

PUBLIC VERSION

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 Schmidlein 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 Schmidlein in Dissent on the Economic Prong of the Domestic Industry Requirement as to U.S. Design Patent Nos. D877,416 and D867,664.

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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).

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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.”

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	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").

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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.”).

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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).

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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

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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”).

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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:

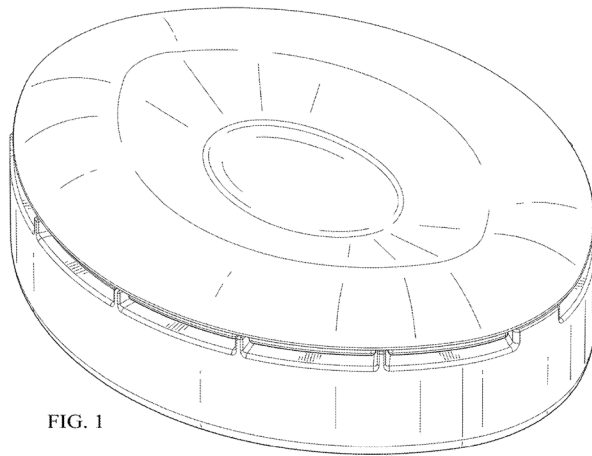
TERM	CLAIM(S)	CLAIM CONSTRUCTION
“spaced apart [from each other]”	1	Plain and ordinary meaning. Such as: “placed at intervals or arranged with distance between [the first cluster and the second cluster]”
“heat fused [connection/together]”	1, 23, 28	joined by applying heat to form a single entity
“cluster(s)”	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

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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:



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:

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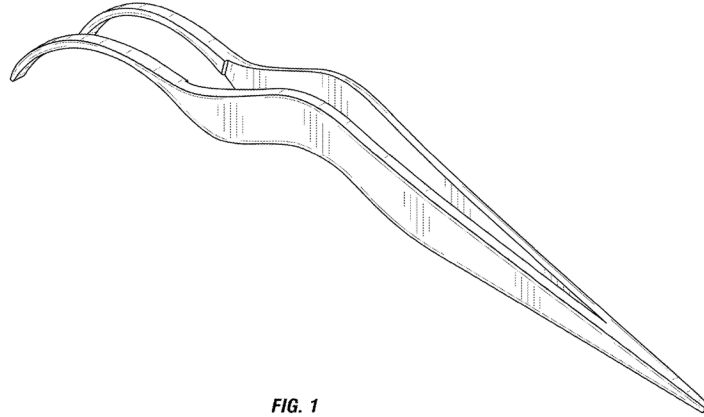


FIG. 1

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-

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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 ██████████ used for the ██████████ manufactured domestic industry products does not create heat fused connections. *Id.* at 67-69. The FID explains that “while ██████████ could cause friction, which could result in heat, the evidence does not show that the ██████████ performed by ██████████ 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],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”).

LASHIFY	
Product	Lashes
A10 (9922)	PBT
A14 (9923)	PBT
B10 (9924)	PBT
B14 (9925)	PBT
C10 (9926)	PBT
C12	PBT
C12 (Prismatics-Red)	PBT
C14 (9927)	PBT
D10 (9928)	PBT
D14 (9929)	PBT
E10 (9930)	PBT
E14 (9931)	PBT
EE10 (9932)	PBT
EE14 (9933)	PBT
F-10	PET
F14 (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] [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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██████████ 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. ██████████ Manufactured Products

As the FID notes, Lashify argued that ██████████ uses ██████████ ██████████ to heat fuse the lashes ██████████, 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 ██████████ ██████████ 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 ██████████ 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 ██████████ 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 ██████████ in the chart) (Opening Trial Demonstrative of Dr. Robert A. Iezzi); *see also* CPet. at 6 (“For ██████████ Ms. Lotti discovered that a thin line of glue could be applied along the base of the fibers, followed by using ██████████.”). Further, for the ██████████ manufactured domestic industry products, the glue is added first, so the ██████████ 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 ██████████ does not result in heat fused artificial fibers. *Id.* Rather, the ██████████ 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 ██████████ 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 ██████████ equipment. JX-0062C (Lotti Tr. Pt. 1) at 274:6-9 (inventor testifying she had never seen ██████████ equipment)). Lashify provided a photo of the alleged ██████████ machine (CX-471C at 8), but did not provide any settings or other information regarding the ██████████ process. Lashify also did not provide any evidence that ██████████ 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] [REDACTED]—without the use of any glue—the *only possible mechanism* holding the lash fibers together

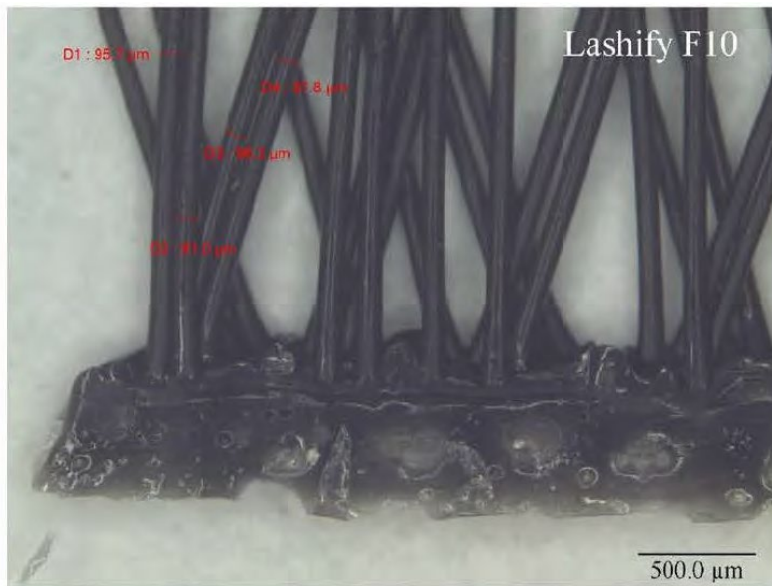
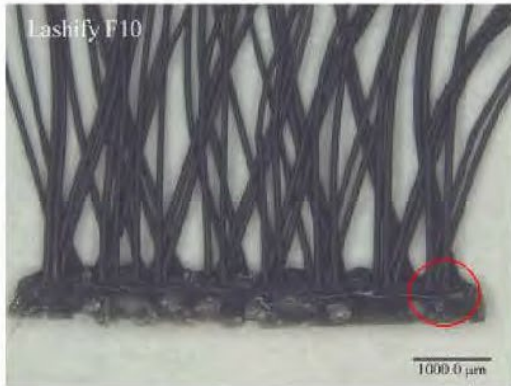
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is the softening of the artificial fibers such that they join together.” *Id.* at 55 (emphasis in CPet.). Lashify asserted that the ██████████ manufactured lashes had bases that “comprise a single base material (*i.e.*, no horizontal fiber is used) created when the clusters of fibers join during manufacture.” CIB 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 ██████████ and evidence that no glue is used during the ██████████ 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 ██████████ 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 ██████████ 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 ██████████ (as shown below):

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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

