

PUBLIC VERSION

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN ARTIFICIAL EYELASH
EXTENSION SYSTEMS, PRODUCTS,
AND COMPONENTS THEREOF**

Investigation No. 337-TA-1226**COMMISSION OPINION**

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On January 20, 2022, the Commission determined to review in part the final initial determination (“FID”) issued by the presiding administrative law judge (“ALJ”) on October 28, 2021. 87 Fed. Reg. 4044-46 (Jan. 26, 2022). On review, the Commission has determined that there has been no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”), with respect to claims 1, 9, 13, 23, 27, or 28 of U.S. Patent No. 10,721,984 (“the ’984 patent”) (JX-0002), and the sole claims, respectively, of U.S. Design Patent Nos. D877,416 (“the D’416 patent”) (JX-0003) and D867,664 (“the D’664 patent”) (JX-0004) (collectively, the “Asserted Patents”).¹ This opinion sets forth the Commission’s reasoning in support of that determination.

I. BACKGROUND

A. Procedural History

On October 28, 2020, the Commission instituted this investigation under section 337, based on a complaint filed by Lashify, Inc. of Glendale, California (“Lashify” or “Complainant”). *See* 85 Fed. Reg. 68366-67. The complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, sale for importation, or sale after importation into the United States of certain artificial eyelash extension systems, products, and components thereof by reason of infringement of certain claims of U.S. Patent No. 10,660,388 (“the ’388 patent”) (JX-0001) and the ’984 patent, and of the sole claims of the D’416 and D’664 patents. The complaint also alleges the existence of a domestic industry. The notice of investigation (“NOI”) names nine respondents: KISS Nail Products, Inc. (“KISS”) of

¹ Commissioners Karpel and Schmidtlein concur in the determination of no violation as to the ’984 patent. However, they find a violation as to the D’416 and D’664 patents. They provide their reasoning in their dissent. *See Separate Views of Commissioners Karpel and Schmidtlein in Dissent on the Economic Prong of the Domestic Industry Requirement as to U.S. Design Patent Nos. D877,416 and D867,664.*

Port Washington, New York; Ulta Beauty, Inc. of Bolingbrook, Illinois; CVS Health Corporation of Woonsocket, Rhode Island; Walmart, Inc. (“Walmart”) of Bentonville, Arkansas; Qingdao Hollyren Cosmetics Co., Ltd. d/b/a Hollyren (“Hollyren”) of Shandong Province, China; Qingdao Xizi International Trading Co., Ltd. d/b/a Xizi Lashes (“Xizi Lashes”) of Shandong Province, China; Qingdao LashBeauty Cosmetic Co., Ltd. d/b/a Worldbeauty (“Worldbeauty”) of Qingdao, China; Alicia Zeng d/b/a Lilac St. and Artemis Family Beginnings, Inc. of San Francisco, California (collectively, “Lilac”); and Rachael Gleason d/b/a Avant Garde Beauty Co. of Dallas, Texas. *Id.* The Office of Unfair Import Investigations (“OUII”) is also a party to the investigation. *Id.*

The Commission subsequently amended the complaint and NOI to substitute CVS Pharmacy, Inc. (“CVS”) in place of named respondent CVS Health Corporation and Ulta Salon, Cosmetics & Fragrance, Inc. (“Ulta”) in place of named respondent Ulta Beauty, Inc. *See* Order No. 10, *unreviewed by* Comm’n Notice (Feb. 10, 2021); *see also* 86 Fed. Reg. 9535 (Feb. 16, 2021).

The Commission previously terminated the investigation as to claims 2-4 and 7 of the ’388 patent and claims 6-8, 12, 18-19, 25-26, and 29 of the ’984 patent based on Complainant’s partial withdrawal of the complaint. *See* Order No. 24 (Apr. 23, 2021), *unreviewed by* Comm’n Notice (May 11, 2021).

The Commission also previously terminated respondent Rachael Gleason d/b/a Avant Garde Beauty Company from the investigation based on a Consent Order Stipulation and a Proposed Consent Order. *See* Order No. 28 (May 6, 2021), *unreviewed by* Comm’n Notice (May 20, 2021).

On June 9, 2021, the ALJ granted in part the KISS Respondents'² Motion for Summary Determination of No Domestic Industry. *See* Order No. 35 (June 9, 2021), *unreviewed by* Comm'n Notice (July 9, 2021). Specifically, the ALJ found that Lashify had failed to satisfy the technical prong of the domestic industry requirement for the '388 patent. *Id.* at 9.

Prior to the evidentiary hearing, the Commission terminated claims 2-5, 10-11, 14, 17, 21-22, and 24 of the '984 patent from the investigation. *See* Order No. 38 (June 22, 2021), *unreviewed by* Comm'n Notice (July 6, 2021).

The ALJ held a claim construction hearing on February 17, 2021. On April 30, 2021, the ALJ issued Order No. 26 construing certain disputed terms of the '984 patent. Order No. 26 (April 30, 2021) ("*Markman* Order").

The evidentiary hearing was held July 12-15, 2021.

On October 28, 2021, the presiding ALJ issued the FID, finding that no violation of section 337 has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain artificial eyelash extension systems, products, and components thereof. FID at 141-142. The relevant findings are summarized as follows:

'984 Patent	
<u>Infringement</u>	<p>The KISS accused products, Hollyren accused products, Worldbeauty Glue-Based accused products, and Lilac accused products do not practice claims 1, 9, 13, 23, 27, or 28 of the '984 patent. FID at 141.</p> <p>The TSD Worldbeauty Heat-Bonded accused product practices claims 1, 9, 23, and 27 of the '984 patent, but does not practice claims 13 or 28. <i>Id.</i></p>

² KISS, Ulta, Walmart, and CVS are herein collectively referred to as the "KISS Respondents."

	The TGSS Worldbeauty Heat-Bonded accused products practices claims 1, 23, and 27 of the '984 patent, but does not practice claims 9, 13, or 28. <i>Id.</i> Lilac does not induce infringement of the '984 patent. <i>Id.</i>
<u>Technical Prong</u>	Lashify has failed to satisfy the technical prong of the domestic industry requirement for the '984 patent. <i>Id.</i>
<u>Invalidity</u>	The asserted claims of the '984 are not invalid under 35 U.S.C § 103 ³ for obviousness and not invalid under 35 U.S.C. § 112 for lack of enablement or written description. <i>Id.</i>
D'416 patent	
<u>Infringement</u>	The Hollyren storage cartridge, Model No. DX02059G0004, practices the D'416 patent. <i>Id.</i>
<u>Technical Prong</u>	Lashify has satisfied the technical prong of the domestic industry requirement for the D'416 patent. <i>Id.</i>
<u>Invalidity</u>	Hollyren did not challenge the validity of the D'416 patent. <i>Id.</i> at 116.
D'664 patent	
<u>Infringement</u>	The Hollyren applicator Model No. CX1514 practices the D'664 patent. <i>Id.</i>
<u>Technical Prong</u>	Lashify has satisfied the technical prong of the domestic industry requirement for the D'664. <i>Id.</i> at 141.
<u>Invalidity</u>	The D'664 is not invalid as functional. <i>Id.</i>
'984 Patent, D'416 patent, D'664 patent	
<u>Economic Prong</u>	Lashify has failed to satisfy the economic prong of the domestic industry requirement for the Asserted Patents. <i>Id.</i>

The ALJ's recommended determination ("RD") on remedy and bonding recommends, if the Commission finds a violation, issuing a limited exclusion order barring entry of products that infringe asserted claims of the Asserted Patents. RD at 142-147. The RD also recommends issuing cease and desist orders directed to KISS, Ulta, CVS, and Walmart. *Id.* at 147-151. The

³ The '984 patent is considered under the America Invents Act ("AIA").

RD recommends that a bond of 100 percent be set for any importations of infringing products during the period of Presidential review. *Id.* at 151-152.

On November 9, 2021, Lashify filed a petition for review of the FID's findings of non-infringement of the '984 patent, that Lashify has not satisfied the technical prong of the domestic industry requirement with respect to the '984 patent, and that Lashify has failed to satisfy the economic prong of the domestic industry requirement with respect to any of the Asserted Patents.⁴

Also on November 9, 2021, Respondents filed a contingent petition for review.⁵ Specifically, Respondents sought contingent review of alleged additional, independent grounds to support the FID's finding of no violation, "including, (i) non-infringement of the 'cluster' '984 patent claim limitation under the [ALJ's] construction or as properly construed, (ii) obviousness of the asserted '984 claims, particularly under the broad construction for 'cluster' adopted by the [FID] (and given the similarities between the 'clusters' in the prior art and the products of Respondent World Beauty that the [FID] found satisfy the 'cluster' claim limitation), and (iii) lack of written description and enablement for the full scope of the asserted '984 claims, at least under Lashify's theory for the 'heat fused' claim limitation." *See* RPet. at 2.

⁴ Petition for Review of October 28, 2021 Initial Determination by Complainant Lashify, Inc. (Nov. 9, 2021) ("CPet.").

⁵ Contingent Petition for Review of Final Initial Determination of Respondents KISS Nail Products, Inc.; Ulta Salon, Cosmetics & Fragrance, Inc.; Walmart, Inc.; CVS Pharmacy, Inc.; Qingdao Hollyren Cosmetics Col., Ltd. d/b/a Hollyren; Qingdao Xizi International Trading Co., Ltd. d/b/a Xizi Lashes; Qingdao LashBeauty Cosmetic Co., Ltd. d/b/a Worldbeauty; Alicia Zeng; and Artemis Family Beginnings, Inc. d/b/a Lilac St. (Nov. 9, 2021) ("RPet.").

On November 17, 2021, Lashify, Respondents, and OUII filed their respective responses to the petitions for review.⁶

On November 29, 2021, the KISS Respondents filed a joint submission on the public interest pursuant to Commission Rule 210.50(a)(4).⁷ *See* 19 C.F.R. § 210.50(a)(4). Lashify and OUII did not file statements on the public interest. No submissions were received in response to the Commission notice seeking public interest submission. *See* 86 Fed. Reg. 62844-45.

On January 20, 2022, the Commission determined to review the FID in part. 87 Fed. Reg. at 4044-46. Specifically, for the '984 patent, the Commission determined to review the FID's findings regarding the technical prong of the domestic industry requirement and the FID's findings that the asserted claims of the '984 patent are not invalid as obvious. *Id.* at 4045. The Commission also determined to review the FID's findings regarding the economic prong of the domestic industry requirement with respect to all three patents. *Id.* The Commission asked the parties to address two questions regarding the economic prong of the domestic industry requirement. *Id.*

⁶ Response to Respondents' Contingent Petition for Review of Final Initial Determination by Complainant Lashify, Inc. (Nov. 17, 2021) ("CPet. Reply"); Response to Complainants' Petition for Review of Final Initial Determination by Respondents KISS Nail Products, Inc.; Ulta Salon, Cosmetics & Fragrance, Inc.; Walmart, Inc.; CVS Pharmacy, Inc.; Qingdao Hollyren Cosmetics Col., Ltd. d/b/a Hollyren; Qingdao Xizi International Trading Co., Ltd. d/b/a Xizi Lashes; Qingdao LashBeauty Cosmetic Co., Ltd. d/b/a Worldbeauty; Alicia Zeng; and Artemis Family Beginnings, Inc. d/b/a Lilac St. (Nov. 17, 2021) ("RPet. Reply"); Response of the Office of Unfair Import Investigations to the Private Parties' Petitions for Review of the Final Initial Determination on Violation of Section 337 (Nov. 17, 2021) ("OUII Reply").

⁷ Statement on the Public Interest by Respondents KISS Nail Products, Inc.; Ulta Salon, Cosmetics & Fragrance, Inc.; Walmart, Inc.; and CVS Health Corporation (Nov. 29, 2021).

On February 3, 2022, Lashify filed its initial written response to the Commission's request for briefing.⁸ Respondents filed their initial written response that same day.⁹ OUII also filed its initial written response that day.¹⁰

On February 10, 2022, Lashify filed its reply submission.¹¹ That same day, Respondents filed their reply submission.¹² OUII also filed its reply submission that day.¹³

B. The Asserted Patents

Lashify asserts claims under three patents in this investigation: the '984 patent, the D'416 patent, and the D'664 patent. FID at 15, 92, 104.

1. The '984 Patent¹⁴

The '984 patent, titled "Artificial Lash Extensions," issued on July 28, 2020, to Sahara Lotti, who is also Lashify's CEO and co-founder. FID at 15. The '984 patent is a continuation

⁸ Response by Complainant Lashify, Inc. to the Commission's Determination to Review in Part the Final Initial Determination; Submission on Remedy, Public Interest, and Bonding (Feb. 3, 2022) ("Lashify IR").

⁹ Respondents' Opening Submission on the Issues Under Review and on Remedy, the Public Interest, and Bonding (Feb. 3, 2022) ("Respondents IR").

¹⁰ Submission of the Office of Unfair Import Investigations in Response to the Commission's Notice (Feb. 3, 2022) ("OUII IR").

¹¹ Reply by Complainant Lashify, Inc. to Respondents' and the Commission Investigative Staff's Opening Submissions Regarding the Issues Under Review and on Remedy, the Public Interest, and Bonding (Feb. 10, 2022) ("Lashify Reply").

¹² Respondents' Reply to Complainant's Opening Submission on the Issues Under Review and on Remedy, the Public Interest, and Bonding (Feb. 10, 2022) ("Respondents Reply").

¹³ Reply Submission of the Office of Unfair Import Investigations in Response to the Commission's Notice (Feb. 10, 2022) ("OUII Reply").

¹⁴ The '984 patent claims priority to a provisional application filed on July 28, 2016. *See* JX-0002. Therefore, the issue of whether the '984 patent has been shown to be invalid as

of U.S. Patent Application No. 15/968,361, which issued as the previously terminated '388 patent. *See* JX-0002 ('984 patent). The '984 patent is assigned to Lashify. FID at 15 (citing Compl. at ¶ 56). The '984 patent relates to “clusters of artificial eyelash extensions that can be applied to the underside of an individual’s natural eyelashes.” *Id.* (citing JX-0002 at 1:16-18).

