

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN VAPORIZER DEVICES,
CARTRIDGES USED THEREWITH, AND
COMPONENTS THEREOF**

Investigation No. 337-TA-1368

**[REVISED] NOTICE OF COMMISSION DETERMINATION TO REVIEW IN PART A
FINAL INITIAL DETERMINATION FINDING A VIOLATION OF SECTION 337;
REQUEST FOR WRITTEN SUBMISSIONS ON THE ISSUES UNDER REVIEW AND
ON REMEDY, THE PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission has determined to review in part a final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) in the above-captioned investigation finding a violation of section 337. The Commission requests written submissions from the parties on the issues under review and submissions from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding under the schedule set forth below.

FOR FURTHER INFORMATION CONTACT: Richard P. Hadorn, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3179. 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, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on August 7, 2023, based on a complaint filed by JUUL Labs, Inc. of Washington, D.C. and VMR Products LLC of San Francisco, California (together, “JLI”). 88 FR 52207 (Aug. 7, 2023). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), based on the importation into the United States, the sale for importation, and/or the sale within the United States after importation of certain vaporizer devices, cartridges used therewith, and components thereof by reason of infringement of certain claims of U.S. Patent Nos. RE49,114 (“the ’114 patent”), 10,130,123 (“the ’123 patent”), 10,709,173 (“the ’173 patent”), 11,134,722 (“the ’722 patent”), and 11,606,981 (“the ’981 patent”). *Id.* The complaint further alleges that a domestic industry (“DI”) exists. *Id.* The notice of investigation names five respondents: (1) NJOY, LLC of Phoenix, Arizona; (2) NJOY Holdings, Inc. of Scottsdale, Arizona; (3) Altria Group, Inc. of Richmond, Virginia; (4)

Altria Group Distribution Company of Richmond, Virginia; and (5) Altria Client Services LLC of Richmond, Virginia (collectively, “NJOY”). *Id.* The Office of Unfair Import Investigations (“OUII”) is also named as a party. *Id.* The Commission also directed the ALJ to take evidence on and provide factual findings and a recommended determination concerning the public interest. *Id.*

On April 3, 2024, the Commission terminated the investigation as to the following asserted claims based on partial withdrawal of the complaint: (i) claims 1, 5-7, 29, 30, 36, 80, 89, and 93 of the ’114 patent; (ii) claims 16, 18, 29, and 31 of the ’123 patent; (iii) claims 3, 8, 14, and 17 of the ’722 patent; and (iv) claims 6, 9-11, 17, and 18 of the ’981 patent. Order No. 18 (Mar. 6, 2024), *unreviewed by Comm’n Notice* (Apr. 3, 2024).

On April 26, 2024, the Commission terminated the investigation as to the following asserted claims based on partial withdrawal of the complaint: (i) claims 43, 44, 76, 77, 81, and 86 (all remaining claims) of the ’114 patent, thus terminating the ’114 patent in its entirety; (ii) claim 14 of the ’123 patent; (iii) claims 2, 3, 6, 7, 15, 16, 18-25, 28, and 30 of the ’173 patent; (iv) claims 5, 7, 9-13, 16, and 18-21 of the ’722 patent; and (v) claims 2, 5, and 13-16 of the ’981 patent. Order No. 21 (Apr. 2, 2024), *unreviewed by Comm’n Notice* (Apr. 26, 2024).

On June 18, 2024, the Commission affirmed an initial determination granting summary determination that JLI has satisfied the economic prong of the DI requirement as to the remaining asserted patents, *i.e.*, the ’123, ’173, ’722, and ’981 patents. Order No. 22 (Apr. 3, 2024), *aff’d by Comm’n Notice* (June 20, 2024).

On August 23, 2024, the ALJ issued the final ID, which finds a violation of section 337 as to claims 27 and 32 of the ’123 patent, claims 1 and 4 of the ’173 patent, claims 1 and 15 of the ’722 patent, and claims 1 and 8 of the ’981 patent. The ID also includes the ALJ’s recommended determination (“RD”) on remedy, the public interest, and bonding. The RD recommends that, should the Commission determine that a violation of section 337 has occurred, the Commission should: (i) issue a limited exclusion order against NJOY’s infringing products; (ii) issue cease and desist orders against each of the NJOY respondents; and (iii) impose no bond (0 percent bond) for importations of infringing products during the period of Presidential review. The ALJ also found that the statutory public interest factors do not support denying or delaying the recommended relief set forth in the RD.

