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 THE COMMISSION'S FINAL DETERMINATION FINDING A VIOLATION OF SECTION 337; ISSUANCE OF A LIMITED EXCLUSION ORDER AND CEASE AND DESIST ORDERS; TERMINATION OF THE INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission ("Commission") has found a violation of section 337 of the Tariff Act of 1930, as amended, in this investigation and has issued a limited exclusion order prohibiting the importation of infringing tobacco heating articles and components thereof and cease and desist orders directed against respondents Philip Morris USA, Inc. ("PM USA") and Altria Client Services LLC ("ACS"). The investigation is terminated.

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 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 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).

The Commission previously affirmed that the economic prong of the domestic industry requirement is satisfied under 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* Notice (Feb. 18, 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 June 15, 2021, both Complainants and Respondents filed submissions on the public interest pursuant to Commission Rule 210.50(a)(4). OUII did not file a statement on the public interest. The Commission also received seven filings in response to its Federal Register notice calling for public interest comments. *See* 86 FR 28382 (May 16, 2021).

On July 27, 2021, the Commission determined to review the FID in part. 86 FR 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 August 10, 2021, Complainants, Respondents, and OUII each filed an initial written response to the Commission's request for briefing. On August 17, 2021, Complainants and Respondents each filed a reply submission. On August 20, 2021, OUII filed its reply submission.

On August 5, 6, 9, and 10, 2021, twenty-nine members of the public submitted public interest submissions. On August 9, 2021, the Hispanic Leadership Fund and the National Minority Quality Form filed public interest submissions. On August 10, 2021, Nextera

Healthcare filed a public interest submission. On August 11, 2021, Tom Miller, the Attorney General of Iowa, filed a public interest submission.

On September 13, 2021, Respondents filed Respondents' Motion to Take Judicial Notice of Recent Regulatory Determinations and District Court Opinion. On September 15, 2021, Complainants filed Complainants' Opposition to Respondents' Motion to Take Judicial Notice of Recent Regulatory Determinations and District Court Opinion. The Commission has determined to deny the motion, but has considered the parties' submissions in its consideration of the public interest factors.

Having reviewed the record of the investigation, including the FID and the parties' submissions, the Commission has 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. Specifically, with respect to the '915 patent, the Commission has determined to: (1) modify the construction of the limitation "electrical energy source" recited in asserted claims 1 and 3 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"; and (2) affirm the FID's findings as to infringement, technical prong, and invalidity findings under the modified claim construction. With respect to the '123 patent, the Commission has determined to: (1) affirm, with supplemental analysis, the FID's finding that Respondents failed to prove claims 27-30 of the '123 patent are invalid for obviousness under 35 U.S.C. 103; and (2) take no position as to the FID's findings with respect to the economic prong of the domestic industry requirement under subsection 337(a)(3)(A). The Commission has further determined to affirm the FID's non-infringement finding for the '238 patent.

The Commission has determined that the appropriate remedy is: (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. The Commission has determined that the public interest factors do not preclude issuance of the limited exclusion order or the cease and desist orders. The Commission has further determined that no bond is required during the period of Presidential review. *See* 19 U.S.C. 1337(j)(3).

The investigation is terminated. The Commission's reasoning in support of its determinations is set forth more fully in its opinion. The Commission's orders and opinion were delivered to the President and the United States Trade Representative on the day of their issuance.

The Commission vote for this determination took place on September 29, 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.



Lisa R. Barton
Secretary to the Commission

Issued: September 29, 2021