Lashify asserts all, or a subset, of claims 1, 9, 13, 23, and 27-28 of the '984 patent against each of the Respondents. *Id.* (citing CIB¹⁵ at 30, 39, 45, 51). To satisfy the technical prong of the domestic industry requirement, Lashify asserts that the domestic industry products practice all of the asserted claims of the '984 patent. *Id.* at 64. The claims at issue in this investigation read as follows (with emphasis on the relevant limitations):

1. [pre] A lash extension comprising:

- [a] a plurality of first artificial hairs, each of the first artificial hairs having a first **heat fused** connection to at least one of the first artificial hairs adjacent thereto in order to form a **first cluster** of artificial hairs, the first **heat fused** connection defining a first base of the **first cluster** of artificial hairs; and
- [b] a plurality of second artificial hairs, each of the second artificial hairs having a second **heat fused** connection to at least one of the second artificial hairs adjacent thereto in order to form a **second cluster** of artificial hairs, the second **heat fused** connection defining a second base of the **second cluster** of artificial hairs,
- [c] the first base and the second base are included in a **common base** from which the **first cluster** of artificial hairs and the **second cluster** of artificial hairs extend,
- [d] the **first cluster** of artificial hairs and the **second cluster** of artificial hairs are **spaced apart from each other along the common base**,
- [e] the **common base**, **first cluster** of artificial hairs, and **second cluster** of artificial hairs collectively forming a lash extension configured to be attached to a user.

9. The lash extension according to claim 1, wherein each of the first artificial hairs or each of the second artificial hairs is **formed of a polybutylene terephthalate (PBT)**.

obvious is considered under 35 U.S.C. § 103, as amended by the America Invents Act (“AIA”) 35 U.S.C. § 103.

¹⁵ Post-Hearing Brief of Complainant Lashify, Inc. (July 30, 2021) (“CIB”).

13. The lash extension according to claim 1, wherein the base has a thickness between about 0.05 millimeters and about 0.15 millimeters.
23. [pre] A lash extension comprising:
- [a] a plurality of first artificial hairs having a plurality of first proximal end portions and a plurality of first distal end portions, the first proximal end portions being **heat fused** together such that a **first cluster** of artificial hairs is defined; and
 - [b] a plurality of second artificial hairs having a plurality of second proximal end portions and a plurality of second distal end portions, the second proximal end portions being **heat fused** together such that a **second cluster** of artificial hairs is defined,
 - [c] the **first cluster** of artificial hairs and the **second cluster** of artificial hairs being linearly **heat fused** to a **common base spanning between the first proximal end portions and the second proximal end portions**,
 - [d] the **common base**, **first cluster** of artificial hairs, and **second cluster** of artificial hairs collectively forming a lash extension that is configured to be attached to a user.
27. The lash extension of claim 23, wherein the base has a length in a range between about 4 millimeters and about 8 millimeters.
28. [pre] A lash extension comprising:
- [a] a base; and
 - [b] a plurality of **clusters** of **heat fused** artificial hairs extending from the base,
 - [c] the base having a thickness between about 0.05 millimeters and about 0.15 millimeters,
 - [d] the base and **clusters** of artificial hairs collectively forming a lash extension that is configured to be attached to a user.

Id. at 15-17; JX-0002 at 9:5-11:11 (emphasis added).

The ALJ previously construed the following terms:

TERM	CLAIM(S)	CLAIM CONSTRUCTION
"spaced apart [from each other]"	1	Plain and ordinary meaning. Such as: "placed at intervals or arranged with distance between [the first cluster and the second cluster]"
"heat fused [connection/together]"	1, 23, 28	joined by applying heat to form a single entity
"cluster(s)"	1, 23, 28	group(s) [of artificial hairs/eyelashes/fibers]
"lash extension(s)"	1, 9, 13, 23, 27-28	any eyelash application product(s) used to extend one's natural lashes

See Markman Order at 11, 18, 25, 35. The ALJ also found that “a person of ordinary skill in the art [“POSA”] with respect to the . . . ’984 patent[] would have at least a bachelor’s degree or higher in materials science, chemistry, physics, or equivalent professional experience.” *Id.* at 6.

2. The D’416 Patent

The D’416 patent is entitled “Storage Cartridge for Artificial Eyelash Extensions,” and it issued on March 3, 2020 to Sahara Lotti. FID at 104; *see also* JX-0003 (D’416 patent). Lashify, Inc. is the named assignee. FID at 104. The D’416 patent claims an ornamental design for a storage cartridge for artificial eyelash extensions. *Id.* at 104-106. Figure 1 is shown below:

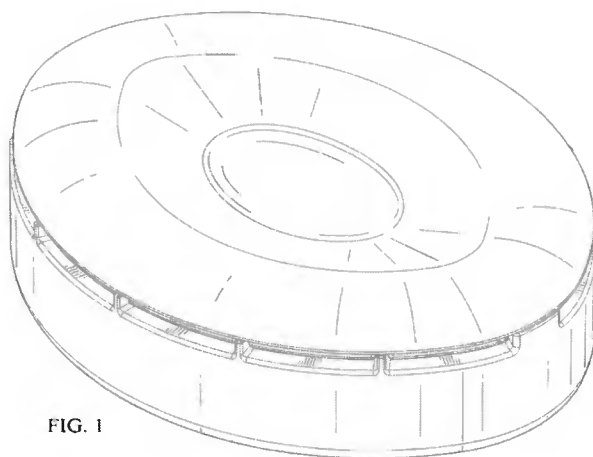


FIG. 1

D’416 at Fig. 1.

3. The D’664 Patent

The D’664 patent is entitled, “Applicator for Artificial Lash Extensions,” and it issued on November 19, 2019 to Sahara Lotti. FID at 92; *see also* JX-0004 (D’664 patent). Lashify, Inc. is the named assignee. FID at 92. The D’664 patent claims an ornamental design for an applicator for artificial lash extensions. *Id.* at 92-95. Figure 1 is shown below:

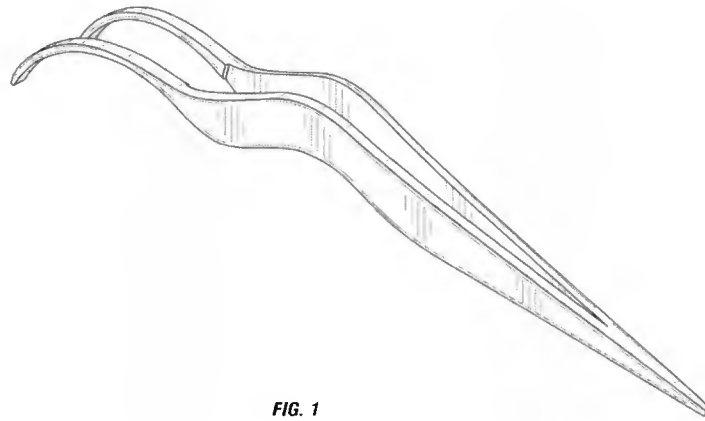


FIG. 1

D'664 patent at Fig. 1.

C. The Domestic Industry Products

Lashify's domestic industry products are its do-it-yourself ("DIY"), salon-style lash extension system. FID at 7 (citing CIB at 23). Lashify's system is comprised of the "Gossamer lash extensions in styles A (Amplify), B (Bold), C (Curl), D (Drama), E (Extreme), EE (Extra Extreme), F (Fluffy), and their variations (such as the Prismatic and Starburst); Fuse Control Wands; Wandoms (covers that are placed over the tips of the Fuse Control Wand to keep it from becoming sticky or otherwise being affected by the bond or remover); Bonds and Sealers; Removers; and a Storage Box designed to store these components." *Id.* (citing CIB at 23-24). Lashify's expert, Dr. Iezzi, testified that Lashify's domestic industry products include the following: "(1) Lashify Control Kit; (2) Lashify's Gossamer Lash Extensions: Amplify (A), Bold (B), Curl (C), Drama (D), Extreme (E), Extra Extreme (EE), Fluffy (F), and their variations, such as Prismatic; (3) Lashify's Fuse Control Wands; (4) Lashify's Bonds; and (5) Lashify's Removers." *Id.* at 64, n.34 (citing CX-2095C at Q/A 21; CDX-0003 at 8).

II. COMMISSION REVIEW OF THE FID

When the Commission reviews an initial determination, in whole or in part, it reviews the determination *de novo*. *Certain Soft-Edged Trampolines and Components Thereof*, Inv. No. 337-

TA-908 (“*Soft-Edged Trampolines*”), Comm’n Op. at 4 (May 1, 2015). Upon review, the “Commission has ‘all the powers which it would have in making the initial determination,’ except where the issues are limited on notice or by rule.” *Certain Flash Memory Circuits & Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm’n Op. at 9-10 (July 1997) (quoting *Certain Acid-Washed Denim Garments & Accessories*, Inv. No. 337-TA-324, Comm’n Op. at 5 (Nov. 1992)). With respect to the issues under review, “the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge.” 19 C.F.R. § 210.45(c). The Commission also “may take no position on specific issues or portions of the initial determination,” and “may make any finding or conclusions that in its judgment are proper based on the record in the proceeding.” *Id.*; see also *Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir. 1984).

III. ANALYSIS

The Commission’s findings, conclusions, and supporting analysis follow. The Commission affirms and adopts the FID’s findings, conclusions, and supporting analysis that are not inconsistent with the Commission’s opinion.

A. Domestic Industry – Technical Prong for the ’984 Patent

When a section 337 investigation is based on allegations of patent infringement, the complainant must show that “an industry in the United States, relating to the articles protected by the patent . . . exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). The “domestic industry requirement” consists of a so-called “technical prong” and a so-called “economic prong.”

A complainant satisfies the technical prong by showing it is practicing, licensing, or otherwise exploiting the patents at issue. *Certain Microsphere Adhesives, Process for Making Same and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-

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TA-366, Comm'n Op. at 8 (Jan. 16, 1996). The test for “practicing” a patent is essentially the same as it is for infringement, only it involves comparing the complainant’s own “domestic industry products” to one or more claims of the patent. *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). It is sufficient that the domestic industry product practices at least one claim of each patent that serves as a basis for relief; it is not necessary for the complainant to practice the same claims it is asserting against the respondent. *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546 (“*Male Prophylactic Devices*”), Comm'n Op. at 38 (Aug. 1, 2007).

Lashify argued that its domestic industry products satisfy the technical prong by practicing claims 1, 9, 13, 23, and 27-28 of the '984 patent. FID at 64; CIB at 54. The FID finds that Lashify failed to satisfy the technical prong of the domestic industry requirement for the '984 patent. FID at 64-75. The Commission determined to review those findings. 87 Fed. Reg. at 4045. The Commission affirms, with the supplemental reasoning below, the finding that Lashify failed to satisfy the technical prong of the domestic industry requirement for the '984 patent.

1. The FID

The FID finds that Lashify’s domestic industry products fail to meet the “heat fused” limitation and thus Lashify failed to satisfy the technical prong of the domestic industry requirement. *Id.* at 64-75. The FID notes that Lashify’s domestic industry products come from two different manufacturers: 1) [REDACTED] which makes Lashify’s Gossamer lash models designated A, B, C, D; and 2) [REDACTED] which makes Lashify’s Gossamer lash models E, EE,

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F.¹⁶ *Id.* The FID notes that OUII and Respondents “assert that Lashify failed to demonstrate that the [Domestic Industry] Products analyzed by Dr. Iezzi were representative of the other [Domestic Industry] Products,” but concludes that because “the evidence presented by Lashify fails to prove that the [Domestic Industry] Products practice any claims of the ’984 patent, this argument is moot.” *Id.* at 64 n.33.

Specifically, the FID finds that Lashify’s [REDACTED] used for the [REDACTED] manufactured domestic industry products does not create heat fused connections. *Id.* at 67-69. The FID explains that “while [REDACTED] could cause friction, which could result in heat, the evidence does not show that the [REDACTED] performed by [REDACTED] results in heat that would cause the fibers to join to form a single entity.” *Id.* at 67. The FID also relies on the testimony of Respondents’ expert, Dr. Wanat, and his solvent testing and ultramicrotomy images, and the FID finds that such testing confirms that the domestic industry products are not “heat fused.” *Id.* at 67-69 (citing RX-1688C (Wanat RWS) at Q/As 564-94, 322-32). In particular, the FID notes that some of the images relied on by Lashify’s expert, Dr. Iezzi, show separate individual fibers rather than fibers that are joined to form a “single entity” as required by the ALJ’s construction of “heat fused.” *Id.* at 70 (citing CX-2095C at Q/A 649). The FID also finds that the images of the domestic industry products “are in stark contrast with those of a known heat fused product—the PUIE lashes.” *Id.* at 70-71.

¹⁶ The different models (A, B, C, D, E, EE, and F) are also further subdivided into models that include a letter and number, such as A14, B10, C10, C12, F10. FID at 66-75; CX-2095C at 649.

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For the [REDACTED] manufactured domestic industry products, made using [REDACTED] [REDACTED],¹⁷ the FID finds that the manufacturing process “only wraps them around a metal cylinder and heats them at [REDACTED]” which is “evidence that they are not joined by applying heat to form a single entity.” *Id.* at 71-73. The FID further finds that the images provided by both private parties’ experts confirm that these products include individual separate fibers that are not connected to form a single entity. *Id.* at 72-74.

The FID thus finds that Lashify failed to prove that the domestic industry products meet the “heat fused” limitations recited in independent claims 1, 23, and 28. *Id.* at 75.

2. Analysis

The Commission determined to review the finding that Lashify has failed to satisfy the technical prong of the domestic industry requirement with respect to the ’984 patent. 87 Fed. Reg. at 4045. The Commission did not request additional briefing on this issue. *Id.*

The Commission affirms, with supplemental reasoning, the FID’s finding that Lashify’s domestic industry products do not practice the asserted claims of the ’984 patent. As further explained below, Lashify’s representative domestic industry products do not meet the “heat fused” limitation, which is required in independent claims 1, 23, and 28.

a. Lashify’s Representative Products and Lack of Manufacturing Evidence

Lashify’s expert, Dr. Iezzi, did not test and examine each of the domestic industry products and instead stated, without explanation or support, that certain domestic industry products were representative of others. RX-1688C (Wanat RWS) at Q/As 59-60; RDX-

¹⁷ The FID finds that Lashify’s F10 is made by [REDACTED], and the C12 Prismatics is made by [REDACTED] FID at 71 (citing CRB at 29-30; CX-2091C at Q/As 88-107, 110-13).

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0011C.17 (Wanat Rebuttal Demonstratives); RX-1688C (Wanat RWS) at Q/A 60; CX-2095C (Iezzi DWS) at Q/A 156; Trial Tr. (Iezzi) at 142:18-144:15 (Dr. Iezzi's opinion that "I feel that [the Lashify Gossamer lashes] are representative . . . "); *see also* Order No. 58 Granting-In-Part Respondents' High Priority Objections (striking CX- 2095C (Iezzi DWS) at Q/As 145, 148, and 153, which would have detailed the step by step manufacturing processes used at [REDACTED] [REDACTED] for certain Gossamer lashes).

