

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

In the Matter of

**CERTAIN TOBACCO HEATING
ARTICLES AND COMPONENTS
THEREOF**

Investigation No. 337-TA-1199

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

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (“Commission”) has determined to review in part a final initial determination (“FID”) of the presiding administrative law judge (“ALJ”) finding a violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation. The Commission requests briefing from the parties on certain issues under review, as indicated in this notice. The Commission also requests briefing from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Lynde Herzbach, Office of the General Counsel, U.S. International Trade Commission, 500 E Street S.W., Washington, D.C. 20436, telephone (202) 205-3228. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: On May 15, 2020, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), based on a complaint filed by RAI Strategic Holdings, Inc., R.J. Reynolds Vapor Company, and R.J. Reynolds Tobacco Company, all of Winston-Salem, North Carolina (collectively, “Complainants”). *See* 85 Fed. Reg. 29482-83. The complaint, as supplemented, alleges a violation of section 337 based upon the importation of certain tobacco heating articles and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 9,839,238 (“the ’238 patent”); 9,930,915 (“the ’915 patent”); 9,901,123 (“the ’123 patent”) (collectively, “the Asserted Patents”). The complaint also alleges the existence of a domestic

industry. The notice of investigation names five respondents: Altria Client Services LLC, Altria Group, Inc. (“AGI”), and Philip Morris USA, Inc., all of Richmond, Virginia; Philip Morris International Inc. (“PMI”) of New York, New York; and Philip Morris Products S.A. of Neuchatel, Switzerland (collectively, “Respondents”). *See id.* The Office of Unfair Import Investigations (“OUII”) is also a party to the investigation. *See id.*

The Commission previously terminated respondents AGI and PMI from the investigation based on Complainants’ partial withdrawal of the complaint. *See* Order No. 24 (Dec. 14, 2020), *unreviewed by* Comm’n Notice (Jan. 5, 2021).

The Commission previously affirmed an initial determination finding that the economic prong is satisfied under section 337(a)(3)(A) (19 U.S.C. 1337(a)(3)(A)) with respect to the ’238 and ’915 patents and provided supplemental analysis. Order No. 35 (Jan. 19, 2021), *affirmed in part by* Comm’n Notice (Feb. 18, 2021). The Commission took no position on the finding that the economic prong was satisfied under section 337(a)(3)(B) (19 U.S.C. 1337(a)(3)(B)). *Id.*

On May 14, 2021, the presiding ALJ issued the FID on violation. The FID finds a violation of section 337 as to the ’915 patent and the ’123 patent by virtue of Respondents’ infringement of claims 1-3 and 5 of the ’915 patent and claims 27-30 of the ’123 patent. The FID finds that Complainants did not establish a violation with respect to the ’238 patent. In particular, the FID finds that Respondents failed to show that the asserted claims of the ’915 and ’123 patents are invalid. The ID further finds that claim 19 of the ’238 patent is invalid as anticipated. The FID finds that the domestic industry requirement is satisfied for each of the Asserted Patents.

The Recommended Determination on Remedy and Bond (“RD”) recommends the issuance of a limited exclusion order barring entry of products that infringe the asserted claims of the Asserted Patents. The RD does not recommend issuing cease and desist orders. The RD recommends imposing no bond during the Presidential review period. Finally, the RD concludes that the public interest evidence does not weigh against entry of a remedy.

On May 28, 2021, Complainants, Respondents, and OUII each filed petitions for review of various aspect of the FID. Specifically, Complainants filed a petition for review of the FID’s infringement and validity findings for the ’238 patent. Respondents filed a petition for review that challenges aspects of the FID’s construction of “electrical energy source” recited in claims 1 and 3 of the ’915 patent. Respondents also petitioned for review of the FID’s findings concerning infringement and invalidity with respect to the ’915 and ’123 patents, and the FID’s domestic industry findings for the ’123 patent. Respondents contingently petitioned for review of the constructions of “pressure channel” and “air inlet channel” recited in claim 19 of the ’238 patent, as well as the FID’s infringement findings based on the alleged incorrect claim constructions. OUII filed a petition for review of the constructions of “pressure channel” and “air inlet channel” recited in claim 19 of the ’238 patent, and the FID’s infringement findings based on the limitation “spatially separated” recited in claim 19.

On June 8, 2021, the parties filed their respective responses to the various petitions for review. That same day, Respondents filed a motion to strike-in-part Complainants' petition for review to the extent the petition sought review of the RD. On June 21, 2021, Complainants filed a response opposing the motion. OUII did not file a response.

Having examined the record of the investigation, including the FID, the petitions for review, and the responses thereto, the Commission has determined to review the FID in part, as follows.

As to the '915 patent, the Commission has determined to review the ALJ's construction of the limitation "electrical energy source" recited in asserted claims 1 and 3 and the FID's infringement, technical prong, and invalidity findings to the extent they may be affected by a modified claim construction.

As to the '123 patent, the Commission has determined to review the FID's obviousness and domestic industry findings, including whether Complainants have satisfied the economic prong of the domestic industry requirement.

As to the '238 patent, the Commission has determined to review the FID's infringement finding.

The Commission has determined not to review the remainder of the FID. The Commission denies Respondents' motion to strike-in-part Complainants' petition for review.

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

With regard to the '915 patent, please address whether a construction of the term "electrical energy source" to mean "receptacle that provides for transmission of electrical current from the power source to the heating member, where the receptacle is not limited to a structure that requires wiring or insertion," is supported by the intrinsic and extrinsic evidence. Also, please address whether this modified claim construction affects any other findings in the FID regarding the '915 patent such as infringement, domestic industry technical prong, or invalidity.

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

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia*, (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States; and/or (2) cease and desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks

exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (Dec. 1994). In particular, the written submissions should address any request for a cease and desist order in the context of recent Commission opinions, including those in *Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor*, Inv. No. 337-TA-977, Comm'n Op. (Apr. 28, 2017) and *Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same*, Inv. No. 337-TA-959, Comm'n Op. (Feb. 13, 2017). Specifically, if Complainants seek a cease and desist order against any respondent, the written submissions should respond to the following requests:

- (1) Please identify with citations to the record any information regarding commercially significant inventory in the United States as to each respondent against whom a cease and desist order is sought. If Complainants also rely on other significant domestic operations that could undercut the remedy provided by an exclusion order, please identify with citations to the record such information as to each respondent against whom a cease and desist order is sought.
- (2) In relation to the infringing products, please identify any information in the record, including allegations in the pleadings, that addresses the existence of any domestic inventory, any domestic operations, or any sales-related activity directed at the United States for each respondent against whom a cease and desist order is sought.
- (3) Please discuss any other basis upon which the Commission could enter a cease and desist order.

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

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission's determination. See Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary

of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. In addition, the parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding.

In their initial submissions, Complainants are also requested to identify the remedy sought and Complainants and OUII are requested to submit proposed remedial orders for the Commission's consideration. Complainants are further requested to state the dates that the Asserted Patents expire, to provide the HTSUS subheadings under which the accused products are imported, and to supply the identification information for all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on **August 10, 2021**. Reply submissions must be filed no later than the close of business on **August 17, 2021**. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (Inv. No. 337-TA-1199) in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary, (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy Rules 201.6 and 210.5(e)(2) (19 CFR 201.6 & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on July 27, 2021.

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

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', enclosed within a circular flourish.

Lisa R. Barton
Secretary to the Commission

Issued: July 27, 2021