

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	87951444
LAW OFFICE ASSIGNED	LAW OFFICE 115
MARK SECTION	
MARK	https://tmng-al.uspto.gov/resting2/api/img/87951444/large
LITERAL ELEMENT	FAT PANDA
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font style, size or color.
ARGUMENT(S)	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
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DESCRIPTION OF EVIDENCE FILE	Request for Reconsideration (1 file) and Ex. 1 - 35 - exhibits (35 files) in support of request for reconsideration
ATTORNEY SECTION (current)	
NAME	Samantha M. Ferguson
ATTORNEY BAR MEMBERSHIP NUMBER	NOT SPECIFIED
YEAR OF ADMISSION	NOT SPECIFIED
U.S. STATE/ COMMONWEALTH/ TERRITORY	NOT SPECIFIED
FIRM NAME	LEGAL SERVICES INTERNATIONAL, LLC
STREET	1688 152ND ST STE 404
CITY	SURREY, B.C.
POSTAL CODE	V4A4N2
COUNTRY	CA
PHONE	+1-8775743388 x1
EMAIL	samantha@legalservicesinternational.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
ATTORNEY SECTION (proposed)	
NAME	Samantha M. Ferguson
ATTORNEY BAR MEMBERSHIP NUMBER	XXX
YEAR OF ADMISSION	XXXX
U.S. STATE/ COMMONWEALTH/ TERRITORY	XX
FIRM NAME	LEGAL SERVICES INTERNATIONAL, LLC
STREET	1688 152ND ST STE 404
CITY	SURREY, B.C.
POSTAL CODE	V4A4N2
COUNTRY	Canada
PHONE	

PHONE	+1-8775743388 x1
EMAIL	samantha@legalservicesinternational.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
DOCKET/REFERENCE NUMBER	FP102019
CORRESPONDENCE SECTION (current)	
NAME	SAMANTHA M. FERGUSON
FIRM NAME	LEGAL SERVICES INTERNATIONAL, LLC
STREET	1688 152ND ST STE 404
CITY	SURREY, B.C.
POSTAL CODE	V4A4N2
COUNTRY	CA
PHONE	+1-8775743388 x1
EMAIL	samantha@legalservicesinternational.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
CORRESPONDENCE SECTION (proposed)	
NAME	Samantha M. Ferguson
FIRM NAME	LEGAL SERVICES INTERNATIONAL, LLC
STREET	1688 152ND ST STE 404
CITY	SURREY, B.C.
POSTAL CODE	V4A4N2
COUNTRY	Canada
PHONE	+1-8775743388 x1
EMAIL	samantha@legalservicesinternational.com; samantha@legalservicesinternational.ca
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
DOCKET/REFERENCE NUMBER	FP102019
SIGNATURE SECTION	
RESPONSE SIGNATURE	/Samantha M. Ferguson/
SIGNATORY'S NAME	Samantha M. Ferguson
SIGNATORY'S POSITION	Attorney of Record
SIGNATORY'S PHONE NUMBER	832-608-7475
DATE SIGNED	10/07/2019
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	NO
FILING INFORMATION SECTION	
SUBMIT DATE	Mon Oct 07 15:51:59 EDT 2019
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PTO Form 1960 (Rev 10/2011)

OMB No. 0651-0050 (Exp 09/20/2020)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **87951444** FAT PANDA(Standard Characters, see <https://tmng-al.uspto.gov/resting2/api/img/87951444/large>) has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

EVIDENCE

Evidence in the nature of Request for Reconsideration (1 file) and Ex. 1 - 35 - exhibits (35 files) in support of request for reconsideration has been attached.

Original PDF file:

[evi_1-104200132239-20191007150807391773_.Request_for_Reconsideration_-_Final.pdf](#)

Converted PDF file(s) (16 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

[Evidence-11](#)

[Evidence-12](#)

[Evidence-13](#)

[Evidence-14](#)

[Evidence-15](#)

[Evidence-16](#)

Original PDF file:

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Converted PDF file(s) (10 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

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Converted PDF file(s) (1 page)

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Converted PDF file(s) (2 pages)

[Evidence-1](#)

[Evidence-2](#)

Original PDF file:

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[Evidence-1](#)

[Evidence-2](#)

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[Evidence-1](#)

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[evi_104200132239-20191007150807391773_.Exhibit_16_-_Google_search.pdf](#)

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Original PDF file:

[evi_104200132239-20191007150807391773_.Exhibit_17_-_Rolling_paper_with_marijuana.pdf](#)

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Original PDF file:

[evi_104200132239-20191007150807391773_.Exhibit_18_-_Registrant_s_Pre-rolls.pdf](#)

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[evi_104200132239-20191007150807391773_.Exhibit_19_-_Registrant_s_Pre-rolls_2.pdf](#)

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[evi_104200132239-20191007150807391773_.Exhibit_20_-_Registrant_s_Pre-roll_w-Mark.pdf](#)

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[evi_104200132239-20191007150807391773_.Exhibit_21_-_YouTube_customer.pdf](#)

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[evi_104200132239-20191007150807391773_.Exhibit_22_-_T-shirts.pdf](#)

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[evi_104200132239-20191007150807391773_.Exhibit_23_-_First_Twitter_post.pdf](#)

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[evi_104200132239-20191007150807391773_.Exhibit_24_-_Corporate_vision_Twitter.pdf](#)

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Original PDF file:

[evi_104200132239-20191007150807391773_.Exhibit_25_-_Corporate_vision_Twitter_2_.pdf](#)

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Original PDF file:

[evi_104200132239-20191007150807391773_.Exhibit_26_-_Smoking_joint.pdf](#)

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Original PDF file:

[evi_104200132239-20191007150807391773_.Exhibit_27_-_Joint.pdf](#)

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Original PDF file:

[evi_104200132239-20191007150807391773_.Exhibit_28_-_Corporate_vision_Instagram.pdf](#)

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Original PDF file:

[evi_104200132239-20191007150807391773_.Exhibit_29_-_Corporate_vision_Instagram_2_.pdf](#)

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Original PDF file:

[evi_104200132239-20191007150807391773_.Exhibit_30_-_Co-founders_interview.pdf](#)

Converted PDF file(s) (11 pages)

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Original PDF file:

[evi_104200132239-20191007150807391773 . Exhibit 31 - Registrant s Response to OA.pdf](#)

Converted PDF file(s) (4 pages)

[Evidence-1](#)
[Evidence-2](#)
[Evidence-3](#)
[Evidence-4](#)

Original PDF file:

[evi_104200132239-20191007150807391773 . Exhibit 32 - Registrant s Response to OA 2 .pdf](#)

Converted PDF file(s) (4 pages)

[Evidence-1](#)
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[Evidence-4](#)

Original PDF file:

[evi_104200132239-20191007150807391773 . Exhibit 33 - Expert Report of Riccardo Polosa MD.pdf](#)

Converted PDF file(s) (34 pages)

[Evidence-1](#)
[Evidence-2](#)
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[Evidence-34](#)

Original PDF file:

[evi_104200132239-20191007150807391773 . Exhibit 34 - Applicant Las Vegas Trade Show.pdf](#)

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Original PDF file:

[evi_104200132239-20191007150807391773 . Exhibit 35 - Applicant Shanghai Vape Expo.pdf](#)

Converted PDF file(s) (1 page)

[Evidence-1](#)

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Samantha M. Ferguson submitted the following statement: The attorney of record is an active member in good standing of the bar of the highest court of a U.S. state, the District of Columbia, or any U.S. Commonwealth or territory.

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SIGNATURE(S)

Request for Reconsideration Signature

Signature: /Samantha M. Ferguson/ Date: 10/07/2019

Signatory's Name: Samantha M. Ferguson

Signatory's Position: Attorney of Record

Signatory's Phone Number: 832-608-7475

The signatory has confirmed that he/she is a U.S.-licensed attorney who is an active member in good standing of the bar of the highest court of a U.S. state (including the District of Columbia and any U.S. Commonwealth or territory); and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S.-licensed attorney not currently associated with his/her company/firm previously represented the owner/holder in this matter: the owner/holder has revoked their power of attorney by a signed revocation or substitute power of attorney with the USPTO; the USPTO has granted that attorney's withdrawal request; the owner/holder has filed a power of attorney appointing him/her in this matter; or the owner's/holder's appointed U.S.-licensed attorney has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is not filing a Notice of Appeal in conjunction with this Request for Reconsideration.

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Serial Number: 87951444

Internet Transmission Date: Mon Oct 07 15:51:59 EDT 2019

TEAS Stamp: USPTO/RFR-XXX.XXX.XXX.XXX-20191007155159

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827-N/A-N/A-20191007150807391773

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK EXAMINING OPERATION**

In re Application of:

6898743 Manitoba Ltd., Applicant

**U.S. App. Serial Number:
87951444**

Application Filed: June 6, 2018

**Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451**

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**Examining Attorney:
Curtis French/**

Trademark Law Office 115

REQUEST FOR RECONSIDERATION

This is in response to the Final Office Action issued on May 1, 2019, in connection with the above-referenced Application. The Examining Attorney has refused to grant registration on the grounds that the word mark, FAT PANDA, (“Applicant’s Mark”) owned by 6898743 Manitoba Ltd., (“Applicant”) based upon the likelihood of confusion with the stylized mark “PHAT PANDA” (“Registrant’s Mark”) in U.S. Registration No. 5084617 and owned by Phat Panda LLC (“Registrant”). Applicant respectfully requests that the Examining Attorney reconsider and withdraw the refusal for the following reasons.

I. SUMMARY OF HISTORICAL FACTS

Applicant’s trademark application was filed seeking to register Applicant’s Mark which is used by Applicant to identify its company’s brand, website, e-commerce store, product labels and packaging for Applicant’s flavored e-liquid products. The Examining Attorney issued an outgoing office action based upon a likelihood of confusion with Registrant’s stylized mark, U.S. Registration No. 5084617. Applicant submitted a response to the Examining Attorney’s office action stating evidence in support of registration that included distinction of the marks in (a) overall commercial impression; (b) dissimilarity of the nature of the parties’ goods (“Electronic cigarette liquid (e-liquid)” versus “Cigarette paper”); (c) connotation of the marks in relation to the named goods; and (d) difference in trade channels.

The Examining Attorney did not find Applicant's evidence to be persuasive and subsequently issued a final office action based upon a Section 2(d) refusal of Applicant's Mark due to a likelihood of confusion with Registrant's Mark.

II. SUMMARY OF ISSUES AND BASIS FOR RECONSIDERATION

Upon Applicant's in depth review of Registrant's Mark, business, and product, Applicant is of the belief that Registrant has no lawful use of "PHAT PANDA" for cigarette papers in commerce because Registrant's Mark is used for goods that are prohibited by the federal Controlled Substances Act ("CSA"), 21 U.S.C. § 801 et seq. Therefore, upon information and belief, Applicant believes Registrant's Mark is not entitled to protection and includes in this request for reconsideration evidence in support of resolving the issue of whether Registrant's Mark is entitled to protection. In addition and in light of Applicant's findings during review of Registrant's social media marketing showing use of Registrant's Mark on "pre-rolls", marijuana joints, and T-shirts with Registrant's Mark promoting the use of "Weed" and "Drugs", Applicant asserts, by way of the new enclosed exhibits, that the overall commercial impression, dissimilarity of the goods and difference in trade channels are such that there is no likelihood of confusion and this is compounded given that Applicant's Mark is not used for goods that are prohibited by the CSA while Registrant's Mark is goods that are prohibited by the CSA.

III. APPLICABLE LAW

A mark must have lawful use in commerce in order for federal trademark registration. *Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522 (Fed. Cir. 1987) (stating that "[a] valid application cannot be filed at all for registration of a mark without 'lawful use in commerce,'").

The CSA prohibits, among other things, the manufacturing, distributing, dispensing, or possessing controlled substances, including marijuana and marijuana-based preparations. 21 U.S.C. §§812, 841(a)(1), 844(a); see also 21 U.S.C. §802(16) (defining "[marijuana]").

In the seminal case, *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), the court listed thirteen principal factors to be considered when determining

whether there is a likelihood of confusion under Section 2(d). A likelihood of confusion is evaluated on a case-by-case basis and although the weight given to the relevant *du Pont* factors may vary, the following two factors are key considerations in any likelihood of confusion determination: (1) The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression; (2) The similarity or dissimilarity of and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; and (3) Additional factors, to the extent relevant, must be considered if there is pertinent evidence in the record, including, the similarity or dissimilarity of established, likely-to-continue trade channels must also be considered. *Id.* A single factor on its own may be dispositive. *Kellogg Company. v. Pack'em Enterprises, Inc.*, 951 F.2d 330 (Fed. Cir. 1991).

Evidence must be produced that demonstrates something in addition to either similar or identical marks. See *In re Coors Beers Brewing Company*, 343 F.3d 1340 (Fed. Cir. 2003), where there was no showing of “*something more*” sufficient to justify a relatedness between beer and restaurant services (emphasis added); quoting *Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 1236 (CCPA 1982) (establishing that “[t]o establish likelihood of confusion a party *must show something more* than that similar or even identical marks are used for food products and for restaurant services.”).

IV. RECONSIDERATION ARGUMENTS IN FAVOR OF REGISTRATION

Applicant has enclosed several exhibits along with arguments in support of Applicant's belief that Registrant has no lawful use of Registrant's Mark for cigarette papers in commerce because Registrant's Mark is affixed on goods that are prohibited under the CSA. The purpose of this is twofold: first, to establish that Registrant's Mark is affixed on goods that are prohibited under the CSA and second to establish the even more substantial disparity between Applicant's and Registrant's goods, trade channels, overall commercial impression and connotation such that a likelihood of confusion as to the source of the goods is unlikely given that Applicant's goods are lawfully permitted for sale and consumers who smoke marijuana would not associate Applicant's e-liquids with Registrant's cigarette papers, especially cigarette papers containing a controlled substance and vice versa.

(a) Establishing Registrant's Mark is Affixed on Goods Prohibited Under the CSA

Exhibit 1 contains the results from a historical domain search conducted by Applicant on the website domain that Registrant noted in its response to an office action dated February 5, 2016 (enclosed herein as Exhibit 32), in which Registrant's trademark attorney enquired as to whether Registrant's application should be refused due to the possibility that Registrant's goods were prohibited by the CSA. In its response to that office action, Registrant noted that Registrant advertises its cigarette papers on Registrant's website located at www.pandapapers.net and that Registrant was "not creating any association between its marijuana sales [on a separate website] and rolling paper sales." Registrant further stated that "[t]here is *no evidence*" of Registrant's intention "to sell rolling papers for use with marijuana." (emphasis added). Applicant hereby submits such evidence in Exhibit 1, reflecting that Registrant's website domain, www.pandapapers.net is no longer operable and that the website in question was last updated one year and one day after Registrant's response to Registrant's office action, with February 6, 2017 noted in Exhibit 1 as the last date the website was updated. Upon learning of such information, it is Applicant's belief that the date of such last update reflects that Registrant obtained the website one day before filing its response to the office action and then Registrant deactivated the website after the first year.

In order to qualify for federal trademark registration, the use of a mark in commerce must be lawful. *Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 526 (Fed. Cir. 1987) (stating that "[a] valid application cannot be filed at all for registration of a mark without 'lawful use in commerce'"). The earliest post on Registrant's social media pages showing Registrant's cigarette papers filled with marijuana is November 12, 2016, on Registrant's Instagram page. See Exhibit 8 and www.instagram.com/p/BMuSfWSgcUK/ which is ten days prior to the date of issuance of the certificate of registration for Registrant's Mark.

Exhibit 23 shows the date of Registrant's first Twitter post, December 26, 2014, and upon review by Applicant, all of Registrant's Twitter feed containing photos and video, all posts are cannabis related and no photo contains plain cigarette papers; instead there are photos of marijuana, pre-rolled cigarette papers with marijuana inside or pre-rolled cigarette papers with kief (cannabis resin) sprinkled on top. See also <https://twitter.com/thatpanda/status/548411795011276800>. Exhibit 24 is a screen capture of Registrant's Twitter page which states Registrant's corporate vision: "Our vision is to

contribute to the space by continuing to challenge ourselves every day and bring inspiration and innovation to *the Cannabis industry*. (emphasis added). See also www.twitter.com/phantpanda Exhibit 25 reflects Registrant's identical corporate vision statement on Registrant's separate Twitter post and again duplicated on Registrant's Instagram page in Exhibit 28 and in Registrant's second Instagram page in Exhibit 29. See also www.instagram.com/phantpanda and www.instagram.com/phantpandacannabis.

This shows that Registrant's corporate vision and marketing strategy is focused solely on the cannabis industry; whereas Applicant's industry is the e-liquid industry, of which there is no overlap between the parties' goods, target market, trade channels, overall commercial impression or connotation. Registrant's headquarters are located in Spokane Valley, Washington, which has a population size of 97,847; for context, Registrant's Instagram page (103,000) and Twitter page (2,595) have a combined 105,595 followers.

Registrant is located in Washington state where the sale of cannabis is legal under state law despite being illegal under federal law. Evidence that a mark is being used in connection with sales of a specific substance (marijuana) that falls within the prohibitions of the CSA and has previously resulted in a finding that the sale of such goods are illegal under federal law, and therefore encompass a use that is unlawful. See *In re Morgan Brown*, 119 USPQ2d 1350 (TTAB 2016). Exhibit 2 contains information from a third party website containing a definition of "pre-roll" and states:

What does Pre-Roll mean? Pre-roll refers to a joint that has been pre-rolled. Dispensaries often sell pre-rolls. Pre-roll joints tend to be relatively cheap, small, and discreet. They are ideal for an occasional user who wants to keep a tiny bit of cannabis readily available to smoke."

See Maximum Yield, www.maximumyield.com/definition/4263/pre-roll-cannabis.

Exhibit 3 is a third party website containing a "Cannabis 101" page describing how pre-rolls are made and what pre-rolls contain and also states "[t]he biggest problem with a pre-roll is the paper, because it hides what's inside." The reference to "paper" is a reference to "cigarette papers", Registrant's goods which are used to roll marijuana "pre-rolls", and is what Registrant

has been selling for several years with Registrant's Mark affixed to the cigarette paper containing the marijuana. *See also* Leafly www.leafly.com/news/cannabis-101/whats-in-a-pre-roll. Exhibit 4 is another third party website containing a "Cannabis 101" article describing what "kief" is, (which is the cannabis resin that Registrant sprinkles on Registrant's pre-rolled cigarette papers), which states:

"Kief refers to the resin glands which contain the terpenes and cannabinoids that make cannabis so unique. While marijuana sans kief still contains cannabinoids, *the resin glands that develop on flower buds pack the biggest punch.*"

See www.leafly.com/news/cannabis-101/what-is-kief (emphasis added).

Exhibit 5 is a third party website with an article titled "First-time cannabis shopper? Buy some "pre-rolls" - Here's why". The article, dated February 19, 2018, goes on to list pre-rolls sold by companies in states where the sale of cannabis is legal under state law. The article notes that Registrant's cigarette paper with marijuana pre-rolled in it is one of "the best pre-rolls in America". *See also* www.greenstate.com/explained/first-time-cannabis-shopper-buy-pre-rolls-here/ (two red arrows added to point out text showing Registrant's name).