Dr. Iezzi performed full testing on only three of the sixteen domestic industry products, specifically the C10 domestic industry product, the C12/Prismatic domestic industry product, and the F10 domestic industry product. CRB¹⁸ at 28-29 (citing CX-2095C (Iezzi) at Q/A 32-39, 50, 143-144, 146-147, 149-152, 154-156, 649 (describing analysis of Gossamer[®] C12, F10, and Prismatics lashes from the EAG laboratory)). Dr. Iezzi's summary of the Lashify products are listed in his demonstrative, as shown below:

¹⁸ Post-Hearing Reply Brief of Complainant Lashify, Inc. (Aug. 6, 2021) ("CRB").

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Product	Lashes
A10 (9922)	PBT
A34 (9923)	PBT
A10 (9924)	PBT
A14 (9925)	PBT
E10 (9926)	PBT
C12	PBT
C12 (Prismatics-Red)	PBT
C14 (9927)	PBT
D10 (9928)	PBT
D14 (9929)	PBT
E10 (9930)	PBT
E14 (9931)	PBT
E10 (9932)	PBT
E14 (9933)	PBT
F-30	PET
E14 (9935)	PBT

CDX-0003 at 14. Dr. Iezzi’s demonstrative reflects that the base fibers for certain lashes were “Not Analyzed.” *Id.* As for others, the base fibers include [REDACTED] *See id.* Lashify asserts that Dr. Iezzi tested the domestic industry products “made by each of the three [Lashify manufacturing] processes: a C12 model made by the first process; a F10 model made by the second process, and a Prismatics lash made by the third process.” CRB at 28.

As Respondents and OUII noted in their responses to Lashify’s petition for review, the evidentiary record regarding Lashify’s manufacturing processes is limited because Lashify failed to provide evidence of the manufacturing processes used by its two manufacturers, [REDACTED]. OUII Reply at 14-15; RPet. Reply at 69-70. During claim construction, Lashify took the position that the ’984 patent was not a manufacturing patent. *See Markman* Order at 21. During discovery, Lashify submitted declarations from its manufacturers [REDACTED]

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[REDACTED] regarding manufacturing of the Lashify domestic industry products. However, declarations “are not admissible as substantive evidence” under the ALJ’s Ground Rule 9.5.3.1 (Order No. 2 at Ground Rule 9.5.3.1), so Lashify withdrew the two manufacturing declarations. *See* Joint Submission Regarding Status of Motions *in Limine* and High Priority Objections (July 8, 2021). The ALJ also struck portions of Dr. Iezzi’s report (CX-2095C) that summarized the withdrawn declarations. Order No. 58 (July 9, 2021).

The FID notes Lashify’s arguments and dismisses them, and specifically finds that Lashify’s evidence is lacking. FID at 64-75 (technical prong analysis). Because the Commission affirms the FID’s finding that Lashify has failed to demonstrate any of the domestic industry products practice the claims of the ’984 patent, there is no need to determine whether the three tested domestic industry products are representative of any other asserted domestic industry product.

b. [REDACTED] Manufactured Products

As the FID notes, Lashify argued that [REDACTED] uses [REDACTED] [REDACTED] to heat fuse the lashes [REDACTED], which Lashify contends is well above both the range cited in the ’984 patent (55-110°C) and the melting temperature of PBT (about 225°C) and PET (about 260°C). CPet. at 54 (citing CX-2091C (Lotti) at Q/A 104, 110-111; CX-2095C (Iezzi) at Q/A 59). The FID finds that the evidence does not show that the [REDACTED] [REDACTED] results in heat that would cause the fibers to join to form a single entity. FID at 65-67.

We agree with the FID’s finding that the [REDACTED] manufactured domestic industry products do not practice the “heat fused” limitation recited in the claims of the ’984 patent. We further find that there are additional reasons, beyond those stated in the FID’s analysis, that the [REDACTED] manufactured domestic industry products do not practice the claims of the ’984 patent.

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For example, Lashify's expert, Dr. Iezzi, recognized that all of these lashes use a base string and most of them also use glue. CX-2095C at Q/A 50-51, 649; CDX-0003 at 14 (glue is referred to as [REDACTED] in the chart) (Opening Trial Demonstrative of Dr. Robert A. Iezzi); *see also* CPet. at 6 ("For [REDACTED] Ms. Lotti discovered that a thin line of glue could be applied along the base of the fibers, followed by using [REDACTED]."). Further, for the [REDACTED] manufactured domestic industry products, the glue is added first, so the [REDACTED] step would not necessarily result in a heat fused connection between the individual artificial fibers. RX-1688C (Wanat RWS) at Q/A 561. Dr. Wanat's solvent testing confirms this by showing that the glue is found between the fibers rather than the fibers being "a single entity" as required by the ALJ's construction of "heat fused." *Id.* Dr. Wanat also testified that Lashify's use of the [REDACTED] does not result in heat fused artificial fibers. *Id.* Rather, the [REDACTED] step would affect only the outer layer of glue and not the individual fibers held together by the glue. *Id.*

Lashify's main evidence regarding [REDACTED] manufacturing process was testimony from the named inventor/CEO, Ms. Lotti. FID at 65¹⁹; CX-2091C (Lotti DWS) at Q/A 104, 110-111. However, Ms. Lotti testified that she had never seen [REDACTED] equipment. JX-0062C (Lotti Tr. Pt. 1) at 274:6-9 (inventor testifying she had never seen [REDACTED] equipment)). Lashify provided a photo of the alleged [REDACTED] machine (CX-471C at 8), but did not provide any settings or other information regarding the [REDACTED] process. Lashify also did not provide any evidence that [REDACTED] at any temperature could or does result in "heat fused" fibers. We agree with

¹⁹ The FID cites Lashify's post-hearing brief, and Lashify's post-hearing brief cites Ms. Lotti's testimony. *See* FID at 65; *see also* CIB at 52-56 (citing CX-2091C (Lotti)).

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the FID that Lashify lacked the evidence to prove its case on the technical prong of domestic industry. FID at 65-67.

In its petition for review, Lashify mischaracterized the testimony of Respondents' expert, Dr. Wanat, as "confirming Lashify products are [REDACTED]" to try to support its argument that Lashify's domestic industry products include heat fused artificial fibers. CPet at 40 n.179, n.180. Dr. Wanat, however, neither confirmed nor agreed that Lashify's alleged [REDACTED] process actually reached a temperature of [REDACTED] or that the domestic industry products were "[REDACTED] at above-melting temperatures." Trial Tr. (Wanat) 434:3-7, 437:11-24. Instead, he testified only that Ms. Lotti's direct witness statement stated a temperature range of [REDACTED] *Id.* As Dr. Wanat observed, Ms. Lotti testified that the [REDACTED] occurred for only [REDACTED], so it is unlikely that there was any appreciable rise in temperature from friction, and there is no evidence describing the requisite time and frequency needed to heat fuse the Lashify domestic industry products. RX-0003C (Wanat) at Q/A 206 ("If [REDACTED] is applied for the requisite time and at the requisite frequency, the joint area of two materials can melt and fuse together. However, the appropriate time and frequency is dependent on the type of material as different materials have different melt temperatures and differing responses to the [REDACTED] . . ."). Lashify failed to provide evidence of any actual temperature measurements or testimony from a qualified witness of Lashify's manufacturers. Accordingly, the FID correctly finds that Lashify's [REDACTED] products lack heat fused fibers, and Respondents' evidence confirms that the [REDACTED] products were joined with glue, not heat. FID at 67-71; RX-1688C (Wanat RWS) at Q/A 189-294, 295-342.

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Contrary to Lashify's mischaracterization, the FID does not categorically exclude any manufacturing methods from the scope of the '984 patent's claims. FID at 67. Lashify contends that the FID finds "Lashify's domestic industry products do not practice the claims of the '984 patent because they are made using an [REDACTED] CPet. at 15-16. To the contrary, the FID finds that "the evidence does not show that the [REDACTED] performed by [REDACTED] results in heat that would cause the fibers to join to form a single entity." *Id.* The FID does not find that [REDACTED] fails to "apply heat to form a single entity"; rather it found Lashify failed to meet its burden to show [REDACTED] as used by [REDACTED] to make certain domestic industry products satisfies this limitation.

The FID's finding is correct in view of the evidence, and the additional evidence noted above regarding the glue and base used to manufacture the domestic industry products confirms that those domestic industry products do not meet the "heat fused" claim limitations. Accordingly, we affirm, with the supplementary discussion provided above, the FID's finding as to the [REDACTED] manufactured DI products that Lashify failed to satisfy the technical prong of the domestic industry requirement with respect to the '984 patent.

c. [REDACTED] Manufactured Products

Lashify argued that it is undisputed that the [REDACTED] E, EE, and F-type lashes do not use glue or horizontal fibers to hold the lash fibers together and so the lashes are heat fused. CPet. at 54-55 (citing CX-2091C (Lotti) at Q/A 110, 112; CX-2095C (Iezzi) at Q/A 32-39, 50, 649, 661). Lashify also argued that [REDACTED] applies heat at [REDACTED] where the fibers intersect and then heats the lashes in an oven "for approximately [REDACTED] *Id.* (citing CX-2091C (Lotti) at Q/A 110-111). Lashify further argued that "because Lashify's [REDACTED] products are comprised *exclusively* of PBT and/or PET fibers that are laid in a pattern and [REDACTED]—without the use of any glue—the *only possible mechanism* holding the lash fibers together

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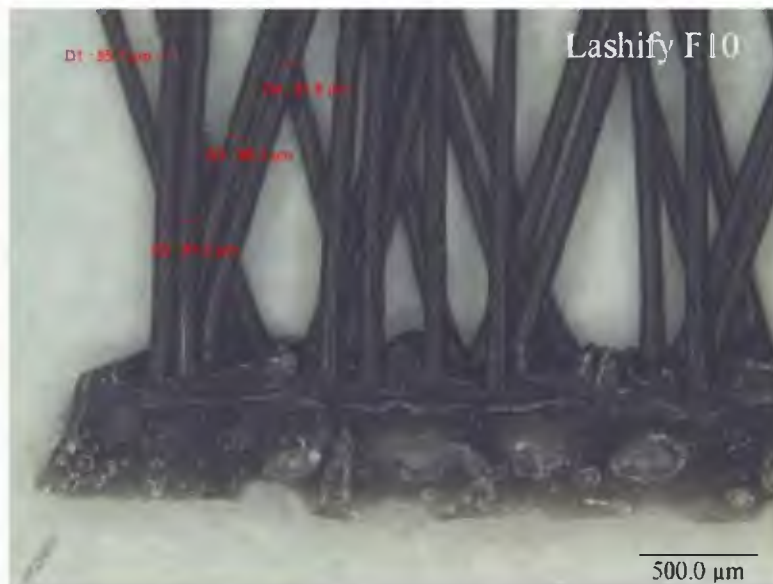
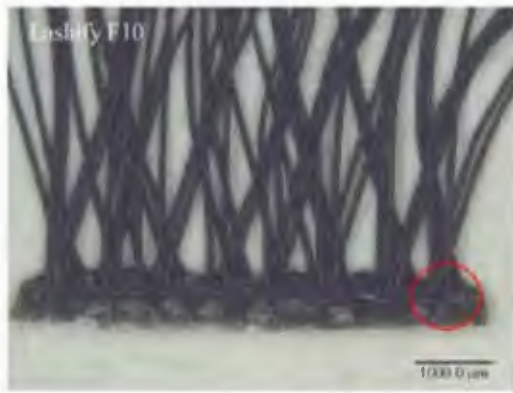
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is the softening of the artificial fibers such that they join together.” *Id.* at 55 (emphasis in CPet.).

Lashify asserted that the [REDACTED] manufactured lashes had bases that “comprise a single base material (*i.e.*, no horizontal fiber is used) created when the clusters of fibers join during manufacture.” ClB at 53 (citing CX-2091C (Lotti) at Q/A 110-111; CX-2095C (Iezzi) at Q/A 50, 147, 149-151). Lashify further asserted that “artificial lashes having a single-material base, like [the Lashify domestic industry product], are heat fused.” *Id.* at 54 (no citation provided).

Respondents argued that Lashify relied on Ms. Lotti’s unsupported, hearsay testimony about a process she had not seen in person as evidence of the temperature range allegedly used for [REDACTED] and evidence that no glue is used during the [REDACTED] manufacturing process. RPet. Reply at 70 (citing JX-0062C (Lotti Tr. Pt. 1) at 274:6-9). Respondents also noted that the FID considers Lashify’s arguments and images but explains that “other images of the [representative F10 lashes] (reproduced below) show individual separate fibers with well-defined boundaries,” which show the lack of “heat fused” fibers. *Id.* Respondents argued that the FID correctly finds that Lashify’s [REDACTED] manufactured domestic industry products do not meet the “heat fused” limitation due to the “contradictory figures provided by Lashify’s expert and given Lashify’s alleged manufacturing temperatures [REDACTED] that were well below melting temperature of PBT.” *Id.* at 72-73.

Dr. Iezzi provided images of the Lashify F10 lashes that are manufactured by [REDACTED] (as shown below):



CX-2095C at page 305 (top two images), page 308 (bottom image). The images clearly show a separate base²⁰ in addition to the fibers extending up from the base. *Id.* Dr. Iezzi also testified that for Lashify's E10, E14, EE10, EE14, and F14, "the lashes were comprised of PBT, and the **base** was comprised of PBT" and for Lashify's F10, "the lashes were PET, and the **base** was comprised of PET." *Id.* at Q/A 50 (emphasis added). Dr. Iezzi also cited a Fourier-transform

²⁰ This separate base is not the same as what Lashify argues is the "common base" required by the claims. CIB at 56; *see* '984 patent at claims 1, 23. Lashify argues there is no separate string or base, and that the "common base" is created when the clusters of fibers join during manufacture of the lash extensions. CIB at 56 (citing CX-2095C (Iezzi) at Q/A 650-651).

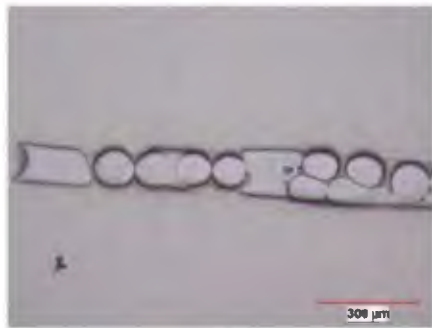
Infrared Spectroscopy (“FTIR”) analysis of the F10 lashes, which identified an area around the lashes as a “massive base,” formed out of PET. *Id.* at Q/A 649 (page 331). Lashify never explained the additional, separate “massive base,” and instead argued that the clusters form the claimed “common base” because only one material is used for the base and the lashes. CIB at 53; CPet. at 54-55. Dr. Iezzi’s testimony regarding the base of the F10 lashes, however, does not support Lashify’s attorney argument. *Compare id. with CX-2095C* at Q/A 50, 649 (page 305 (top two images), page 308 (bottom image)). The additional base provides the explanation as to why the lashes stay together in the absence of glue. Because the fibers are pushed into and held in place by the base, the base physically holds the fibers despite there being no “heat fused” connection between the fibers. RX-1688C (Wanat RWS) at Q/A 560, 562, 563; CX-2095C at Q/A 50, 156, 649.

