

**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C. 20436**

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<b>In the Matter of</b>	)	
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<b>CERTAIN MALE PROPHYLACTIC</b>	)	Inv. No. 337-TA-546
<b>DEVICES</b>	)	
	)	

**NOTICE OF COMMISSION DETERMINATION TO AFFIRM IN PART, REVERSE IN PART, AND REMAND IN PART THE INITIAL DETERMINATION FINDING NO VIOLATION OF SECTION 337, AND TO EXTEND THE TARGET DATE FOR COMPLETION OF THE INVESTIGATION**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to affirm in part, reverse in part, and remand in part the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on June 30, 2006, in the above-captioned investigation. The Commission has also determined to extend the target date for completion of the investigation until June 5, 2007.

**FOR FURTHER INFORMATION CONTACT:** Mark B. Rees, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3116. The public version of the ALJ’s final ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by

accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS-ON-LINE) at <http://edis.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:** The Commission instituted this investigation on August 5, 2005, based on a complaint filed on behalf of Portfolio Technologies, Inc., of Chicago, Illinois. 70 *Fed. Reg.* 45422. The complaint, as amended and supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain male prophylactic devices by reason of infringement of claims 1-27, 31-33, and 36 of U.S. Patent No. 5,082,004 (“the ‘004 patent”). The respondents named in the investigation are Church & Dwight Co., Inc., of Princeton, New Jersey; Reddy Medtech, Ltd., of Tamil Nadu, India; and Intellx, Inc., of Petoskey, Michigan.

On June 30, 2006, the ALJ issued a final ID in which he ruled that there is no violation of section 337 of the Tariff Act of 1930, as amended. All parties petitioned for review of various parts of the final ID.

On September 29, 2006, the Commission determined to review the issues of claim construction, invalidity due to anticipation, infringement, and domestic industry, and requested briefing on these issues. 71 *Fed. Reg.* 58875 (Oct. 5, 2006). The Commission noted that it was particularly interested in briefing on the following five sub-issues: (1) the proper treatment of functional limitations in the asserted claims of the ‘004 patent; (2) whether the use of “theoretical constructs” to construe claim terms is appropriate, including whether the use of

theoretical constructs to interpret claims would raise any issues under 35 U.S.C. § 112, second paragraph; (3) the effect that the parties' proposed claim constructions may have on the resolution of issues concerning anticipation, infringement, and the technical prong of the domestic industry; (4) whether the ID properly applied Commission precedent to determine that complainant had not met the economic prong of the domestic industry requirement; and (5) whether the ID gave appropriate weight to the evidence complainant proffered to prove that a domestic industry exists under the economic prong. In order to assist the Commission in its review, the Commission also requested that the parties include responses to several briefing questions in their submissions. Id.

Complainant, Respondents, and the investigative attorney filed their initial submissions on October 16, 2006. They filed their reply submissions on October 23, 2006.

Having examined the record in this investigation, including the ALJ's final ID and the submissions of the parties, the Commission has determined that (1) the ALJ's finding that the functional limitations in claims 1, 9, and 18 are not actual claim limitations is reversed and the matter is remanded to the ALJ to construe the claims in light of these limitations; (2) the ALJ's construction of the claim phrase "elongated tubular portion" is reversed and the construction to be applied is "the remaining portions of the condom that are not identified as one or more second pouches (or a third pouch) and are tubular in shape;" (3) the ALJ's construction of "generally constant diameter from the open end to the closed end" is amended by deleting the ALJ's clarification that the diameter "includes both a physical diameter of the tubular portion and the theoretical diameter of the tubular portion that lies beneath the pouch or pouches that are the crux of the invention (i.e., the second pouch(es));" (4) the ALJ's construction of "circumference"

is amended by deleting the ALJ's clarification that the circumference "includes both a physical diameter of the tubular portion and the theoretical diameter of the tubular portion that lies beneath the pouch or pouches that are the crux of the invention (i.e., the second pouch(es));" (5) the ALJ's construction of "longitudinally directed chamber" is reversed and the construction to be applied is "the enclosed space or compartment into which the penis is inserted. In regions where a second pouch exists, the outermost limits of the longitudinally directed chamber do not coincide with the latex walls but rather the chamber continues its generally straight tube shape until the chamber sharply tapers and closes at the closed end of the condom;" (6) the ALJ's finding that Figure 10 of the '004 patent is covered by the patent is affirmed; (7) the issues of anticipation, infringement, and the technical prong of the domestic industry requirement are vacated and remanded to the ALJ for reconsideration in light of his new claim constructions for the subject functional limitations and the revised claim constructions set forth above; (8) the ALJ is to reconsider the finding of non-infringement as to claims 22 and 25 taking into consideration all of the record evidence regarding the thickness limitation; (9) the ALJ's finding that Complainant has not demonstrated the economic prong of the domestic industry requirement is reversed; (10) the investigation is remanded to the ALJ to conduct further proceedings in accordance with this Order and the Commission's opinion, and to issue an initial determination on remand ("IDR") by March 5, 2007; (11) any findings of the ALJ that are not reversed, vacated, or remanded by this Order are affirmed; (12) the parties may file petitions for review of the ALJ's IDR within five business days after service of the IDR and to file responses to any petitions within five business days after service of the petitions; and (13) the target date for termination of the investigation is hereby extended to June 5, 2007.

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 sections 210.45 and 210.51 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.45, 210.51).

By order of the Commission.

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Marilyn R. Abbott  
Secretary to the Commission

Issued: December 5, 2006