Exhibit 6 is a September 8, 2017, screen capture of Registrant's social media marketing on Registrant's Instagram page containing a video showing the way the kief (cannabis resin) is sprinkled onto the Registrant's pre-rolls. Registrant's Mark is clearly visible on the top of the pre-roll and the Instagram post contains the notation: "phatpanda Firecracker what? We decided to step it up. Introducing the TNT Pre-Roll! 10 gram joint covered in oil & kief! BOOM! @cannabis" *See* www.instagram.com/p/BYyrT8xjAo/. Exhibit 7 is a screen capture of Registrant's social media marketing on Registrant's Twitter page containing the identical video with Registrant's Mark visible mark and the same notation. *See also* www.twitter.com/phatpanda/status/977608024066936832

Exhibit 8 is a screen capture of Registrant's social media marketing on Registrant's Instagram page showing Registrant's pre-rolled cigarette papers on November 12, 2016, ten days *prior to* the issuance of the registration certificate for Registrant's Mark. *See also* www.instagram.com/p/BbIaTcgI8Jb/.

Exhibit 9 is a screen capture of Registrant's social media marketing on Registrant's Twitter page containing a video showing Registrant's pre-rolls being made (version 2) with video paused in different position and noting: "Introducing the TNT Pre-Roll! 10 gram joint covered in oil & kief! BOOM! [four emojis] @HIGH_TIMES_Mag #phatpanda #stickyfrog #hotsugar #i502 #marijuana #chronic #710 #joint #dabs #concentrates #flavor #dabs #oil #dank #pot #weed #terps #extraction #vape #hightimesmagazine"
See www.twitter.com/phatpanda/status/977608024066936832.

Exhibit 10 is a screen capture of Registrant's social media marketing on Registrant's Instagram page with Registrant's Mark visible on the pre-rolled cigarette paper containing kief (cannabis resin) with the notation: "**10,000,000 pre-rolls sold!** #milestone Tag someone who needs to try that @phatpanda fire!! [four emojis depicting a panda, a leaf, fire, a snowflake and smoke] #phatpanda #topshelf #cannabis #topshelf" (emphasis added). Exhibit 11 represents the same information but is instead posted to Registrant's Twitter page rather than Registrant's Instagram page.

Exhibit 12 is a screen capture of Registrant's social media marketing on Registrant's Instagram page and contains a video showing Registrant's Mark on pre-rolls with kief is sprinkled onto the pre-rolls with the notation: "phatpanda Firecracker production line is always on fire! @phatpanda2.0 team working around the clock to keep the shelves stocked! #phatpanda #topshelf @juicewrld999" *See also* www.instagram.com/p/Bxs1MpEF3zg/

Exhibit 13 is a screen capture of Registrant's social media marketing on Registrant's Instagram page showing the machine used to make Registrant's "joints", which are Registrant's cigarette papers filled with marijuana and notes: "**phatpanda Joint Nation has a new joint machine!** This is The Rocketbox from @seshtechnologies and it can do **453 joint in 5 minutes**

[one emoji] Joint Nation pushes out 100,000 joints each week, and *it's hard to find a machine that can keep up* so we're very excited to get this rockin' and rollin' to see what it can do! [three emojis] *See also* www.instagram.com/p/B13os_NF557/ (emphasis added).

Exhibit 14 is a screen capture of a third party e-commerce website selling Registrant's pre-rolls with Registrant's Mark visible at the top of the pre-roll. Exhibit 15 is a screen capture of a different third party e-commerce website selling Registrant's pre-rolls. *See also* and <https://www.headset.io/the-best-selling-cannabis-products/washington-pre-rolls> and <https://dutchie.com/dispensaries/hangar-420-snohomish/menu/?search=phat%20panda&sortBy=alpha>.

Exhibit 17 is a screen capture of Registrant's social media marketing on Registrant's Instagram page and contains a photo of Registrant's cigarette paper with Registrant's "Golden Pineapple" marijuana spread out on the paper before it is rolled. *See also* <https://www.instagram.com/p/BTR7UOgDPWp/>.

Exhibit 18 is a screen capture of Registrant's social media marketing on Registrant's Instagram page and contains a post showing Registrant's pre-rolls with the notation: "phatpanda Double tap if you could use one of these right now! @phatnsticky" *See also* www.instagram.com/p/BRqqFh9DB6I/.

Exhibit 19 is a screen capture of Registrant's social media marketing on Registrant's Instagram page and contains a picture showing Registrant's pre-rolls and notes: "phatpanda Pick a number between 1 & 10! Comment Below! @highcartel #phatpanda #420 #420photography #420friendly #hightimesmagazine #highlife #topshelflife #weed #weedporn #wakenbake #dank #kush #loud #fire #purp #highsociety #marijuana #cannabis #chronic #joint #pot" *See also* www.instagram.com/p/BRqqFh9DB6I/.

Exhibit 20 is a screen capture of Registrant's social media marketing on Registrant's Instagram page and contains a photo showing a lighter and a pre-roll with Registrant's Mark

visible at the top of the pre-roll and the notation “phatpanda Firecracker Infused pre-roll shot by: @hazypineapple” *See also* www.instagram.com/p/BbIaTcgl8Jb/

Exhibit 26 is a screen capture of Registrant’s social media marketing on Registrant’s Twitter page showing a photo of a “joint” stating: “phatpanda Another One! Golden Pineapple firecracker joint! [four emojis] *See also* www.instagram.com/p/BddeQSzF8GR/

Exhibit 27 is a screen capture of Registrant’s social media marketing on Registrant’s Instagram post showing a lit, smoked pre-roll and stating “phatpanda You can never go wrong with a firecracker pre-roll! #lightemup” *See also* www.instagram.com/p/BdTK-bJFPxA/

Applicant believes the foregoing arguments, information and exhibits serve to establish that Registrant’s Mark is affixed on goods (cigarette papers containing marijuana and cannabis resin) which are prohibited under the CSA both prior to and after the issuance of Registrant’s registration certificate. This, coupled with the fact that Registrant’s Allegation of Use filed on October 26, 2015 amended Registrant’s application to remove “tobacco substitute” is further evidence, in Applicant’s view, that Registrant had no intention of lawful use of Registrant’s Mark in commerce given that the “tobacco substitute” in Registrant’s Application was a reference to marijuana. Therefore, Registrant had no lawful use in commerce and there Registrant had no bona fide intent to lawfully use Registrant’s Mark in commerce.

In the event that the Examining Attorney is not under the same belief as Applicant that Registrant’s goods being prohibited under the CSA; Applicant puts forth the secondary argument that Applicant’s goods and Registrant’s goods are sufficiently distinguished in all respects necessary for a likelihood of confusion to exist other than the similarity in the sound of the mark’s names. Assuming that Registrant’s cigarette papers were used for tobacco rather than for marijuana, the mere fact that plain marijuana-free cigarette papers are smoked make the product contrary and in direct opposition to Applicant’s goods. Applicant’s Mark as described in the application is for: “Electronic cigarette liquid (e-liquid) comprised of flavorings in liquid form, other than essential oils, used to refill electronic cigarette cartridges” while Registrant’s Mark is

described as “Cigarette paper”. In a recent expert report by Riccardo Polosa, M.D., Ph.D., (the “Expert Report”) regarding Mr. Polosa’s independent opinion of the general safety of electronic cigarettes includes the following statement:

The growing popularity of [Electronic Cigarettes] appears to be driven by a variety of factors, including the following: they can be *used to reduce cigarette consumption or quit smoking*; they are *perceived as a much less harmful smoking alternative*; their prices are competitive compared to conventional cigarettes; they *allow the user to continue having a “smoking experience without smoking.”*

(summarizing Siegel MB, Tanwar KL, Wood KS. Electronic cigarettes as a smoking-cessation tool: results from an online survey; American Journal of Preventive Medicine 40(4):472-475, 2011.); Farsalinos KE, Romagna G, Tsiapras D, Kyrzopoulos S, Voudris V. Characteristics, perceived side effects and benefits of electronic cigarette use: a worldwide survey of more than 19,000 consumers; International Journal of Environmental Research and Public Health 11(4):4356-4373, 2014.); Caponnetto P, Maglia M, Polosa R. Electronic cigarettes - from smoking cessation to smoking sensation and back. Addiction 110(4):678-9, 2015.) (emphasis added).

The Expert Report goes on to state that “[a]lthough these recreational use products are not intended to be smoking cessation devices or nicotine replacement therapies (and are not marketed as such), *their regular daily use is associated with the corollary benefit of helping tobacco cigarette smokers quit smoking or using nicotine altogether.* (Summarizing <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/healthandlifeexpectancies/bulletins/adultsmokinghabitsingreatbritain/2014>). (emphasis added). Those consumers who utilize Applicant’s e-liquids typically substitute cigarettes for e-liquids, thereby negating any likelihood of confusion with Registrant’s cigarette papers because cigarette papers are not typically purchased in conjunction with e-liquids. To the extent e-liquids and cigarette papers were offered in the same store front, consumers would not be under any confusion as to a manufacturer of cigarette paper being related to a manufacturer of e-liquids. Rather, as the Expert Report shows in its survey of 19,000 individuals, cigarettes (and in this case, cigarette papers) would be to aid the consumer in quitting smoking. The Expert Report supports the

foregoing by stating “[g]iven the importance of sensorial attributes in making the users' vaping experience more fulfilling, we are now beginning to learn that *smoking abstinence is enhanced by [Electronic Cigarettes'] success as smoking cessation products*, even though the products are not marketed or sold as cessation products.” See *Expert Report of Riccardo Polosa, Md, PhD*, 2016 Misc. Filings Lexis 216 (2016) and Exhibit 33 (emphasis added).

As the survey of 19,000 individuals referred to in the Expert Report, Applicant's and Registrant's goods are not at all complimentary in nature because a consumer who buys e-liquids is typically a non-smoker or a smoker who is attempting to quit smoking by using e-liquids. As such, it follows that consumers are not likely to be confused as to the source of the goods if they were to come across both goods because not only are the goods different products, but the purpose of the products are diametrically opposed to each other.

(b) Establishing There is No Likelihood of Confusion Given the goods, trade channels, overall commercial impression and connotation

Applicant believes the enclosed Exhibits 6 - 13; 17 - 20 and 22 - 29 reflecting Registrant's social media marketing posts on Registrant's Instagram and Twitter web pages convey a consistent theme of Registrant's goods, trade channels, overall commercial impression and connotation.

The test for likelihood of confusion is not whether the marks can be distinguished when subjected to a side by side comparison. Rather, the issue is whether the marks create the same overall impression. *Visual Information Institute, Inc. v. Vicon Industries Inc.*, 209 USPQ 179 (TTAB 1980). With regard to appearance, Applicant's Mark is a word mark for “FAT PANDA” while Registrant's Mark is a stylized mark which includes the colors black, white and green in reference to a panda holding a green marijuana leaf with the words “PHAT PANDA” along side the panda, using the slang word, “phat”. The “PH” spelling and marijuana leaf in Registrant's Mark give the overall impression of a cannabis related product and the use of the slang word “phat” provides a connotation of going against social norms. The fact that the parties' marks are identical in sound and therefore when spoken may make the hearer think about the other mark, does not in itself establish a likelihood of confusion as to the source of the goods. *Jacobs v.*

International Multifoods Corp., 668 F.2d 1234, 1236 (C.C.P.A. 1982) (stating that “Boston Sea Party” brings to mind the “Boston Tea Party,” and noting that the fact that a mark may bring to mind another term, and not another mark, is further support for the conclusion that no confusion is likely.) (emphasis added).

“Generally, where the trade channels differ and do not lead to the same target purchasers, there is less likelihood of confusion, and more where the channels and customers are the same or converge.” Richard L. Kirkpatrick, *Likelihood of Confusion in Trademark Law* § 5:12.1, at 5-38 (May 2012) (footnotes omitted). If we are to assume that Registrant’s Mark has been lawfully used in commerce, the parties’ trade channels are entirely different because Registrant is restricted to sales of its product in Washington state in order to comply with the interstate transfer of paraphernalia rules within the CSA; while Applicant’s goods may be sold throughout the entire United States and worldwide subject Applicant’s to compliance with all local applicable e-liquid regulations. See Exhibits 34 and 35 showing screen captures of Applicant’s You Tube page and Applicant’s vendor’s You Tube page with videos of Applicant attending e-liquid trade shows in Las Vegas, Nevada and Shanghai. Indeed, Applicant was unable to find any instance of Registrant’s “cigarette papers” for sale in any jurisdiction outside of Washington state. In addition, Applicant and Registrant are not direct competitors and their goods are not sold in the same marketing channels. Further, the two goods, e-liquids and cigarette papers, are in direct opposition to one another because users of Applicant’s e-liquids are typically people who are quitting smoking cigarettes. Further, as evidenced by the Exhibits showing Registrant’s marketing practices on social media, and the Exhibits showing online e-commerce stores, magazine articles, and blogs, there is no mention of e-liquids on any of the sites that contain Registrant’s cigarette papers (all of which either contain marijuana in pre-rolls or are sprinkled with kief). See *Ty, Inc. v. Jones Group Inc.*, 237 F.3d 891, 2001 U.S. App. LEXIS 843, 57 U.S.P.Q.2D (BNA) 1617 (noting the factors to analyze for concurrent use include: (1) the relative geographical distribution areas; (2) evidence of direct competition; (3) whether the products are sold to consumers in the same type of store; (4) whether the products are sold in a similar section of a particular store; and (5) whether the product is sold through the same marketing channels).

The mere fact that Applicant's Mark and Registrant's Mark sound the same when pronounced is not sufficient to meet the burden of proof necessary under the *Jacobs* "something more" requirement in order to maintain the refusal for likelihood of confusion under Section 2(d). Exhibit 16 is a screen capture of Google search engine results for the search "fat panda pre rolls" with the intentional misspelling of Registrant's Mark "PHAT PANDA" replaced with Applicant's Mark "FAT PANDA" and the word "pre-rolls" added in order to associate the search with Registrant's cigarette papers pre-rolled with marijuana. Even with Applicant's Mark intentionally used for the spelling of "FAT" rather than "PHAT", Google search results nevertheless show Registrant as the top results due to the addition of the word "pre-rolls". Further, the Google search results automatically correct the search query that was entered by noting at the top of the page "*Including search results for **phat** panda*". See also www.google.com/search?client=firefox-b-d&q=fat+panda+pre-rolls. This shows that in addition to the significant differences in Applicant's and Registrant's target markets for e-liquids and marijuana filled and kief sprinkled cigarette papers, those consumers who attempt to search for the goods of Registrant yet misspell Registrant's Mark by typing Applicant's Mark, will still be redirected to Registrant's website despite any erroneous misspelling by the consumer when the product is included the Google search query. Further, given that cannabis is legal in the state of Washington and Registrant may only sell its goods within the state of Washington, Registrant's consumers are also located in the state of Washington and when searching for Registrant's products, they will be looking for a business with a physical presence in Washington state; while Applicant is not located in Washington state. Exhibit 21 is a screen capture of one of Registrant's customer's You Tube video reviews of Registrant's pre-rolled cigarette papers with marijuana with the Registrant's Mark visible at the top of the pre-rolled "joint". The video shows the location of Registrant's consumer is in Vancouver, Washington, which highlights the point that all of Registrant's customer base and target market are located in Washington state due to the nature of Registrant's business and goods being legal in Washington state yet illegal federally. This is in contrast to Applicant's ability to sell Applicant's goods across the entire United States and worldwide subject Applicant's to compliance with all local applicable regulations on e-liquids. See Exhibits 34 and 35 showing screen captures of Applicant's You Tube page and

Applicant's vendor You Tube page with videos of Applicant attending e-liquid trade shows in Las Vegas, Nevada and Shanghai.

Exhibit 22 is a screen capture of Registrant's social media marketing on Instagram showing two women wearing Registrant's T-shirts with Registrant's Mark on the T-shirts which state: "Say why not to drugs!" and "Don't smoke shitty weed!" Which, although Registrant's goods as noted in Registrant's application are not apparel, this Exhibit is shown to reinforce the image that Registrant's brand portrays, which is in no way similar to Applicant's brand and marketing. *See also* www.instagram.com/p/BZouFwrIM6X/ in which

Exhibit 30 is a copy of an article in which Registrant's co-founders are interviewed. The statements made by Registrant's co-founders in that interviewed again serve to evince and further distinguish Registrant from Applicant given the overall impression of the goods and trade channels. It should also be noted that the date of this article is August 17, 2015, which is less than six months after Registrant's application for trademark registration and three months prior to the registration of Registrant's Mark. The interview states:

With the McKinleys' *background in marketing*, it stands to reason that Grow Op Farms would *put a heavy emphasis on establishing a brand that would stand out in Washington's crowded cannabis marketplace*.

Not only did the packaging have to stand out to potential consumers, but it was also the first step in getting Phat Panda on retail shelves.

"I would say that the packaging was very important to getting our product tested by the store owners," Rob McKinley says. "When we would drop off samples, typically there was a basket with 50 other samples in it. Having glass (jars) and a really cool presence or label got our product tested first.

The name ["Phat Panda"] came from a lesson McKinley took from one of his early mentors — use an animal if you want to create a memorable, catchy brand. Thus Grow Op Farms utilized Phat Panda for its flower products and Sticky Frog for its concentrates.

On an average week, Grow Op Farms puts out about 40,000 to 50,000 grams of flower, 12,000 pre-rolled joints and 1,000 grams of concentrates.

See Garrett Rudolph *Panda-monium* online article dated August 17, 2015 <http://www.marijuanaventure.com/panda-monium/#more-2934> (emphasis added).

V. CONCLUSION

Applicant is of the belief that Registrant has no lawful use of “PHAT PANDA” for cigarette papers in commerce because Registrant’s Mark is used on pre-rolls containing kief (cannabis) resin on the exterior of the rolling paper/cigarette paper, and Registrant’s cigarette paper bearing Registrant’s Mark contains marijuana (also known more commonly as “joints”) and are therefore goods prohibited under the CSA. Even if Registrant’s Mark was determined to be deemed entitled to federal trademark protection, Applicant’s Mark differs substantially in overall commercial impression, connotation, trade channels and dissimilarity of the nature of the goods.

Based upon the analysis in this request for reconsideration, Applicant respectfully requests that the Examining Attorney approve Applicant’s Mark for “Fat Panda”, Application Serial No. 87951444 for registration and proceed with the publication of the mark because there is no likelihood of confusion. In the event that the Examining Attorney declines to withdraw the refusal, then Applicant also preserves its ability to appeal such decision by filing a Notice of Appeal in conjunction with this request for reconsideration including a request to suspend the appeal until there has been a decision by the Examining Attorney on this request for reconsideration.

