trading Inc. d/b/a Vapesourcing of Tustin, California (collectively, "Defaulting Respondents"). *See* Order No. 17 (Sept. 16, 2024), *unreviewed by* Comm'n Notice (Oct. 8, 2024).

Two (2) respondents – Kimsun Technology (HuiZhou) Co., Ltd. of Shenzhen, China; and Bidi Vapor, LLC of Orlando, Florida – were terminated from the investigation based on consent orders. Order No. 10 (Aug. 28, 2024), *unreviewed by* Comm'n Notice (Sept. 23, 2024); Order No. 26 (Nov. 5, 2024), *unreviewed by* Comm'n Notice (Dec. 5, 2024).

On June 11, 2024, the same date it filed its complaint, Reynolds filed a motion for a temporary exclusion order ("TEO"). Respondents filed a joint memorandum in opposition to Reynolds's motion for a TEO on August 12, 2024. The presiding ALJ held an evidentiary hearing on September 26 and 27, and October 8, 2024. On November 19, 2024, the ALJ issued an ID denying Reynolds's motion for a TEO, which the Commission determined not to review. Order No. 28 (Nov. 19. 2024), *unreviewed by* Comm'n Notice (Dec. 18, 2024).

On May 1, 2025, the Commission partially terminated the investigation with respect to claims 3, 8, 10, 13, 17-27, and 29-30 of the '202 patent due to voluntary withdrawal of the claims. Order No. 44 (Apr. 7, 2025), *unreviewed by* Comm'n Notice (May 1, 2025).

The presiding ALJ held an evidentiary hearing from April 7-11, 2025, with an additional day of testimony on domestic industry on June 11, 2025. FID at 4. By that time, Reynolds was asserting claims 1, 4, 9, 11-12, and 15 of the '202 patent for purposes of infringement, and claims 1, 2, 4-5, 7, 9, and 14-16 for domestic industry. *Id.* at 5.

On August 29, 2025, the ALJ issued the present FID, which finds that Respondents violated section 337 by way of infringing claims 4 and 12 of the '202 patent, and that neither claim is invalid as anticipated or obvious. *Id.* at 144, 152, 189-90. The FID finds that

Respondents also infringed claims 1, 11, and 15, but those claims are invalid as anticipated. *Id*. The FID also finds that Reynolds satisfied both the technical and economic prongs of the domestic industry requirement. *Id*. at 98, 117, 121, 182.

On September 12, 2025, the presiding ALJ issued a Recommended Determination on Remedy, Bonding, and Public Interest ("RD"). The RD recommends that, in the event a violation is found, the Commission should issue a general exclusion order ("GEO") as to claims 4 and 12 of the '202 patent. RD at 3, 26. Should the Commission determine not to issue a GEO, the RD recommends that the Commission issue a limited exclusion order covering infringing articles imported by or on behalf of each respondent found to have violated section 337. *Id*. at 30. The RD also recommends that the Commission issue cease and desist orders against certain respondents and set a bond of 136% of the entered value of infringing articles imported during the period of Presidential review. *Id*. at 3, 40, 44. Finally, the RD recommends finding that the public interest factors do not preclude issuance of a remedy. *Id*.

On September 15, 2025, the Commission issued a notice requesting submissions on public interest issues raised by the recommended relief, should the Commission find a violation. 90 Fed. Reg. 45056 (Sept. 18, 2025). The Commission issued a second notice on November 18, 2025, and extended the deadline for responses because the original deadline expired during the shutdown of the Federal Government. 90 FR 52700 (Nov. 21, 2025). On December 1, 2025, NJOY, LLC, Altria Group Distribution Company, and Altria Client Service LLC (collectively, "NJOY") filed a public interest statement, stating they were not named as a respondent and their products have been recognized to be non-infringing, so any GEO that may issue should include a carve-out for NJOY's products.