On September 6, 2024, NJOY filed a petition seeking review of certain findings in the ID, including (i) claim construction and infringement of the asserted claims of the ’722 and ’981 patents, (ii) claim construction, infringement, the technical and economic prongs of the DI requirement, and validity of the asserted claims of the ’123 patent, and (iii) claim construction, infringement, and the technical prong of the DI requirement of the asserted claims of the ’173 patent. That same day, JLI filed a contingent petition seeking review of certain of the ID’s findings concerning (i) claim construction, infringement, and validity of the ’722 and ’981 patents, (ii) the technical prong of the DI requirement and validity of the ’123 patent, and (iii) validity of the ’173 patent. On September 16, 2024, JLI and NJOY each filed a response opposing the other’s petition. That same day, OUII filed a response addressing both petitions.

On September 23, 2024, NJOY filed a motion for leave to file a reply in support of its petition for review, addressing certain positions taken by OUII in its response to NJOY's petition. On September 25 and 27, 2024, OUII and JLI, respectively, filed a response opposing NJOY's motion for leave.

On September 24, 2024, JLI and NJOY each filed a submission on the public interest pursuant to Commission Rule 210.50(a)(4) (19 CFR 210.50(a)(4)). The Commission did not receive any submissions on the public interest from members of the public or interested government agencies in response to the Commission's *Federal Register* notice. See 89 FR 70668-69 (Aug. 30, 2024).

Having reviewed the record of the investigation, including the final ID, the parties' submissions to the ALJ, the petitions and the responses thereto, and NJOY's motion for leave and the responses thereto, the Commission has determined to review the ID in part.

Specifically, the Commission has determined to review the ID's construction of the "pressure sensor" limitations (limitations 27[d] and 27[e]) recited in claim 27 of the '123 patent. The Commission has also determined to review the ID's findings that the NJOY ACE accused product, the asserted RevB and JAGWAR iterations of the JUUL DI system, and the asserted JUUL2 DI system literally practice limitations 27[d] and 27[e] of claim 27 of the '123 patent under the ID's construction of those limitations.

The Commission has further determined to review certain of the ID's findings regarding claim construction and satisfaction of the technical prong of the DI requirement with respect to the '173 patent. In particular, the Commission has determined to review the ID's construction of the claim terms "mouthpiece" and "disposed within" recited in the asserted claims 1 and 4 of the '173 patent. The Commission has further determined to review the ID's finding that the JUUL2 DI system practices claims 1 and 4 of the '173 patent.

In view of the parties' submissions and the issues raised with regard to satisfaction of the technical prong of the DI requirement, the Commission has further determined to reconsider its previous finding that JLI has satisfied the economic prong of the DI requirement with respect to the '123 patent and the '173 patent based on investments related to both the JUUL DI system and the JUUL2 DI system. 19 CFR 210.47, .48.

The Commission has determined not to review the remaining findings in the ID, including the ID's findings of a violation of section 337 as to the '722 and '981 patents. The Commission has further determined to deny NJOY's motion for leave to file a reply in support of its petition for review.

In connection with its review, the Commission requests responses to the following questions. The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record.

- (1) Please explain whether the final ID correctly finds that "JLI does not rely on the RevB iteration as a domestic industry product." ID at 123 (citing

Case Management Conf. Tr. at 8:16-24 (April 26, 2024) (EDIS Doc. ID 820002)). To the extent it is argued that the final ID errs in this finding and JLI asserted the RevB iteration of the JUUL system to satisfy the technical prong of the domestic industry requirement with respect to the '123 patent, please identify where in the record JLI timely preserved this contention so as to avoid a finding of waiver.

