

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 COMMISSION DECISION TO DENY RESPONDENTS' MOTION TO
STAY THE REMEDIAL ORDERS PENDING APPEAL**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission ("Commission") has determined to deny respondents' motion to stay the remedial orders pending appeal.

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" or "Reynolds"). *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: ACS Altria Group, Inc. ("AGI"), and Philip Morris USA, Inc. ("PM USA"), 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).

On May 14, 2021, the presiding ALJ issued the final initial determination on violation (“FID”), which finds a violation of section 337 based on infringement of the ’123 patent and the ’915 patent and finds no violation as to the ’238 patent.

On July 27, 2021, the Commission determined to review the FID in part. 86 Fed. Reg. 41509-11 (Aug. 2, 2021). Specifically, the Commission determined to review: (1) as to the ’915 patent, 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; (2) as to the ’123 patent, the FID’s obviousness and domestic industry findings; and (3) as to the ’238 patent, the FID’s infringement finding. *Id.* The Commission also asked the parties to address a question related to the issues under review regarding the ’915 patent. *Id.* The Commission further requested briefing on remedy, bonding, and the public interest. *Id.*

On September 29, 2021, the Commission found a violation of section 337 as to claims 1-3, and 5 of the ’915 patent and claims 27-30 of the ’123 patent. 86 Fed. Reg. 54998-99 (Oct. 5, 2021). The Commission issued: (1) a limited exclusion order prohibiting the importation of tobacco heating articles and components thereof that infringe claims 1-3, and 5 of the ’915 patent and claims 27-30 of the ’123 patent; and (2) cease and desist orders directed to respondents PM USA and ACS. *Id.* The Commission determined that the public interest factors do not preclude issuance of the limited exclusion order or the cease and desist orders. *Id.* The Commission further determined that no bond was required during the period of Presidential review. *See* 19 U.S.C. 1337(j)(3).

On November 29, 2021, the period of Presidential review ended without disapproval by the President, *see* 19 U.S.C. 1337(j)(2).

On December 3, 2021, Philip Morris filed a motion requesting that the Commission stay the remedial orders pending the completion of its appeal to the Federal Circuit. On December 13, 2021, Reynolds filed a response in opposition to Philip Morris’s motion to stay. OUII did not file a response.

On January 12, 2022, Philip Morris filed a Notice of Supplemental Authority concerning proceedings at the Patent Trial and Appeal Board (“PTAB”). On January 13, 2022, Reynolds filed a response that the PTAB proceedings are irrelevant to the pending motion to stay.

For the reasons discussed in the Commission Opinion issued concurrently herewith, the Commission has determined to deny Philip Morris's motion to stay the remedial orders pending appeal.

The Commission vote for this determination took place on January 20, 2022.

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 large, loopy oval flourish.

Lisa R. Barton
Secretary to the Commission

Issued: January 20, 2022