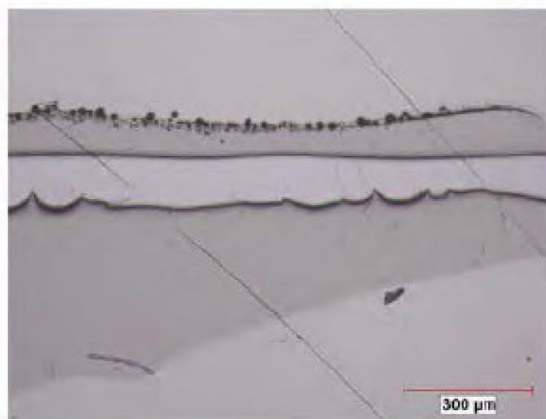
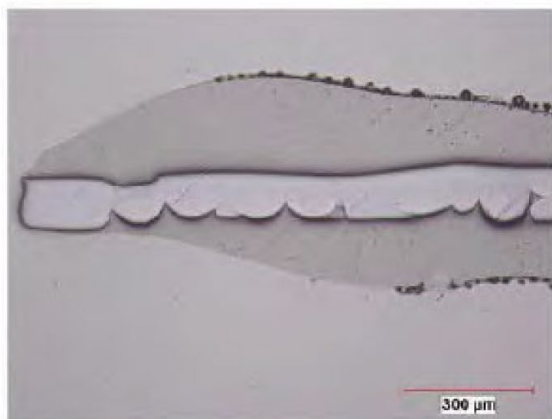
²⁰ This separate base is not the same as what Lashify argues is the “common base” required by the claims. CIB at 56; *see* ’984 patent at claims 1, 23. Lashify argues there is no separate string or base, and that the “common base” is created when the clusters of fibers join during manufacture of the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

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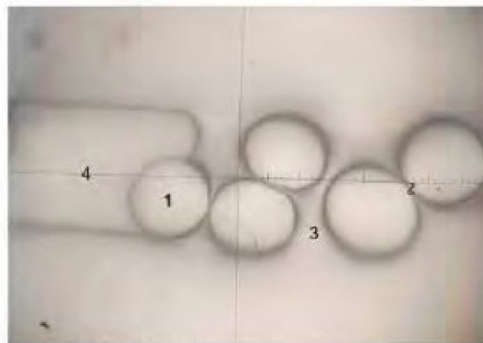
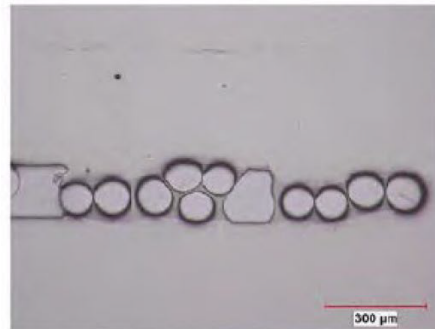
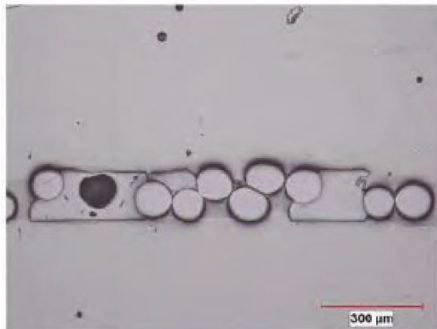
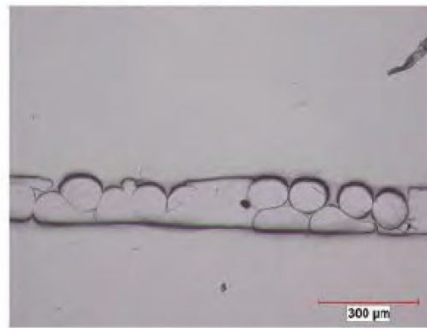
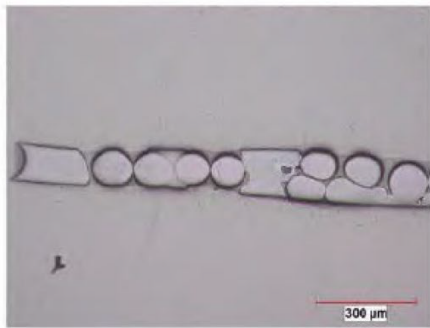
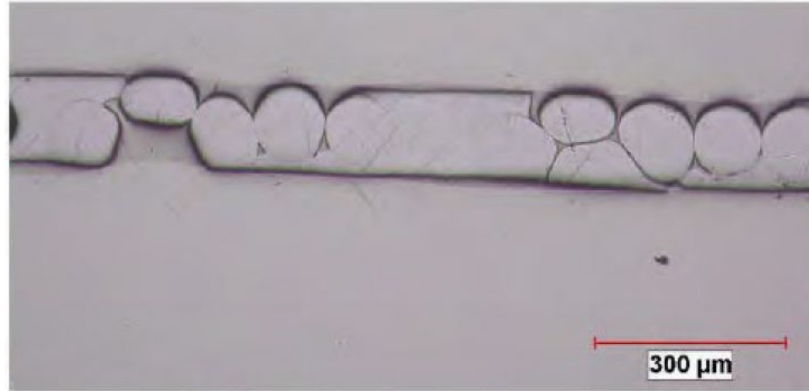
Infrared Spectroscopy (“FTIR”) analysis of the F10 lashes, which identified an area around the lashes as a “massive base,” formed out of PET. *Id.* at Q/A 649 (page 331). Lashify never explained the additional, separate “massive base,” and instead argued that the clusters form the claimed “common base” 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



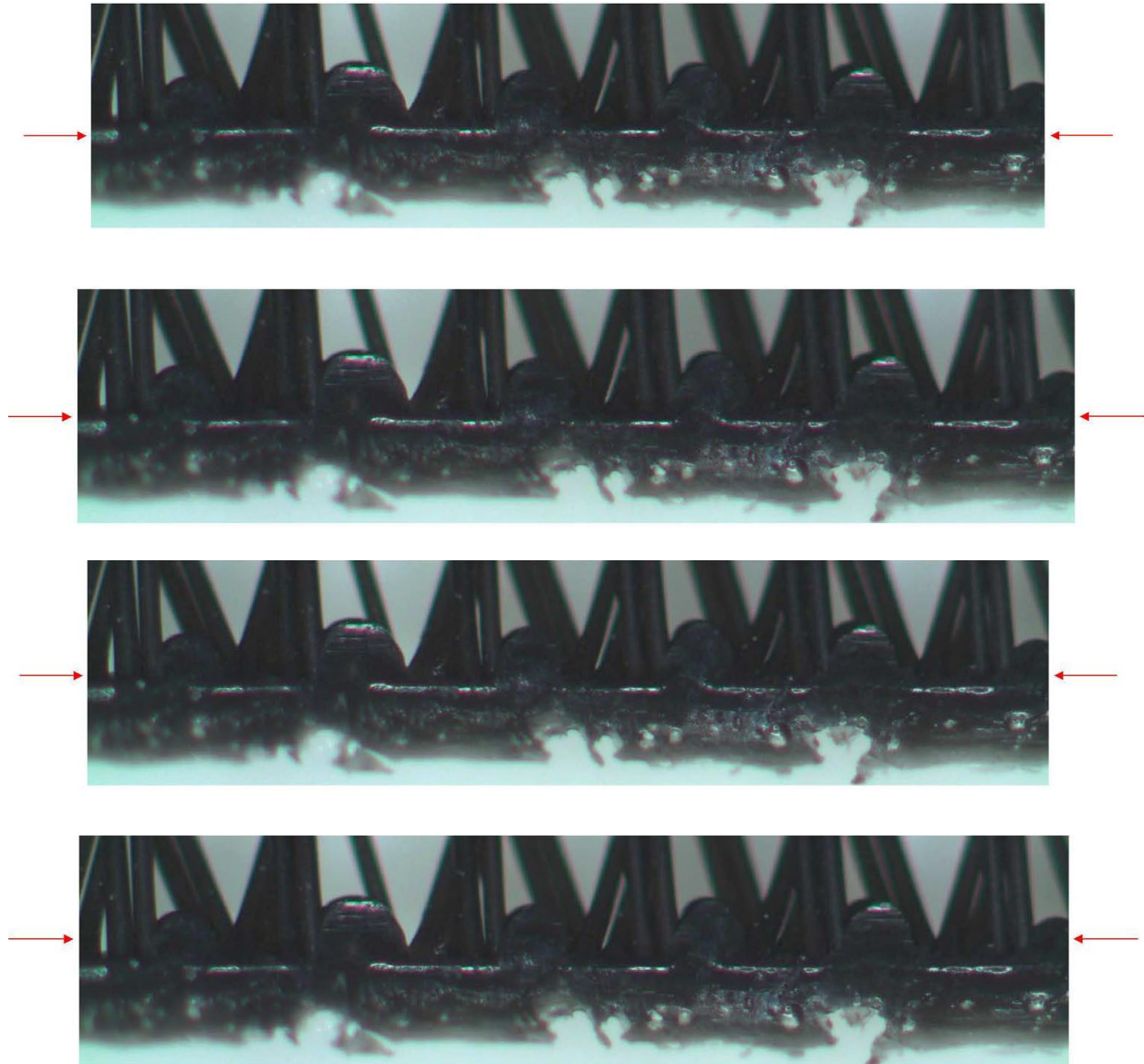
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FID at 73-74 (citing CX-2095C at Q/A 649). The difference, however, is attributable to the fact that the images that are taken at different depths, starting at the base and extending up into the lashes. CX-2095C at Q/A 649 (“I contacted Eurofins and 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 ██████████ regarding ██████████ 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 ██████████, 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.