On September 15, 2025, Respondents filed a petition for review of the FID's findings, including the ALJ's construction of "smoking article," its findings that Respondents infringed claim 4 and 12, literally and by equivalence, and its findings that claims 4 and 12 were not anticipated or obvious over the prior art.

On September 23, 2025, Reynolds and OUII filed their respective responses to Respondents' petition for review. Neither Reynolds nor OUII filed a petition for review of their own. Thus, any objections to the FID's findings that claims 1, 9, 11, and 15 of the '202 patent are invalid have been waived, per Commission Rule 210.43(b)(2), 19 CFR 210.43(b)(2). As a result, only claims 4 and 12 (and claim 1, on which they depend) remain at issue.

Upon review of the FID, the petition for review and responses thereto, and the evidence of record, the Commission has determined to review the FID in part, specifically its findings that claims 4 and 12 are not invalid as anticipated or obvious over the asserted prior art and its findings that the domestic industry requirement has been satisfied. The Commission has determined not to review, and thereby adopts, the FID's findings on claim construction, including "smoking article" and "the aerosol that is produced" (claim 4). The Commission notes that the parties have waived broader constructions that do not limit the invention to devices that use tobacco or tobacco components.

The parties are asked to provide additional briefing on the following issues under review:

(1) Explain whether, at the time of the invention, it would have been obvious to a person skilled in the art to use a porous material capable of wicking liquid toward the heater element in view of Kim (U.S. Patent App. Pub. No. 2006/0016453) with Pienemann (International Patent Publication WO 00/28843). Explain whether it would have been obvious to use a porous chip that permits "the aerosol that is produced" (using the FID's interpretation of that term) to pass at least partially though that chip, as recited in claim 4 of the '202 patent.

(2) Explain whether, at the time of the invention, it would have been obvious to a person skilled in the art to design a central channel with a heater coil or other heater element that permits airflow therethrough, as recited in claim 12 of the '202 patent, in view of Kim with Pienemann.

The parties are requested to brief only the discrete issues identified above, with reference and citations to the applicable law, the evidentiary record, and the parties' previous briefings. The parties are not to brief any other issues on review, which have already been adequately presented in the parties' previous filings.

In connection with the final disposition of this investigation, the statute authorizes issuance of: (1) a limited or general exclusion order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) cease-and-desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (December 1994).

The statute requires the Commission to consider the effects of any remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and/or cease-and-desist order would have on: (1) the public health and welfare; (2) competitive conditions in the U.S. economy; (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation; and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission's action. *See* Presidential Memorandum of July 21, 2005. 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: Parties to this investigation are requested to file written submissions on the issues identified above in this notice. In addition, the parties, interested government agencies, and any other interested parties are requested to file written submissions on the issues of remedy, the public interest, and bonding. Such initial submissions should include views on the recommended determination by the ALJ on remedy and bonding. Explain whether your views on public interest or bonding would differ if the redesigned products (or redesigned components of a product) put forward by Respondents were excluded from any remedy.

In its initial submission, Complainant is requested to identify the remedy sought and to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to provide the HTSUS subheadings under which the accused products are imported. Complainant is further requested to supply the names of known importers of the Respondents' products at issue in this investigation. Complainant is also requested to identify and explain, from the record, articles that it contends are "components of" the subject products, and thus potentially covered by the proposed remedial orders, if imported separately from the subject products. *See* 85 FR at 31211. Failure to provide this information may result in waiver of any remedy directed to "components of" the subject products, in the event any violation may be found.

The parties' written submissions and proposed remedial orders must be filed no later than the close of business on **January 23, 2026**. Reply submissions must be filed no later than the close of business on **January 30, 2026**. Opening submissions are limited to 40 pages. Reply submissions are limited to 30 pages. All submission from third parties and/or interested government agencies are limited to 10 pages. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (Mar. 19, 2020). Submissions should refer to the investigation number ("Inv. No. 337-TA-1410") in a prominent place on the cover page and/or first page. (*See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate

nondisclosure agreements. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The Commission vote for this determination took place on January 9, 2026.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: January 9, 2026