Date: October 7, 2019

Respectfully submitted,

/Samantha M. Ferguson/

SAMANTHA M. FERGUSON
Attorney of Record, Texas Bar Member

Legal Services International, LLC


Exhibit 1

Pandapapers.net
Domain

Domain pandapapers.net
Words in panda papers
Date creation 2016-01-22
Web age 3 years and 7 months
IP Address 199.36.223.40
 199.36.223.40 abuse reports

IP Geolocation  United States, Georgia, Atlanta [map](#)

Registrant
from last whois record

Name 1 1 is associated with 100+ domains
Email robertmckinley@gmail.com is associated with 8 domains
Address PO BOX 5487
City SPOKANE [map](#)
State WA
Country  United States
Phone +1.5555555555
Fax +1.5555555555
Private no

Whois

last record, updated : 2017-02-06
Domain Name: PANDAPAPERS.NET
Registry Domain ID: 1996406069_DOMAIN_NET-VRSN
Registrar WHOIS Server: whois.enom.com
Registrar URL: www.enom.com

Updated Date: 2017-02-04T11:17:15.00Z
Creation Date: 2016-01-22T06:15:00.00Z
Registrar Registration Expiration Date: 2018-01-22T06:15:33.00Z
Registrar: ENOM, INC.
Registrar IANA ID: 48
Reseller: NAMECHEAP.COM
Domain Status: clientTransferProhibited <https://www.icann.org/epp#clientTransferProhibited>
Registry Registrant ID:
Registrant Name: 1 1
Registrant Organization:
Registrant Street: PO BOX 5487
Registrant City: SPOKANE
Registrant State/Province: WA
Registrant Postal Code: 99212
Registrant Country: US
Registrant Phone: +1.5555555555
Registrant Phone Ext:
Registrant Fax: +1.5555555555
Registrant Fax Ext:
Registrant Email: ROBERTMCKINLEY(at)GMAIL.COM
Registry Admin ID:
Admin Name: 1 1
Admin Organization:
Admin Street: PO BOX 5487
Admin City: SPOKANE
Admin State/Province: WA
Admin Postal Code: 99212
Admin Country: US
Admin Phone: +1.5555555555
Admin Phone Ext:
Admin Fax: +1.5555555555
Admin Fax Ext:
Admin Email: ROBERTMCKINLEY(at)GMAIL.COM

Registry Tech ID:
Tech Name: 1 1
Tech Organization:
Tech Street: PO BOX 5487
Tech City: SPOKANE
Tech State/Province: WA
Tech Postal Code: 99212
Tech Country: US
Tech Phone: +1.5555555555
Tech Phone Ext:
Tech Fax: +1.5555555555
Tech Fax Ext:
Tech Email: ROBERTMCKINLEY(at)GMAIL.COM
Name Server: DNS1.REGISTRAR-SERVERS.COM
Name Server: DNS2.REGISTRAR-SERVERS.COM
DNSSEC: unSigned
Registrar Abuse Contact Email: abuse(at)enom.com
Registrar Abuse Contact Phone: +1.4252982646
URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>
>>> Last update of WHOIS database: 2017-02-04T11:17:15.00Z <<<

For more information on Whois status codes, please visit <https://icann.org/epp>

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Version 6.3 4/3/2002

Recorded : 2017-01-24

Historic Registrant

Name 1 1 is associated with 100+ domains
Email robertmckinley@gmail.com is associated with 8 domains
Address PO BOX 5487
City SPOKANE
State WA
Country  United States
Phone +1.5555555555
Fax +1.5555555555
Private no

Historic Whois Record

Domain Name: PANDAPAPERS.NET

Registry Domain ID: 1996406069_DOMAIN_NET-VRSN

Registrar WHOIS Server: whois.enom.com

Registrar URL: www.enom.com

Updated Date: 2017-01-23T02:26:27.00Z

Creation Date: 2016-01-22T06:15:00.00Z

Registrar Registration Expiration Date: 2017-01-22T06:15:33.00Z

Registrar: ENOM, INC.

Registrar IANA ID: 48

Reseller: NAMECHEAP.COM

Domain Status: clientTransferProhibited <https://www.icann.org/epp#clientTransferProhibited>

Registry Registrant ID:

Registrant Name: 1 1
Registrant Organization:
Registrant Street: PO BOX 5487
Registrant City: SPOKANE
Registrant State/Province: WA
Registrant Postal Code: 99212
Registrant Country: US
Registrant Phone: +1.5555555555
Registrant Phone Ext:
Registrant Fax: +1.5555555555
Registrant Fax Ext:
Registrant Email: ROBERTMCKINLEY@GMAIL.COM
Registry Admin ID:
Admin Name: 1 1
Admin Organization:
Admin Street: PO BOX 5487
Admin City: SPOKANE
Admin State/Province: WA
Admin Postal Code: 99212
Admin Country: US
Admin Phone: +1.5555555555
Admin Phone Ext:
Admin Fax: +1.5555555555
Admin Fax Ext:
Admin Email: ROBERTMCKINLEY@GMAIL.COM
Registry Tech ID:
Tech Name: 1 1
Tech Organization:
Tech Street: PO BOX 5487
Tech City: SPOKANE
Tech State/Province: WA
Tech Postal Code: 99212
Tech Country: US

Tech Phone: +1.5555555555
Tech Phone Ext:
Tech Fax: +1.5555555555
Tech Fax Ext:
Tech Email: ROBERTMCKINLEY@GMAIL.COM
Name Server: DNS1.NAME-SERVICES.COM
Name Server: DNS2.NAME-SERVICES.COM
Name Server: DNS3.NAME-SERVICES.COM
Name Server: DNS4.NAME-SERVICES.COM
Name Server: DNS5.NAME-SERVICES.COM
DNSSEC: unSigned
Registrar Abuse Contact Email: abuse@enom.com
Registrar Abuse Contact Phone: +1.4252982646
URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>
>>> Last update of WHOIS database: 2017-01-23T02:26:27.00Z <<<

For more information on Whois status codes, please visit <https://icann.org/epp>

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Version 6.3 4/3/2002

Recorded : 2016-01-23

Historic Registrant

Name 1 1 is associated with 100+ domains
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Phone +1.5555555555
Fax +1.5555555555
Private no

Historic Whois Record

Domain Name: PANDAPAPERS.NET

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Registrar URL: www.enom.com

Updated Date: 2016-01-21T22:15:33.00Z

Creation Date: 2016-01-22T06:15:00.00Z

Registrar Registration Expiration Date: 2017-01-22T06:15:00.00Z

Registrar: ENOM, INC.

Registrar IANA ID: 48

Reseller: NAMECHEAP.COM

Domain Status: clientTransferProhibited <https://www.icann.org/epp#clientTransferProhibited>

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Registrant Name: 1 1

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Registrant Street: PO BOX 5487

Registrant City: SPOKANE

Registrant State/Province: WA

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Tech Country: US
Tech Phone: +1.5555555555
Tech Phone Ext:
Tech Fax: +1.5555555555
Tech Fax Ext:
Tech Email: ROBERTMCKINLEY@GMAIL.COM

Name Server: DNS1.REGISTRAR-SERVERS.COM
Name Server: DNS2.REGISTRAR-SERVERS.COM
Name Server: DNS3.REGISTRAR-SERVERS.COM
Name Server: DNS4.REGISTRAR-SERVERS.COM
Name Server: DNS5.REGISTRAR-SERVERS.COM

DNSSEC: unSigned

Registrar Abuse Contact Email: abuse@enom.com

Registrar Abuse Contact Phone: +1.4252982646

URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>

Last update of WHOIS database: 2016-01-21T22:15:33.00Z

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Version 6.3 4/3/2002

Other TLDs

pandapapers.ar

pandapapers.at

pandapapers.com

pandapapers.hu

pandapapers.dk
pandapapers.cz
pandapapers.za
pandapapers.ro
pandapapers.ua
pandapapers.se
Nameservers
History

Date	Status	Name Server
2019-03-06	Deleted	registrar-servers.com
2017-02-05	Transferred to	registrar-servers.com
2017-01-23	Transferred to	name-services.com
2016-07-25	Transferred to	registrar-servers.com
2016-07-24	Transferred to	registrar-serversys6118ec.biz
2016-01-22	New	registrar-servers.com

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Exhibit 2

The screenshot shows a web browser displaying the article 'What is Pre-Roll?' on the Maximum Yield website. The browser's address bar shows the URL: <https://www.maximumyield.com/dictionary/4213/pre-roll-cannabis>. The website's navigation menu includes 'FEATURES', 'EXPERTS', 'MAGAZINE', 'DICTIONARY', 'DIRECTORY', 'WEBINARS', 'TOPICS: CANNABIS', 'LIGHTING', 'GROWING ME', 'MORE', and a 'SUBSCRIBE' button. The article title is 'Pre-Roll', and the breadcrumb trail is 'Home > Dictionary > Tags > Enjoy > Accessories >'. The article content is as follows:

Definition - What does *Pre-Roll* mean?

 Pre-roll refers to a joint that has been pre-rolled. Dispensaries often sell pre-rolls. Pre-roll joints tend to be relatively cheap, small, and discreet. They are ideal for an occasional user who wants to keep a tiny bit of cannabis readily available to smoke.

MaximumYield explains *Pre-Roll*

 Historically, joints were rolled as needed using rolling paper and marijuana plant material. Nowadays, joints can still be rolled on the spot as needed, but they take time to roll and a bit of talent. It also requires a flat surface, a grinder or scissors, and so on.

However, a pre-roll is usually easily purchased so a user no longer has to worry about having nimble fingers and rolling their own classic joint.

Pre-rolls are quick and easy. Most users can enter a dispensary and purchase one for a reasonable price. They are ideal for user who do not want to make the commitment of purchasing a bong, dab rig, bubbler, or some other paraphernalia to enjoy cannabis.

Prior to purchasing a pre-roll, the consumer should always ask about the quality of the weed used in the joint's creation. Many pre-rolls are made with sub-par cannabis and sold for a cheap price. Pre-rolls are often

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



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Exhibit 3

The image is a screenshot of a web browser displaying a Leafly article. The browser's address bar shows the URL <https://www.leafly.com/news/cannabis-101/whats-in-a-pre-roll>. The Leafly logo is visible in the top left, and a search bar is in the top right. On the left side, there is a navigation menu with categories: News Home, Cannabis 101 (highlighted), Growing, Strains & Products, Politics, Health, Lifestyle, Science & Tech, Industry, Canada, Podcasts, and Leafly TV. The main content area features the article title "What's in a Pre-Roll?" in a large, bold font. Above the title is a small "CANNABIS 101" tag. Below the title, the author's name "BEN ADLIN" and the date "March 3, 2016" are listed. To the right of the title are social media sharing icons for Dribbble, Facebook, Twitter, Pinterest, and Email, along with a print icon. Below the text is a large photograph showing several pre-rolled cannabis joints on a wooden surface. One joint is partially unrolled, revealing green cannabis leaves. In the background, there are four colorful lighters (yellow, blue, pink, and white). To the right of the joints is a small, dark-colored box with a blue label that reads "PLANTINUM BURNERS".

"A lot of the pre-rolls that are out there are made with a combination of plant material, and sometimes that includes smaller stems," she said.

The biggest problem with a pre-roll is the paper, because it hides what's inside. That makes it easier for producers to get away with using sub-par cannabis or trim. Even when a store includes high-quality cannabis, consumers still can't judge what's inside — so the store may see little advantage in stocking high-quality pre-rolls.

How Pre-Rolled Joints Are Made



Exhibit 4

The image is a screenshot of a web browser displaying a page from Leafly. The browser's address bar shows the URL <https://www.leafly.com/learn/cannabis-101/what-is-kief>. The Leafly logo is visible in the top left corner of the page. On the left side, there is a navigation menu with the following items: News Home, Cannabis 101 (highlighted), Growing, Strains & Products, Politics, Health, Lifestyle, Science & Tech, Industry, Canada, Podcasts, and Leafly TV. The main content area features a video player. Above the video, the text reads "CANNABIS 101" and "What Is Kief and How Can You Use It?". Below this, it says "LEAFLY STAFF" and "October 15, 2014". To the right of the video are social media sharing icons for YouTube, Facebook, Twitter, and Pinterest, along with a print icon. The video player itself has a purple header with the text "CHECK OUT OUR CHANNEL!" and "DON'T MISS OUT ON NEW VIDEOS - SUBSCRIBE NOW!". The video title is "Cannabis 101 Landraces". Below the video, there are three smaller video thumbnails with titles: "How will cannabis", "HOW TO GROW A CANNABIS PLANT FOR MEDICAL RELIEF", and "How CBD Treats So Many Conditions". The video player controls at the bottom show a progress bar at 11:03/20.

Exhibit 5

First-time cannabis shopper? E: X

https://www.greenstate.com/explained/first-time-cannabis-shopper-buy-pr... what is a pre-roll

Can I make my own pre-rolls?

Yes! Get yourself a [premium grinder](#), a pack of [nice papers](#), and of course a bag of your favorite bud. If you want to go pro, try out some [Futurola](#) machines and store your precious pre-rolls in some [Doob Tubes](#). Go get rolling.

What are the best pre-rolls in America?

Great question. Pre-roll quality can vary by dispensary, city and region and there are very few statewide producers in legal states. There are no interstate pre-roll brands due to federal law.

In California, we've enjoyed pre-rolls from Medi-Cone, Henry's, Lowell Herb Co, and Buena Vista. We gave [GreenState 2018 Awards](#) to pre-roll makers [The Hepburns](#), [Triple J](#), [Medi-Cone](#), [Henry's](#), and [Buena Vista](#). We've recently reviewed the [ToastGold](#) pre-roll, [Willie's Reserve](#), and [Chong's Choice](#).

In Washington, the top-selling pre-rolls are those made by [Phat Panda](#), [Medusa Gardens](#), [Legit Cannabis Co](#) and [Sitka](#).


In Oregon, we've loved [Fortune](#) pre-rolls. and Colorado's best sellers are prerolls made by [Kaviar](#), [Heartland Industries](#), and [District 8](#).

Exhibit 6

Phat Panda on Instagram: "Fire: X" +

https://www.instagram.com/p/BYyT8qAoJ/ n cuckold and tammy 2 →

Instagram Search Log in Sign Up



phatpanda • Follow ...

phatpanda Firecracker what? We decided to step it up... Introducing the TN! Pre-Roll! 10 gram joint covered in oil & kief! BOOM! 🚬🔥🔥🔥 @cannabis

105w

sabrina_uae @kait_lynch holy fuck
105w Reply

stemurph20 @erinmoriarty_
105w Reply

b4no3r123 Wwww @iesckbauch

12,394 views
SEPTEMBER 8, 2017
Log in to like or comment.

Exhibit 7


The image is a screenshot of a Twitter post from the account 'Phat Panda' (@phatpanda). The browser address bar shows the URL 'https://twitter.com/phatpanda/status/977608024066936832'. The tweet text reads: 'Introducing the TNT Pre-Roll! 10 gram joint covered in oil & kief! BOOM! 🐼🔥🌿 @HIGH_TIMES_Mag #phatpanda #stickyfrog #hotsugar #i502 #marijuana #chronic #710 #joint #dabs #concentrates #flavor #dabs #oil #dank #pot #weed #terps #extraction #vape #hightimesmagazine'. Below the text is a video player showing three cannabis joints. The joints are wrapped in paper with the 'phat panda' logo and the word 'RAW' printed on them. The video player shows '1,083 views' and a duration of '0:12 / 0:45'. The background of the tweet is a photograph of cannabis plants in a grow tent. The left sidebar of the profile shows the 'Phat Panda' bio: 'Our vision is to contribute to the space by continuing to challenge ourselves every day and bring inspiration and innovation to the Cannabis industry.' It also lists the location 'Spokane Valley, WA', the website 'phatpanda.com', and the join date 'December 2014'. The bottom right of the page contains copyright information: '© 2019 Twitter. About Help Center Terms Privacy policy Cookies Ads etc.'

Exhibit 8

Phat Panda on Instagram: "Variety is a good thing!"

https://www.instagram.com/p/BMu5FW5gcUK/

Instagram



phatpanda • Follow

phatpanda Variety is a good thing! 🌿

151w

reecooliver23 @reed_swag16 good shit

151w Reply

ogkushcanvas Yes 🙌🏻

151w Reply

amylavadoxis Demn, you sharing??

151w Reply

olazeww3r1121 If that's the truth hwo

1,017 likes

NOVEMBER 12, 2016

Log in to like or comment.

11:17 PM 2019-10-06

Exhibit 9

Phat Panda on Twitter: "Introduci..."

https://twitter.com/phatpanda/status/977608024066936832


Home Moments

Phat Panda @phatpanda

Phat Panda @phatpanda

Follow

Introducing the TNT Pre-Roll! 10 gram joint covered in oil & kief! BOOM! 🧨🔥💣
@HIGH_TIMES_Mag #phatpanda #stickyfrog #hotsugar #i502 #marijuana #chronic #710 #joint #dabs #concentrates #flavor #dabs #oil #dank #pot #weed #terps #extraction #vape #hightimesmagazine



1,082 views 0.43 / 0.45

Have an account? Log in

Follow

Exhibit 10

The screenshot shows a web browser window displaying an Instagram post. The browser's address bar shows the URL <https://www.instagram.com/p/B0oxZppF5jL/>. The Instagram post features a large image of numerous pre-rolls, some with pink and white packaging. The post is from the account 'phatpanda' and includes the following text:

phatpanda 10,000,000 pre-rolls sold! #milestone Tag someone who needs to try that @phatpanda fire!! 🤖🔥🔥
📍 #phatpanda #topshelf

7w

Comments:

- Jogonsalves84 | only need like 5, I'm not greedy 🤖
- jizzlepizzle710 X 5 or 10 a piece 🤖🤖

5,934 likes
AUGUST 1

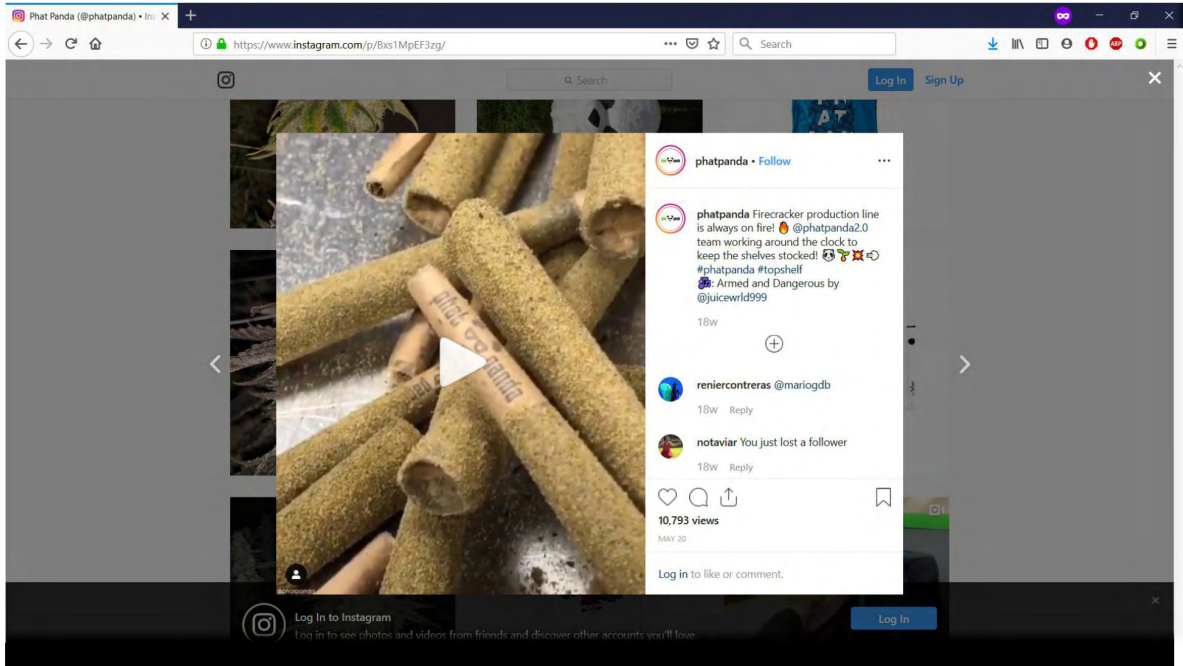
Log in to like or comment.