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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”).

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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.*

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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.”),

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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.

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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.”).

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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,

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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,³⁴ 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 ██████████ 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: ██████████ for the ’984 patent; ██████████ for the D’416 patent; and ██████████ 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 ██████████ ██████████, 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.*

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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.

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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

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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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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

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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 ██████ (*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.

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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.

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“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.

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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.

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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.

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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.

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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.

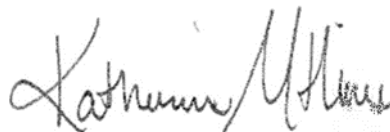
Accordingly, the Commission affirms, with a supplemental analysis, the FID's finding that Lashify did not satisfy the economic prong of the domestic industry requirement for any of the Asserted Patents.

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

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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

**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**

Commissioners Karpel and Schmidlein find a violation of 19 U.S.C. § 1337 (“Section 337”) as to U.S. Design Patent Nos. D877,416 (“the D’416 patent”) and D867,664 (“the D’664 patent”). The final initial determination (“FID”) issued on October 28, 2021, by the presiding and then Chief Administrative Law Judge (“CALJ”) in this case finds that, apart from the economic prong of the domestic industry requirement, complainant Lashify Inc. (“Lashify”) established all other elements of a Section 337 violation, including importation, infringement, and the technical prong of the domestic industry requirement as to the D’416 and D’664 patents. *See* FID at 141-42. As relevant to these patents, the Commission determined not to review these findings, with the exception of the FID’s findings on the economic prong.⁴² On review, the Majority finds the

⁴² *See* 87 Fed. Reg. 4044, 4045 (Jan. 26, 2022) (“Having examined the record of the investigation, including the FID, the petitions for review, and the responses thereto, the Commission has determined to review the FID in part. . . . The Commission has further determined to review the FID’s findings regarding the economic prong of the domestic industry requirement. The Commission has determined not to review the remainder of the FID.”) (omitting particular findings under review pertaining only to U.S. Patent No. 10,721,984 (“the ’984 patent”)).

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economic prong has not been met as to any patent.⁴³ Since the Commission finds that Lashify failed to establish that its domestic industry (“DI”) products practice any claim of the ’984 patent,⁴⁴ Commissioners Karpel and Schmidlein take no position on the FID’s findings regarding whether Lashify satisfies the economic prong for the ’984 patent. With respect to the D’416 and D’664 patents, however, Commissioners Karpel and Schmidlein disagree with the Majority’s analysis. As explained herein, they find that Lashify has established the economic prong of the domestic industry requirement under subsection 337(a)(3)(B), and thus they find a violation of Section 337 as to these patents. From the Commission Majority’s determination of no violation as to the D’416 and D’664 patents, Commissioners Karpel and Schmidlein therefore dissent.

Subsections 337(a)(2) and (a)(3) set forth the following economic criteria for determining the existence of a domestic industry with respect to articles protected by the asserted intellectual property right in investigations involving alleged infringement of a U.S. patent(s):

(2) Subparagraphs (B), (C), (D), and (E) of paragraph (1) apply only if an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.

(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

⁴³ The Commission issues its opinion concurrently herewith. *See Certain Artificial Eyelash Extension Systems, Products, and Components Thereof*, Inv. No. 337-TA-1226, Comm’n Op. (Oct. 6, 2022).

⁴⁴ *See, e.g., id.* at 15 (“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.”).

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- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(2) and (3). Thus, subsection 337(a)(3) requires that the investments and employment with respect to protected articles be either “significant” or “substantial.” *Id.*

1. The FID

The FID frames the two main disputes regarding the economic prong as: “(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

Setting aside for the moment the technical prong findings that Lashify has failed to show existence of any articles protected by the '984 patent as noted above, the following discussion recounts the FID's findings and arguments presented to the CALJ relating to the domestic industry with respect to the “articles protected by” the '984 patent, the D'416 patent, and D'664 patent, so as to identify Lashify's corresponding U.S. investments for each patent. The '984 patent is directed to eyelash extensions. The D'664 patent covers the design of Lashify's Fuse Control® Wand. The D'416 patent covers the design of Lashify's Gossamer lash storage cartridge.

The first question is whether Lashify's domestic industry should be limited to the protected articles for each patent, as argued by OUII and Respondents, or whether the industry should extend to the Lashify system or to the protected articles plus the components of that system necessary to use that system as Lashify argued. FID at 117-18. The FID finds that for the '984 patent, Lashify's DI should include the Gossamer lashes, Lashify's lash subscription service (Lashify X), and the Control Kit, which also includes, for example, the Fuse Control Wand, the Whisper Light dual-sided bond, and Glass, but should not include the entire Lashify

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system. *Id.* at 119, 121-22. The FID relies on the testimony of Ms. Lotti, the named inventor (CX-2091C at Q/As 115,⁴⁵ 118, 144), and the Lashify Control Kit instructions (CX-0723; CX-0727) to support the inclusion of the Control Kit. *Id.*; *see also* Dr. Iezzi (CX-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. *Id.* at 119 (citing CX-0727; CX-2091C (Lotti) at Q/A 118). The FID 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.

Having defined the domestic industry, the FID then turns to the evidence offered by Lashify's expert, Mr. Thomas, as to Lashify's U.S. investments corresponding to the industry with respect to articles protected by the '984 patent.⁴⁶ The FID rejects two of three alternative allocations. The FID rejects the primary allocation as overinclusive. It also rejects the first alternative allocation, which included the lashes plus the Control Kit and subscription service, but also two additional products, "the Get Intimate" set and the "the Vault" set. 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

⁴⁵ Ms. Lotti testified that the Control Kit "contains the basic components needed to start using the system." CX-2091C at Q/A 115.

⁴⁶ Mr. Thomas offered three different allocation methods. His "primary allocation" included sales of numerous components of the Lashify system, including bonds, bond removers, cleansing products, storage cases, and applicators. *Id.* at 121-22 (citing CX-2101C at Q/A 182). 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 the Control Kit, the Gossamer Lashes, Lashify's lash subscription service (Lashify X), the Get Intimate Set, and the Vault; albeit the latter two products had not been sold as of the date of the complaint. *Id.* at 122 & n.60.

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Get Intimate Set or the Vault are basic components that are essential to applying the Gossamer lashes themselves.” *Id.* at 122. The FID therefore finds that the first alternative allocation could not be used as it included the two sets, “the Get Intimate” set and the “the Vault,” for which testimony was lacking as to whether they were necessary to use the lashes. The FID thus considers Lashify’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 122-123 (citing CX-2101C at Q/A 186). Thus, although the CALJ’s reasoning would have allowed Lashify to rely upon its investments in the core components of the Lashify system for the ’984 patent, the CALJ rejected Mr. Thomas’s primary and first alternative allocations that would have provided data to approximate the amounts for those core components.

