

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
AN INITIAL DETERMINATION GRANTING IN PART COMPLAINANTS'
PARTIALLY UNOPPOSED MOTION FOR SUMMARY DETERMINATION;
AND ON REVIEW, TO AFFIRM THE INITIAL DETERMINATION WITH
MODIFICATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review an initial determination (“ID”) (Order No. 35) of the presiding administrative law judge (“ALJ”) granting in part Complainants’ partially unopposed motion for summary determination that the economic prong of the domestic industry requirement is satisfied for asserted U.S. Patent Nos. 9,839,238 (“the ’238 patent”) and 9,930,915 (“the ’915 patent”). On review, the Commission supplements the ID’s analysis and affirms the ID’s finding that the Complainants satisfy the economic prong of the domestic industry requirement for the ’238 patent and the ’915 patent.

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 FR 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 the '238 patent, the '915 patent, and U.S. Patent No. 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 the following 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).

On November 20, 2020, Complainants filed a partially unopposed motion seeking summary determination that the economic prong of the domestic industry prong was satisfied for each of the Asserted Patents. On December 2, 2020, Respondents filed a response partially opposing the motion as to the alleged economic prong for the '123 patent, but not opposing the motion as to the economic prong for the '238 patent and '915 patent. The same day, OUII filed a response supporting the motion.

On January 19, 2021, the ALJ issued the subject ID granting in part the motion for summary determination. Order No. 35 (Jan. 19, 2021). The subject ID finds that Complainants satisfied the economic prong of the domestic industry requirement under 19 U.S.C. 1337(a)(3)(A) and (B) with respect to the '238 patent and the '915 patent. *Id.* The ALJ declined to grant summary determination with respect to the '123 patent.

On January 27, 2021, OUII filed a petition for limited review of Order No. 35, asserting that the Commission should affirm the ID’s finding that the economic prong of the domestic industry requirement with respect to the '238 patent and the '915 patent, albeit with supplemental reasoning.

Having examined the record of the investigation, the Commission has determined to review the subject ID. On review, the Commission supplements the ID’s reasoning with a contextual analysis consistent with our precedent to determine whether Complainants’ investments are significant. *See, e.g., Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 18 (Oct. 28, 2019). We determine that the undisputed record evidence supports the following findings: (1) the undisputed amount of Complainants’ domestic investments in plant and equipment recited in the ID are used to manufacture in the United States 100 percent of the Vuse Solo G2 cartridges and to produce e-liquid for the G2 version of the VUSE Solo products that Complainants allege practice the '238 patent and the '915 patent; (2) Complainants’ U.S.-manufactured cartridges account for the majority of net sales of all Solo-related products; and (3) Complainants’ undisputed plant and equipment investments in manufacturing the Vuse Solo G2 cartridges and e-liquid in the United States are significant in the context of Complainants’ worldwide operations relating to these

domestic industry products. *See* Complainants' Mem. at 7-10, 13-19, 24-27; *see also* ID at 3-5. We also note that neither Respondents nor OUII disputed the significance, within context, of the undisputed domestic investments in plant and equipment for the '238 and '915 patents. Respondents' Resp. at 31-32; OUII Resp. at 6, 11-12; OUII Pet. at 9. With the additional analysis of context for the domestic investments, the Commission affirms the ID's finding that Complainants satisfy the economic prong of the domestic industry requirement under 19 U.S.C. 1337(a)(3)(A) for the '238 patent and the '915 patent. The Commission takes no position regarding the ID's findings under 19 U.S.C. 1337(a)(3)(B). (Commissioner Schmidlein would also affirm the ID's finding that the economic prong is satisfied under 19 U.S.C. 1337(a)(3)(B).)

The Commission vote for this determination took place on February 18, 2020.

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', with a stylized flourish at the end.

Lisa R. Barton
Secretary to the Commission

Issued: February 18, 2021