Log In to Instagram
Log in to see photos and videos from friends and discover other accounts you'll love.

Exhibit 11

The image is a screenshot of a Twitter post from the account 'Phat Panda (@phatpanda)'. The browser address bar shows 'https://twitter.com/phatpanda'. The tweet features a large photograph of a pile of pre-rolls, which are cylindrical cannabis products with a green, textured exterior and a pinkish-purple paper filter. The text of the tweet reads: 'Phat Panda @phatpanda · Aug 2 10,000,000 pre-rolls sold! #milestone Tag someone who needs to try that @phatpanda fire!! 🚬🔥🌿🌿 #phatpanda #topshelf #cannabis #topshelf'. Below the text, the engagement metrics are visible: 2 replies, 3 retweets, and 28 likes. The Twitter interface elements, including the navigation bar and the user's profile information, are also visible.

Exhibit 12



The image is a screenshot of a web browser displaying an Instagram post. The browser's address bar shows the URL <https://www.instagram.com/p/Bxs1MpEF3zg/>. The Instagram post features a video thumbnail of several cylindrical, green, textured firecrackers. The post is from the account **phatpanda**, which is followed by the user. The caption reads: "phatpanda Firecracker production line is always on fire! 🇺🇸 @phatpanda2.0 team working around the clock to keep the shelves stocked! 🇺🇸🇺🇸🇺🇸 #phatpanda #topshelf 🇺🇸: Armed and Dangerous by @juicewld999". The post has 10,793 views and was posted on May 20. There are three replies visible: one from **reniercontreras @mariogdb** (18w Reply), one from **notaviar** (18w Reply) stating "You just lost a follower", and another from **notaviar** (18w Reply). The interface includes a search bar, a "Log In" button, and a "Sign Up" button. At the bottom, there is a "Log In to Instagram" prompt with the text "Log in to see photos and videos from friends and discover other accounts you'll love."

Exhibit 13

The screenshot shows a web browser window displaying an Instagram post. The browser's address bar shows the URL https://www.instagram.com/p/Bi3os_NF557/. The Instagram post features a video of a joint-making machine with a grid of circular rollers. A hand is visible at the bottom, interacting with the machine. The post is from the user 'phatpanda' and includes the following text:

phatpanda • Follow

phatpanda Joint Nation has a new joint machine! This is The Rocketbox from @sesstechnologies and it can do 453 joint in 5 minutes 🤖 Joint Nation pushes out 100,000 joints each week, and it's hard to find a machine that can keep up so we're very excited to get this rockin' and rollin' to see what it can do! 🤖🔥👏

60w

phatpanda #phatpanda #stickyfrog #hotsugar #420 #420photography #420friendly #hightimesmagazine #highlife #topshellife #weed #weedhumor #weedporn #wakenbake #dank #kush #loud #fire #purr #highsociety #marijuana #cannabis #chronic #joint #pot

7,599 views
JULY 30, 2018

Log in to like or comment.

Log In to Instagram
Log in to see photos and videos from friends and discover other accounts you'll love.

Log In

https://www.instagram.com/accounts/login/?next=/phatpanda/&source=follow

Exhibit 14

Phat Panda | Animal Mintz Pre-Roll | 1g

~~\$5.00~~ \$4.50

10% OFF

29.15% 0.19% Hybrid

1 gram pre-roll from Phat Panda

1g \$4.50

ADD TO CART - \$4.50

Calm
Energetic
Happy
Relaxed

Exhibit 15

Best Selling Pre-Rolls in Wash... X

https://www.headset.io/the-best-selling-cannabis-products/washington-pre-ro

HEADSET

Washington's Best Selling Cannabis Products

TOP SELLING PRE-ROLLS IN WASHINGTON

Discover the best selling cannabis products and pricing updated daily, provided by: INSIGHTS

Last refresh: September 24, 2019

Change Location

Pre-Rolls

Select Category

	BRAND	PRODUCT		
1	PHAT PANDA	OG Chem Pre-Roll (Gram)		
2	PHAT PANDA	Golden Pineapple Pre-Roll (Gram)	\$3.66	Yes No, just browsing
3	PHAT PANDA	Hawaiian Golden Pineapple Pre-Roll (Gram)	\$3.67	

Operator from Headset
Our team is out-of-office right now 🌙. I can have them follow up with you. Would you like to leave them a message?

Exhibit 16

fat panda pre-rolls - Google

https://www.google.com/search?client=firefox-b-d&q=fat+panda+pre-rolls

fat panda pre-rolls

About 7,780,000 results (0.72 seconds)

Including results for **phat panda pre-rolls**
Search only for fat panda pre-rolls

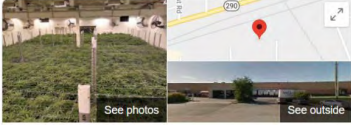
Phat Panda
<https://phatpanda.com>
The Phat Panda line speaks for itself and is a result of a state-of-the-art growing facility using perfected growing techniques executed by Team Panda.

People also ask

- What is Phat Panda?
- Who owns Phat Panda?
- How do you use the Phat Panda DAB pen?

Phat Panda | Featured Products & Details | Weedmaps
<https://weedmaps.com/brands/phat-panda>
Phat Panda is rolling through Washington's traditional cannabis industry. Crafting effortlessly potent cannabis flower, pre-rolls, and other products. Phat Panda ...

Phat Panda | Flower - Pre Rolls | Weedmaps
<https://weedmaps.com/brands/phat-panda/products/flower/pre-rolls>
View Flower - Pre Rolls products for Phat Panda. ... Phat Panda. Follow. 4.1. Followers 898.




Phat Panda LLC
Website Directions Save
3.9 ★★★★★ 83 Google reviews
Address: 2611 N Woodruff Rd, Spokane Valley, WA 99206, United States
Hours: Closed - Opens 6 a.m.
Phone: +1 509-981-9409
Suggest an edit - Own this business?

Questions & answers
See all questions (7) Ask a question

Popular times
Mondays

Exhibit 17



The screenshot shows an Instagram post from the user 'phatpanda'. The main image is a photograph of a cylindrical container with a white background and gold pineapples, labeled 'GOLDEN PINEAPPLE'. In front of the container is a white tray filled with dried, green cannabis buds. The post includes a caption with several hashtags, two comments from other users, and a like count of 1,022. The interface elements of the Instagram website are visible, including the browser address bar, search bar, and navigation buttons.

Phat Panda on Instagram: "Go" X

https://www.instagram.com/p/BTR7UOgDPWp/

Instagram Search Log in Sign Up

phatpanda • Follow

phatpanda Golden Pineapple! 🍍🌿
📍 #phatpanda #420
#420photography #420friendly
#hightimesmagazine #highlife
#topshelflife #weed #weedporn
#wakenbake #dank #kush #loud #fire
#purp #highsociety #marijuana
#cannabis #chronic #joint #pot

127w

jamr13 Love this strain!
127w 1 like Reply

miami_certified_39 Beutifull I've only
tried it once
127w Reply

1,022 likes
APRIL 24, 2017

Log in to like or comment.

Exhibit 18

The screenshot shows a web browser window displaying an Instagram post. The browser's address bar contains the URL <https://www.instagram.com/p/BRqgFh9DB6I/>. The Instagram post features a central image of a large, dense stack of rolled marijuana joints, with some green plant matter visible at the top. The post is by the user 'phatpanda' and includes the following text and interactions:

phatpanda • Follow

phatpanda Double tap if you could use one of these right now! 🍀👀
@phatsticky
136w

noa_h.m @poke_smot_mee too
136w Reply

the.lil.homie One isnt enough haha these would last me a day if that
136w Reply

pepinho__ @monsieur_muscle tkt

1,408 likes
FEBRUARY 13, 2017
Log in to like or comment.

Exhibit 19



Exhibit 20

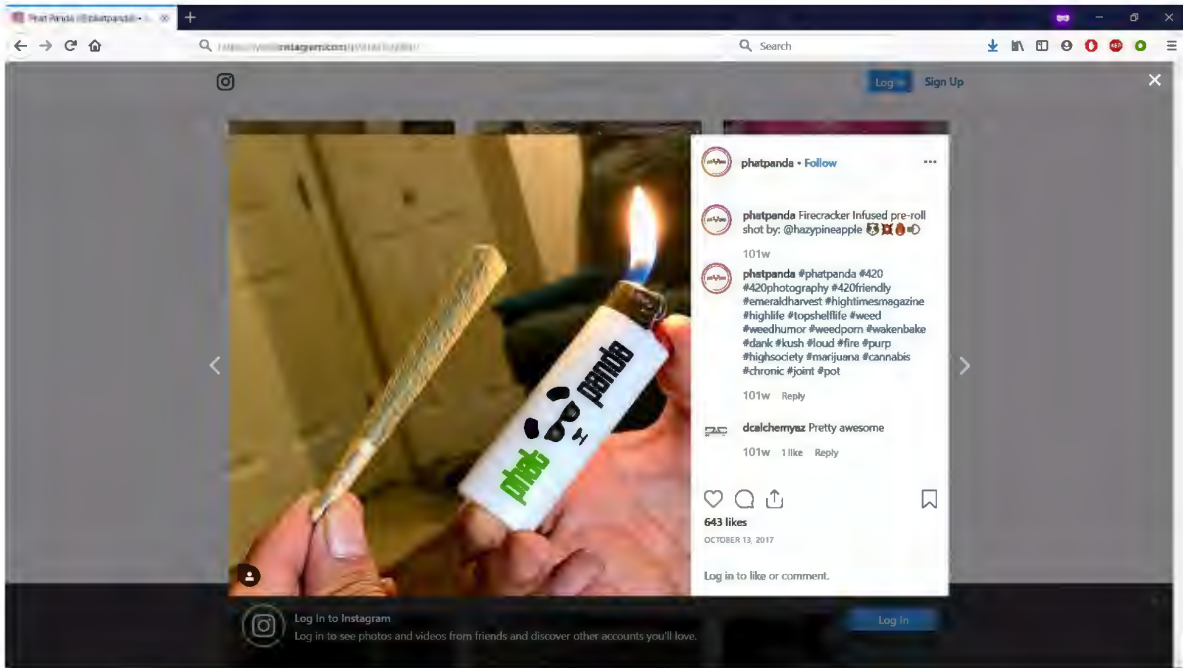


Exhibit 21

The image is a screenshot of a web browser displaying a YouTube video. The browser's address bar shows the URL <https://www.youtube.com/watch?v=0zDJeT1Snbw>. The YouTube player interface includes a search bar, a 'SIGN IN' button, and a video player with a progress bar at 1:00 / 15:16. The video content shows a hand holding a pre-roll cigarette, with several large black redaction boxes covering the faces of individuals in the background. Below the video player, the video title is 'Phat Panda Gelato Pre-Roll' with a location tag for 'VANCOUVER'. It indicates '273 views · Streamed live on Apr 2, 2018'. Interaction buttons for 'Like' (4), 'Dislike' (0), 'Share', and 'Save' are visible. A message states 'Live chat replay was turned off for this video.'

Exhibit 22

The screenshot shows an Instagram post from the account 'phatpanda'. The main image features two individuals from the waist up, wearing bright green tank tops. The person on the left has a tank top that says 'SAY WHY NOT TO DRUGS' with 'phat panda' and a panda logo below. The person on the right has a tank top that says 'DON'T SMOKE SHITTY WEED' with 'phat panda' and a panda logo below. The Instagram interface includes a browser address bar at the top, a search bar, and navigation icons. The post's caption reads: 'phatpanda "Say why not to drugs!" & "Don't smoke shitty weed!" 🐼🐼🐼 Click link in bio to browse our clever clothing line!'. The post has 1,695 likes and was posted on September 29, 2017. Comments from 'broccoli3oy', 'corganix541', and 'luke_coffman10' are visible. A 'Log in to like or comment' prompt is at the bottom of the post area.

Exhibit 23



Exhibit 24

PHAT PANDA (@PHATPANDA) | 3

Home Moments Search Twitter Search Twitter Have an account? Log In

phat panda

Tweets 1,117 Followers 2,592 Likes 96 Follow

Phat Panda
@phatpanda

Our vision is to contribute to the space by continuing to challenge ourselves every day and bring inspiration and innovation to the Cannabis industry.

Spokane Valley, WA
phatpanda.com
Joined December 2014

Tweets Tweets & replies Media

Phat Panda @phatpanda · Sep 18
Point Break - Hybrid, this strain is an uplifting and euphoric strain that offers plenty of energy and invigoration, and a blast of mood enhancement and body buzz.

Cultivated by us @phatpanda | Bred by @surfseeds ♡ @phatpanda #topshelf #cannabis #weed

Want to take advantage of all the new Twitter features?
It's simple - just log in.
Log in

Exhibit 25

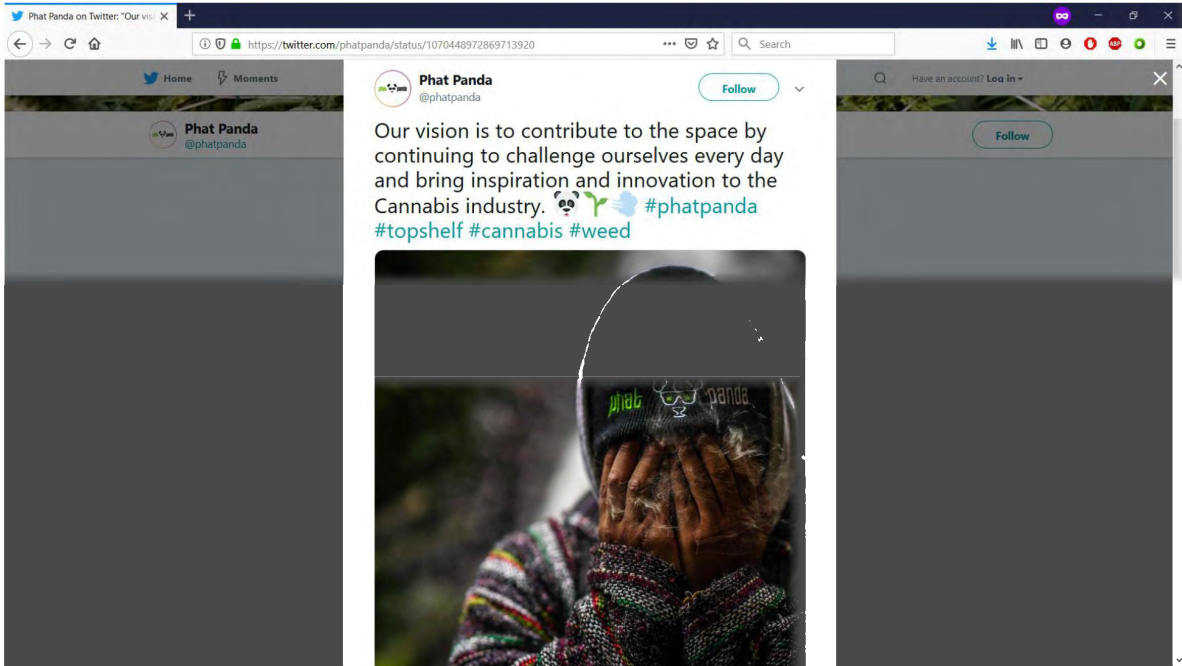


Exhibit 26

The screenshot shows a web browser window displaying an Instagram post. The browser's address bar shows the URL <https://www.instagram.com/p/BddeQszF8GR/>. The Instagram post features a close-up photograph of a lit firecracker joint, with a hand holding it and a pack of 'Onel' brand firecrackers visible in the background. The post is from the user 'phatpanda' and includes the following text and interactions:

phatpanda • Follow

phatpanda Another Onel! Golden Pineapple firecracker joint! 🍌🍌🍌

90w

crystallic_the_0z_defender The smoke almost had me KO!

90w Reply

tko.reserve 🍌🍌🍌

90w Reply

tommysisterson I've just bought some weeds how do i take it

1,942 likes

JANUARY 2, 2018

Log in to like or comment.

At the bottom of the browser window, there is a 'Log In to Instagram' prompt with the text: 'Log in to see photos and videos from friends and discover other accounts you'll love.'

Exhibit 27

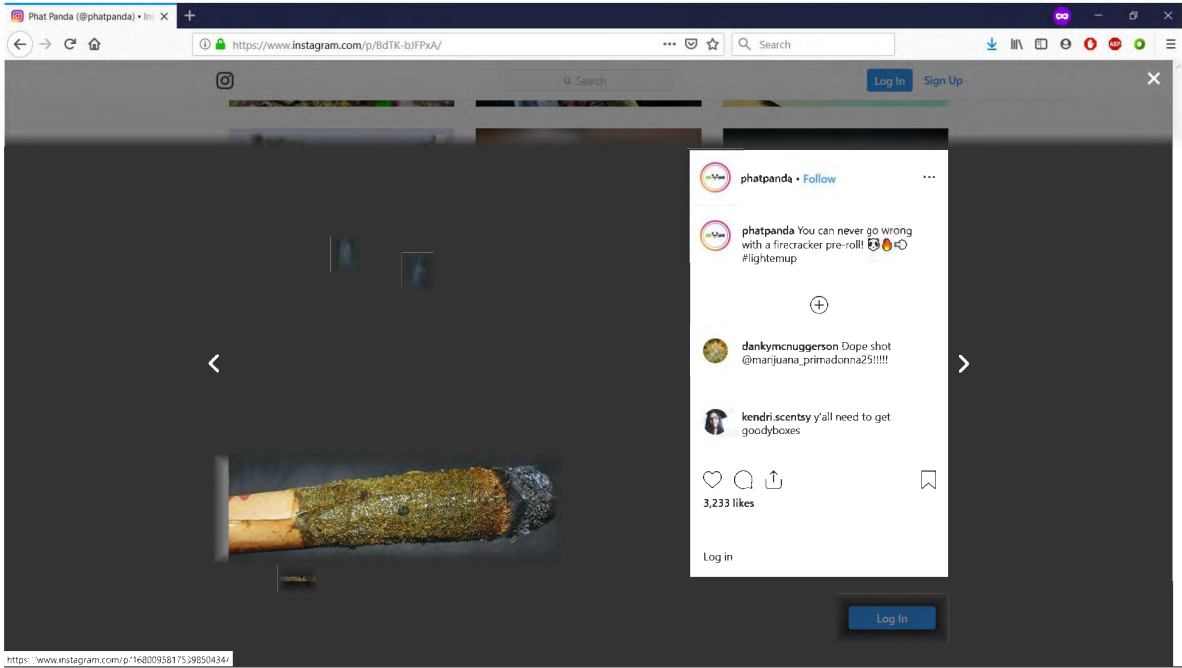


Exhibit 28

Phat Panda (@phatpanda) • In: X

https://www.instagram.com/phatpanda/

Instagram

Log In Sign Up

phatpanda Follow

1,951 posts 103k followers 59 following

Phat Panda
Our vision is to contribute to the space by continuing to challenge ourselves every day and bring inspiration and innovation to the Cannabis industry.

Inc. 5000
#1712

Employment

Brands/Par...

Press

Facebook

Twitter

POSTS

Log In to Instagram
Log in to see photos and videos from friends and discover other accounts you'll love.