As discussed above, Lashify argued that the articles protected by the D’664 patent and D’416 patent include all components of the Lashify system. But, the FID found 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 should include more than just the protected products themselves.” *Id.* at 123. Thus, the FID finds that the article protected by the D’416 patent is the storage cartridge and the article protected by the D’664 patent is the Fuse Control Wand, and the domestic industry with respect to those patents is limited to the articles protected by the respective patents. The FID finds that Mr. Thomas’s second alternative allocation includes only the standalone products for the D’416 and D’664 patents respectively “. . . and the portion of the multi-component products that include the standalone component” and uses that allocation method in analyzing Lashify’s economic prong investments for the DI for the D’416 patent and D’664 patent. *Id.* (citing CDX-0005C at Schedule 3.1).

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b. Plant and Equipment under Subsection (A)

The FID states that it does not exclude the sales and marketing expenditures in their entirety, but rather finds they should be evaluated under each subsection to first determine whether there are significant expenditures in other qualifying activities. *Id.* at 125; *see also id.* (citing *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) (“*In Vitro Fertilization*”).

As to plant and equipment, Lashify claimed four facilities in the United States. The FID notes that these 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). As noted, the FID relied on Mr. Thomas’s second alternative allocation, which estimates 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 126 (citing CX-2101C (Thomas) at Q/A 198).⁴⁷

The FID concludes at the outset that Lashify did not meet its burden to establish it has made significant investments in plant and equipment because the evidence does not support Mr.

⁴⁷ For plant and equipment expenses, Mr. Thomas considered 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 DI plant and equipment expenditures from Lashify’s Profit and Loss statement, finding a total expenditure of [REDACTED]; (2) performing an allocation to remove expenditures not associated with DI activities, concluding 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 DI plant and equipment expenditures for the Lashify system. FID at 126 (citing CX-2101C (Thomas) at Q/A 160, 166, 173). For step two, Mr. Thomas used an allocation methodology based on salaries of employees and contractors who conducted work relating to the DI products at one or more of the four facilities; he excluded salary information for employees and contractors who either did not work at one of the facilities or performed administrative or finance activities only. FID at 128 (citing CX-2101C (Thomas) at Q/A 172).

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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).’” *Id.* at 128 (citing CX-2101C at Q/A at 173). The FID finds that in calculating these percentages “Mr. Thomas did not exclude the salaries of individuals who perform certain activities that do not qualify toward a domestic industry.” *Id.* at 128 (footnote omitted).

Neither Respondents nor OUII addressed plant and equipment specifically. Instead, they argued for exclusion of various expenditure categories generally. FID at 126. The FID proceeds to lay out certain expenditures that it found do not qualify toward the domestic industry, such as: sales and marketing, warehousing and distribution, and quality control. *See* FID at 128-131.

The FID excludes all sales and marketing-related expenditures from the plant and equipment expenditures. The FID finds that at least some portions of the Sunset Plaza and New York facilities are used for sales and marketing, including customer service activities. *Id.* at 130 & n.69 (citing CX-2101C at Q/As 145, 151). But, the FID excludes the sales and marketing expenses from the DI analysis because Lashify did not provide evidence of significant expenditures in other qualifying activities. *Id.* at 130-131.

The FID excludes all warehousing/distribution costs from the plant and equipment expenditures applying a salability test derived from *Male Prophylactic Devices*.⁴⁸ The FID finds that “‘from approximately July 2018 until July 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 (citation omitted).

⁴⁸ *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm’n Op. (Aug. 1, 2007) (Public Version) (“*Male Prophylactic Devices*”).

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The FID finds that at least some of the Laurel Canyon and Chandler Boulevard costs could count toward DI for the D'664 patent because Lashify conducts finishing steps on the Fuse Control Wand in the United States that is protected by the D'664 patent. *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”)). But, because Lashify did not specifically identify the costs to perform the finishing steps, the costs associated with these finishing operations at the Laurel Canyon and Chandler Boulevard facilities relating to the D'664 patent were excluded. *Id.* at 129.

The FID likewise rejects warehousing/distribution expenditure for the D'416 patent. The FID finds that Lashify failed to “explicitly state whether the storage cartridge 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.

The FID similarly rejects warehousing/distribution costs for the '984 patent because 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 (citations omitted).

The FID also excludes facility costs associated with quality control because Lashify's cursory checks of its products to ascertain damage during shipment is no more than what a normal importer would do upon receipt. *Id.* at 129-130 (citing, in part, *Schaper Mfg. Co. v. U.S. Int'l Trade Comm'n*, 717 F.2d 1368, 1372-1373 (Fed. Cir. 1983)).

Additionally, because Ms. Lotti uses the Sunset Plaza and New York facilities [REDACTED], the FID finds “it is not credible to claim that almost 100% of the rent should be allocated to domestic industry activities.” *Id.* at 131. Thus, the FID finds Mr. Thomas's

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conclusion that nearly 100 percent of the rent for four facilities allegedly used for DI activities, including “approximately [REDACTED] [REDACTED] and [REDACTED] of Lashify’s [expenditures for these four facilities] are for domestic industry activities” is unreliable. *Id.* (bracketed material in original).

Based on the findings above, the FID concludes that Lashify has not established that it meets the economic prong under subsection (A). *Id.* at 131-32. 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.

c. Labor and Capital under Subsection (B)

With regard to labor under subsection (B), Mr. Thomas’s second alternative allocation calculations claim 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 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). Again, neither Respondents nor OUII specifically addressed labor; instead they argued generally for exclusion of various expenditure categories. *Id.* at 132.

As with plant and equipment under subsection (A), with respect to labor under subsection (B) the FID finds that expenditures 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

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Mr. Thomas failed to allocate investments to the Asserted Patents until his final step. *Id.* at 133 & n.71. The FID also finds that Lashify failed to justify sales and marketing expenses for any patent. *Id.* at 133. Because Mr. Thomas’s analysis includes these categories of expenditures and does not allocate the warehouse expenses associated with the finishing step for the Fuse Control Wand to the D’664 patent alone, the FID could not rely upon that analysis. *Id.* at 133 & n.70. Thus, the FID finds Lashify did not meet its burden to establish significant investments in labor. *Id.* at 133.

With regard to capital under subsection (B), Mr. Thomas’s second alternative allocation analysis claimed capital expenditures as follows: (1) [REDACTED] for the ’984 patent; (2) [REDACTED] [REDACTED] for the D’416 patent; and (3) [REDACTED] for the D’664 patent. *Id.* at 132 (citing CX-2101C at Q/A 237). These capital expenditures include: “(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 (citing CX-2101C at Q/A 227). Respondents, again, did not specifically address subsection (B), but asserted “certain categories of expenditures should be excluded from the analysis.” *Id.* at 132 (citation omitted). While the FID indicated that OUII addressed Lashify’s calculations with respect to capital expenditures, the FID noted OUII’s argument for exclusion of most of the expenditure categories, as well as staff’s conclusion “that only R&D is a cognizable expenditure.” *Id.* (citation omitted).

The FID finds that the majority of the expenses relate to sales and marketing; and that the next largest set of expenditures includes expenses related to shipping and freight charges, which

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the FID finds to be within the category of warehouse and distribution.⁴⁹ *Id.* at 134. The FID finds Mr. Thomas again incorrectly included non-qualifying expenses that should have been excluded from the analysis. *Id.* at 133-135. The FID finds that the research and development expenses of ██████ 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). *Id.*

d. Research and Development under Subsection (C)

Lashify argued its investments were significant in three categories of research and development (“R&D”) under subsection 337(a)(3)(C): (1) Lashify’s DI 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.* (citing CX-2101C (Thomas) at Q/A 239). Under Mr. Thomas’s second alternative allocation, Lashify asserted the following R&D expenditures: ██████ for the ’984 patent; ██████ for the D’416 patent; and ██████ for the D’664 patent. *Id.* (citing CX-2101C (Thomas) at Q/A 258); 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 under subsection 337(a)(3)(C) 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 finds is broader than the

⁴⁹ In addition, the FID found “Mr. Thomas also identifies expenses of ██████ for ‘Meals.’ Lashify has not demonstrated how ‘meals’ constitute a qualifying domestic industry expenditure.” FID at 135.