We disagree with the FID’s finding that, “the images of the F10 presented by Dr. Iezzi are contradictory.” FID at 73. The FID reasons that “some of the images of the F10 [Domestic Industry] Products (reproduced below) show fibers that may be merging with each other” but other images show individual, separate fibers with well-defined boundaries (bottom three rows of five images below):

F10

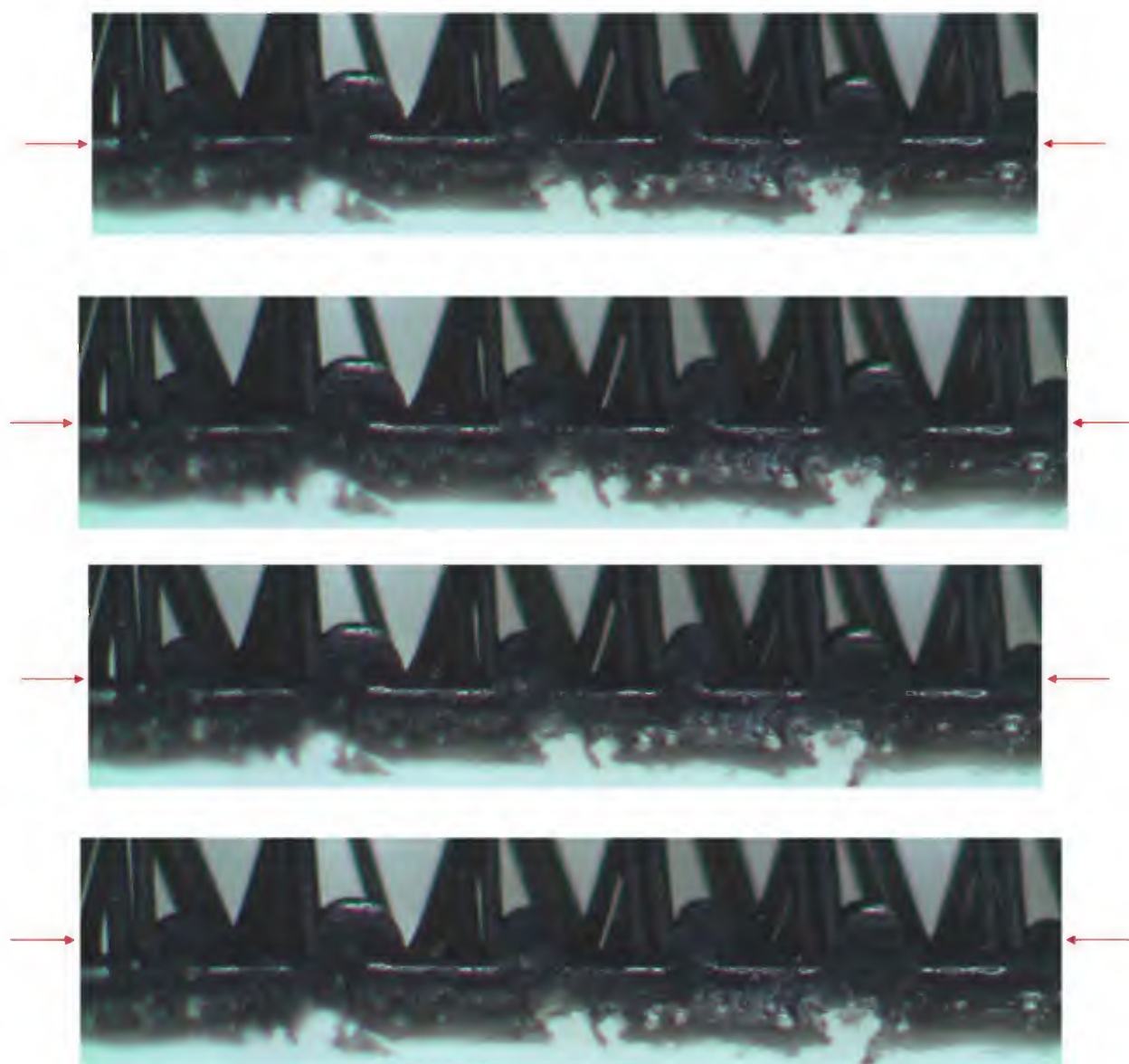


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FID at 73-74 (citing CX-2095C at Q/A 649). The difference, however, is attributable to the fact that the images that are taken at different depths, starting at the base and extending up into the lashes. CX-2095C at Q/A 649 (“I contacted Eurofins and asked them to take cross section images of the bases of the eyelash products.”).

Eurofins took four cross sections of the F10 lashes as follows:



CX-0791C.0057-0060 (starting at base and moving up lash fibers). When the locations of the cross-section cuts are compared to Dr. Iezzi’s images, it is clear that the images that allegedly

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appear to show “merging” are actually cut through the solid PET base. *Compare id. with CX-2095C at Q/A 649; see also FID at 73-74.* As the cross-sections move up from the base, the images show individual separate fibers with well-defined boundaries. CX-0791C.0057-0060; *see also FID at 73-74.* It appears that the lash fibers are stuck into the separate PET base, but there is no evidence that there is a “heat fused” connection between the fibers. CX-0791C.0057-0060; *see also RX-1688C (Wanat RWS) at Q/A 560, 562, 563; see ’984 patent, claim 1* (requiring “each of the first artificial hairs [to have] a first heat fused connection to at least one of the first artificial hairs adjacent thereto in order to form a first cluster”). There is also no support for Lashify’s attorney argument that the “common base,” as recited in the asserted claims, is formed when the clusters are combined, as opposed to being a separate PET base. *See CIB at 56; supra, n. 20.* The varying cross-section locations explains any differences in Dr. Iezzi’s images and confirms the FID’s finding that the [REDACTED] domestic industry products do not meet the “heat fused” limitation.

Further, the FID correctly finds that the temperatures [REDACTED] uses in manufacturing, according to Ms. Lotti, are not high enough to result in “heat fused” fibers. FID at 71, 73 (“[N]one of Ms. Lotti’s testimony regarding the manufacturing steps indicate that there would be heat fused connections.”). First, the FID finds that “[s]emi-crystalline polymers like PBT have a melting temperature (T_m) of about 225°C and a glass transition temperature (T_g) of about 55°C.” *Id.* at 33²¹ (citing RX-1688C (Wanat RWS) at Q/As 68, 70; RX-0007C at Q/As 97-99; 102, 105; CX-2095C at Q/A 55). The FID also finds that “amorphous PET has a T_g of around

²¹ The FID finds that “[a]t the glass transition temperature, the material can bend more easily, but remains solid” and “[i]f the temperature is increased to reach the melting temperature, the crystalline regions will then melt.” *Id.* at 33. The PBT may be flexible at the glass transition temperature, but it remains solid and will not heat fuse to form a single entity.

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68-69°C and semi-crystalline PET has a Tg of around 77-82°C” and “a Tm of about 260°C.” *Id.* at 33, n.15 (citing RX-0007C at Q/A 102; RX-1298; CX-2095C at Q/A 55; RX-0007C at Q/A 112). Second, the FID finds that “[e]xceeding the glass transition temperature will cause the non-crystalline regions to become more flexible, but the crystalline regions remain rigid” and “[a]t the glass transition temperature, the material can bend more easily, but remains solid.” *Id.* (citing RX-1688C (Wanat RWS) at Q/A 67, 68, 72; RX-0007C at Q/As 98, 101). Third, the FID finds that “at temperatures at or above the melting temperature, the polymer will flow and can fuse to other pieces of polymer” and “absent other conditions, PBT and PET must reach their melting temperature in order to be joined to form a single entity.” *Id.* (citing RX-1688C (Wanat RWS) at Q/A 73). These findings are important to the analysis of the [REDACTED] domestic industry products because they show that Lashify’s process does not use a temperature at or above the melting temperature of PBT or PET. *Id.* at 71-73.

The comparison of the FID’s findings as to the melting temperatures of PBT/PET (about 225°C) to the temperature that Ms. Lotti alleges ([REDACTED]) are used in manufacturing the [REDACTED] domestic industry product further confirms the products are not “heat fused.” [REDACTED] [REDACTED]’s manufacturing process allegedly uses a machine that “applies heat at around [REDACTED] [REDACTED].” CX-2091C at Q/A 110. According to Ms. Lotti, a [REDACTED] technician next cuts the lashes to remove excess portions of fiber, and then rolls the lashes around a metal cylinder and heats them in an oven for approximately [REDACTED]. *Id.* at Q/A 111. Thus, the melting temperature of the lash material [REDACTED], and accordingly, the individual lashes could not have been heat fused to form a single entity.

Other than Ms. Lotti’s testimony, there is no other record evidence of the [REDACTED] manufacturing process. Lashify’s expert, Dr. Iezzi, did not testify regarding any specific aspects

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of the Lashify manufacturing process, such as the temperature used. *See* CX-2095C at Q/A 649.

Dr. Iezzi states that his knowledge of Lashify's manufacturing process comes from Lashify's representations, and he does not cite any documents that he reviewed or identify people with whom he may have discussed manufacturing. *Id.* Dr. Iezzi also repeatedly refers to the combination of "heating and pressure" but provides no specific temperatures or pressure amounts. *Id.* In addition, Lashify agreed to withdraw a declaration from [REDACTED] regarding [REDACTED] manufacturing process because declarations are not admissible as substantive evidence, and the ALJ struck Dr. Iezzi's summary of the declaration. Joint Submission at 5 (July 8, 2021); Order No. 2 at Ground Rule 9.5.3.1; Order No. 58. Therefore, based on the evidence presented at the hearing, Lashify could not establish that the domestic industry products practice any claim of the '984 patent.

Accordingly, the Commission affirms, with the supplemental analysis above, the FID's finding that Lashify has failed to satisfy the technical prong of the domestic industry requirement for the '984 patent.

B. Validity – Obviousness Findings for the '984 Patent

Respondents contend that asserted claims 1, 9, 23, and 27 of the '984 patent²³ would have been rendered obvious under 35 U.S.C. § 103 by U.S. Patent No. 4,299,242 (RX-0474) ("Choe") and U.S. Patent No. 10,791,782 (JX-0366) ("Nakamura"), either alone or in combination with

²² [REDACTED], a professional lash manufacturer in China. CX-2091C (Lotti) at Q/A 53.

²³ The FID notes that Respondents did not present any argument that claims 13 or 28 of the '984 patent would have been obvious and thus finds any such argument waived. FID at 76 n.39. No party petitioned for review of this finding.

U.S. Patent No. 10,433,607 (JX-0368) (“Ahn”), the KISS Quattro product²⁴ (RPX-0054, RX-0853, RX-0865), U.S. Patent No. 8,225,800 (RX-0384) (“Byrne”), or U.S. Patent No. 3,900,038 (JX-0374) (“Masters”). FID at 76 (citing RIB at 65-78). Respondents further asserted that, to the extent Choe does not disclose the “heat fusion” limitation, “heat fusion for false eyelashes was obvious in light of Nakamura” *Id.* at 81.

The FID notes that Lashify “does not dispute that the prior art identified by Respondents disclose a ‘lash extension’ with a ‘plurality’ of ‘hairs’ and a ‘base.’” *Id.* (citing CLUL²⁵ at 1). However, the FID finds that Respondents did not meet their burden to prove that any of the prior art combinations rendered any asserted claim of the ’984 patent obvious. *Id.* at 87.

The Commission determined to review the FID’s findings that the asserted claims of the ’984 patent are not invalid as obvious. *Id.*

On review, the Commission takes no position regarding whether the asserted claims of the ’984 patent are not invalid as obvious. *Beloit*, 742 F.2d at 1423 (Commission may take “no position” on a single issue, which may often save the Commission, the parties, and the Federal Circuit substantial unnecessary effort).

²⁴ The Quattro product is a type of false eyelash that has been sold by KISS since at least July 2015. FID at 76, n.40 (citing RX-0003C (Wanat) at Q/As 12-14). Lashify agreed on July 2, 2021, “not to dispute the date or public availability” of RX-0865, an advertisement for the Quattro product in a magazine dated November 2015. RPet. at 55, n.8.

²⁵ Statement of Undisputed Claim Limitations Regarding Validity by Complainant Lashify, Inc. (July 30, 2021) (“CLUL”).