Log In

Exhibit 29

The screenshot shows the Instagram profile page for 'phatpandacannabis'. The browser address bar displays 'https://www.instagram.com/phatpandacannabis/'. The profile header includes the Instagram logo, the name 'phatpandacannabis', and a 'Follow' button. Below the name, it shows '979 posts', '29.8k followers', and '15 following'. The bio reads: 'Phat Panda Our vision is to contribute to the space by continuing to challenge ourselves every day and bring inspiration and innovation to the Cannabis industry. www.phatpanda.com'. A row of three suggested accounts is visible: 'Phat Panda', 'Sticky Frog', and 'Hot Sugar'. The 'POSTS' section shows three image thumbnails. At the bottom, a dark navigation bar contains the Instagram logo, the text 'Log In to Instagram Log in to see photos and videos from friends and discover other accounts you'll love.', and a 'Log In' button.

Phat Panda (@phatpandacannabis)

Instagram

Log In Sign Up

phatpandacannabis Follow

979 posts 29.8k followers 15 following

Phat Panda
Our vision is to contribute to the space by continuing to challenge ourselves every day and bring inspiration and innovation to the Cannabis industry.
www.phatpanda.com

Phat Panda Sticky Frog Hot Sugar

POSTS

Log In to Instagram
Log in to see photos and videos from friends and discover other accounts you'll love.

Log In

MARIJUANA VENTURE

The Journal of Professional Cannabis Growers and Retailers

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CULTIVATION | NEWS

Panda-Monium



By MV Staff Writer
August 17, 2015



Washington's top-selling producer, Grow Op Farms, has been selling Phat Panda products like crazy, and could have the state's first \$1 million month. Story and photos by Garrett Rudolph

For years in the music industry, record sales were charted through phone calls and conversations with music stores. The widely-believed assumption was that rock and roll topped the charts. It wasn't until the industry started tracking records directly based on sales that the true pecking order — with country western at the top — came to light. The same analogy can be made of the cannabis industry, where so many numbers and reports tend to be anecdotal in nature, rather than based on facts. That is, until recently, as Washington's seed-to-sale tracking and programs such as Tetratrak reveal the true sales and production numbers of every licensed marijuana business in the state. And what that data shows is that Grow Op Farms is absolutely dominating the Washington market.

The Spokane Valley-based producers of the wildly popular Phat Panda brand have sold nearly \$3 million dollars of cannabis in the past six months.

Grow Op Farms was the top-selling producer/processor in the state for a four-month stretch between February and May (June results had not been released as of press time). In April, Grow Op finished the month just shy of a \$1 million milestone. Its \$946,000 in sales was more than the next two companies combined.

BMF Washington, which produces the Liberty Reach brand, sold \$471,000 of product, while DB3, of Zoots fame, sold \$458,000 of product.

Despite being operational for just six months, Grow Op Farms ranks third in the state for total revenue since Washington's recreational market launched in July 2014. Co-founders Rob and Katrina McKinley say the Grow Op team is biggest reason they've been able to grow so rapidly, with the quality of their product and their marketing and brand creation as

other significant factors in their success.

The McKinleys brought a wealth of entrepreneurial experience to the grow, but had never been directly involved in the marijuana business. In addition to a wide range of other business ventures, the McKinleys own a successful marketing company, which lent its name — Phat Panda — to the company's flower brand.

The McKinleys say they've been lucky many times in their lives, choosing the right path and picking the right people to align themselves with. It seems Grow Op Farms follows in that lineage.

"I always look at things from a business perspective," Rob McKinley says. "If you could have been Jack Daniel's when they removed the prohibition on alcohol, then you should probably make some whiskey."

And so it goes following the end of cannabis prohibition in Washington that the McKinleys figured they should start growing marijuana.

The right hires

McKinley points at two hires that were absolutely crucial for Grow Op's success.

The first and most important was Andrew Guy, the vice president of operations and master grower of Phat Panda.

In terms of his growing knowledge and expertise, Guy "passed the sniff test," McKinley says. He was confident Guy could handle the enormity of a full-size, commercial grow operation.

Plus, Guy's contacts within the industry allowed management to build a team underneath him that was up to the challenge.

"Some of our best employees came from Andrew's knowledge and contacts in the industry," McKinley says.

Guy probably isn't the typical "master grower." He started learning cultivation techniques years ago from a relative, but he also has a degree in economics and an understanding of how to make a cost-benefit analysis.

There's a level of trust between Guy and McKinley that's necessary when it comes to equipment and capital expenditures. McKinley tells people he's never said no to Guy. One of the first questions that came up between them was about the type of lighting they were going to install in the flower rooms. They weighed the merits of a cheaper light at \$250 apiece or a more expensive light at \$400.

"When you're buying lights for a single room, it might not be that big of a deal," McKinley says. "When you're buying a train car of them, that was a big decision."

They went with the more expensive light — a decision that seems to have paid off considering the yields they've achieved.

"I'm certainly able to objectively look at what things cost, what the potential return is and make the best decision for us as to whether that's something we need to do," Guy says.

The second key hire was bringing in Garrison Smith as a staff designer.

McKinley calls Smith the best designer in the industry, which warranted Grow Op to bring him in-house and keep him away from other competitors.

Smith is responsible for the label designs that are one of the most recognizable aspects of Phat Panda. Whether it's the Granddaddy Purple, the Golden Pineapple or the OG Chem,

each strain has a unique, eye-catching label that sets it apart from the vast majority of the industry.

Marketing and branding

With the McKinleys' background in marketing, it stands to reason that Grow Op Farms would put a heavy emphasis on establishing a brand that would stand out in Washington's crowded cannabis marketplace.

Not only did the packaging have to stand out to potential consumers, but it was also the first step in getting Phat Panda on retail shelves.

"I would say that the packaging was very important to getting our product tested by the store owners," Rob McKinley says. "When we would drop off samples, typically there was a basket with 50 other samples in it. Having glass (jars) and a really cool presence or label got our product tested first. All of our flower is packaged in glass. I believe we were the first to do this. Because of the labels and glass jars, our shelf presence is undeniable. When you walk into a retail store our products will be the first to catch your eye."

The company's original plans were to go a co-branding route, where the farm would grow the product, but it would be branded for each individual store.



However, the Phat Panda prototypes were an instant hit among Grow Op's employees.

The name came from a lesson McKinley took from one of his early mentors — use an animal if you want to create a memorable, catchy brand. Thus Grow Op Farms utilized Phat Panda for its flower products and Sticky Frog for its concentrates.

Katrina McKinley came up with the idea of using mug-style glass jars during a trip through Hobby Lobby.

While the jars might be more expensive than the typical plastic bags most producers use, the glass helps separate Phat Panda from many of its competitors.

McKinley describes one instance where a retailer specifically requested his shipment in plastic bags. Grow Op Farms granted the special request, but in the hustle and bustle of putting the shipment together, packaged the flower in glass jars just like every other

shipment.

Originally, McKinley and his team were apologetic for the mix-up. But within a couple weeks, the glass jars were flying off the shelves and the retailer completely reversed his stance.

The glass jars and catchy packaging have also created a collectible craze among some consumers, McKinley said. He regularly hears comments from people that they are trying to collect every jar, or that they save the bigger mugs to reuse as drinking glasses.

The packaging is crucial for getting consumers to buy Phat Panda products in the first place, but getting them to keep coming back for more is a factor of quality, McKinley says. "Cool packaging might lead people to buy a product once, but if they're not satisfied with the product, they're not going to keep buying it," McKinley says.

McKinley says he believes Grow Op Farms grows the best cannabis in the state.

But, then again, everybody in this industry says that, right?

"If our product weren't the best in the state, then the retailers wouldn't call back after we drop samples and the customers wouldn't become repeat buyers," McKinley says.

Employees

Guy says the employees of Grow-Op Farms are what make Washington State's largest cannabis producer successful. Without having the right staff in place to manage all aspects of the garden, as well as the trimming, processing and packaging needs, Phat Panda wouldn't be what it is today, he says.

The business currently has about 40 full-time employees and 27 part-timers.

"A lot of the employees really enjoy working with the marijuana," Katrina McKinley says.

"They love it. Not only do we try our best to treat them well, but they like their work. They want to be there, because they like what they're doing. It's awesome that they get the opportunity to do something they used to have to hide in their house to do and now they can actually do it for work and get paid to do it, legally."

The attrition rate has been extremely low since Grow-Op Farms began operating. That's been crucial in getting everybody up to speed and on the same page, Guy says.

The company has been able to retain the bulk of its work force by taking care of the employees.

"We treat them well, and in turn reciprocate with their time and energy," Guy says.

Grow-Op Farms' lowest-paid employees make at least \$12 an hour, while many make \$15 an hour or more, plus the possibility of overtime during especially busy times.

The entire management team has the option for an ownership stake written into their contracts, and every employee is eligible for profit sharing. Rob McKinley says 4% of the net profit at the end of the year is set aside for bonus dividends for all employees at the end of the year.

On the busiest days of the week — Tuesdays, Wednesdays and Thursdays — the company provides lunch or dinner for all employees

The McKinleys don't take a salary from the company. Instead, they've been reinvesting any profits back into the enterprise.

"Right now, as long as we're bringing in more than we're spending, that's a good month," Rob says.

Staffing was originally one of the biggest obstacles Grow-Op Farms had to address. “We grossly underestimated the amount of people that we needed, mostly on the processing side,” Guy says.

McKinley adds that the operation grew so fast during its first few months that employees were working 10-12 hours a day for several weeks at a time. That shortage cost the company a lot of money in overtime as it tried to keep up with the staffing needs.

“Since we are growing plants and they have schedules, flex time is difficult to offer any of the growing staff,” McKinley says. “Processing is a similar situation. Certain jobs have to get done in a very organized way. There isn’t a lot of freewheeling like you might find in a small tech startup where as long as I get my code written no one else is harmed. With plants if they aren’t attended to correctly it will negatively affect the whole operation, not just that one person and their job.”

Grow-Op Farms currently does not offer health insurance, but could be offering a medical/dental plan in the next few months for employees who wish to participate, McKinley says.

While working for Phat Panda is extremely fun, it’s certainly not easy, Guy says.

“It’s challenging,” he says. “Every day it’s the most challenging thing any of us have ever done.”

There have been times when Guy has worked 24-hour shifts — or more. The magnitude of the grow makes it easy to lose track of time taking care of necessary tasks, he says.

“We shackle him at night so he can’t leave,” McKinley jokes.

Operations

One challenge almost all state-licensed growers face is scaling up to commercial quantities.

“It’s one thing to grow one room, but changing that to 16 big rooms and meeting the labor demands is completely different,” Guy says.

There really is no secret to how Grow Op Farms has managed to tackle that challenge better than any other producer in Washington. The growers have done everything they can to maximize

their allotted 21,000 square feet of canopy. They’ve had to learn how to manage the balancing act of keeping enough clones and mother stock to supply the 16 grow rooms.

They use top-of-the-line lights and nutrients, McKinley says. They capitalize on economies



of scale.

The company initially faced a challenge with keeping the full-automated programming running correctly, McKinley says. With such a high-tech operation, it took a while before employees were familiar with the inner workings.

The growers have kept the operation within their means, focusing on what they do well. There are plans of introducing a line of non-perishable edibles in the near future, but rather than investing in extraction equipment and hiring somebody to handle concentrates, the company has outsourced that part of the operation to Weed Bunny, a Rainier-based processor.

On an average week, Grow Op Farms puts out about 40,000 to 50,000 grams of flower, 12,000 pre-rolled joints and 1,000 grams of concentrates.

The week leading up to 4/20, the grow facility stepped up its production to put 80,000 grams of flower and 17,000 joints on the shelves of retailers.

Despite consistently high revenue, McKinley admits the company is probably not making a lot of profit right now. The operating cost of a nearly 600-light grow operation, coupled with the cost of labor, is tremendous (all Phat Panda buds are trimmed by hand).

McKinley says his goal is to build Grow Op Farms into a \$50 million dollar company in gross revenues.

"I think we can get there within 18 months or so," he says.

Without a background in the cannabis industry, McKinley said he initially didn't know what to expect in terms of yields. When early numbers came out, Grow Op was averaging about three pounds per light.

That set a high bar to follow, McKinley says.

"We didn't really set out to dominate (the market), but as soon as that was provided to us, then there's only one way to do it," he says. "You're either going to do it or you're not. We fortunately have the team that can take it by the horns and do it."

The company is in the process of implementing changes that could push its weekly production to around 80,000 grams.

"When we're at that point, I think it's going to be really hard for people to keep up with us," McKinley says.

Sales

One might think sales would be easy for a company that's producing more cannabis than anybody else in Washington.

"As fast as we can cure it, is as fast as we can sell it," McKinley says.

But, like anything, the balancing act is half the battle. Despite its tremendous production, the demand for Phat Panda currently outstrips the supply. McKinley says he has to turn down at least one retail store per day, and the company already has to keep its 40 active retailers happy.

"We currently have a waiting list of 50 retailers that we cannot fulfill due to lack of product," McKinley says.

As soon as Grow Op Farms had product to sell, McKinley and Johnny Wilson, his vice president of sales, were cold-calling retailers and dropping off product to as many stores as possible. McKinley and Wilson saw the value of developing a great rapport with the

owners and buyers at retail stores.

McKinley handles the two Spokane stores — Satori and Green Light — while Wilson handles the west side of the state.

“They have parties for him when he shows up,” McKinley says. “They’re giving him hugs and high-fives and they’re taking pictures with him because they want everybody to know they got their Phat Panda in.”

With a limited supply to spread throughout the entire state, Grow Op Farms has had to focus on working with like-minded retailers, while also trying not to oversaturate a particular region of Washington. McKinley says it was important to hire the right person to handle sales, but the company doesn’t have a particular policy that sets it apart from other producer/processors.

“It’s very important to have good open and honest relationships with all of our retail partners,” McKinley says. “We are growing plants. This can cause variances in supply due to unforeseen circumstances and having a good relationship that’s open and honest allows us some goodwill on the retailer’s part.”

Regulatory changes

If there’s one regulatory change, McKinley and Guy would like to see, it’s the canopy limitations the Washington State Liquor Control Board has implemented.

Grow Op Farms is fortunate that demand is exceeding supply, McKinley says, but in the long run, he would like to be able to fulfill more orders and have a larger retail footprint. Grow Op isn’t ready to expand just yet. But McKinley and Guy say they want to have the option when the company is ready. It’s only a matter of time before Grow Op Farms is going to need more canopy.

“The goal is to get rid of the black market. If enough product can’t be grown, at a reasonable enough price, that will never happen,” McKinley says.

Overall, most of the regulations haven’t been too burdensome, but Grow Op Farms has had a bit of a “head-bashing contest” with the Liquor Control Board about the topic of expansion.

McKinley says it doesn’t make sense to penalize businesses that have maxed out their canopy and still need more room to grow.

“They don’t limit how many grapes you can grow, or even how much tobacco you can grow,” Guy says.

One idea that would ease the canopy restrictions on successful growers would be to make it so non-flowering plants don’t count toward the canopy, Guy says.

That would allow the canopy to focus on flowering plants, while allowing plenty of room for clones and mothers needed to keep the operating running.

However, the McKinleys recognize that the Liquor Control Board regulations are a fluid guideline.

The legal cannabis industry is so new, it will take time to shape rules that provide the right level of regulation without stifling business growth, Katrina McKinley says.



COMMENT

One response to "Panda-Monium"



Mary Birkenbuel says:

August 23, 2015 at 10:31 am

I have a friend that is having the pleasure to work for ur company. I have been trying to apply she sent me a email address so I forwarded my resume. Would to be part of the phat panda team!!



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MARK FILE NAME	http://tmng-al.uspto.gov/resting2/api/img/86523969/large
LITERAL ELEMENT	PHAT PANDA
STANDARD CHARACTERS	NO
USPTO-GENERATED IMAGE	NO
ARGUMENT(S)	
<p>This is in response to the Office Actions dated February 29, 2016 and April 22, 2016.</p> <p>The Examining Attorney has requested fact sheets, brochures, advertisements, and/or similar materials relating to the goods and/or services. Attached in the evidence section is the primary advertising of the cigarette papers of the application. There are no brochures or fact sheets.</p> <p>As requested by the Examining Attorney, applicant hereby asserts that the goods identified in the application comply with the Controlled Substances Act (CSA), 21 U.S.C. Sections 801-971.</p> <p>The Examining Attorney has requested responses to the following questions:</p> <p>"Do applicant's identified goods include or contain marijuana, marijuana-based preparations, marijuana extracts or derivatives, or any other illegal controlled substance?"</p> <p>"Are applicant's identified goods used or intended for use in connection with marijuana, marijuana-based preparations, marijuana extracts or derivatives, or any other illegal controlled substance?" and</p> <p>"Do applicant's goods comply with the Controlled Substances Act?"</p> <p>Applicant responds as follows:</p> <p>Applicant's identified goods, cigarette papers, do not include or contain marijuana, marijuana-based preparations, marijuana extracts or derivatives, or any other illegal controlled substance.</p> <p>Applicant's identified goods, cigarette papers, are not marketed for use in connection with marijuana, marijuana-based preparations, marijuana extracts or derivatives, or any other illegal controlled substance.</p> <p>Applicant asserts that applicant's cigarette papers comply with the Controlled Substances Act.</p>	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	evi_98125218168-20160426141607129934_20160406_evidence_appendix.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS\EXPORT16\IMAGEOUT16\865\239\86523969\xml20\ROA0002.JPG
DESCRIPTION OF EVIDENCE FILE	Applicant's only advertising of the cigarette papers.

SIGNATURE SECTION	
RESPONSE SIGNATURE	/Deepak Malhotra/
SIGNATORY'S NAME	Deepak Malhotra
SIGNATORY'S POSITION	Attorney of record, Washington State Bar member
DATE SIGNED	04/26/2016
AUTHORIZED SIGNATORY	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Tue Apr 26 14:29:56 EDT 2016
TEAS STAMP	USPTO/ROA-XX.XXX.XXX.XXX- 20160426142956591863-8652 3969-5504cfebb1435672755a 4121012c24d0a8be5753b1845 5d2babaed5352904473c6-N/A -N/A-20160426141607129934

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Response to Office Action

To the Commissioner for Trademarks:

Application serial no. **86523969** PHAT PANDA (Stylized and/or with Design, see <http://tmng-al.uspto.gov/resting2/api/img/86523969/large>) has been amended as follows:

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Applicant asserts that applicant's cigarette papers comply with the Controlled Substances Act.

EVIDENCE

Evidence in the nature of Applicant's only advertising of the cigarette papers. has been attached.