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protected DI articles. *Id.* at 136. The FID also notes that Mr. Thomas's calculations begin in 2017 and do not include the research and development expenses incurred in the conception and initial design of the Gossamer lashes or Fuse Control Wand. *See id.* at 136 n.73.

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], should be attributed to Lashify's DI activities. *Id.* at 137. The FID also finds that Lashify has not established that R&D is conducted at all four asserted facilities, which forms the basis for Mr. Thomas's assumption. *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.* The FID also finds that the evidence contradicts Ms. Lotti's statements. *Id.* at 139. For example, the FID finds that while Ms. Lotti testified that 100% of one of her employee's, [REDACTED] time is spent on R&D, "[t]he evidence shows, however, that [REDACTED] is a graphic designer who assists with 'design work on the cartridge and the wand.' . . . As such, it is inappropriate to include her salary, at least with respect to the '984 patent." FID at 139 (citing CX-2091C at Q/As 4, 136; CX-2101C at Q/A 109; and RX-1690C at Q/A 52). The FID indicated that "[w]ithout additional information to support Mr. Thomas's calculations, the undersigned cannot rely on his analysis with respect to Lashify's investments in labor allocated to R&D." *Id.* (footnote omitted).

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

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Patents collectively. FID at 139-40 (citing CX-2101C at Q/A 250-51). 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 140 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 (citing CIB at 109-110), but that Lashify does not specifically argue that [REDACTED] is substantial. *Id.* at 140.

Accordingly, the FID finds that, without evidence to specifically place the [REDACTED] in context, it cannot be found that the economic prong is met. *Id.* (citation omitted). The FID also finds that the evidence suggests 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.* (citations omitted). 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 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

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to record evidence. Please be sure to provide your explanation and data separately for each asserted patent.

Id. Having considered the record of the investigation, and the parties' briefing, including responses to these questions, Commissioners Karpel and Schmidlein find that Lashify satisfies the economic prong of the domestic industry requirement with respect to the D'416 and D'664 Asserted Patents based on the data Lashify has presented. Specifically, in their view, Lashify's investments identified in its first alternative allocation should be considered, and a domestic industry should be found under section 337(a)(3)(B) for these patents.

a. Lashify's Activities in the United States

Lashify describes itself as a start-up that has achieved its success through its design and development of its innovative Lashify system in the United States:

It is a fast-growing American startup founded on innovation and development of an entirely new product that revolutionized the market for artificial eyelashes. Lashify invented, designed, and developed its eyelash extension system in the United States. Because domestic manufacturers lack the capability to make its products, Lashify utilizes foreign contract manufacturers. Otherwise, Lashify performed and continues to perform all the work necessary to create, develop, commercialize, distribute, sell, and support its products in the United States.

Lashify IR at 1.⁵⁰ Lashify recounts the efforts of Ms. Sahara Lotti, who set out to create a new artificial lash system that enables users to apply professional salon-quality eyelash extensions at home. *Id.* at 2-3. She began by inventing the eyelash extension applicator, progressed to a new type of eyelash extensions, and thereafter to the other components of the system. *See* CX-2101C at Q/A 92. Lashify states:

Working out of her home in Los Angeles, Ms. Lotti developed an entire suite of new products: a new type of tool she called the Fuse Control® Wand, a new type of lash extension she called the Gossamer®, a new type of lash storage she called the Gossamer® cartridge, and a new type of adhesive she called the Whisper Light™

⁵⁰ 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").

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Bond. Her conception of the Fuse Control® Wand involved countless prototypes made using a jewelry soldering tool, modeling clay, and other materials drawing on her past experience of making jewelry. She eventually created designs with a 3D printer in her California home and with the help of local businesses. Ms. Lotti also developed a new type of cartridge to store the Gossamer® lashes that was more attractive and luxurious than what was otherwise on the market and to work seamlessly with the Fuse Control® Wand. To turn the cartridge into a commercial product, Ms. Lotti led the creation of multiple rounds of CAD drawings, three-dimensional renderings, and 3D printed models—all in the U.S.

Lashify IR at 3 (citations omitted). According to Lashify, “Lashify’s research, design, development, and launch of the domestic industry products paved the way for Lashify’s domestic industry as it exists today.” *Id.* at 7.

After creating prototypes, Ms. Lotti sought out domestic manufacturers who could manufacture the components of her system to no avail and turned to manufacturers [REDACTED], cosmetics manufacturers in Indonesia and China. *Id.* at 5. While Ms. Lotti developed the system in the United States, contract manufacturers played a role in working out the production process. For example, Lashify worked with [REDACTED] on “materials testing and development of manufacturing processes” to produce its Lashify system. *See* RX-0480C ([REDACTED]); JX-0062C (Lotti Tr. Pt. 1) at 274:4-277:21 ([REDACTED]). 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 2017.⁵¹ CX-2101C at Q/A 139. Like many

⁵¹ The Majority represents that the ALJ “excluded any purported evidence of pre-2017 ‘sweat equity’” as untimely. Comm’n Op. at 47 (citing Order No. 55). While Order 55 does strike certain testimony of Ms. Lotti detailing her activities prior to 2017, it is an overstatement to suggest that it precludes any consideration of pre-2017 sweat equity. In any event, as discussed below Commissioners Karpel and Schmidlein do not rely on the evidence struck by

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start-ups, Lashify’s business began in its founder’s home with its founder as the sole “employee” and without formal financial recordkeeping.

Lashify began in Ms. Lotti’s home with a staff of one and grew to a much larger operation located in four facilities and employing nearly 100 people. *See* Lashify IR at 8. According to its founder, “Lashify’s emergence changed both the market and the industry, creating a *new market segment* and dramatically disrupting the markets for artificial lashes and mascara.” *Id.* at 7 (emphasis in original) (citations omitted).

Respondents note that Lashify’s “over ██████████ in annual U.S. sales for 2020, which is ██████████ in 2021” and its “profit margin ██████████” is achieved “primarily through its use of foreign manufacturers.” Respondents’ IR at 2 & n.2 (citations omitted).⁵² They note Mr. Thomas’s calculations show “Lashify’s sales and marketing activities account for ██████████ ██████████ of its capitalized expenditures” and that “its shipping, freight, and foreign-sourced material costs account for ██████████.” *Id.* at 2-3. In contrast, Respondents also point out that Lashify’s R&D “accounts for just ██████████ of Lashify’s capitalized expenditures.” *Id.* at 3 (emphasis in original) (citations omitted). Respondents conclude that “Lashify’s sales, marketing, warehousing, and distribution activities do not merely supplement its traditional domestic industry activities—specifically, R&D—they represent the overwhelming majority of those investments.” *Id.* at 3. Thus, Respondents contend Lashify “is a mere importer

Order 55 in reaching their conclusion that Lashify has satisfied the domestic industry requirement. They do, however, consider the evidence of record including that Lashify is a company started in the United States that has relied on the innovation and effort of its founder in the United States to successfully develop and market the domestic industry articles, evidence that does not appear to be relevant to the Majority or its approach that *inter alia* finds Lashify’s domestic industry evidence unreliable because it includes investments in activities that it considers non-cognizable.

⁵² Respondents’ Opening Submission on the Issues Under Review and on Remedy, the Public Interest, and Bonding (Feb. 3, 2022) (“Respondents’ IR”).