- (2) Did JLI explicitly or implicitly waive its right to rely on the RevB iteration of the JUUL system to satisfy the DI requirement with respect to the '123 patent?
- (3) Can OUII, as a party to the investigation, assert that the RevB iteration of the JUUL system satisfies the DI requirement with respect to the '123 patent where the complainant did not allege that this product satisfies that requirement? *See John Mezzalingua Assocs., Inc. v. ITC*, 660 F.3d 1322, 1331 (Fed. Cir. 2011); *but see Certain Liquid Transfer Devices with an Integral Vial Adapter*, Inv. No. 337-TA-1362, Comm'n Op. at 16-19 (July 26, 2024) (recognizing that OUII should have been allowed to raise an invalidity argument that was waived by respondents).
- (4) Do the asserted JAGWAR iteration of the JUUL DI system and the asserted JUUL2 DI system practice (literally and/or under the doctrine of equivalents) limitations 27[d] and 27[e] of claim 27 of the '123 patent under a construction of those limitations requiring at least one “pressure sensor” that has both “a first side . . . exposed to a sealed air flow path” and “a second side . . . exposed to a device air path open to ambient pressure.”
- (5) Assuming that only the JAGWAR iteration of the JUUL DI system and the JUUL2 DI system can be relied upon to satisfy the technical prong of the DI requirement, is there any need to further consider the allocation of investments related to the economic prong findings as to the '123 patent in Order 22? In responding to this question, please address the ALJ's finding in Order 26 that JLI “did not rely on its Rev. B JUUL System for economic domestic industry for the '123 patent” (Order 26 at 1) and the statement in NJOY's petition for review that it had not opposed the summary determination that JLI has satisfied the economic prong of the domestic industry requirement “based on the understanding that JUUL Jagwar and JUUL 2 were the only domestic industry products for the '123 Patent.” NJOY Pet. at 29.
- (6) Assuming that only the JAGWAR iteration of the JUUL DI system and the JUUL2 DI system can be relied upon to satisfy the technical prong of the DI requirement, does the record in this investigation support an allocation of JLI's investments to only one or both those DI products?

- (7) Please confirm that the investments asserted by JLI as to the “JUUL system” regarding the ’123 patent in Order 22 do not include investments relating to RevB. If RevB investments are included, what are the amounts specific only to JAGWAR and to JUUL2? Are these revised investments in JAGWAR and JUUL2 regarding the ’123 patent significant under section 337(a)(3) (A) and (B)?
- (8) Please comment on whether remand is necessary to determine whether the domestic industry requirement is satisfied as to the ’123 patent.

The parties are invited to brief only the discrete issues requested above. The parties are not to brief other issues on review, which are adequately presented in the parties’ existing filings.

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia*, (1) an 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 (Dec. 1994).

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and cease and desist orders 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 determination. 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: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the

recommended determination by the ALJ on remedy, the public interest, and bonding.

In its initial written submission, JLI is also requested to identify the remedy sought and to submit proposed remedial orders for the Commission's consideration. JLI is further requested to state the dates that the asserted patents expire, to provide the HTSUS subheadings under which the accused products are imported, and to supply the identification information for all known importers of the products at issue in this investigation. In its written submission, OUII is also requested to submit proposed remedial orders for the Commission's consideration.

The initial written submissions and proposed remedial orders from the parties must be filed no later than the close of business on **November 7, 2024**. Reply submissions from the parties must be filed no later than the close of business on **November 14, 2024**. Initial written submissions from interested government agencies, and any other interested parties must be filed no later than the close of business on **November 20, 2024**. Reply submissions from the interested government agencies, and any other interested parties must be filed no later than the close of business on **November 27, 2024**. Opening submissions are limited to 60 pages. Reply submissions are limited to 40 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-1368) in a prominent place on the cover page and/or the 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. Any non-party wishing to submit comments containing confidential information must serve those comments on the parties to the investigation pursuant to the applicable Administrative Protective Order. A redacted non-confidential version of the document must also be filed with the Commission and served on any parties to the investigation within two business days of any confidential filing. 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 nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on October 24, 2024.

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.

A handwritten signature in black ink, appearing to read "Lisa R. Barton", written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: November 6, 2024