C. Domestic Industry – Economic Prong for the Asserted Patents²⁶

Section 337(a)(3) sets forth the following economic criteria for determining the existence of a domestic industry in such investigations:

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned –

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3). Thus, section 337(a)(3) requires that investments be either “significant” or “substantial.” *Id.* The Federal Circuit has clarified that a quantitative analysis must be performed in order to make this determination. *Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879, 883 (Fed. Cir. 2015) (“The plain text of § 337 requires a quantitative analysis in determining whether a [complainant] has demonstrated a ‘significant investment in plant and equipment’ or ‘significant employment of labor or capital.’”). There is no threshold amount that a complainant must meet. *See Certain Stringed Musical Instruments & Components Thereof*, Inv. No. 337-TA-586 (“*Stringed Musical Instruments*”), Comm’n Op. at 25-26 (May 16, 2008) (“We emphasize that there is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the ‘substantial investment’ requirement of this section.”); *Male Prophylactic Devices*, Comm’n Op. at 39 (“[T]here is no mathematical threshold test.”). Rather, the inquiry depends on “the facts in each investigation, the article of commerce, and the realities

²⁶ Commissioners Karpel and Schmidlein do not join the remainder of this opinion. Their separate views are set forth in their dissent. *See Separate Views of Commissioners Karpel and Schmidlein in Dissent on the Economic Prong of the Domestic Industry Requirement as to U.S. Design Patent Nos. D877,416 and D867,664.*

of the marketplace.” *Certain Printing & Imaging Devices & Components Thereof*, Inv. No. 337-TA-690, Comm’n Op. at 27 (Feb. 17, 2011). As such, “[t]he determination takes into account the nature of the investment and/or employment activities, the industry in question, and the complainant’s relative size.” *Id.*

Turning to specific types of investments, it is well settled that sales and marketing activities alone cannot satisfy the domestic industry requirement.²⁷ *See, e.g., Stringed Musical Instruments*, Comm’n Op. at 14-16 (quoting H. Rep. No. 100-40 at 157). The Commission previously “has stated that [w]hile marketing and sales activity, alone, may not be sufficient to meet the domestic industry test, those activities may be considered as part of the overall evaluation of whether or not a Complainant meets the economic prong.” *See, e.g., Certain Solid State Storage Drives, Stacked Elec. Components, & Prods. Containing Same*, Inv. No. 337-TA-1097, Comm’n Op. at 22 (June 20, 2018) (internal quotations omitted). Further, in investigations where the Commission has excluded such expenditures when considering whether a domestic industry exists, the facts of those investigations did not support including sales and marketing expenditures as part of the overall analysis.²⁸ For example, in *Kinesiotherapy Devices*, the

²⁷ The dissent also agrees that “[w]ith respect to sales and marketing, it is well-understood that a domestic industry cannot be predicated upon sales and marketing alone.” *See infra.*

²⁸ *See, e.g., Certain Beverage Dispensing Systems and Components Thereof*, Inv. No. 337-TA-1130, Comm’n Op. at 20 (March 11, 2020) (excluding sales and marketing expenditures); *Certain Television Sets, Television Receivers, Television Tuners, & Components Thereof*, Inv. No. 337-TA-910, Comm’n Op. at 73 (Oct. 14, 2015) (“With respect to any allegedly ongoing activity related to a very small number of products Cresta purportedly continues to sell . . . such sales alone are insufficient to establish a domestic industry.” (citing H.R. Rep. No. 100-40, Pt. 1, at 157 (1988) (“Marketing and sales in the United States alone would not, however, be enough to meet this test.”); S. Rep. 100-71, at 29 (1988) (same))); *Certain Integrated Circuits, Processes for Making Same, and Products Containing Same*, Inv. No. 337-TA-450, Final Initial Determination at 150 (May 6, 2002), (“[T]he mere marketing and sale of products in the United States is insufficient to constitute a domestic industry.”),

Commission specifically excluded sales and marketing expenditures, stating: “Standard Innovation argues that a variety of other activities are relevant to the establishment of the domestic industry under prong C. These expenses primarily relate to sales and marketing and are not the sort of expenditures that the Commission has considered sufficiently related to the claims of the patent. The Commission and the Federal Circuit have generally treated these activities as no different from those of an importer.” *Certain Kinesiotherapy Devices and Components Thereof*, Inv. No. 337-TA-823, Comm’n Op. at 29-30 (July 12, 2013), *rev’d on other grounds sub nom., Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879 (Fed. Cir. 2015) (citing *Schaper Mfg. Co. v. US. Int’l Trade Comm’n*, 717 F.2d 1368, 1373 (Fed. Cir. 1983) (stating that “Schaper’s very large expenditures for advertising and promotion cannot be considered part of the production process,” and explaining that “[w]ere we to hold otherwise, few importers would fail the test of constituting a domestic industry”).

Congressional intent supports the Commission’s practice. In amending the statute in 1988, Congress considered, and specifically decided to remove from the statutory language, “sales and “marketing,” stating that “[t]he inclusion of ‘sales and marketing’ activities in the United States was seen by most commentators as being too broad.” Congressional Record, 132 Cong. Rec. H2977 at H3004 & 132 Cong. Rec. H99650 at H10006 (“Deleted from both versions is language relating to ‘sales and marketing.’ As many of the witnesses indicated, the ‘domestic industry’ requirement will serve as a gatekeeper to prevent the excessive use of the ITC under

unreviewed by Notice (June 21, 2002); *Certain Sleep-Disordered Breathing Treatment Systems and Components Thereof*, Inv. No. 337-TA-890, Final Initial Determination at 173-174 (Sept. 16, 2014); *Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Final Initial Determination at 13 (Feb. 11, 2011); *Certain In Vitro Fertilization Prods., Components Thereof & Prods. Containing the Same*, Inv. No. 337-TA-1196, Comm’n Op. at 21-23 (Oct. 28, 2021); *Bone Cements I*, Comm’n Op. at 22.

section 337.”). The House and Senate Reports confirmed that sentiment, stating that “[m]arketing and sales in the United States alone would not, however, be sufficient to meet this test.” H.R. Rep. No. 100-40, Pt. 1, at 157 (1988). When proposed legislation includes broad language that is later removed for being too broad, the legislation, as enacted, does not cover what was removed. See 2A Sutherland Statutory Construction § 48:18 (7th ed.) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language it earlier has discarded in favor of other language,” citing *Acosta v. Local Union 26, UNITE HERE*, 895 F.3d 141 (1st Cir. 2018)). In other words, “[c]ourts do not read a statute to implicitly include language that was specifically rejected.” *Id.* (citing *Dai Global v. Administrator of the United States Agency for International Development*, 945 F.3d 1196 (Fed. Cir. 2019)). However, in this investigation, the Commission does not need to decide what level of investment in other qualifying activities is required before considering sales and marketing, as Lashify did not make the required showing here under any standard.²⁹

The FID finds that Lashify did not satisfy the economic prong of the domestic industry requirement for any of the Asserted Patents. FID at 117-141. The Commission determined to review the FID’s economic prong findings and asked two questions regarding the issue. 87 Fed. Reg. at 4045. The Commission affirms, with the supplemented analysis below, the FID’s finding

²⁹ In Commissioner Kearns’ view, sales and marketing expenses should not be credited toward the satisfaction of the domestic industry requirement under section 337, whether or not there are other valid investments. Among other things, he observes in amending the statute in 1988, Congress considered, and specifically decided to remove from the statutory language, “sales and marketing,” stating that “[t]he inclusion of ‘sales and marketing’ activities in the United States was seen by most commentators as being too broad.” Congressional Record, 132 Cong. Rec. H2977 at H3004 & 132 Cong. Rec. H99650 at H10006 (“Deleted from both versions is language relating to ‘sales and marketing.’ As many of the witnesses indicated, the ‘domestic industry’ requirement will serve as a gatekeeper to prevent the excessive use of the ITC under section 337.”).

that Lashify did not satisfy the economic prong of the domestic industry requirement for any of the Asserted Patents.

1. The FID

The FID states that the two main disputes regarding the economic prong are: “(1) what articles should be considered in the [domestic industry] analysis; and (2) what expenses should be excluded from the analysis.” FID at 117.

a. Articles Protected by the Asserted Patents

For the '984 patent, Lashify argued that its entire system,³⁰ and not just the Gossamer lashes, should be considered as part of the domestic industry products. *Id.* at 117-118. Respondents and OUII agreed that “the article for purposes of the economic prong of the domestic industry requirement are the Gossamer Lash[es].” *Id.* at 118. The FID finds that Lashify’s domestic industry should include the Lashify lashes³¹ and the Control Kit, which also includes the Fuse Control Wand, the Whisper Light dual-sided bond, and Glass, but should not include the entire Lashify system. *Id.* at 119, 121. The FID relies on the testimony of Ms. Lotti, the named inventor (CX-2091C at Q/As 115,³² 118, 144), and the Lashify Control Kit instructions (CX-0723; CX-0727) to support the inclusion of the Control Kit. *Id.*; *see also* CX-

³⁰ According to Lashify, “[t]he central component of Lashify’s system is the Gossamer® eyelash” and “[a]dditional key components of the Lashify system include” the Fuse Control Wand, the Whisper Light dual-sided bond, and Glass. FID at 117, n.57 (citing CIB at 96). Lashify contends that these components are sold together as the Lashify Control Kit. *Id.* Lashify’s system also includes “a number of different bonds,” “a series of removers and cleaners,” “silicone tips . . . called ‘Wandoms™,’” and “storage boxes specifically designed to cradle the patented cartridge design.” *Id.*

³¹ Lashify sells its lashes under the brand name “Gossamer.” FID at 7, 117; CIB at 23-24.

³² Ms. Lotti testified that the Control Kit “contains the basic components needed to start using the system.” CX-2091C at Q/As 115.

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2095C (Iezzi) at Q/A 21. Specifically, the FID finds that, to apply the Gossamer lashes, customers need the components of the Control Kit, including the bond and the Fuse Control Wand. FID at 119 (citing CX-0727; CX-2091C (Lotti) at Q/A 118). The FID also rejects Respondents' argument that Lashify customers routinely use both the Gossamer lashes and the non-patented portions of the Lashify system with third-party products. *Id.* at 120.

For the final step of his analysis, Lashify's domestic industry expert, Mr. Thomas, applied three different sales-based allocations to calculate Lashify's domestic investments on a patent-by-patent basis. *Id.* at 121-123; CIB at 98-100. Mr. Thomas's "primary allocation" included sales of numerous components of the Lashify system, including bonds, bond removers, cleansing products, storage cases, and applicators. FID at 121. The FID rejects this allocation "for including expenses for products other than the Gossamer lashes and the components necessary to use them." *Id.* at 122.

Mr. Thomas's "first alternative allocation" included sales of the Control Kit, the Gossamer Lashes, Lashify's lash subscription service (Lashify X), the Get Intimate Set, and the Vault. *Id.* The FID finds that neither Ms. Lotti nor Mr. Thomas provided any testimony regarding the Get Intimate Set or the Vault, and that the record does not contain any evidence "that the components of either the Get Intimate Set or the Vault are basic components that are essential to applying the Gossamer lashes themselves." *Id.* The FID further finds:

Prior to the filing of the Complaint, Lashify did not have any sales of the Get Intimate Kit or the Vault. *See* CDX-0005C at Schedule 13 (identifying [REDACTED] of sales of the Vault between the day the complaint was filed and December 31, 2020 and identifying no sales of the Get Intimate Set). Mr. Thomas did not explain what (if any) expenses related to these kits he included in his first alternative allocation. It is possible that Mr. Thomas's first alternative allocation only includes negligible expenses related to these kits. The undersigned must rely on the evidence presented, however, and cannot make assumptions as to what the evidence might have shown.

Id. at 122, n.60. Accordingly, the FID also rejects Lashify's first alternative allocation. *Id.*

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Lashify also relied on a third possible allocation, Mr. Thomas's "second alternative allocation," which includes "only the portion of the Control Kit represented by the component that specifically practices each Asserted Patent plus the standalone sales of those components." *Id.* at 122 (citing CX-2101C (Thomas) at Q/A 186). Mr. Thomas provided the following chart, which shows his first alternative allocation and second alternative allocation:

Schedule 3.1 – Lashify System Products (Alternative Scenarios) ⁽¹⁾						
<i>Inv. 337-TA-1226</i>						
Lashify System Product	Prong (A), (B), and (C) Alternative ^(a)			Additional Prong (A), (B), and (C) Alternative ^(b)		
	'984 Patent	'416 Patent	'664 Patent	'984 Patent	'416 Patent	'664 Patent
Get Intimate Set	X	X		Partial	Partial	
The Vault	X	X	X	Partial	Partial	Partial
Lashify Control Kit	X	X	X	Partial	Partial	Partial
Gossamer Lashes	X	X		X	X	
Lashify X	X	X		X	X	
Storage Box		X			X	
Storage Case		X			X	
Fuse Control Wand			X			X
Wandom			X			X

Notes:

(a) Should the Commission determine under Prong (A), (B), and (C) under Section 337 that the appropriate Lashify system product is the specific products that practice the Asserted Patents.

(b) Should the Commission determine under Prong (A), (B), and (C) under Section 337 that the appropriate Lashify system product is the standalone components of the Lashify system that practice the Asserted Patent and the portion of multi-component products that include the standalone component.

Source:

(1) *See, e.g.*, RX-0942C, Lashify's Inc.'s Sixth Supplemental Response to First Set of Interrogatories to Lashify, Inc. (Nos. 1-32) from KISS Nail Products, Inc.; Ulta Salon, Cosmetics & Fragrance, Inc.; Walmart, Inc.; and CVS Pharmacy, Inc., dated March 26, 2021, pp. 33 – 37.

CDX-0005C at Schedule 3.1; *see also* CX-2101C (Thomas) at Q/A 187. However, it is not entirely clear what the differences are between the products included in the first alternative allocation versus the second alternative allocation. The percentages of total sales that Mr. Thomas calculated based on the included products differ greatly between the first alternative and second alternative allocation. For example, Schedule 13.1 for the first alternative allocation uses a "% of Total Sales" for the '984 patent of [REDACTED] for 2018, [REDACTED] for 2019, and [REDACTED] for 2020 (through September 9, 2020). CDX-0005C at Schedule 13.1; *see also* CX-2101C (Thomas) at Q/A 189. Schedule 13.2 for the second alternative allocation uses a "% of Total Sales" for the '984 patent of [REDACTED] for 2018, [REDACTED] for 2019, and [REDACTED] for 2020 (through September 9,

2020). CDX-0005C at Schedule 13.2; *see also* CX-2101C (Thomas) at Q/A 190. Yet, Mr. Thomas does not specifically explain the large differences in the percentages calculated in Schedules 13.1 and 13.2 and does not adequately identify the specific products included (or excluded) in the different allocations. *See* CX-2101C (Thomas) at Q/A 67, 185-192.