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because of, not in spite of, its investments in sales, marketing, warehousing, and distribution activities.” *Id.*

b. Lashify’s Domestic Industry Relating to Articles Protected by the D’664 and D’416 Patents

Before the CALJ and the Commission, Lashify argued that its domestic industry should not be limited to the specific “articles protected by” the Asserted Patents, as relevant here, the applicator for the eyelash extensions (covered by the D’664 patent) and the storage cartridges for the eyelash extensions (protected by the D’416 Patent). Lashify argues that its industry should extend to cover the “inter-related components” that “are all designed, marketed, sold, and used with a single purpose, to enable a user to apply, wear, and remove the Gossamer lashes.” CIB⁵³ at 98. Thus, Lashify contends that “the various components of the system are central to enabling exploitation” of the eyelash extensions that are cradled in the storage cartridges until they are applied by the customer using the specially-designed applicator.⁵⁴ *Id.* at 94; *see also id.* at 98-99; Lashify IR at 17-18.

Lashify relies on *Magnetic Tape Cartridges*, which discusses circumstances where the domestic industry is defined more broadly than the article that is covered by the asserted patent

⁵³ Post-Hearing Brief of Complainant Lashify, Inc. (Revised Version Submitted as Exhibit C to Complainant Lashify, Inc.’s Submission in Response to Order No. 65) (August 12, 2021) (“CIB”).

⁵⁴ Lashify describes its products as follows:

Lashify’s Domestic Industry Products are its DIY, salon-style lash extension system. The Lashify System includes the Gossamer lashes, which are the core of the system, and other products that are specifically designed, marketed, and intended to be used with the Gossamer® lashes, and that are actually used together with the Gossamer® lashes. To effectively apply and wear the Gossamer® lashes, a user needs more than just the lashes themselves. The Lashify System’s components work together to achieve a seamless, salon-style lash extension look. Lashify’s introductory kit, the Control Kit, includes a Fuse Control® Wand, two sets of Gossamer lashes stored in the Gossamer cartridges, Whisper Light Dual Sided Bond, the Glass sealer (which removes stickiness after

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claims. CIB at 96 (citing *Certain Magnetic Tape Cartridges and Components Thereof*, Inv. No. 337-TA-1058, Comm’n Op. at 47-57 (April 9, 2019)); *see also* FID at 118-19. Lashify states that its system falls within the Commission’s decision in *Magnetic Tape Cartridges* of appropriate circumstances for expanding domestic industry, noting that “the Commission has credited domestic investments when they are made with respect to an ‘essential,’ ‘necessary,’ and/or ‘integral’ part of the article covered by the patent claims and/or is ‘central to enabling’ exploitation of the article covered by the patent claims.” CIB at 96 (quoting Comm’n Op. at 50); *see also id.* at 103. Lashify states that the Control Kit contains the basic components for using its system, and that customers can replenish supplies of these components by purchasing refills separately. CIB at 99 (“ . . . [T]he Control Kit includes ‘everything you need to get started with the Lashify system.’ After a purchaser of a Control Kit runs out of, for example, the Gossamer® lashes or bond, the user naturally buys more. . .”) (citation omitted).

In contrast to Lashify’s system-based argument, Respondents and OUII focused their “articles protected by the patent” arguments on the ’984 patent, asserting that the domestic

applying the Gossamer® lashes), Wandoms (which give the Fuse Control® Wand a non-stick finish to allow fusing of the Gossamer® lashes to the natural lashes), and a Storage Box that has inserts designed to store these components. Lashify also sells many other components of the system that do not come in the Control Kit, including a Pre-Cleanse that is designed to clean the user’s eyelid and natural lashes for a better application of the Gossamer® lashes; different types of bonds such as Bondage that are designed and marketed to attach the Gossamer® lashes to the user’s natural lashes for longer wear; a Night Bond that is designed to seal the Gossamer® lashes so they stay even through tossing and turning at night; a Melt Away remover that is designed to take off the Gossamer® lashes, and storage boxes that are designed to hold the Gossamer storage cartridges housing the Gossamer® lashes.

CIB at 23-24 (citations omitted); *see also* FID at 117-18.

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industry should be limited to the Gossamer Lashes. RIB⁵⁵ at 88-89; OUIIB⁵⁶ at 76-81. Respondents distinguished the facts here from *Magnetic Tape Cartridges* because unlike the magnetic tapes/drive systems that were used together in a closed proprietary data storage system and not interoperable with other manufacturers' systems, the lashes and non-patented portions of Lashify's system were sold separately and could be used with third party products. RRB⁵⁷ at 41-42; *see also* OUIIRB⁵⁸ at 30-31. For example, Respondents argue the lashes are priced and sold separately from the other components on which Lashify relies, and in some instances, they are sold in kits together with those components. RIB at 88-89; OUIIB 77-81 (distinguishing *Certain Sleep-Disordered Breathing & Treatment Systems & Components Thereof*, Inv. No. 337-TA-890, FID at 150 (Aug. 21, 2014) (EDIS Doc ID 542166) ("find[ing] that the articles protected by the ResMed Mask Patents do not include flow generators or humidifiers" even though customers could "order masks along with flow generators and humidifiers" because "the masks are almost always purchased separately, and they are not packaged together with the co-packs")). OUII further contends that none of the non-patented products are "critical, integral" components of the patented lashes nor are they necessary to practice the '984 patent or to make

⁵⁵ Initial Post-Trial Brief of Respondents KISS Nail Products, Inc.; Ulta Salon, Cosmetics & Fragrance, Inc.; Walmart Inc.; CVS Pharmacy, Inc.; Qingdao Hollyren Cosmetics Co., 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. (July 30, 2021) ("RIB").

⁵⁶ Commission Investigative Staff's Initial Post-Hearing Brief (July 30, 2021) ("OUIIB").

⁵⁷ Reply Post-Trial Brief of Respondents KISS Nail Products, Inc.; Ulta Salon, Cosmetics & Fragrance, Inc.; Walmart Inc.; CVS Pharmacy, Inc.; Qingdao Hollyren Cosmetics Co., 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. (Aug. 6, 2021) ("RRB").

⁵⁸ Commission Investigative Staff's Reply Post-Hearing Brief (Aug. 6, 2021) ("OUIIRB").

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the lashes saleable. OUIIB at 79-81 (citing *Certain Modular Structural Systems*, Inv. No. 337-TA-164, USITC Pub. 1668, Comm'n Op. at 12-13 (June 1984)). OUII also notes that the lashes are used interchangeably with the products of respondents and third parties. OUIIB at 79-80. Respondents also criticize Mr. Thomas's analysis for expanding the DI for the '984 patent to go beyond the components of the control kit. RIB at 89; *see also* OUIIB at 79-81.

For the D'664 patent and the D'416 patent, OUII and Respondents rested on their argument that Lashify was a mere importer of wand applicators and storage cartridges without offering any specific argument or analysis as to the definition of the domestic industry with respect to articles protected by these two patents. OUIIB at 33 (“... Lashify also fails to satisfy the economic prong of the domestic industry requirement for each of the ‘D664 and ‘D416 Patents because, like for the ‘984 Patent, Lashify is just a ‘mere importer’ of each of the wand/applicator products and storage cartridges for the same reasons provided above.”); OUIIB at 91-92 (indicating that Lashify's overlapping activities are those of a mere importer having domestic investments for the 'D416 patent that are *de minimis*; and further providing that “after applying a sales allocation, Lashify's alleged domestic investments in the 'D664 Patent are roughly one third . . . of its domestic investments in the '984 Patent since 2017. . . . [and] are therefore insignificant and insubstantial on their face.”); RIB at 107 n.35.

Commission precedent holds that in appropriate circumstances, “the realities of the marketplace required a modification of the principle that the domestic industry is defined by the patented article.” *Magnetic Tape Cartridges*, Comm'n Op. at 48 (quoting *Certain Video Game Systems and Wireless Controllers and Components Thereof*, Inv. No. 337-TA-770, Comm'n Op. at 66 (Oct. 28, 2013) (“*Video Game Systems*”). “Factors to consider regarding the realities of the marketplace analysis include whether the patented technology is sold as a separate entity or

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article of commerce; whether it is an essential component of the downstream product; and whether the domestic industry activities ‘have a direct relationship to exploitation of the patented technology.’” *Id.* (citing *Video Game Systems* at 66-67).