Original PDF file:

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Converted PDF file(s) (1 page)

[Evidence-1](#)

SIGNATURE(S)

Response Signature

Signature: /Deepak Malhotra/ Date: 04/26/2016

Signatory's Name: Deepak Malhotra

Signatory's Position: Attorney of record, Washington State Bar member

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the owner/holder in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

Serial Number: 86523969


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TEAS Stamp: USPTO/ROA-XX.XXX.XXX.XXX-201604261429565

91863-86523969-5504cfebb1435672755a41210

12c24d0a8be5753b18455d2babaed5352904473c

6-N/A-N/A-20160426141607129934

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Home

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Products

Phat Panda Rolling Papers
\$12.95



For Tobacco Use Only

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USPTO-GENERATED IMAGE	NO
ARGUMENT(S)	
<p>The U.S. Patent and Trademark Office has rejected the application in view of the Controlled Substance Act.</p> <p>The CSA prohibits, among other things, manufacturing, distributing, dispensing, or possessing certain controlled substances, including marijuana and marijuana-based preparations. 21 U.S.C. §§812, 841(a)(1).</p> <p>(d) "Drug paraphernalia" defined</p> <p>The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, methamphetamine, or amphetamines into the human body, such as—</p> <ol style="list-style-type: none"> (1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; (2) water pipes; (3) carburetion tubes and devices; (4) smoking and carburetion masks; (5) roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand; (6) miniature spoons with level capacities of one-tenth cubic centimeter or less; (7) chamber pipes; (8) carburetor pipes; (9) electric pipes; (10) air-driven pipes; (11) chillums; (12) bongs; (13) ice pipes or chillers; (14) wired cigarette papers; or (15) cocaine freebase kits. <p>(e) Matters considered in determination of what constitutes drug paraphernalia</p> <p>In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:</p> <ol style="list-style-type: none"> (1) instructions, oral or written, provided with the item concerning its use; (2) descriptive materials accompanying the item which explain or depict its use; (3) national and local advertising concerning its use; 	

- (4) the manner in which the item is displayed for sale;
- (5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
- (6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;
- (7) the existence and scope of legitimate uses of the item in the community; and
- (8) expert testimony concerning its use.

This section shall not apply to—

- (1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or
- (2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

Applicant does not sell wired cigarette papers.

On the contrary, applicant sells an item listed in the exceptions, namely, an item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory. Applicant's paper is traditionally intended for use with tobacco products.

In addition, applicant is authorized by Washington State law to manufacture such items.

Further, applicant does not advertise its papers on the same pages noted by the examiner. Instead, applicant advertises its papers at www.pandapapers.net. Applicant is not creating any association between its marijuana sales and rolling paper sales. There is no evidence that applicant intends to sell rolling papers for use with marijuana. Applicant is not suggesting such a use.

The Office has registered the mark RAW ORGANIC HEMP AUTHENTIC PUREST NATURAL HEMP FIBERS UNREFINED RAY NATURAL UNREFINED HEMP ROLLING PAPERS, registration number 4647824 and many other trademarks for rolling papers. Failure to register applicant's trademark would amount to a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The Supreme Court held in *Bolling v. Sharpe* (1954) that equal protection requirements apply to the federal government through the Due Process Clause of the Fifth Amendment.

SIGNATURE SECTION

RESPONSE SIGNATURE	/Deepak Malhotra/
SIGNATORY'S NAME	Deepak Malhotra
SIGNATORY'S POSITION	Attorney of Record, Washington State Bar Member
DATE SIGNED	02/05/2016
AUTHORIZED SIGNATORY	YES

FILING INFORMATION SECTION

SUBMIT DATE	Fri Feb 05 14:22:43 EST 2016
TEAS STAMP	USPTO/ROA-XXX.XXX.X.XXX-2 0160205142243455598-86523 969-5507a4b506b8d52926b8f abeca7fe6ecf5b83718e52d57 dcdbc329be5fd0bfb121-N/A- N/A-20160205141948070921

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- (8) carburetor pipes;
- (9) electric pipes;
- (10) air-driven pipes;
- (11) chillums;
- (12) bongs;
- (13) ice pipes or chillers;
- (14) wired cigarette papers; or
- (15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia

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- (2) descriptive materials accompanying the item which explain or depict its use;
- (3) national and local advertising concerning its use;
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- (5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
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SIGNATURE(S)

Response Signature

Signature: /Deepak Malhotra/ Date: 02/05/2016

Signatory's Name: Deepak Malhotra

Signatory's Position: Attorney of Record, Washington State Bar Member

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the owner/holder in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

Serial Number: 86523969

Internet Transmission Date: Fri Feb 05 14:22:43 EST 2016

TEAS Stamp: USPTO/ROA-XXX.XXX.X.XXX-2016020514224345

5598-86523969-5507a4b506b8d52926b8fabeca

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-N/A-N/A-20160205141948070921

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

IN RE
NJOY, INC. CONSUMER CLASS
ACTION LITIGATION

Case No. CV 14-00428-JFW (JEMx)
consolidated with SACV 14-00427-
MMM (RZx)

HONORABLE JOHN F. WALTER

**EXPERT REPORT OF RICCARDO
POLOSA, MD, PhD**

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Citation 5: Kleinstreuer C, Feng Y. Lung deposition analyses of inhaled toxic aerosols in conventional and less harmful cigarette smoke: a review. <i>Int J Environ Res Public Health</i> 2013;10(9):4454-85.....	19
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Citation 7: German Cancer Research Center (DKFZ) report http://www.dkfz.de/en/presse/download/RS-Vol.19-E-Cigarettes-EN/pdf	20
Citation 8: Vardavas CI, Anagnostopoulos N, Kougias M, Evangelopoulou V, Connolly GN, Behrakis PK. Acute pulmonary effects of using an e-cigarette: impact on respiratory flow resistance, impedance and exhaled nitric oxide. <i>Chest.</i> 2012; 141(6): 1400-6.....	22

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Exhibit A: Curriculum Vitae

Exhibit B: List of Case Specific Materials Provided

INTRODUCTION

1. I, Riccardo Polosa, M.D., Ph.D., have been retained by NJOY, Inc. and Sottera, Inc. (collectively, "NJOY" or "Defendant"), and their counsel, Troutman Sanders LLP, to provide my independent professional opinions as an expert and testifying witness in relation to *In re NJOY, Inc. Consumer Class Action Litigation*, Case No. CV 14-00428-JFW-JEMx.

2. I have been asked to prepare this expert report (hereinafter "Report") containing my independent opinion of the general safety of electronic cigarettes (ECs). Specifically, I have been asked to provide my independent opinion as to whether ECs are less harmful than traditional combustible tobacco cigarettes. If called to testify, I expect my testimony to be consistent with the opinions set forth in this Report.

3. I reserve the right to supplement or modify the opinions expressed herein, as well as the bases for the opinions, depending on the nature and content of the facts or opinions presented by any party or witness in this action, any other information provided by defendants or discovered by NJOY, and any subsequent Court orders concerning this litigation.

4. I am billing my standard rate of \$540 per hour for my time incurred. My compensation does not depend in any way on the content of my testimony and is not affected by the outcome of the case. If called to testify as to the contents of this Report, I can and would testify truthfully and competently.

5. This Report is based on my and other researchers' peer-reviewed scientific articles to date, and sets forth the testimony I am likely to present regarding my opinions.

6. I may also present testimony in rebuttal to the testimony and opinions offered in this case. I further reserve the right to use illustrations, figures, diagrams, tables, and other documents to illustrate my opinions. For example, I may use powerpoint slides to illustrate my opinions regarding the level of relative harm/risk of ECs compared to traditional tobacco cigarettes.

QUALIFICATIONS

A. Background and Experience

7. My background and qualifications are set forth in full in my curriculum vitae, which is attached to this Report as Exhibit A.

8. I am presently the Director of the Institute for Internal and Emergency Medicine of the University of Catania in Italy. I am in charge of the University's Centre for Tobacco Research ("CPCT"), and I am an Honorary Professor of Medicine at Southampton University in the United Kingdom.

9. I currently serve as the chief scientific advisor for Lega Italiana Anti Fumo ("LIAF"), the Italian Anti-Smoking League.

10. I currently serve as a member of The Consumer Advocates for Smoke-free Alternatives Association (CASAA) Board of Advisors.

11. I have been elected chair of the European Union Technical Committee Working Group 4 ("*Requirements and test methods for emissions*").

12. I received an M.D. from the University of Catania in 1986, a Post Graduate Degree in Respiratory Medicine from the Institute of Respiratory Diseases at the University of Catania in 1990, and a Ph.D. from the University of Firenze in 1996.

13. I am the author of more than 550 scientific publications, 330 of which are peer-reviewed articles and book chapters relating to respiratory medicine, clinical immunology, and tobacco addiction. I and my research team have lead several clinical trials on ECs. In 2014, I was identified as the most prolific author in the field of ECs. Zyoud, S.H., *et al.*, *Worldwide research productivity in the field of electronic cigarette: a bibliometric analysis*, 14:667 BMC Public Health 5, Table 6 (2014).

14. One of my fundamental research areas is smoking cessation, including disease-related outcomes, epidemiology, and biomarkers related to smoking cessation. I have written numerous articles and book chapters related to these and related subjects.

15. A significant amount of my research has been focused on tobacco harm reduction and alternative products to tobacco smoking, including ECs.

16. I have not testified at trial or in deposition in any case in the last four years.

INFORMATION CONSIDERED IN FORMING MY OPINIONS

17. In connection with the preparation of this Report, I have considered a variety of sources and documents, including those expressly cited in the body of this Report, all of which I incorporate by reference. A list of case specific materials provided to me is attached as Exhibit B.

18. I have also reviewed the reports identified by Plaintiffs in their Fourth Consolidated Amended Complaint, in the section titled "PUBLISHED STUDIES DEMONSTRATE THE DANGERS AND EXPOSURE TO HEALTH RISKS OF E-CIGARETTES."

19. Although I may cite to particular evidence in this Report, I do so to assist in understanding the various bases used to support my conclusions. I do not intend this Report to contain an exhaustive citation of every piece of evidence that may support my opinions. Accordingly, I expressly reserve the right to affirm, update, or modify my opinions based on such other evidence as necessary.

20. I reserve the right to rely on any other documents and materials that come to light during further fact and expert discovery. To the extent necessary, I anticipate supplementing this Report after the completion of any further deposition or after the receipt of any additional documents or materials produced in the future.

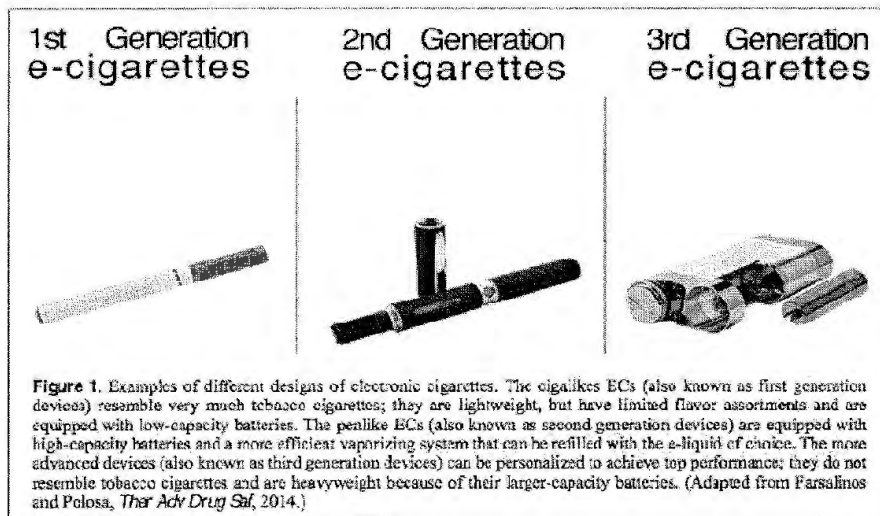
ELECTRONIC CIGARETTES (ECS) ARE MUCH LESS HARMFUL THAN CONVENTIONAL TOBACCO CIGARETTES

ECs as a Tobacco Harm Reduction Strategy

21. There is abundant evidence about the harm of conventional tobacco cigarettes. Cigarette smoke contains a mixture of over 7,000 chemicals, many of which harm the human body by causing a broad range of diseases.¹ Smoking is the leading cause of preventable premature mortality in the world. Total tobacco-attributable deaths are projected to increase from approximately 5 million per year today to over 8 million per year by 2030.² Death is mainly caused by ischemic heart disease, stroke, lung cancer, and the catastrophic complications of advanced stage chronic obstructive pulmonary disease (COPD).^{1,2,3} Besides lung cancer and COPD, inhalation of tobacco smoke has also been recognized to play a negative role in other pulmonary conditions, including asthma⁴ and interstitial lung disease (ILD).⁵ Therefore, it is not at all surprising that abstaining from smoking reduces the risk of lung cancer, ischemic heart disease, COPD, stroke, and other cancers,^{1,2,3} and produces significant health gains in patients with preexisting COPD,⁶ asthma,⁷ and ILD.⁸

22. ECs are electrically driven recreational use products consisting of a battery part and a heating element (atomizer) that vaporizes a liquid (mainly consisting of propylene glycol, vegetable glycerin, distilled water, and flavorings) that may or may not contain liquid nicotine.

Vaporization allows for inhalation of vapor (referred to as vaping) and produces an aerosol similar in appearance but substantially different in substance to conventional cigarette smoke. The EC is a revolutionary technology that provides the first viable recreational alternative to conventional tobacco cigarettes for cigarette smokers because of their many similarities with smoking behavior.⁹ ECs are technology products - not tobacco products - that can come in a large variety of designs, shapes, and sizes (see FIGURE 1).



23. The growing popularity of ECs appears to be driven by a variety of factors, including the following: they can be used to reduce cigarette consumption or quit smoking; they are perceived as a much less harmful smoking alternative; their prices are competitive compared to conventional cigarettes; they allow the user to continue having a “smoking experience without smoking.”^{10,11,12} Although these recreational use products are not intended to be smoking cessation devices or nicotine replacement therapies (NRTs) (and are not marketed as such), their regular daily use is associated with the corollary benefit of helping tobacco cigarette smokers quit smoking or using nicotine altogether.¹³ Given the importance of sensorial attributes in making the users’ vaping experience more fulfilling, we are now beginning to learn that smoking abstinence is enhanced by ECs’ success as smoking cessation products, even though the products are not marketed or sold as cessation products.

24. ECs are a much less harmful smoking alternative. Combusted tobacco products are the most harmful and dangerous products among the currently available nicotine containing products. It is well established, for example, that the more pyrolyzed tobacco constituents a user inhales from a combustible cigarette, the greater the risk of tobacco-related disease that product poses.¹⁴ Of the approximately 7,000 chemicals identified in cigarette smoke, at least 60 are known human carcinogens, including polycyclic aromatic hydrocarbons (PAHs) and tobacco-specific nitrosamines (TSNAs).¹⁵ ECs are far less risky to individual users than combustible cigarettes because they do not result in the inhalation of pyrolyzed chemicals. It has been recently recognized that there is a continuum of risk across various nicotine-delivering products, with combustible products (e.g., cigarettes, cigars, pipes) posing the most danger, while Food and Drug Administration (FDA) approved nicotine replacement therapies (NRTs) posing the least harm. In between, there are a plethora of products, including ECs (see FIGURE 2). Compared to combustible cigarettes, ECs are estimated to be 20 times less harmful and may substantially reduce individual risk and population harm.¹⁶

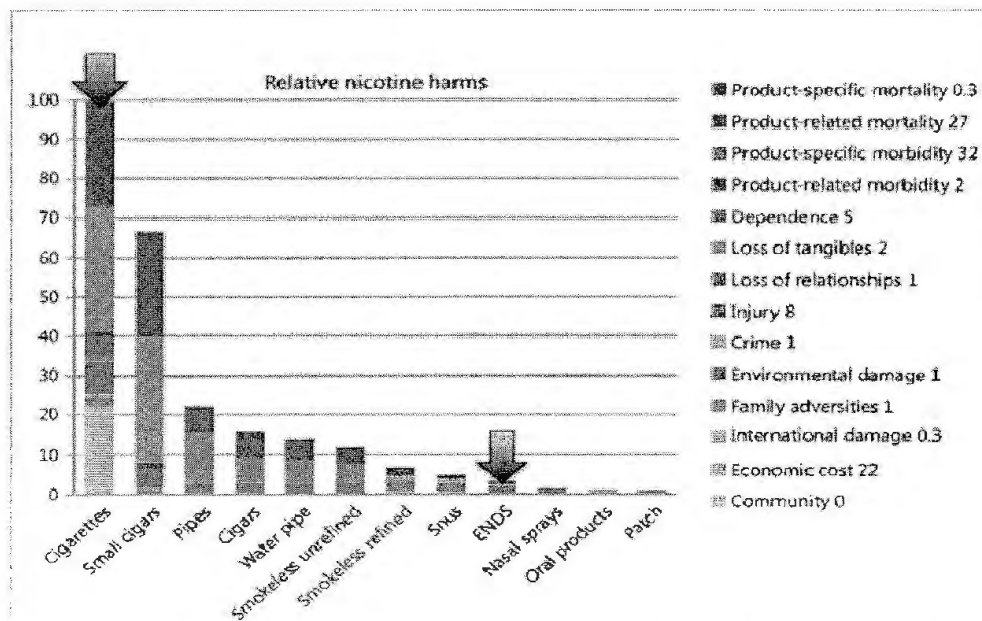


Figure 2. Risk estimates for a wide range of nicotine containing products. Cigarettes, with an overall harm score of 99.6, is judged to be most harmful. Product related mortality, the upper dark red section, is a substantial contributor to tobacco cigarette's risk estimate. An overall risk estimate of 4 has been calculated for electronic cigarettes. (Adapted by Nutt *et al.*, *Eur J Addiction*, 2014. With permission from Karger AG, Basel, Switzerland.)

