Exhibit 2

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN TOBACCO HEATING ARTICLES AND COMPONENTS THEREOF**	**Investigation No. 337-TA-1199**

COMMISSION OPINION DENYING RESPONDENTS' MOTION TO STAY LIMITED EXCLUSION ORDER AND CEASE AND DESIST ORDERS PENDING APPEAL

I. BACKGROUND

On May 15, 2020, the Commission instituted this investigation 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, "Reynolds"). 85 Fed. Reg. 29482-83 (May 15, 2020). The complaint, as supplemented, alleges a violation of section 337 based upon the importation and sale of certain tobacco heating articles and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 9,901,123 ("the '123 patent"), 9,930,915 ("the '915 patent"), and 9,839,238 ("the '238 patent") (collectively, "the Asserted Patents"). *Id.* The complaint also alleges the existence of a domestic industry. The notice of investigation names the following respondents: Altria Client Services LLC ("ACS"), Altria Group, Inc. ("AGI"), and Philip Morris USA, Inc. ("Philip Morris USA"), all of Richmond, Virginia; Philip Morris International Inc. ("PMI") of New York, New York; and Philip Morris Products S.A. ("PMP") of Neuchatel, Switzerland (collectively, "Philip Morris" or "Respondents"). *See id*. The Office of Unfair Import Investigations ("OUII") was also a party to the investigation. *See id*.

The notice of investigation instructed the presiding administrative law judge ("ALJ") to make findings regarding the public interest. 85 Fed. Reg. at 29482-83. The Commission later added claim 3 of the '915 patent. *See* Order No. 9 (July 29, 2020), *unreviewed by* Notice (Aug. 18, 2020). The Commission also terminated respondents AGI and PMI from the investigation based on Reynolds's partial withdrawal of the complaint. *See* 85 Fed. Reg. 52152 (Aug. 4, 2020); Order No. 24 (Dec. 14, 2020), *unreviewed by* Notice (Jan. 5, 2021).

On September 29, 2021, the Commission found a violation of section 337 based on infringement of the asserted claims of the '123 and '915 patents and issued a limited exclusion order ("LEO") and cease and desist orders ("CDOs") against ACS and Philip Morris USA. 86 Fed. Reg. 54998-99 (Oct. 5, 2021) (issuing orders and terminating investigation); *see also* Comm'n Op. (Sept. 29, 2021); *see also* Final Initial Determination ("FID") (May 14, 2021). The Commission found no violation with respect to the '238 patent. *Id.* The Commission found that the statutory public interest factors did not preclude issuance of a remedy. *See* Comm'n Op. On November 29, 2021, the period of Presidential review ended without disapproval of the Commission's action by the President, *see* 19 U.S.C. § 1337(j)(2).

On December 1, 2021, Philip Morris filed an appeal with the U.S. Court of Appeals for the Federal Circuit, seeking review of issues the Commission decided against it in the Commission's final determination. *Philip Morris Products S.A., et al. v. Int'l Trade Comm'n*, Case No. 22-1227. The appeal is currently pending before the Federal Circuit.

On December 3, 2021, Philip Morris filed a motion before the Commission requesting a stay of the remedial orders pending appeal to the Federal Circuit. *See* Respondents' Motion to Stay Limited Exclusion Order and Cease and Desist Orders Pending Appeal (Dec. 3, 2021) ("PM Mot."). On December 13, 2021, Reynolds filed an opposition to Philip Morris's stay motion

before the Commission. *See* Complainants' Response to Respondents' Motion to Stay Limited Exclusion Order and Cease and Desist Orders Pending Appeal (Dec. 13, 2021) ("Reynolds Opp."). OUII did not file a response.

On December 6, 2021, Philip Morris filed an emergency motion to stay the remedial orders before the Federal Circuit. *Philip Morris*, Case No. 22-1227, ECF No. 6 (Dec. 6, 2021). On December 8, 2021, the Federal Circuit denied Philip Morris's request for relief during consideration of its Federal Circuit stay motion. *Id.*, Order, ECF No. 12 (Dec. 8, 2021). On December 16, 2021, the Commission and Reynold each filed an opposition to Philip Morris's Federal Circuit stay motion. *Id.*, ECF Nos. 13, 15 (Dec. 13, 2021). On December 21, 2021, Philip Morris filed a reply in support of its motion. *Id.*, Case No. 22-1227, ECF No. 18 (Dec. 21, 2021). On December 30, 2021, the Federal Circuit issued an order that Philip Morris's Federal Circuit stay motion is held in abeyance, and requested that the parties notify the Court upon the Commission's determination on the stay motion pending before the Commission. *Id.*, ECF No. 21 (Dec. 30, 2021).

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.

II. LEGAL STANDARD

The Administrative Procedure Act provides an agency with the authority to "postpone the effective date of action taken by it, pending judicial review" if the "agency finds that justice so requires." 5 U.S.C. § 705. The Federal Circuit has set forth the following four-part test to assess whether to stay a lower court's remedy pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent

> a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Standard Havens Prods, Inc. v. Gencor Indus, Inc., 897 F.2d 511, 512 (Fed. Cir. 1990) (quotation omitted).

The Commission evaluates motions for stay under the *Standard Havens* test with one exception. At the agency level the movant need not demonstrate a likelihood of success on appeal. The Commission has recognized the futility of establishing a likelihood-of-success in this context given that it would be difficult to ask an agency to find that its own decision is likely to be overturned on appeal. *Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380 ("*Agricultural Tractors*"), Comm'n Op. Denying Resp'ts' Pet. for Reconsideration and Mot. for Relief Pending Appeal at 10 (Apr. 25, 1997); *see also Washington Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) ("Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision"). Accordingly, in lieu of the likelihood-of-success prong, the Commission considers whether it has "ruled on an admittedly difficult legal question." *Holiday Tours*, 559 F.3d at 844-45 ("What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained"); *see also Agricultural Tractors*, Comm'n Op. at 10. The Commission has repeatedly recited and applied this "admittedly difficult question" test in previous investigations in which stays of its remedial orders were sought pending appeal.[1]

[1] *Certain EPROM, EEPROM, Flash Memory, and Flash Microcontroller Semiconductor Devices, and Products Containing Same*, Inv. No. 337-TA-395, Comm'n Op., 2001 WL 242553,

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