Applying these principles, the Commission in *Magnetic Tape Cartridges* credited complainant IBM’s investments in a tape drive because the evidence showed that the technology of the magnetic tape protected by the asserted patents could not be economically exploited without the development of the drive, both of which “make up a closed, proprietary data storage system,” and “there [wa]s no dispute that one cannot be used without the other.” *Id.* at 53. Similarly, in *Video Game Systems*, the Commission credited complainant’s investments necessary to bring to the consumer market the patented technology of the domestic industry toy wands to include “the electronic receivers within the MagiQuest effect, and the relevant main server software that coordinate these effects,” comprising the hardware and software that was built into the MagiQuest attractions because these were “central to enabling [complainant] to exploit the technology of the claimed toy wands.” *Id.* at 70, 73. *See also Certain Sleep-Disordered Breathing Treatment Systems and Components Thereof*, Inv. No. 337-TA-890, *unreviewed* FID at 147 (Sep. 16, 2014) (crediting domestic investments in an unpatented S9 flow generator because the flow generator “is central to enabling [complainant] to exploit the patented technology of the H5i humidifier” given that the humidifier “is designed to work only with the S9 flow generator” and some of the “H5i humidifiers are sold in a ‘co-pack’ with an S9 flow generator.”), *unreviewed in pertinent part by* Notice, 79 Fed. Reg. 63163, 63164 (Oct. 22, 2014); *Certain Personal Computers and Components Thereof*, Inv. No. 337-TA-140, USITC Pub. 1504, Comm’n Op. at 41 (Mar. 1984) (crediting domestic investments in a personal computer in a case involving patented and copyrighted software since the software was an essential component of

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the computers assembled in the United States and the computers cannot be used without the software).

Consistent with this precedent, the FID finds that the facts support extending the domestic industry beyond the lashes alone:

[T]he realities of the marketplace support broadening the domestic industry beyond the Gossamer lashes themselves. The evidence shows that customers need the components of the Control Kit to apply the Gossamer lashes. *See, e.g.*, CX-2091C at Q/A 118. The customer must use a bond, such as the Whisper Light Flexible Bond, prior to applying the Gossamer lashes, and then use the Fuse Control Wand after application. CX-0727 (instruction booklet for the Control Kit). As Ms. Lotti testified: “Had Lashify simply introduced the Gossamer lash, without the additional products, it would have been virtually impossible for users to figure out how to apply and wear the Gossamer lash effectively.” CX-2091C at Q/A 144; *see also id.* at Q/A 118 (“It is rare that a user starts simply with the Gossamer lashes, as you need far more than just the Gossamers in order to apply and wear the Gossamers.”).

FID at 119. The FID rejects Respondents’ and OUII’s arguments that Lashify’s DI for the ’984 patent should be limited to the Gossamer lashes because they are sometimes sold separately since Lashify members need refills after their first purchase. *See id.* at 120-21. The FID, however, limits the domestic industry to the basic components of Lashify’s Control Kit and the Lashify lash subscription service because the evidence shows that this kit “contains all of the components that one needs to apply the Gossamer lashes” and that “there is no evidence that the other components of the Lashify system are necessary or essential to using the Gossamer lashes.” FID at 121-22. The FID notes Ms. Lotti’s testimony that the Control Kit “contains the basic components needed to start using the system.” *Id.* at 121 (citing CX-2091C at Q/A 115). The contents of the Control Kit are “a Fuse Control Wand, Gossamer Lashes, Gossamer cartridges, Whisper Light Dual Sided Bond, the Glass sealer, Wandoms, and a Storage Box that has inserts designed to store these components.” CX-2091C at Q/A 115.

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In contrast to the FID’s findings that the domestic industry reaches Lashify components beyond the lashes in connection with the ’984 patent, the FID rejects Lashify’s identical argument for expanding the domestic industry with respect to the D’416 patent and the D’664 patent. The reason, according to the FID, is because “Lashify did not point to evidence that supports a finding that the domestic industry analysis should include more than just the protected products themselves.” FID at 123. Lashify petitions for review of this finding. CPet.⁵⁹ at 96-97. Lashify’s argument and evidence that its domestic industry should cover all inter-related components of its system was advanced as to all three patents as recited above.

In Commissioner Karpel’s and Commissioner Schmidlein’s view, the record reflects that the same reasons articulated by the FID to support broadening of the domestic industry beyond the Gossamer lashes likewise support extending the domestic industry beyond the lash storage cartridge and Fuse Control Wand protected by the D’416 patent and the D’664 patent. As Lashify points out, Respondents failed to object to the merits of Lashify’s domestic industry evidence for the D’664 and D’416 patents, instead focusing exclusively on only the ’984 patent. CPet. at 97. As discussed above, and as the FID found, the evidence shows that customers need each component of the Control Kit to apply the Gossamer lashes, which are cradled in the lash storage cartridge to protect the lashes, and are applied using the Fuse Control Wand and the other components of the Control Kit. Further, the lash storage cartridge and Fuse Control Wand cannot be economically exploited without being paired with the other components of the Lashify system for which they were designed. *See Magnetic Tape Cartridges*, Comm’n Op. at 53. In other words, the Lashify system components are essential to the exploitation of the Fuse Control

⁵⁹ Petition for Review of October 28, 2021 Initial Determination by Complainant Lashify, Inc. (Nov. 9, 2021) (“CPet.”).

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Wand and lash storage cartridge protected by the patents and without which these articles would have no economic utility. Moreover, standalone sales of individual components indicate further use of the system as a whole because customers need to replace those components once the customer has exhausted their supply. *See* CIB at 99. Thus, as the Commission found in *Magnetic Tape Cartridges*, appropriate circumstances exist here to expand the domestic industry, because the Fuse Control Wand and lash storage cartridge have no utility or value without the other components of the Lashify system. *See* 337-TA-1058, Comm'n Op. at 50 (April 9, 2019) (“In sum, the Commission has credited domestic investments when they are made with respect to an ‘essential,’ ‘necessary,’ and/or ‘integral’ part of the article covered by the patent claims and/or is ‘central to enabling’ exploitation of the article covered by the patent claims.”).

Turning to the data offered by Lashify to support its investments in the domestic industry as defined above, the CALJ rejected Lashify’s primary allocation because that data included expenses for products other than the Gossamer lashes and the components necessary to use them. FID at 122. Mr. Thomas’s first alternative allocation appropriately includes all of the products relating to the articles protected by the D’664 patent and the D’416 patent, *i.e.*, the Fuse Control® Wand and the patented storage cartridge as well as the Control Kit. CPet. at 97 (citing CDX-0005C at 22 (identifying the products and kits contained in Lashify’s first alternative allocations), 56-58 (confirming that the kits in Lashify’s first alternative allocations included either the Fuse Control® Wand or Gossamer® lashes in the patented storage cartridge)).

The FID rejects this first alternative allocation because it also includes two additional kits, the Get Intimate Set and the Vault set. The FID notes “[t]he evidence shows that the Get Intimate set includes Gossamer lashes, as well as Bondage (a bond), Blow (a tool to set the bond), and Wandoms, and that the Vault is a \$300 limited-edition gift set that includes the

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Control Kit, as well as eight other products, including a ‘Black Magic Cleansing Puff’ and a ‘Lashify Beauty Clutch.’” FID at 122 (citing CX-2632; CX-2633). The FID finds “no evidence in the record that the components of either the Get Intimate Set or the Vault are basic components that are essential to applying the Gossamer lashes themselves” and that neither Ms. Lotti nor Mr. Thomas provided testimony to establish that all of the components of either the Get Intimate Set or the Vault should be included in the domestic industry analysis. *Id.* at 122.