For the design patents, the FID finds that the article protected by the D'416 patent is the storage cartridge depicted in the protected design, and the article protected by the D'664 patent is the Fuse Control Wand depicted in the D'664 patent. FID at 123. Lashify argued that the domestic industry analysis for the two design patents should be expanded beyond the articles protected by the design patents. *Id.* Specifically, Lashify argued that the first alternative allocation for the D'416 patent should also cover "individual sales of the Gossamer® lashes in the patented cartridges and the various kits in which they are sold." CIB at 99 (citing CX-2101C (Thomas) at Q/A 186-187, 189; CDX-0005C at Schedules 3.1 (identifying Lashify's domestic industry products from RX-0942C) and 13.1 (summarizing sales from JX-0156C)). Lashify also argued that the first alternative allocation for the D'664 patent should also cover "individual sales of the Fuse Control™ Wand, the kits in which the Fuse Control™ Wand is sold (*i.e.*, the Control Kit™ and the Vault), and the silicone Wandoms™ needed for the wand." *Id.* (citing CX-2101C (Thomas) at Q/A 186-187, 189; CDX-0005C at Schedules 3.1 (identifying Lashify's domestic industry products from RX-0942C) and 13.1 (summarizing sales from JX-0156C)). However, the FID finds that, "[u]nlike with respect to the '984 patent, however, Lashify did not point to evidence that supports a finding that the domestic industry analysis [for the design patents] should include more than just the protected products themselves." FID at 123. Accordingly, the FID finds that Mr. Thomas's second alternative allocation includes the correct products for the design patents and uses that allocation in analyzing whether Lashify has shown a

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domestic industry exists for purposes of the D'416 patent and D'664 patent. *Id.* (citing CDX-0005C at Schedule 3.1).

b. Sales and Marketing Expenditures

The FID finds that it is undisputed that Lashify does not manufacture its products in the United States. FID at 123-124 (citing CX-2101C at Q/A 123; CX-2091 at Q/A 88). Lashify argued, however, that its domestic sales and marketing expenditures should count towards its purported domestic industry. *Id.* at 124 (citing CIB at 95). The FID does not exclude the sales and marketing expenditures in their entirety, but rather finds that those expenditures should be evaluated under each subsection after first determining whether there are significant expenditures in other qualifying activities. *Id.* at 125 (citing *Certain In Vitro Fertilization Prods., Components Thereof & Prods. Containing the Same*, Inv. No. 337-TA-1196 (“*In Vitro Fertilization*”), Comm’n Op. at 21-23 (Oct. 28, 2021) (“While some Commission decisions allowed consideration of marketing and sales expenses, the Commission did so in conjunction with crediting more traditional section 337(a)(3) expenses.”)).

c. Plant and Equipment (Subsection (A))

Lashify asserted that it “has [four] facilities in the U.S., each of which was/is used for activities relating to Lashify’s domestic industry system.” FID at 125. The FID notes that “the facilities include [REDACTED] (the Sunset Plaza Facility and the New York Facility), a warehouse/storage facility (the Laurel Canyon Facility), and a warehouse (the Chandler Boulevard Facility.” *Id.* at 125-126 (citing CX-2101C (Thomas) at Q/A at 155). Mr. Thomas considered several categories of plant and equipment expenses, including: certain Fulfillment Costs; certain Office Expenses; and Rent & Lease. CX-2101C (Thomas) at Q/A 161-165. Mr. Thomas calculated Lashify’s plant and equipment expenditures in three steps: (1) identifying domestic industry plant and equipment expenditures from Lashify’s Profit and

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Loss statement, finding a total expenditure of [REDACTED]; (2) removing expenditures not associated with domestic industry activities based on the salary of employees involved in relevant domestic industry activities, finding that “approximately [REDACTED] [REDACTED] and [REDACTED] of Lashify’s [expenses] are for domestic industry activities in 2018, 2019, and 2020 (through September 9);” and (3) applying a sales-based allocation to calculate domestic industry plant and equipment expenditures for the Lashify system. FID at 136 (citing CX-2101C (Thomas) at Q/A 166, 173).

In the third step, Mr. Thomas’s second alternative allocation, adopted by the FID, identified Lashify’s plant and equipment expenses as follows: (1) [REDACTED] for the ’984 patent; (2) [REDACTED] for the D’416 patent; and (3) [REDACTED] for the D’664 patent. *Id.* at 125 (citing CX-2101C (Thomas) at Q/A 198). Respondents and OUII argued that certain categories of expenditures should be excluded, including warehousing and distribution and quality control. *Id.* (citing RIB at 90-95; OUIIB at 83-88). The FID takes issue with Mr. Thomas’s conclusion that “approximately [REDACTED] [REDACTED] and [REDACTED] of Lashify’s [expenses] are for domestic industry activities in 2018, 2019, and 2020 (through September 9)[.]” and finds that “Mr. Thomas did not exclude the salaries of individuals who perform certain activities that do not qualify toward a domestic industry.”³³ *Id.* at 128 (citing CX-2101C at Q/A at 173). The FID finds that Lashify has not met its burden to establish it has made significant investments in plant and equipment. *Id.* at 128-131.

The FID also addresses each category of plant and equipment expenditures separately. For warehousing/distribution costs, the FID finds that ““from approximately July 2018 until July

³³ It is not clear why Mr. Thomas included salary information under a prong (A) analysis (as opposed to under prong (B)) or why the FID did not question that inclusion.

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2020, Lashify operated the Laurel Canyon Facility primarily as a warehouse,' where it 'performed finishing manufacturing, fulfillment, shipping, and product development activities,' and that in July 2020, "Lashify moved its warehouse operations to the Chandler Boulevard facility." *Id.* at 128-129. The FID finds some of the costs for the D'664 patent should be included, but the costs for products protected by the '984 patent and D'416 patent should not be included. *Id.* at 129. Specifically, the FID finds that Lashify conducts certain finishing steps on the Fuse Control Wand in the United States and these expenses are appropriately considered in the domestic industry analysis for the D'664 patent.³⁴ *Id.* 129, n.67 (citing *Male Prophylactic Devices*, Comm'n Op. at 42 (noting that "if the product is not saleable without the domestic activities, this factor supports a finding of domestic industry")). The FID notes, however, that Lashify does not specifically identify the costs incurred to perform the finishing steps. *Id.*

Regarding the D'416 patent, the FID finds that Lashify failed to "explicitly state whether the storage cartridge³⁵ is manufactured outside of the United States. Thus, it is unclear if any costs related to warehousing and distribution can properly be considered in the analysis" *Id.* at 129, n.68. As to the '984 patent, the FID finds that the "[Lashify] lashes arrive in the United States [REDACTED] or as part of a kit with the [Lashify] lashes already placed inside. . . . There are no additional steps required to make the products saleable." *Id.* at 129. Accordingly, the FID finds that any warehousing and distribution costs should not be considered as to the '984 patent. *Id.*

³⁴ The D'664 patent is directed to an "Applicator for Artificial Eyelash Extensions." JX-0004.

³⁵ The D'416 patent is directed to a "Storage Cartridge for Artificial Eyelash Extensions." JX-0003.

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As to quality control costs, the FID finds those costs should not be included in the calculation of expenses for the '984 patent. *Id.* at 129. Specifically, the FID finds that Lashify's cursory checks of its products to make sure they are not damaged during shipment is no more than what a normal importer would do upon receipt. *Id.* at 129-130 (citing *Schaper Mfg. Co. v. Int'l Trade Comm'n*, 717 F.2d 1368, 1372-73 (Fed. Cir. 1983)).

For sales and marketing expenses, the FID finds that at least some portions of the Sunset Plaza and New York facilities are used for sales and marketing. *Id.* at 130 (citing CX-2101C at Q/As 145, 151). The FID also finds that Lashify's customer service activities fall into sales and marketing. *Id.* at 130, n.69. The FID finds, however, that Lashify did not provide evidence of significant expenditures in other qualifying activities, and thus cannot include sales and marketing expenses as part of its purported domestic industry. *Id.* at 130-131.

The FID takes issue with Mr. Thomas's inclusion of nearly 100 percent of the rent for four facilities allegedly used for domestic industry activities, including the Sunset Plaza and New York facilities, because Ms. Lotti also uses those two locations as [REDACTED]. *Id.* at 131. The FID finds that Mr. Thomas's conclusion that "approximately [REDACTED] [REDACTED] and [REDACTED] of Lashify's [expenditures for these four facilities] are for domestic industry activities" is unreliable. *Id.*

Based on the findings above, the FID finds that Lashify has not established that it meets the economic prong under subsection (A). *Id.* at 131-132. Specifically, the FID finds that "Mr. Thomas's calculations improperly include certain warehouse, distribution, and quality control expenses, improperly include sales and marketing expenses without justification, and rest on an unsupported conclusion that the majority of expenses are attributable to domestic industry activities" *Id.* at 131.

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d. Labor and Capital (Subsection (B))

Lashify argued it made significant investments in labor and capital under subsection (B), and relied on three different allocations, including Mr. Thomas's second alternative allocation calculations, which claims the following labor expenditures: (1) [REDACTED] for the '984 patent; (2) [REDACTED] for the D'416 patent; and (3) [REDACTED] for the D'664 patent. *Id.* at 132 (citing CX-2101C at Q/A 224). Lashify also claimed capital expenditures as follows:

(1) [REDACTED] for the '984 patent; (2) [REDACTED] for the D'416 patent; and (3) [REDACTED] for the D'664 patent. *Id.* (citing CX-2101C at Q/A 23).

For labor, Lashify asserted that its "employees and contractors in the United States perform, or have performed, at least the following activities: research and development, engineering, finishing, manufacturing, including sourcing and procurement, quality control, logistics, fulfillment, marketing and education, including customer service and support." *Id.* at 133 (citing CX-2101C (Thomas) at Q/A 200). The FID finds that Mr. Thomas's calculations related to warehousing, distribution, and quality control are not appropriately considered in the analysis, at least as to the '984 and D'416 patents, and that Mr. Thomas failed to allocate investments to the Asserted Patents until his final step. *Id.* The FID also finds that Lashify failed to justify including sales and marketing expenses for any patent. *Id.* The FID finds that, because Mr. Thomas's analysis is unreliable, Lashify did not meet its burden to establish significant investments in labor. *Id.*

For capital, Lashify relied upon expenditures including: "(1) certain Processing Fees; (2) certain Shipping, Freight & Materials; (3) certain Marketing & Creative; (4) certain Meals/Entertainment; (5) certain Office/General Administrative[.] and (6) Research and Development." *Id.* at 133. The FID finds that the majority of the expenses relate to sales and marketing, and Mr. Thomas again incorrectly included non-qualifying expenses that should have

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been excluded from the analysis. *Id.* at 133-135. The FID finds that the research and development expenses of [REDACTED] are properly considered, but that Lashify did not establish that the investment was significant or substantial. *Id.* at 135. The FID therefore finds that Lashify did not meet its burden to establish significant investments in capital. *Id.*

Accordingly, the FID finds that Lashify has not established it meets the economic prong under subsection (B).

e. Research and Development (Subsection (C))

Lashify argued its investments were significant in three categories of research and development (“R&D”): (1) Lashify’s plant and equipment expenditures allocated to R&D; (2) Lashify’s labor allocated to R&D; and (3) “isolated domestic R&D capital expenditures from Lashify’s profit & loss statement.” FID at 135 (citing CX-2101C (Thomas) at Q/A 239). Under Mr. Thomas’s second alternative allocation, Lashify asserted the following R&D expenditures: [REDACTED] for the ’984 patent; [REDACTED] for the D’416 patent; and [REDACTED] for the D’664 patent. *Id.* (citing CX-2101C (Thomas) at Q/A 238); CDX-0005C at Schedule 9.2).

The FID first finds that Lashify failed to establish that its R&D expenses have the required nexus to the Asserted Patents because neither Lashify nor its expert, Mr. Thomas, linked the R&D expenses to protected articles and argued only that R&D expenses related generally to the “Lashify system,” which the FID notes is broader than the articles relevant to the domestic industry analysis in this case, for any of the Asserted Patents. *Id.* at 136.

For plant and equipment expenditures allocated to R&D, the FID finds that Mr. Thomas’s calculations are unreliable due to several assumptions, including that nearly 100 percent of the rent for the Sunset Plaza Facility and New York Facility, which are the [REDACTED], [REDACTED], should be attributed to Lashify’s domestic industry activities. *Id.* at 137. Further,

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contrary to Mr. Thomas's unsupported assumption, the FID finds that Lashify has not established that R&D is conducted at all four asserted facilities. *Id.* (citing CX-2091C at Q/As 145, 147).

Regarding labor expenses allocated to R&D, the FID finds that Mr. Thomas's calculations are unreliable and not supported by the evidence. *Id.* at 138-139. Specifically, Mr. Thomas relied on Ms. Lotti, who proffered only her personal knowledge and did not confirm the amount of time spent on R&D with any of the Lashify employees. *Id.* at 139. The FID also finds that the evidence contradicts Ms. Lotti's statements on which Mr. Thomas relied. *Id.*

For capital expenses allocated to R&D, Mr. Thomas identified expenditures related to product testing, software development and R&D in the amount of [REDACTED] for all the Asserted Patents collectively. *Id.* at 140. The FID finds, however, that Lashify has not demonstrated that its [REDACTED] in R&D expenditures is substantial, in particular in the absence of a per-patent allocation. *Id.* at 139-140; *see id.* at 14, n.77. Specifically, the FID notes Lashify's argument that its estimated total R&D costs of [REDACTED] ('984 patent), [REDACTED] (D'416 patent), and [REDACTED] (D'664 patent) are substantial (CIB at 109-110), but notes that Lashify does not specifically argue that [REDACTED] is substantial. *Id.* at 140. The FID also finds that the evidence suggest the amount is not substantial, because Lashify expenditures in R&D "accounts for just [REDACTED] of Lashify's capitalized expenditures (*i.e.*, [REDACTED] [REDACTED]." *Id.* The FID thus finds that Lashify has not made substantial investments in capital expenditures related to R&D. *Id.*

Accordingly, the FID finds that Lashify has not established that it meets the economic prong under subsection (C). *Id.*

2. Analysis

The Commission determined to review the FID's findings regarding the economic prong of the domestic industry requirement. 87 Fed. Reg. at 4045. The Commission requested that the parties provide additional briefing on two issues:

- (1) Please discuss whether Complainant should be considered a mere importer when its domestic activities and investments are evaluated as a whole with respect to the asserted patents, rather than when its domestic activities and investments are evaluated in a "line-by-line" approach, with citation to the record evidence.
- (2) To the extent Complainant is not a mere importer and certain domestic activities and investments with respect to the asserted patents excluded by the FID (*see e.g.*, certain warehousing/distribution, quality control, and/or sales and marketing expenditures) should be credited as cognizable domestic industry investments, please discuss whether Complainant's cognizable domestic industry investments are significant or substantial within the meaning of section 337(a)(3)(A)-(C), with citation to record evidence. Please be sure to provide your explanation and data separately for each asserted patent.

Id. Having considered the parties' responses, and with the supplemental analysis below, the Commission finds that Lashify does not satisfy the economic prong for any of the Asserted Patents.³⁶

The FID's findings support the conclusion that Lashify failed to satisfy the economic prong. It is undisputed that Lashify's products are manufactured outside of the United States and the lashes arrive in the United States already individually packaged. FID at 123; CX-2101C at Q/A 123; CX-2091 at Q/A 88. The FID also correctly finds that Lashify overstates its domestic

³⁶ We note that the main disagreement between the majority and the dissent is whether to credit certain expenditures. As explained in this section, we agree with the ALJ that, based on the record and arguments presented in this investigation, Lashify did not meet its burden to show that certain of its expenditures should be cognizable as part of its alleged domestic industry. Because of the way Lashify's expert Mr. Thomas constructed his analysis, this overinclusion undermines the entirety of Lashify's domestic industry case. The Commission thus does not reach issues addressed in subsequent steps of Mr. Thomas's analysis that are discussed by the dissent, such as the scope of products to be considered for each patent, or the significance of the investments put forth by Lashify.

investments and that Lashify's evidence and expert testimony is unreliable. FID at 123-140.