25. Harm reduction is a valuable public health strategy with the potential to reduce, although not eliminate, the preventable disease and death caused by tobacco. ECs hold great promise in this regard. That is because ECs have significantly lower levels of known tobacco toxicants than combusted tobacco products.^{17,18} Indeed, public health experts from around the world support tobacco harm reduction through the use of ECs. For example, more than 50 tobacco and nicotine and public health specialists from 15 countries recently sent a letter to the World Health Organization (WHO) Director General Margaret Chan, emphasizing the importance of tobacco harm reduction through the use of “low risk non-combustible tobacco products” (which includes ECs). These products “could be among the most significant health innovations of the 21st Century— perhaps saving hundreds of millions of lives.”¹⁹ Recently, Public Health England (PHE), the equivalent of the United States Center for Disease Prevention and Control (CDC), calculated the level of harm caused by different nicotine delivery systems, from cigarettes to cigars, pipes, nicotine patches, and ECs, and ultimately concluded that ECs are 95% less harmful than conventional cigarettes.²⁰ PHE also found that a comprehensive review of the evidence determined that almost all of the 2.6 million adults using ECs in England are current or former tobacco smokers, most of whom are using the devices to help them quit smoking or to prevent them going back to tobacco cigarettes. The report indicates that very few adults and young people who have never smoked are becoming regular EC users (less than 1% in each group). Despite these benefits, the review raised concerns that increasing numbers of people believe ECs are equally or more harmful than smoking tobacco cigarettes (22.1% in 2015, up from 8.1% in 2013).²¹

Safety of ECs Aerosol Emissions

26. As noted above, not all nicotine-containing products are equally harmful. Across the continuum of risk for various nicotine-delivering products, ECs and NRTs are far less risky to individual users than combustible tobacco cigarettes. This is because they do not contain tobacco and do not use combustion to deliver nicotine. Any product delivering nicotine without combustion, such as ECs, has a substantially lower risk compared with conventional cigarettes, because their use does not result in the inhalation of pyrolyzed chemicals, including the potent carcinogenic polycyclic aromatic hydrocarbons (PAHs) and tobacco-specific nitrosamines (TSNAs).^{22,23,24}

27. NJOY ECs are no exception. Analytical testing of NJOY's products⁷⁷ reveals the following:

- There are no reportable quantities of aromatic amines (see TABLE 2):

Table 2 - Aromatic amine results

Sample	Client ID		1-aminonaphthalene	2-aminonaphthalene	3-aminobiphenyl	4-aminobiphenyl
			Total µg for 120 puffs	Total µg for 120 puffs	Total µg for 120 puffs	Total µg for 120 puffs
AA35020	King Menthol Bold	Prep A	BQL	BQL	ND	ND
		Prep B	ND	BQL	ND	ND
		Prep C	ND	BQL	BQL	ND
AA35021	King Menthol Gold	Prep A	BQL	BQL	BQL	ND
		Prep B	BQL	BQL	ND	ND
		Prep C	BQL	BQL	ND	BQL
AA35022	King Bold	Prep A	BQL	BQL	ND	ND
		Prep B	ND	BQL	ND	ND
		Prep C	ND	BQL	ND	ND
AA35023	King Gold	Prep A	ND	BQL	BQL	BQL
		Prep B	ND	BQL	ND	ND
		Prep C	BQL	BQL	ND	ND

ND = None Detected - No peak found BQL = Below quantitation limit

- There were no reportable quantities of ammonia (see TABLE 3):

Table 3 - Ammonia results

Sample	Client ID		Ammonia
			Total mg for 120 puffs
AA35020	King Menthol Bold	Prep A	BQL
		Prep B	BQL
		Prep C	BQL
		Average	BQL
AA35021	King Menthol Gold	Prep A	BQL
		Prep B	BQL
		Prep C	BQL
		Average	BQL
AA35022	King Bold	Prep A	BQL
		Prep B	BQL
		Prep C	BQL
		Average	BQL
AA35023	King Gold	Prep A	BQL
		Prep B	BQL
		Prep C	BQL
		Average	BQL

BQL = Below quantitation limit

- There were no reportable quantities of the potent carcinogenic PAHs, such as Benzo[a]pyrene (see TABLE 4):

Table 4 – Benzo(a)pyrene results

Sample	Client ID	BaP	
		Prep	Total ng for 120 puffs
AA35020	King Menthol Gold	Prep A	ND
		Prep B	ND
		Prep C	ND
		Average	ND
AA35021	King Menthol Gold	Prep A	ND
		Prep B	ND
		Prep C	ND
		Average	ND
AA35022	King Bold	Prep A	ND
		Prep B	ND
		Prep C	ND
		Average	ND
AA35023	King Gold	Prep A	ND
		Prep B	ND
		Prep C	ND
		Average	ND

ND = None Detected / No peak found

- There were no reportable quantities of the potent carcinogenic TSNA, NNN and NNK (see TABLE 8):

Table 8 – TSNA results

Sample	Client ID	Prep	NNN	NNK
			Total ng for 120 puffs	Total ng for 120 puffs
AA35020	King Menthol Gold	Prep A	ND	BQL
		Prep B	ND	BQL
		Prep C	ND	BQL
		Average	ND	BQL
AA35021	King Menthol Gold	Prep A	ND	BQL
		Prep B	ND	BQL
		Prep C	ND	BQL
		Average	ND	BQL
AA35022	King Bold	Prep A	ND	BQL
		Prep B	ND	BQL
		Prep C	ND	BQL
		Average	ND	BQL
AA35023	King Gold	Prep A	ND	BQL
		Prep B	ND	BQL
		Prep C	ND	BQL
		Average	ND	BQL

ND = None Detected / No peak found

BQL = Below quantitation limit

- There were no reportable quantities of the Volatile Organic Compounds (VOCs) (see TABLE 9):

Table 9 - VOC results

Sample ID	Client Marks	1,3-Butadiene µg/120puffs	Isoprene µg/120puffs	Acrylonitrile µg/120puffs	Benzene µg/120puffs	Toluene µg/120puffs
AA35020	King Menthol Bold A	ND	ND	ND	ND	ND
	King Menthol Bold B	ND	ND	ND	ND	ND
	King Menthol Bold C	ND	ND	ND	ND	ND
	Average	ND	ND	ND	ND	ND
AA35021	King Menthol Gold A	ND	ND	ND	ND	ND
	King Menthol Gold B	ND	ND	ND	ND	ND
	King Menthol Gold C	ND	ND	ND	ND	ND
	Average	ND	ND	ND	ND	ND
AA35022	King Bold A	ND	ND	ND	ND	ND
	King Bold B	ND	ND	ND	ND	ND
	King Bold C	ND	ND	ND	ND	ND
	Average	ND	ND	ND	ND	ND
AA35023	King Gold A	ND	ND	ND	ND	ND
	King Gold B	ND	ND	ND	ND	ND
	King Gold C	ND	ND	ND	ND	ND
	Average	ND	ND	ND	ND	ND

ND = None Detected / No peak found

28. The characterization of EC aerosol emissions has been the subject of intense research activity over the last three years. Standard e-liquid ingredients include: propylene glycol and/or vegetable glycerin (glycerol or glycerine), distilled water, and flavorings, and may or may not contain liquid nicotine. Although the media often portrays e-liquids and aerosol emissions generated by the vaporization of e-liquids as containing “unknown” toxins, the safety of many of these ingredients is now well established.

1. Nicotine

29. The latest US Surgeon General’s report has concluded that nicotine itself does not contribute to smoking-related diseases.¹ In particular, nicotine is not classified as a carcinogen by the International Agency for Research on Cancer.²⁵ The safety and toxicological profile of nicotine has been studied extensively in both animals and humans. The long-term inhalation effects of nicotine have been studied over a two-year period in Sprague-Dawley rats.²⁶ After being exposed to pure nicotine aerosol for 20 hours a day for five days a week for over two years, no tumorigenic

effects of nicotine were found in any organ in the body. In particular, no tumors were detected on either macroscopic or microscopic examination of the lungs. There were also no changes evident in the macroscopic examination of the hearts, including atherosclerotic lesions. Studies on the long-term use of nicotine-replacement therapies (NRTs) have similarly made clear that nicotine is not a carcinogen in humans. Specifically, a connection between nicotine and cancer was not found in a five-year study of 5,887 subjects.²⁷ Moreover, up to five years of nicotine gum use was unrelated to cardiovascular diseases or other serious side effects.²⁸ A meta-analysis of 35 clinical trials found no evidence of cardio-vascular or other life-threatening adverse effects caused by nicotine intake.²⁹

30. It has been speculated that regular vaping might induce people to higher nicotine consumption (i.e. nicotine overdosing), but this is unlikely, given that ECs are generally much less efficient than conventional cigarettes at delivering nicotine into the body.^{30,31,32} Moreover, there is no evidence of compensatory puffing behaviors contributing to higher nicotine intake in exclusive EC users and those who engage in smoking and vaping; the overall level of plasma nicotine and cotinine (a stable metabolite of nicotine) is comparable (not higher) to that of smoking cigarettes.^{33,34}

31. Of course, nicotine does pose some acute hazards if swallowed or absorbed through the skin. As a result of the increasing market share of refillable open-system vaporizers and the growing presence of e-liquids on the marketplace and in the home, the population that may be inadvertently exposed to nicotine at levels that pose an acute toxicity risk is expanded. However, contrary to popular belief, the lethal dose of nicotine for adults (when ingested) is not 50-60 mg - as many still believe - but 10 to 20 times higher.³⁵ Nevertheless, child-resistant packaging and specific refill mechanisms can control risks associated with these hazards.

32. According to the results of analytical testing of NJOY's products,⁷⁷ nicotine was systematically detected at various levels in the EC emission aerosol (see TABLE 5).

Table 5 - Nicotine results

Sample	Client ID		Nicotine
			Puffs 1 3
			Total mg for 120 puffs
AA35020	King Menthol Bold	Prep A	9.014
		Prep B	9.254
		Prep C	7.270
		Average	8.513
AA35021	King Menthol Gold	Prep A	3.969
		Prep B	4.665
		Prep C	5.454
		Average	4.696
AA35022	King Bold	Prep A	9.092
		Prep B	7.814
		Prep C	10.629
		Average	9.175
AA35023	King Gold	Prep A	6.739
		Prep B	6.324
		Prep C	6.876
		Average	6.646

33. Nicotine levels ranged from 3.969 mg/120 puffs to 10.629 mg/120 puffs, but in any case - considering that a smoker normally takes between 1 and 3 mg of nicotine per cigarette (on average, one conventional cigarette is consumed after 12 puffs) – the amount of nicotine introduced with NJOY ECs is at best the same, if not much less, compared to tobacco cigarette.

2. Propylene Glycol and Vegetable Glycerin (i.e. glycerol, glycerine)

34. Propylene Glycol (“PG”) and Vegetable Glycerin (“VG” or glycerine) are alcoholic compounds used as humectants (in tobacco products), solvents (in many pharmaceutical products, including liquid formulations for nebulization), and preservatives (in food). They are also used in personal care and cosmetic products. PG and VG have been classified as GRAS (Generally Regarded As Safe) by the FDA for direct use in food.^{36,37} VG and PG are metabolized and stored in the liver and adipose tissue and can be used as an energy source with final production of carbon dioxide and water. About 45% of an absorbed PG is excreted by the kidneys unchanged or as the glucuronide conjugate. Neither of these substances are carcinogenic or genotoxic.^{38,39} The safety and toxicological profile of both PG and VG have been studied extensively in both animals and humans. Animal toxicology studies demonstrate very low oral, dermal, or inhalation toxicity.⁴⁰ In particular, a comprehensive review of the toxicological profile of a condensation aerosol of PG under conditions where the inhaled aerosol was targeted to produce deep lung delivery showed

that PG is not-toxic.⁴¹ Despite the favorable safety profile of PG, acute exposure to thick mist of unrefined (i.e. non pharmaceutical (USP grade)) PG from smoke generators in discotheques, theatres, and aviation emergency training settings may cause eye irritation, cough, and airway obstruction in susceptible individuals.^{42,43 [7,8]} Direct exposure to propylene glycol mist generated by ECs has been reported to cause mouth irritation, throat irritation, and dry cough in clinical trials of unexperienced EC users.^{44,45,46,47} Nonetheless, it has been shown that these irritative effects appear to disappear spontaneously over a short period of time.^{43,44} Because PG in its aerosol form is a potent bactericidal agent,⁴⁸ regular vaping may potentially prevent respiratory infections.

35. Only pharmaceutical purity (i.e. USP grade) PG and VG were used in the NJOY products at issue in this litigation. Therefore, the possibility for these products to cause irritation similar to that reported with use of crude unrefined (i.e. not USP grade) products for industrial applications, is highly unlikely.

3. Carbon Monoxide

36. Carbon monoxide (CO) is a clear, odorless toxic gas produced in high concentrations during cigarette combustion. So when tobacco is burned and inhaled, one of the 7,000 or more chemicals that enters the body is CO. Measurements of exhaled CO (eCO) in humans are universally adopted as a biomarker of active smoking and elevated levels of eCO in cigarette smokers will fall rapidly to within normal limits after complete abstinence.⁴⁹ Previous studies carried out with different ECs models^{50,51,45} have shown a much-reduced toxic burden of CO in smokers who quit their tobacco consumption by switching to ECs. Because ECs are battery-operated devices that work without burning tobacco, this is not surprising. In addition, the substantial reduction in CO (as well as in Carboxyhemoglobin (COHb) levels) provides an explanation for the frequently reported rapid improvements in respiratory symptoms (e.g. shortness of breath) and general well-being following smoking abstinence in regular EC users.¹¹

37. According to the results of analytical testing of NJOY's products,⁷⁷ there were no reportable quantities of CO in aerosol emissions (see TABLE 6):

Table 6 – Carbon monoxide results

Sample	Client ID		CO mg / first 50 puffs
AA38520	King Menthol Bold	Prep A	BQL
		Prep B	BQL
		Prep C	BQL
		Average	BQL
AA38521	King Menthol Gold	Prep A	BQL
		Prep B	BQL
		Prep C	BQL
		Average	BQL
AA38522	King Bold	Prep A	BQL
		Prep B	BQL
		Prep C	BQL
		Average	BQL
AA38523	King Gold	Prep A	BQL
		Prep B	BQL
		Prep C	BQL
		Average	BQL

4. Carbonyls

38. Consumers have raised concerns regarding thermal degradation of PG and VG in the course of vaporization and the potential for the formation of low molecular carbonyls compounds, including harmful aldehydes. Although formaldehyde, acetaldehyde, and acrolein in EC emission aerosols are generally found at much lower levels compared with cigarette smoke,^{22,52} a recent study has shown that at excessively high temperatures, PG and VG in e-liquids can generate levels of carbonyls approaching or even exceeding those found in cigarette smoke.⁵³ This report has generated concerns that EC use at high power levels may be associated with significant exposure to harmful toxic chemicals. However, it is important to understand that high aldehyde levels are generated during overheating of these devices only in the course of certain standardized experimental protocols that bear little relevance to normal use.⁵⁴ Moreover, under these extreme conditions, the excess in aldehyde release is associated with the perception of a strong unpleasant taste by the user (the so-called “dry puff phenomenon”).⁵⁵ At dry puff conditions, EC users are not expected to be exposed to such high levels of aldehydes, because in practice, it is impossible to tolerate the taste of such unpleasant aerosol. It is no different from the unlikely risk of being exposed to high levels of carcinogenic heterocyclic amines and polycyclic aromatic hydrocarbons in an overcooked piece of meat that one can never eat. In any case, at normal vaping conditions, aldehyde emission levels are far lower than in cigarette smoke. Moreover, newer models being

introduced to the market have been fitted with an automatic temperature control and other safety features to prevent excessive heating.

39. According to the results of analytic testing of NJOY's products,⁷⁷ of all the carbonyls analysed in the EC aerosol emissions, only formaldehyde could be systematically detected in the EC emission aerosol (see TABLE 7). This is not unexpected, given that formaldehyde is a common byproduct of PG and VG and is generated at various concentration, depending on whether the specific testing conditions is causing overheating of these devices.

Table 7 - Carbonyl results

Sample	Client ID		Formaldehyde blank corrected Total µg for 120 puffs	Acetaldehyde blank corrected Total µg for 120 puffs	Acrolein Total µg for 120 puffs	Crotonaldehyde Total µg for 120 puffs
AA30520	King Menthol Bold	Prep A	N/A*	N/A*	N/A*	N/A*
		Prep B	22.39	BQL	BQL	ND
		Prep C	30.18	4.77	BQL	ND
		Average	26.29	N/A		
AA35021	King Menthol Gold	Prep A	11.83	BQL	ND	BQL
		Prep B	13.11	BQL	ND	ND
		Prep C	15.03	BQL	BQL	BQL
		Average	13.32	N/A		
AA35022	King Bold	Prep A	15.26	BQL	BQL	ND
		Prep B	15.55	BQL	BQL	ND
		Prep C	16.48	BQL	BQL	ND
		Average	15.09	N/A		
AA35023	King Gold	Prep A	6.99	BQL	BQL	BQL
		Prep B	13.35	BQL	BQL	BQL
		Prep C	16.61	BQL	BQL	ND
		Average	12.32	N/A		

N/A = Not Applicable N/A* = sample broke during preparation ND = None Detected / No peak found
BQL = Below quantitation limit

40. Under experimental condition (i.e., collection of EC aerosol emission generated by a consecutive run of 120 puffs of four second intervals), formaldehyde was detected at low levels in all devices and ranged from 6.99 to 30.18 microg/120-puff collection. These levels can be estimated to average approximately 0.058 and 0.252 microgram formaldehyde/puff. The calculated potential daily exposure to formaldehyde resulting from this per-puff concentration range is approximately at least 4 times lower than the equivalent daily exposure derived from exposure to formaldehyde at the limit established by the Deutsche Forschungsgemeinschaft (DFG). The No Significant Risk Level (NSRL) for formaldehyde, however, is 40 microg/day. Assuming that one NJOY EC cartridge provides 100 puffs and that each puff contains 0.25 microg formaldehyde (worst case scenario), the estimated daily exposure to formaldehyde is about 25

microg/day, which is less than the NSRL of 40 microg/day. Of note, when collection of aerosol was carried out under normal condition of use for a single vaping session (i.e. collection of EC aerosol emission generated by a consecutive run of 10 puffs) there were no reportable quantities of formaldehyde in aerosol emissions for all NJOY products at issue.⁷⁸

5. Metals

41. It may not be unusual to detect some contamination with metals in EC emission aerosols, because ECs consists of several metal parts. In particular, heating coils may release some metal particles in the aerosol during vaporization. Only a few studies have reported the presence of metals in EC aerosol emissions. Goniewicz et al.²² examined 12 samples for the presence of metals and found only trace levels of nickel, cadmium, and lead in the vapor (a few nanograms per 150 puffs). In another study of an early first-generation EC, several metals were detected in the aerosol, which in some cases were similar or slightly higher compared with conventional cigarettes.⁵⁶ Most importantly, a detailed risk assessment performed on the data obtained from these two studies established that these levels are unlikely to pose a serious threat to users' health.⁵⁷ Even if the consumer absorbed 100% of inhaled aerosols (which in practice is not true – because a certain quota is exhaled), the average user would be exposed to 4 to 40 times lower amounts for most metals than the maximum daily dose allowance from inhalational medications⁵⁸ and by orders of magnitude lower than the regulatory limits for daily occupational exposure.⁵⁹ It must be also noted that both studies evaluated outdated models. There is a continuous improvement in the design, properties, and safety features of EC parts, with new-generation atomizers featuring pyrex glass and stainless steel structure substituting plastics and other metals.

42. According to the results of analytic testing of NJOY's products,⁷⁷ of all the metals analysed in the EC aerosol emissions, only iron could be detected (see TABLE 6). This is not unexpected, given that it is commonly used in the manufacturing of atomizers as well as in the heating coils.

Table 10 - Metals results

Sample	Client ID		Arsenic As Total µg for 120 puffs	Cadmium Cd Total µg for 120 puffs	Chromium Cr Total µg for 120 puffs	Iron Fe Total µg for 120 puffs	Nickel Ni Total µg for 120 puffs	Lead Pb Total µg for 120 puffs
AA35020	King Menthol Bold	Prep A	BQL	BQL	BQL	BQL	BQL	ND
		Prep B	BQL	ND	BQL	BQL	BQL	BQL
		Prep C	BQL	BQL	BQL	1.44	BQL	ND
AA35021	King Menthol Gold	Prep A	BQL	ND	BQL	1.88	BQL	BQL
		Prep B	BQL	ND	BQL	BQL	BQL	BQL
		Prep C	BQL	BQL	BQL	BQL	BQL	BQL
AA35022	King Bold	Prep A	ND	ND	BQL	BQL	BQL	BQL
		Prep B	ND	BQL	BQL	BQL	BQL	ND
		Prep C	ND	BQL	BQL	BQL	BQL	ND
AA35023	King Gold	Prep A	ND	ND	BQL	1.67	BQL	ND
		Prep B	ND	BQL	BQL	BQL	BQL	ND
		Prep C	ND	ND	BQL	8.68	BQL	ND

ND = None Detected / No peak found BQL = Below quantitation limit

43. Iron is an essential human nutrient with a variety of physiological roles, including those associated with haemoglobin, myoglobin, ferritin and Fe-containing enzymes. No inhalational PDE or MRL has been defined. NIOSH has defined a REL of 5000 µg/m³ (i.e. 5 µg/L) for iron oxide; assuming that iron oxide was the emitted compound, and considering the worst case scenario of King Gold Prep C (i.e. 8.68 microg/120 puffs and considering a puff of 50cc), daily exposure from EC aerosol emission was about 3.5 times lower compared to the safety limit.