The Commission agrees that the ALJ was not required to recalculate Lashify's alleged expenditures, as Lashify argues in its petition. Accordingly, Lashify has failed to meet its burden of establishing a domestic industry exists for each of the Asserted Patents.

a. Lashify Cannot Rely on Pre-2017 "Sweat Equity" Evidence or Arguments

First, we note that the ALJ excluded purported evidence of pre-2017 "sweat equity" by Ms. Lotti during Lashify's start-up phase because such evidence was untimely and prejudicial. Order No. 55 (July 9, 2021) (granting-in-part Respondents' MIL No. 1 to preclude Lashify from relying on belated domestic industry evidence). Lashify did not seek review of Order No. 55 and failed to address Order No. 55 in its petition. *See* CPet. Lashify has therefore abandoned any challenge to that order. 19 C.F.R. § 210.43(b)(2) (issues not raised in petition for review will be deemed abandoned and may be disregarded); *see Finnigan Corp. v. ITC*, 180 F.3d 1354, 1362 (Fed. Cir. 1999) ("A party seeking review in this court of a determination by the Commission must 'specifically assert' the error made by the ALJ in its petition for review to the Commission.").

Before the Commission, Lashify attempts to rely on pre-2017 evidence that was excluded. Lashify IR at 10-12 (citing CX-2091C (Lotti) at Q/A 13-78); CPet. at 60 (same). In accordance with Order No. 55, most of Lashify's evidence based on pre-2017 "start-up" or "sweat equity" activities is untimely and will not be considered. To the extent Lashify's pleadings intend to rely on the cited portions of the record not stricken by Order No. 55, the

Commission has considered that testimony and finds the overall record insufficient to demonstrate a domestic industry exists, for the reasons detailed below.³⁷

b. Lashify's Evidence is Not Credible or Reliable and Cannot Form the Basis of a Domestic Industry

The complainant bears the burden of establishing that a domestic industry exists. *See, e.g., Lelo*, 786 F.3d at 883 (“A claimant asserting patent rights under § 337 must satisfy the ‘domestic industry’ requirement set out in the statute”); *Certain Network Controllers & Prods. Containing Same*, Inv. No. 337-TA-531, Order No. 13 at 3 (July 6, 2005). Further, a complainant must present credible and reliable evidence in order to meet its burden. *See, e.g., Soft-Edged Trampolines*, Comm’n Op. at 54-57; *Stringed Musical Instruments*, Comm’n Op. at 14 (May 16, 2008). The Commission agrees with the FID’s conclusion that Lashify did not present credible and reliable evidence in support of its domestic industry arguments, for the reasons stated in the FID and as supplemented below.

Lashify essentially characterized all of its investments as domestic investments. CPet. at 62 (“Critically, other than contract manufacturing performed abroad due to the absence of any domestic capabilities, *all* of Lashify’s activities and investments with respect to its system, including development, design, R&D, and customer education and support, are *by Lashify in the U.S.*” (emphases in original)); *see also* CIB at 87, 93 (“Developing Lashify’s domestic industry

³⁷ The dissent focuses on Lashify’s assertion that it “is a company started in the United States that has relied on the innovation and effort of its founder in the United States,” but Lashify was founded in 2015 (*see* CX-2091C at Q/As 3, 4). The dissent does not explain how Lashify’s assertions regarding its pre-2017 founding and development is relevant to the analysis of Lashify’s expenditures, which do not include pre-2017 investments (*see* CDX-0005C). As noted in the dissent, “Ms. Lotti’s start-up efforts in 2015-2016 are not reflected in the quantitative data Lashify submitted to support its DI investments because Lashify does not have financial statements that predate its sales that commenced in 2017.” Accordingly, it is not clear that such pre-2017 efforts affect whether Lashify provided reliable evidence of its investments.

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products, which did not previously exist, required extensive efforts over multiple years, including *materials testing and development of manufacturing processes* for the Gossamer® lashes . . .” (emphasis added)). However, Lashify’s characterization of its investments as all “in the U.S.” is at odds with other evidence. For example, Lashify admits its products are manufactured outside of the United States, so the alleged “materials testing and development of manufacturing processes” would have necessarily occurred at the foreign manufacturers, [REDACTED] and not in the United States. See RX-0480C ([REDACTED] [REDACTED]; JX-0062C (Lotti Tr. Pt. 1) at 274:4-277:21 ([REDACTED] [REDACTED]). There is also evidence that Lashify made foreign investments totaling approximately [REDACTED] in foreign tooling costs. RX-1690C (Vander Veen) at Q/A 122; see RIB at 104. In contrast, Lashify has spent approximately [REDACTED] on tooling in the United States. *Id.* The Commission has considered a comparison of a complainant’s foreign and domestic investments versus its domestic investments in the protected articles as one way of determining the significance of the domestic investments; here Lashify over-stated its domestic investments in claiming that “100% of Lashify’s activities and investments are performed or made in the U.S.” CPet. at 62; CIB at 108. It is not possible to determine the extent to which Lashify exaggerates the domestic investments compared to foreign investments because, in addition to Lashify’s decision to not provide discovery regarding its manufacturing, Lashify also chose not to provide evidence of its foreign investments.

The Commission determines that the evidentiary record supports the FID’s findings and there is a lack of credible evidence to find that the domestic industry requirement is met, as further explained below for each subsection. *Soft-Edged Trampolines*, Comm’n Op. 56-57 (“The

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Commission supports the ALJ's determination that there was a lack of credible evidence presented by" the complainant and that the complainant "failed to meet its burden of proof in establishing the significance of its investments in terms of this industry or in general."). Lashify has thereby failed to satisfy its burden to demonstrate the existence of a domestic industry. *Certain Television Sets, Television Receivers, Television Tuners, & Components Thereof*, Inv. No. 337-TA-910 ("Television Sets"), Comm'n Op. at 66 (Oct. 30, 2015) (citing *Soft-Edged Trampolines*, Comm'n Op. at 56-57).

i. Plant and Equipment (Subsection (A))

The Commission affirms the FID's finding that Lashify has not met its burden to establish that it has made significant investments in plant and equipment for any of the Asserted Patents. FID at 128-132. As explained above, the FID analyzes Lashify's alleged plant and equipment expenditures in depth and finds that Lashify includes expenditures that are not cognizable investments under the statute and Commission precedent. *Id.* This is fatal to Lashify's subsection A arguments because the nature and extent of the non-cognizable expenses preclude "an accurate assessment of the amount of economic activity properly allocated to activities covered under section 337" and thus, in this case, "a determination that a significant domestic industry exists is impossible." *Certain Non-Volatile Memory Devices & Products Containing the Same*, Inv. No. 337-TA-1046 ("Non-Volatile Memory Devices"), ID at 186 (Apr. 27, 2018), *aff'd*, Comm'n Op. (Aug. 1, 2018).

First, the FID finds that "the evidence does not support Mr. Thomas's conclusion in the second step of his analysis that 'approximately [REDACTED] [REDACTED] and [REDACTED] of Lashify's expenses 'are for domestic industry activities in 2018, 2019, and 2020 (through September 9).'" FID at 128. The FID specifically finds that Mr. Thomas errs in his calculations because he did not exclude the salaries of individuals who perform certain activities that do not qualify toward

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Lashify's domestic industry, such as warehousing and fulfillment or administration³⁸, and this error undermines the rest of Mr. Thomas's analysis. *Id.* The FID further finds that Mr. Thomas erred in including quality control expenditures because the evidence shows Lashify conducts only cursory checks of its products in the United States. *Id.* at 129-130. The Commission has declined to credit general quality assurance because these are expenditures "that would be expected of any commercial purchaser." *Certain Bone Cements, Components Thereof & Prod. Containing the Same*, Inv. No. 337-TA-1153 ("*Bone Cements I*"), Comm'n Op. at 8-11 (Jan. 25, 2021) (quoting *Certain Miniature, Battery-Operated, All Terrain, Wheeled Vehicles*, Inv. No. 337-TA-122, Comm'n Op. at 6, 10-11 (Oct. 1, 1982)). Here, we agree with the FID that Lashify's quality control activities should not be credited towards its domestic industry for any of the Asserted Patents.

Second, we agree with the FID that Lashify has not justified crediting nearly the entirety of its investments in domestic plant and equipment toward the satisfaction of the domestic industry requirement. *Id.* at 128-131. For example, Mr. Thomas included almost 100% of Lashify's expenses for four facilities, including [REDACTED] (the Sunset Plaza Facility and the New York Facility), a warehouse/storage facility (the Laurel Canyon Facility), and a warehouse (the Chandler Boulevard Facility). *Id.* at 125-126, 128-129 (citing CX-2101C at Q/A at 155). However, the Laurel Canyon and Chandler Boulevard facilities are used mostly for warehousing and distribution. *Id.* The FID finds that the record does not support including any

³⁸ Mr. Thomas includes the salaries of several employees, such as [REDACTED] who is listed as part of the "Administration" department, but Lashify has not shown that those salaries should be included. See JX-0152C; CX-2101C (Thomas) at Q/A 170-176; see also FID at 128, 139. For example, [REDACTED] title is "Director of Creative," and as the FID explains, the evidence shows [REDACTED] is a graphic designer who assists with "design work on the cartridge and the wand," so for the '984 patent it is not appropriate to include her salary. *Id.*; see also FID at 139 (citing CX-2101C at Q/A 4, 136; CX-2101C at Q/A 109; RX-1690C at Q/A 52).

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warehousing and distribution costs for the '984 patent or the D'416 patent because: 1) Lashify's artificial lashes ('984 patent) are manufactured outside the United States and no additional steps occur in the United States to make them saleable, and 2) Lashify failed to provide evidence regarding the storage cartridge (D'416 patent) manufacturing location so it is unclear if any warehousing and distribution costs could be included. *Id.* at 129 & n.68. For the D'644 patent, the FID finds some costs could be included due to certain finishing steps in the United States but Lashify did not identify the actual costs related to the finishing steps, so there is also a lack of evidence as to the D'644 patent. *Id.* at 129 & n.67. The Commission agrees with the FID's conclusion that Mr. Thomas's calculations including the Laurel Canyon and Chandler Boulevard facilities are unreliable.

The FID finds Mr. Thomas's calculations regarding [REDACTED] (the Sunset Plaza Facility and the New York Facility) are not credible because he concluded that nearly 100% of the rent for those facilities, which are also used as [REDACTED], should be included in Lashify's domestic industry. *Id.* at 131. The FID further finds Mr. Thomas's opinions regarding these facilities are also unreliable. *Id.*

We agree with the FID's finding that Mr. Thomas's analysis cannot be relied on due to errors in his analysis and lack of support for his opinions in the record evidence. *Id.* at 131-132. Due to the lack of a credible expert opinion and a reliable analysis, it is not possible to credit Lashify's domestic industry arguments. *See Non-Volatile Memory Devices*, ID at 186 ("Without an accurate assessment of the amount of economic activity properly allocated to activities covered under section 337, a determination that a significant domestic industry exists is impossible."). Accordingly, the Commission affirms the FID's finding that Lashify failed to

meet its burden that a domestic industry exists based on plant and equipment expenditures for subsection A.

ii. Labor and Capital (Subsection (B))

For Lashify's alleged labor and capital expenditures, the FID evaluates Mr. Thomas's analysis and finds it is overinclusive and not supported. FID at 132-135. The FID finds Mr. Thomas's analysis is unreliable because it includes expenses related to warehousing, distribution, and quality control, which Lashify has not demonstrated should be considered part of its domestic industry for the reasons discussed above for subsection A. FID at 133; *see id.* at 128-130 (*e.g.*, only minor repackaging and inspection of imported lashes). This error extends to all of the Asserted Patents because Mr. Thomas did not allocate the investments to each patent until the final step of his analysis. *Id.* at 133, n.71.

The FID further finds that Mr. Thomas errs by including Lashify's sales and marketing expenses because Lashify did not demonstrate that it has other significant qualifying expenditures such that sales and marketing expenditures can be considered. *Id.* at 133-135; *see Collapsible Sockets*, Comm'n Op. at 19-20 (explaining that the complainant "also provided evidence of significant expenditures in its employment of labor in other qualifying activities, such as engineering, product development, product assembly, supply chain and operation management, and customer service, as well as capital expenditures for fixtures, furniture, software, and equipment used for design, engineering, and operating management"); *see also In Vitro Fertilization*, Comm'n Op. at 21-23 ("While some Commission decisions allowed consideration of marketing and sales expenses, the Commission did so in conjunction with crediting more traditional section 337(a)(3) expenses"). The FID does not categorically exclude sales and marketing expenditures, or any other type of expenditure, based solely on the category of expense, but rather a lack of evidence that such expenses are cognizable in the context of this

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investigation. The Commission agrees with the FID's finding that in this case sales and marketing should not be credited toward the existence of a domestic industry. The Commission notes that under any rationale, either due to the exclusion of sales and marketing expenditures or because Lashify failed to demonstrate there are sufficient other qualifying expenditures such that sales and marketing expenditures could be included, the outcome is the same. Therefore, Mr. Thomas's analysis of Lashify's alleged labor and capital is over-inclusive and unreliable.

In sum, the FID correctly finds that Lashify did not meet its burden of demonstrating a domestic industry for the Asserted Patents under subsection B. Lashify failed to provide evidence or reliable expert opinion to support its analysis for the majority of the alleged labor and capital expenditures. While the FID does credit Lashify's research and development expenses of [REDACTED] (*id.* at 135), the FID further finds that Lashify failed to establish that this domestic investment was significant or substantial (*id.* at 140), a finding the Commission affirms (*see infra*). Accordingly, the Commission affirms the FID's finding that Lashify failed to meet its burden that a domestic industry exists based on labor and capital expenditures for subsection B.

iii. Research and Development (Subsection (C))

The Commission affirms the FID's finding that Lashify failed to meet its burden that a domestic industry exists based on R&D expenditures for subsection C for the following reasons: 1) Lashify failed to demonstrate the required nexus exists between the alleged R&D expenses and the Asserted Patents; 2) Mr. Thomas's calculations are based on unreliable and unsupported assumptions.

Regarding nexus, Lashify's non-specific arguments and evidence do not meet its burden. FID at 136-137 (citing *Non-Volatile Memory Devices*, Comm'n Op. at 41 n.11 ("Subprong (C) requires 'substantial' domestic investments in the exploitation of the patent, which must be

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supported by a demonstration of ‘nexus’ between the investments and the patent right.”).

Lashify does not tie its R&D expenses to the actual articles protected by the Asserted Patents, let alone to the patented features. *Id.* (citing CIB at 106-107 (arguing R&D expenses “enable exploitation of the Lashify system”). Mr. Thomas also opines generally as to the “Lashify system” and fails to specify which products were part of Lashify’s R&D. *Id.* (citing CX-2091C at Q/A 177); RX-1690C at Q/A 61-62).

As to Lashify’s alleged R&D expenditures, the FID correctly finds that Mr. Thomas’s analysis is over-inclusive and is not supported by credible evidence. *Id.* at 137-140. For example, for plant and equipment R&D expenditures, the FID correctly finds that Mr. Thomas’s assumption that nearly 100% of [REDACTED] (Sunset Plaza Facility and New York Facility) should be included is unsupported. *Id.* at 137. Further, the FID also correctly finds that Ms. Lotti’s testimony contradicts Mr. Thomas’s assumption that R&D is conducted at all four facilities. *Id.* at 137-138 (citing CX-2091C at Q/A 145, 147). We agree with the FID that Mr. Thomas’s calculations for plant and equipment expenditures allocated to R&D are unreliable. *Id.*

Mr. Thomas’s calculations of labor expenditures allocated to R&D are also unsupported by the record and unreliable. *Id.* at 138-139. Mr. Thomas based his labor calculations on conversations with Ms. Lotti, however, the FID finds that Ms. Lotti does not provide any support for her estimates, she did not testify that she spoke to any of her employees to confirm her estimates, and Lashify did not cite any testimony from the employees themselves. *Id.* The FID also finds that other evidence contradicts Ms. Lotti’s estimates. *Id.* at 139 (citing CX-2101C at Q/A 133, 136; CX-2101C at Q/A 109). “Inconsistencies, contradictions and unsupported assertions, such as those discussed by the ALJ, militate against reliance on [a complainant’s]

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testimony in regard to the alleged investments and allocations.” *Television Sets*, Comm’n Op. at

65. We agree with the FID’s finding that Mr. Thomas’s calculations with respect to labor expenditures allocated to R&D is unreliable.

Finally, while the FID notes that Mr. Thomas calculates capital expenditures allocated to R&D as [REDACTED], the FID finds that is not a substantial investment. FID at 139-140 (citing CX-2101C at Q/A 251). First, the FID finds that Lashify never specifically argues that [REDACTED] is substantial. *Id.* at 140 (CIB at 109-111). Second, the FID finds other evidence demonstrate [REDACTED] is not substantial, including evidence that the R&D capital expenditure of [REDACTED] is just [REDACTED] of Lashify’s capitalized expenditures (*i.e.*, [REDACTED] [REDACTED].” *Id.* (citing RIB at 95; CX-0005C at 36; SIB at 90).

Accordingly, for all the reasons described herein, the Commission affirms the FID’s finding that Lashify has not made substantial investments in capital expenditures related to R&D for any of the Asserted Patents.

c. Commission Precedent Supports the FID’s Findings

In its response to the January 26, 2022 review notice, Lashify argues that the FID incorrectly fails to credit Lashify’s domestic industry expenditures and cites *Certain Percussive Massage Devices*, Inv. No. 337-TA-1206 (“*Percussive Massage Devices*”), Comm’n Op. (Jan. 4, 2022) to support its argument. Lashify IR at 1, 6-7. The evidence here does not support Lashify’s reliance on *Percussive Massage Devices*.³⁹

³⁹ Also, in *Percussive Massage Devices*, the Commission considered a motion for summary determination after all of the remaining respondents were previously found in default. *Id.*, Comm’n Op. at 75, 141-142. The ALJ found the complainant met its burden based on uncontested assertions regarding the technical and economic prongs of the domestic industry requirement. *Id.* That procedural history is far different from the contested issues in the present investigation.

In *Percussive Massage Devices*, the Commission stated that “the record evidence supports a finding that Hyperice is more than a mere importer because Hyperice started as a small domestic entity where a majority of its expenses went towards designing and developing the [Domestic Industry] Products in the United States.” *Percussive Massage Devices*, Comm’n Op. at 14-15. The Commission first found that Hyperice had traditional qualifying cognizable activities, including research, design, and development of the domestic industry products, as well as warranty, repair, and customer service of the domestic industry products, among others. *Id.* Only after these qualifying cognizable activities were credited were other non-qualifying activities, such as sales and marketing, considered. *Id.* Here, Lashify largely forfeited any reliance on its initial “sweat equity” toward development of the domestic industry products for the U.S. market, and the remainder lacks any quantification. *See* Order No. 55; CX-2091C at Q/A 13-78 (as modified by Order No. 55). Moreover, unlike the complainant in *Percussive Devices*, Lashify does not perform any qualifying repair/warranty/servicing activities in the United States. Thus, Lashify is not similarly situated to the complainant in *Percussive Massage Devices* and is more like the complainant in *Schaper Mfg. Co.*, 717 F.2d at 1372-73.

In *Schaper*, the Federal Circuit affirmed that “the nature and extent of Schaper’s domestic activities (in relation to the total production process of the [domestic industry product toy vehicles]) are insufficient to constitute an ‘industry . . . in the United States’” where the domestic activities included quality control, warehousing and shipping, advertising, financing, and licensing fee payments. *Id.* at 1372. Ultimately, the Court concluded that “[t]here is simply not enough significant value added domestically to the toy vehicles by Schaper’s activities in this country (including design, inspection and packaging).” *Id.* at 1373.

“While there is no bright-line rule to determine whether a complainant’s domestic activities are distinguishable from those of a mere importer[,] the Commission has often considered some types of activities, such as administrative overhead, inspections, and warehousing costs associated with importation of the domestic industry products as well as sales and marketing of the product, to be indistinguishable from those of a mere importer and has not typically credited them when determining whether a domestic industry exists.” *Bone Cements I*, Comm’n Op. at 22 (citing *Schaper Mfg. Co.*, 717 F.2d at 1372-73). Here, Lashify’s artificial lashes arrive in the United States individually packaged, and Lashify’s warehousing and distribution activities involve simply “select[ing] the items that are on [an] order” and “putting [them] in a box.” CX-2101C (Thomas) at 114. Further, for the Lashify Control Kit, Lashify adds only a Fuse Control Wand before putting the Control Kit in a box for shipping. JX-0247C (Control Kit Assembly) at 1-2; *see also* CX-2101C (Thomas) at Q/As 107, 116. As the FID correctly finds, “[t]here are no additional steps to make [the Lashify] products saleable” in the United States, so expenditures relating to warehousing and distribution should not be considered. FID at 129.

The facts here are also similar to those in *In Vitro Fertilization*. As in that case, “Complainant imports the final, packaged product in the form it is ultimately provided to the consumer,” and “[n]one of Complainant’s activities are directly related to the exploitation of the Asserted [Patents].” *In Vitro Fertilization*, Comm’n Op. at 23. Lashify’s warehousing and distribution activities are limited to “select[ing] the items that are on [an] order” and “putting [them] in a box.” CX-2101C at 114. Further, when the eyelash products are sold as part of a kit, including the Lashify Control Kit, Lashify’s U.S. activities include merely adding a Fuse Control Wand to the kit, as delivered from overseas, before putting the kit in a box for shipping to U.S.

customers. JX-0247C (Control Kit Assembly) at 1-2. We agree with the FID that these warehousing and distribution activities are not cognizable as part of a domestic industry in this case.

As the Federal Circuit has noted, “Congress did not mean to protect American importers (like Schaper) who cause the imported item to be produced for them abroad and engage in relatively small nonpromotional and non-financing activities in this country – *i.e.*, they engage in design and a small amount of inspection and packaging in this country.” *Schaper Mfg. Co.*, 717 F.2d at 1373. Here, it is undisputed that Lashify’s products are manufactured outside of the United States and the lashes arrive in the United States already individually packaged. FID at 123; CX-2101C at Q/A 123; CX-2091 at Q/A 88. Moreover, Lashify failed to establish that its R&D expenses have the required nexus to the Asserted Patents. FID at 136. There is no credible evidence in the record to demonstrate that Lashify engages in research and development activities sufficiently related to the exploitation of the Asserted Patents, much less that such activities are substantial.

d. Lashify’s Evidence is Unreliable Regardless of Which Allocation of Products is Considered in the Economic Prong Analysis

The parties disagreed before the ALJ, and continue to disagree before the Commission, as to the scope of products for which expenditures should be included as part of the domestic industry analysis for each of the Asserted Patents.⁴⁰ *See* FID at 117. However, since Mr. Thomas did not allocate the expenditures according to the products until the final step of his

⁴⁰ Lashify argues in its petition that the FID errs in rejecting Lashify’s first alternative allocation, which Lashify asserts includes “the standalone products specifically protected by each asserted patent and the Lashify kits in which those stand-alone products are sold.” CPet. at 94-97. Respondents and OUII argue that the FID correctly considers the second alternative allocation.

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analysis, the lack of evidence and credible expert testimony affects all of Mr. Thomas's allocations (primary, first alternative, second alternative), and thus Lashify fails to meet its burden regardless of which of the three allocations is considered.

Lashify used the same general method to calculate its alleged domestic investments for subsections (A) and (B). FID at 125-135. Specifically, Mr. Thomas's analysis proceeded in three steps: 1) he identified specific line items from Lashify's Profit and Loss statement allegedly relevant under subsection (A) or (B); 2) he allocated the total from step 1 according to the portion of Lashify expenses attributable to domestic industry activities in 2018 (██████████ 2019 (██████████ and 2020 (██████████ and 3) he allocated the total from step 2 based on the sales of the domestic industry products relevant to each patent. FID at 126, 132. At the third step, Mr. Thomas calculated his "primary," "first alternative," and "second alternative" allocations. *See id.* at 126 (plant and equipment (citing CX-2101C at Q/A 160, 166, 173, 198); *see also id.* at 132 (labor and capital) (citing CX-2101C at Q/As 201, 225).

For subsection (C), Mr. Thomas, separated the expenses into the following categories: "(1) Lashify's domestic industry plant and equipment expenditures allocated to R&D; (2) Lashify's labor allocated to R&D; and (3) isolated domestic R&D capital expenditures from Lashify's profit & loss statement." *Id.* at 135 (citing CX-2101C at Q/A 239). Taking the total of these amounts, he applied a percentage discount to determine the expenditures associated with R&D, similar to the second step of his analysis of subsections A and B. Finally, he applied the same sales-based allocation to the expenditures to calculate Lashify's per-patent investments according to the three potential allocations (primary, first alternative, and second alternative allocations). *Id.* at 137-140.

In sum, all of Mr. Thomas's allocations are based on the same unreliable evidence and over-inclusive calculations in steps one and two, that is, before Mr. Thomas applied any allocation based on the scope of the domestic industry products. As the FID correctly finds, Mr. Thomas improperly included a variety of expenses for each of the Asserted Patents, a conclusion the Commission affirms, regardless of the scope of domestic industry products.

e. The ALJ Was Not Obligated to Perform New Calculations in Light of Lashify's Deficient Evidence

In its petition, Lashify argues that the ALJ should have recalculated Lashify's expenditures to subtract any non-cognizable amounts instead of finding that Lashify's entire analysis was unreliable. *See* CPet. at 64-98. Specifically, Lashify argued that "[d]espite being presented with competing proposed quantifications, and the ability to vary those quantifications as warranted, the [ALJ] failed to quantify Lashify's domestic industry plant and equipment investments." *Id.* at 65-66 (citing FID at 131, 137). However, Lashify does not provide any support for its argument. Further, the Commission can think of no persuasive reason why the fact finder must sift through the record evidence to construct an allocation that meets the complainant's burden after finding complainant's presentation of evidence severely flawed.

The FID correctly recognizes that a determination as to whether a domestic industry exists is impossible "[w]ithout an accurate assessment of the amount of economic activity properly allocated to activities covered under section 337." FID at 131-132 (citing *Non-Volatile Memory Devices*, ID at 186). Lashify did not provide credible and reliable evidence upon which the FID could assess its alleged domestic industry. Accordingly, Lashify did not meet its burden of demonstrating a DI exists for any of the Asserted Patents.

f. Lashify's Recalculated Fourth Alternative Allocation in Lashify's Petition is Waived

Lashify presented a recalculated fourth allocation in its petition, which Lashify claimed removed the non-cognizable activities. CPet. at 71-73, 80-81, 86, 88-91. Respondents and OUII argued that the ALJ was not required to sort through all of the data and correct Lashify's overstatements. *See* RPet. Reply; OUII Reply.

Lashify's argument that the Commission should consider its new analysis is problematic for a number of reasons. Lashify ignores the requirement that it is the complainant's burden to prove a domestic industry exists. Lashify also waived the recalculated fourth allocation in its petition because that new, fourth allocation was not included as part of Lashify's post-hearing brief. Lashify presented three allocations for its economic prong arguments in its post-hearing brief, when those arguments failed, Lashify argued a fourth, new allocation in its petition for Commission review. CPet. at 71-73, 80-81, 86, 88-91. Pursuant to the ALJ's Ground Rules, all issues not raised in a party's post-trial brief are waived. Order No. 2 (Oct. 28, 2020), at G.R. 9.2.⁴¹ Further, Complainant cites no authority allowing a party to adopt a new theory of the case in response to the ALJ's rejection of the three alternative theories pursued during the evidentiary hearing. Accordingly, the Commission considers Lashify's fourth allocation waived due to Lashify's failure to argue the allocation before the ALJ.

g. Lashify's New Policy Argument

For the first time in its petition, Lashify argued that a new Commission policy on economic prong needs to be adopted to address "modern companies" like Lashify. CPet. at 61-

⁴¹ Among other things, Lashify's failure to advance its newest allocation until its petition meant that the other parties were not able to fully address this allocation in the course of the investigation.

64. First, the Commission finds that this argument is waived under the ALJ's ground rules due to Lashify's failure to raise it before the ALJ. Order No. 2 (Oct. 28, 2020), at G.R. 9.2. Second, as the Federal Circuit has noted, even if "present-day 'economic realities' call for a broader definition to protect American interests (apparently including many of today's importers) it is for Congress, not the courts or the Commission, to legislate that policy." *Schaper Mfg. Co.*, 717 F.2d at 1373. Third, the Commission's docket is replete with examples of "modern companies" that have satisfied the domestic industry requirement; the realities of modern 337 litigation do not bear out the slippery slope Lashify laments.

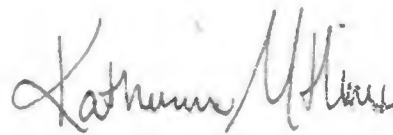
Accordingly, the Commission affirms, with a supplemental analysis, the FID's finding that Lashify did not satisfy the economic prong of the domestic industry requirement for any of the Asserted Patents.

IV. CONCLUSION

For the reasons set forth herein, the Commission determines that Lashify has not established a violation of section 337 by Respondents with respect to claims 1, 9, 13, 23, and 27-28 of the '984 patent, claim 1 of the D'664 patent, and claim 1 of the D'416 patent.

Accordingly, the investigation is terminated with a finding of no violation of section 337.

By order of the Commission.



Katherine M. Hiner
Acting Secretary to the Commission

Issued: October 24, 2022