6. Flavorings

44. E-liquids come in a variety of flavors. Although food flavourings are safe to eat, there has been growing concern about potential dangers associated with the inhalation of certain compounds found in some e-liquid flavors. Specifically, diacetyl and acetyl propionyl (2,3-pentanedione) - two flavorings that are commonly used in the food industry to give food a buttery taste - have been identified in some e-liquid and may raise concern when inhaled. Chronic exposure to high levels of these flavouring substances in microwave popcorn workers has been shown to cause the development of bronchiolitis obliterans, ("popcorn lung").^{60,61} Thus, it is of concern that many brands of vaping liquids may contain varying concentrations of diacetyl and acetyl propionyl (particularly in nutty flavours).^{62,63}

45. While these substances appear to be present in many flavors, it is critical to understand the context of the levels observed relative to the identified workplace/occupational hazard, as well as cigarette smoking. Specifically, the levels in the Farsalinos study^[4] were on average slightly lower than currently established safety limits (set by the National Institute of Occupational Safety and Health - NIOSH). It is also important to note that cigarette smoke also contains both flavorings, but at a much higher level (up to 750 times higher) when compared to the average daily exposure from EC vapor.⁶⁴ And yet there is no evidence that cigarette smoking causes bronchiolitis obliterans. Most importantly, despite millions of vapers worldwide, there is not a single report that this has caused bronchiolitis obliterans in EC users.

46. NJOY did not use diacetyl and acetyl propionyl (2,3-pentanedione) as a flavoring for the products at issue. Therefore, there is not even a remote possibility for NJOY ECs to raise health concern associated with inhalation of flavorings.

CRITICAL APPRAISAL OF THE CITATIONS PRESENTED BY PLAINTIFFS IN THE COMPLAINT UNDER THE SECTION TITLED “PUBLISHED STUDIES DEMONSTRATE THE DANGERS AND EXPOSURE TO HEALTH RISKS OF E-CIGARETTES”

47. As set forth herein, I conclude that ECs are much less harmful than conventional tobacco cigarettes. In their complaint, Plaintiffs rely on studies, technical reports, and press releases that collectively suggest that ECs may be harmful or potentially harmful to human health. My review of these studies, reports, and press releases is set forth below.

Citation 1: FDA 2009 Technical Report

<http://www.fda.gov/downloads/drugs/scienceresearch/ucm173250.pdf>

48. This non peer-reviewed study was carried out by FDA’s Center for Drug Evaluation, Division of Pharmaceutical Analysis (DPA) in early 2009 on two very old products (NJOY ECs with various cartridges and Smoking Everywhere Electronic Cigarettes with various cartridges) that are not the subject of the complaint at issue in this litigation. DPA’s analysis revealed that half of the samples contained certain tobacco-specific nitrosamines (TSNAs), and a majority contained tobacco-specific impurities (anabasine, myosmine, and β -nicotyrine). However, the results in Table 1 are presented as “D” (detected) and “ND” (not detected), making it impossible to establish any health risk. Nonetheless, DPA’s report stated that “Tobacco specific nitrosamines and tobacco

specific impurities were detected in both products at very low levels.” Since then several laboratories have tried to duplicate those results, but were unable to do so.

49. In a recent study investigating a set of 42 popular e-liquids, no sample contained TSNA's at concentrations above their limit of detection (1 microg/g).⁶⁵ Of note, nicotine in e-liquids, like nicotine in nicotine replacement treatment (NRT), is extracted from tobacco and thus may include impurities such as cotinine, anabasine, anatabine, myosmine, and beta-nicotyrine. In a study of 20 e-liquids, tobacco specific impurities were often detected, but below the level where they would be likely to cause harm.⁶⁶ All the e-liquids under investigation were made in EU or US. None were made in China.

Citation 2: FDA consumer health brochure “FDA Warns of Health Risks Posed by E-Cigarettes”
<http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm173401.htm>

50. This non peer-reviewed document was issued soon after the results in Citation 1 were made publicly available. This brochure contains strong statements that do not reflect findings in Citation 1.

Citation 3: FDA news release

<http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm173401.htm>

51. This non peer-reviewed document repeats the same statements discussed in Citation 2.

Citation 4: Trtchounian A, Williams M, Talbot P. Conventional and electronic cigarettes (e-cigarettes) have different smoking characteristics. *Nicotine Tobacco Res.* 2010;12(9):905-12.

52. In this peer-reviewed research article, the authors measured and compared inhalational pressures (i.e. suction) between early first-generation ECs and conventional cigarettes. Generally speaking, these products required stronger suction compared to conventional cigarettes, underscoring the fact that the whole puffing experience is different and requires some degree of adaptation from smoking to vaping.

53. The decreased efficiency of aerosol production shown during ECs use makes dosing nonuniform over time, rendering it unlikely that stronger puffing will automatically lead to higher deep lung deposition. Moreover, high velocity inhalation (i.e. higher suction) will increase impact in the oral mucosa. These differences in inhalational pressures between ECs and conventional

cigarettes are a function of ECs' tip design (e.g. size of the hole in the tip – the larger the less suction) and mostly resolved in newer products (e.g. today, air flow can be adjusted in some models).

54. Please note that the implication of stronger puffing “leading to cancer in the deeper lung regions” may hold true only for tobacco smoking. But for ECs, it is pure speculation unsupported by scientific evidence. If it were true that stronger puffing had potential for “leading to cancer in the deeper lung regions,” then biomarkers of exposure should be higher in ECs users. In fact, the opposite may be true - that substituting tobacco cigarettes (i.e. low suction device) with ECs (i.e. high suction device) expose the user to lower risk of smoking-related disease (see Citation 5 below).

Citation 5: Kleinstreuer C, Feng Y. Lung deposition analyses of inhaled toxic aerosols in conventional and less harmful cigarette smoke: a review. *Int J Environ Res Public Health* 2013;10(9):4454-85.

55. This peer-reviewed review article examines the contributions published between 2009 and 2013 that focus on the potential health risk of toxicants in the smoke of conventional and less harmful tobacco cigarettes, not in the emission aerosols of ECs. At page 13 of the complaint, there is mention of a general statement by the authors about the potential for stronger puffing to “leading to cancer in the deeper lung regions.”

56. As discussed above, this is generally true for tobacco smoking. But for ECs, is pure speculation unsupported by scientific evidence. If it were true that stronger puffing had potential for “leading to cancer in the deeper lung regions,” then biomarkers of exposure should be higher in ECs users. In fact, again, the opposite may be true – that substituting tobacco cigarettes (i.e. low suction device) with ECs (i.e. high suction device) exposes the user to lower risk of smoking-related disease. ECs users have much lower urine levels of tobacco smoke toxicants and carcinogens compared to cigarette smokers⁶⁷ (see FIGURE 3), and urinary acrolein is of several order of magnitude lower after switching to regular EC use.⁶⁸

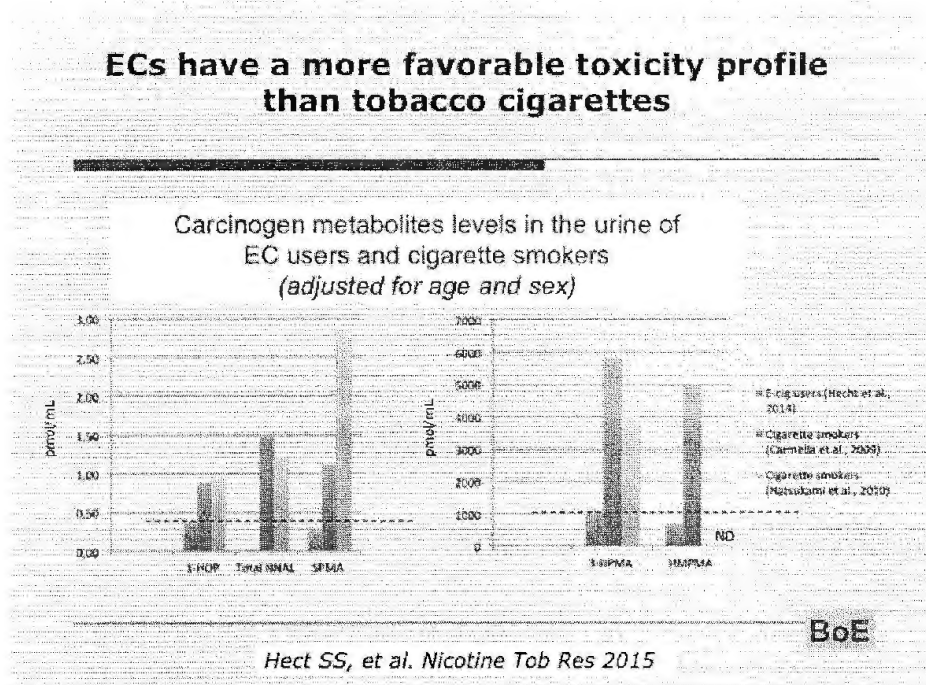


FIGURE 3. Geometric means of levels of toxicants and carcinogen metabolites in the urine of e-cigarette users and tobacco cigarette smokers by study (adjusted for age and gender). BoE: biomarkers of exposure.

Citation 6: WHO statement

http://www.who.int/tobacco/communications/statements/electronic_cigarettes/en/

57. This is a non peer-reviewed document. Statements like “[m]ost ENDS [Electronic Nicotine Delivery Systems] contain large concentrations of propylene glycol, which is a known irritant when inhaled,” that “[t]he testing of some of these products also suggests the presence of other toxic chemicals, aside from nicotine,” and that the safety of these devices “has not been scientifically demonstrated” from a highly respectable health authority like the WHO is likely to confuse the public. Propylene glycol is portrayed as a highly toxic substance, when it is not. The safety of PG is discussed at length at paragraphs 34 and 35 of this Report.

Citation 7: German Cancer Research Center (DKFZ) report

<http://www.dkfz.de/en/presse/download/RS-Vol.19-E-Cigarettes-EN/pdf>

58. This is a non peer-reviewed document based on a comprehensive collection of most of the EC literature in the period between 2009 and 2013. Pages 15-18 of the complaint include

bullet point paragraphs from this document. I will address many of the points listed in the bullet points later when I will discuss their specific scientific source. Many other issues have already been dealt previously in the Report (nicotine, PG, carbonyls, metals, TSNA's). Here I will just refer to one or two that deserve further comment.

59. The DKFZ report states that "Adverse health effects for third parties exposed cannot be excluded because the use of electronic cigarettes leads to emission of fine and ultrafine inhalable liquid particles, nicotine and cancer-causing substances into indoor air."

60. It must be noted that it is not the size that is important, but the composition of the particle that matters; ultrafine particles are known to be generated in large quantities when boiling water, but water vapour particles are not harmful to the respiratory system. Particles emitted from ECs have completely different physics (they are liquid droplets) and completely different chemistry (they have hardly any of the toxic properties) compared to environmental pollution or cigarette smoke. Most importantly, passive vaping cannot be compared to passive smoking, because ECs do not have a substantial negative impact on indoor air quality given that – by design – they do not generate side-stream emissions. Last but not least, there are no studies indicating that particles emitted from ECs represent a risk factor for bystanders.

61. The DKFZ report also states that "Glycerine [an ingredient in NJOY] is considered generally safe for oral intake and is used in food production as a humectant and as a solution carrier in flavours. However, this does not necessarily mean that it is also safe for inhalation – as in ECs if used as intended. These concerns are not unfounded. The specialist journal *Chest* reports about a case study of a patient with lipoid pneumonia caused by glycerine-based oils from the aerosol of electronic cigarettes." This conclusion is based on a case report by McCauley et al.⁶⁹

62. Exogenous lipoid pneumonia is a rare condition that may occur from aspiration or inhalation of fatlike material, such as mineral oil found in commercial products and various aerosolized industrial materials. In fact, lipoid pneumonia has been reported after excessive or inappropriate use of oil-based laxatives, lip balm, and flavoured lip gloss. McCauley et al.⁷⁵ add EC use to the list of potential causes of exogenous lipoid pneumonia. They document the intriguing case of a 42-year-old-woman with lipoid pneumonia and speculate that this could have resulted from regular exposure to glycerine-based oils found in electronic cigarette vapour. For a balanced interpretation of this case report, it is worth emphasizing that this patient also had a schizoaffective disorder for which she was taking multiple psychiatric medications. Schizoaffective

disorder is a mental illness characterized by recurring episodes of mood disorder and psychosis. These are known to be associated with eating disorders, odd behaviours, and suicidality related to delusional ideas or distorted cognitions related to food or body perception.^{70,71} These patients have been described to ingest coins, glycerin soap, urine, flowers, glycerin suppositories, candles, or inhale dangerous substances. Therefore, the lipid pneumonia of this psychiatric patient might have been due to inappropriate ingestion of glycerine-based oils in the e-liquid of her EC. In a follow up of hundreds of regular users of EC with prefilled cartridges (containing a small cotton roll soaked in glycerine-based nicotine solution) no major adverse event has been reported to date.^{45,72,73,74} Thus, the case reported by McCauley et al.⁷⁵ simply indicates that harm can be caused by ECs when these products are not used as recommended by the manufacturers. It worth mentioning that "the patient reported a recent exposure to fumigation chemicals, as the result of a bedbug infestation of her apartment building 2 weeks prior to her hospitalization." Although causality (or non-causality) cannot be proven for certain, the temporal relationship of the clinical symptoms with the reported exposure of fumigation chemicals should be also considered in this case report. New generation fumigation chemicals include crude essential oils.^{75,76}

63. Despite millions of regular EC users, there has been no evidence of new emerging lipid pneumonia outbreaks in recent years, and the case reported by McCauley et al.⁷⁵ is a single isolated one unlikely to generate a legitimate public health concern.

Citation 8: Vardavas CI, Anagnostopoulos N, Kougias M, Evangelopoulou V, Connolly GN, Behrakis PK. Acute pulmonary effects of using an e-cigarette: impact on respiratory flow resistance, impedance and exhaled nitric oxide. Chest. 2012; 141(6): 1400-6.

64. In this peer-reviewed research article, the authors found "that electronic cigarettes had adverse health effects." Specifically, they assessed pulmonary function and airway inflammation in healthy smokers before and after EC use.

65. Unfortunately for the authors, their findings are not conclusive due to the small number of subjects studied, the choice of study outcomes of unclear clinical relevance, together with the lack of appropriate controls. The authors state that the ECs tested in their study "have immediate adverse physiologic effects after short term use that are similar to some of the effects seen with tobacco smoking." The reported 16% decrease in FeNO (i.e. 2.1 ppb in absolute term) and 11% increase in peripheral flow resistance (IOS) (i.e. 0.025 kPa/L/s in absolute term) after EC use from baseline are so small and well within tests variability^{79,80} that it is highly unlikely to have

meaningful adverse effects. Of note, no changes were detected by canonical pulmonary function testing after EC use. The small changes in FeNO and peripheral flow resistance reported by the authors may be non specific. Consequently, the authors should have included a more pertinent control (e.g. saline mist generated by an ultrasonic nebulizer) in their study.

Citation 9: French article published in August 2013 in the consumer publication “60 millions de consommateurs”

66. This non peer-reviewed document contains no data and no details of the methodology used. It is highly unlikely that it can be useful for discussing toxicological or carcinogenic risk of ECs.

Citation 10: Williams, M., Villarreal, A., Bozhilov, K., Lin, S. and Talbot, P. Metal and silicate particles including nanoparticles are present in electronic cigarette cartomizer fluid and aerosol. *PLoS One* 2013; 8: e57987.

67. In this peer-reviewed research article, authors analysed aerosol emission from an early first generation EC in search of metal and silicate particles. The authors detected the presence of metal and silicate particles

68. It is surprising that a list of adverse health effects associated with chronic exposure to very large concentrations of metals was presented by the authors in their paper, while much lower levels were measured in the study. This emphasizes the importance of performing a risk assessment, which will result in proper guidance to clinicians and reliable information to the targeted population group (smokers) about any relevant health concern. The results of this risk assessment have been recently published⁸¹ and are not in agreement with concerns over adverse health effects of EC metal emissions expressed by Williams *et al.* In a nutshell, the average user would be exposed to 4 to 40 times lower amounts for most metals than the maximum daily dose allowance from inhalational medications⁸² and by orders of magnitude lower than the regulatory limits for daily occupational exposure.⁸³ It must also be noted that both studies evaluated outdated EC models. There has been continuous improvement in the design, properties and safety features of EC parts, with new-generation atomizers featuring pyrex glass and stainless steel structure substituting plastics and other metals.

69. Of note, according to the report for analytical testing of NJOY's products,⁷⁷ no harmful metals were detected in the EC aerosol emissions (see Table 6). While a trace amount of

iron could be detected; this is not unexpected given that it is commonly used in the manufacturing of atomizers as well as in the heating coils. Iron is an essential human nutrient with a variety of physiological roles including those associated with haemoglobin, myoglobin, ferritin and Fe-containing enzymes and therefore given that it is generally harmless, no inhalational PDE or MRL has been defined.

Citation 11: Abstract presented at the 2013 Annual Meeting American Society for Cell Biology
http://www.eurekalert.org/pub_releases/2013-12/asfc-ndc112613.php

70. This non peer-reviewed press release contains no data and no details of the methodology used. The statement “Nicotine drives cell invasion that contributes to plaque formation in coronary arteries, Research indicates e-cigarettes may not significantly reduce risk for heart disease” cannot be verified. More specifically, Citation 11 is unlikely to be useful for discussing the biologic relevance of nicotine into the cellular/molecular mechanisms of experimental atherosclerosis.

CONCLUSION

71. With any emerging behavior associated with exposure to inhalational agents, there is legitimate cause for concern. However, this potential risk must be taken in the context of the known harm to users of smoking tobacco cigarettes. The critical appraisal of the above studies, technical reports and press releases shows that findings often have been misrepresented or misinterpreted in such a way that the potential for harmful consequences of EC for human health use has been largely exaggerated. By exaggerating their potential for harmful consequences thus adversely changing the relative risk perception of smoking and vaping, governments, media and some health authorities are contributing to spread fear and confusion in the public, possibly deterring traditional tobacco smokers from making a switch that could save their lives. My accurate assessment of the current peer-reviewed scientific literature clearly indicates that ECs are much less harmful than conventional tobacco cigarettes. Consumers deserve, and should make, informed decisions. Current research data on safety evaluation and risk assessment of ECs is sufficient enough to reassure them that ECs are less harmful than traditional tobacco cigarettes.

Executed on March 7, 2016.

/s/ Riccardo Polosa
RICCARDO POLOSA, MD, PhD

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Exhibit 34

The screenshot shows a YouTube video player with the following details:

- Video Title:** Las Vegas Trade Show! Fat Panda
- Views:** 63 views
- Date:** Nov 22, 2018
- Channel:** Fat Panda Vape (113 subscribers)
- Description:** Fat Panda's booth at the Las Vegas Trade Show.
- Engagement:** 2 likes, 0 comments, and a red 'SUBSCRIBE' button.
- Up next:** A list of recommended videos, including 'How to create a 3D Terrain with Google Maps and height maps...' and 'Singapore Prime Minister: I feel very sorry for the situation...'

The video content shows a trade show booth for 'fat panda DISTRO'. A large black sign features a yellow panda face logo and the text 'fat panda DISTRO'. In the foreground, there are several colorful vape pens (blue, green, red) on a table, with a circular sign above them that says 'Hippo'. People are seen interacting at the booth in the background.

Exhibit 35

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