Lashify challenges the CALJ’s criticism of the first alternative allocation that it was not clear what expenses Lashify included related to the Get Intimate Set and the Vault. CPet. at 96. First, Lashify argues that these two sets are irrelevant to the first alternative allocation because, as the FID recognized (at page 122 n.60), Lashify did not have any sales of either of these products before it filed the Complaint. CPet. at 96. Lashify is correct that the inclusion of those kits in the full year 2020 figures, even if in error, appears to have had little if any impact on the quantification of Lashify’s domestic industry in its first alternative allocation, which relied only on pre-Complaint activities, investments, and sales through September 9, 2020.⁶⁰ *Id.* Moreover, the FID’s recitation of the contents of the Get Intimate Set and the Vault set shows that their components include those elements that the CALJ agreed were essential to applying the Gossamer lashes as well as additional bonds, blowers, cleansers, and wandoms for the Fuse Control Wand as well as a beauty clutch to contain these components. *See* FID at 122. Lashify’s post-hearing brief presented these various components of the Lashify system, arguing that “the various components of the system are central to enabling exploitation of the lashes (protected by the ’984 Patent) sold in the cartridges (protected by the ’416 Patent) and the Fuse Control™

⁶⁰ Such testimony and supporting documentary evidence was cited in Lashify’s post-hearing brief, albeit in footnotes. *See* CIB at 97-98 nn.657-661.

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Wand (protected by the '664 Patent).” CIB at 96-99. Commissioner Karpel and Commissioner Schmidlein agree that the FID erred in rejecting the first alternative allocation, which reflects investments with respect to the articles that are protected by the D’416 patent and the D’664 patent together with the Control Kits that are designed to work together to bring these protected articles to the consumer market and to economically exploit these patents. To the extent that some cost associated with a component in the Vault or Get Intimate sets go beyond those “essential to applying the Gossamer lashes,” it does not appear that inclusion of such costs would have had such a significant impact on Mr. Thomas’s first alternative allocation as to warrant rejection of the entire calculated amounts. *See Certain Liquid Crystal Display Devices, Including Monitors, Televisions, and Modules, and Components Thereof*, Inv. No. 337-TA-749, Comm’n Op. at 115-16 (July 6, 2012) (“Indeed, Congress, by using the word ‘substantial,’ indicated that no mathematical precision is required when assessing the amount a complainant has invested in each patent”) (citing 19 U.S.C. § 1337(a)(3)(C); *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (May 16, 2008) (“[T]here is no need to define or quantify the industry itself in absolute mathematical terms.”)). Although the CALJ accepted Lashify’s argument and evidence supporting a broader domestic industry, the FID defaults to Mr. Thomas’s second alternative allocation, which solely counts the individual standalone components and the portion of the multi-component products that include the standalone component protected by the asserted patents, thereby undercounting Lashify’s domestic industry investments. The FID errs in doing so and Lashify’s domestic industry investments should be evaluated based on Mr. Thomas’s first alternative allocation.

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c. Lashify's Investments in Articles Protected by the Patents

Commissioners Karpel and Schmidlein agree that, as noted in the Commission's concurrently-issued opinion, Lashify's DI products do not practice the '984 patent.⁶¹ As the FID also found and the Commission did not review,⁶² however, Lashify's DI products satisfied the technical prong of the domestic industry requirement for both the D'416 patent⁶³ and D'664 patent.⁶⁴ Therefore, examination of whether Lashify satisfies the economic prong of the domestic industry requirement is limited to consideration of the evidence with respect to the D'416 and D'664 patents. As elaborated below, Commissioners Karpel and Schmidlein find the domestic industry requirement met as to subsection (B) but not subsection (A). They take no position on subsection (C).

i. Plant and Equipment

With regard to plant and equipment, as noted above, the FID found that the figures provided in the second alternative allocation were unreliable because the evidence does not support Mr. Thomas's conclusion that "approximately [REDACTED] [REDACTED] and [REDACTED] of Lashify's

⁶¹ See *Certain Artificial Eyelash Extension Systems, Products, and Components Thereof*, Inv. No. 337-TA-1226, Comm'n Op. at 29 (Oct. 6, 2022) ("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.").

⁶² See Commission Determination to Review in Part a Final Initial Determination Finding No Violation of Section 337; Schedule for Filing Written Submissions on Issues Under Review and on Remedy, Public Interest, and Bonding; Extension of Target Date, 87 Fed. Reg. 4044-46 (Jan. 26, 2022).

⁶³ See FID at 113 ("The evidence demonstrates that the Gossamer storage cartridge practices the ornamental design of the D'416 patent."), 116 ("Accordingly, the undersigned finds that Lashify has satisfied the technical prong of the domestic industry requirement for the D'416 patent."); see also FID at 141 (Conclusions of Law).

⁶⁴ See FID at 99 ("The evidence demonstrates that the Lashify Fuse Control Wand and X Fuse Control Wand practice the ornamental design of the D'644 patent."), 102 ("Accordingly, the undersigned finds that Lashify has satisfied the technical prong of the domestic industry requirement for the D'664 patent."); see also FID at 142 (Conclusions of Law).

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expenses “are for domestic industry activities in 2018, 2019, and 2020 (through September 9).” FID at 128 & n.66 (citations omitted). Specifically, the FID finds Mr. Thomas’s allocation methodology to be unreliable because (1) it included expenditures the FID considered not cognizable and (2) the calculated usage percentages for the claimed facilities did not take into account that two of the facilities were [REDACTED], which were used not only for business but also [REDACTED] at least in part. FID at 131. Because of this unreliability, the FID found Lashify had failed to establish a domestic industry under subsection 337(a)(3)(A). *Id.* at 132. As discussed in section 2.c.ii. addressing subsection 337(a)(3)(B), we disagree with the first basis for finding Mr. Thomas’s allocation methodology unreliable. We agree, however, with the FID that Lashify’s failure to reasonably allocate expenditures for [REDACTED] to domestic industry activities rendered each of Mr. Thomas’ plant and equipment allocations unreliable as discussed below, and therefore Lashify has failed to establish a domestic industry under subsection 337(a)(3)(A).

Lashify petitioned for review of the FID’s “categorical rejection” of its proffered expenses for its Sunset Plaza and New York facilities arguing that the record contained undisputed evidence that both facilities were used for business purposes. CPet. at 66-67. Lashify contends that Ms. Lotti testified that “Sunset Plaza was where she developed the domestic industry products and where all of Lashify’s day-to-day operations were conducted when the company was first started in 2016 until July 2018;” that “she held meetings, housed employees, provided work spaces for herself and other employees, and allowed visiting employees to stay at the property” and that “[REDACTED] at Sunset Plaza was used for business purposes.” *Id.* at 67 (citing CX-2091C at Q/A 145, 146) (emphases in original). Likewise, Ms. Lotti testified that the New York facility is “a converted, two-bedroom

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apartment at which [REDACTED]” that was used “for meetings with people in the fashion industry and is used by employees who engage in package design and development, marketing, finance, and creative design,” and for housing “6-8 Lashify employees at any given time, [REDACTED].” *Id.* (citing CX-2091C at Q/A 151). Lashify contends that this testimony was unchallenged as Respondents declined to cross-examine Ms. Lotti. *Id.* at 68.

Moreover, Lashify argues that the FID cited no legal grounds for rejecting expenditures for these business facilities based purely on Mr. Lotti’s use of the Sunset Plaza and New York facilities [REDACTED] during her limited non-working hours. *Id.* Lashify posits that its use of these two facilities “is no different than a company occupying an office building for only a portion of the day. There is no Commission precedent, and the CALJ cited none, for limiting investments in plant and equipment based on the number of hours a particular company facility is utilized for company purposes.” *Id.* at 68. As Lashify puts it: “To hold otherwise would mean that plant and equipment expenses for a traditional office building—one that is used exclusively for business purposes during business hours (*i.e.*, 9:00am to 5:00pm)—only ‘count’ for one-third of their total amounts, as the building is largely unoccupied for two-thirds of each day (*i.e.*, 5:00pm to 9:00am the next morning).” *Id.* Respondents reply that “[o]ffice buildings are not leased by the hour” and that it “cannot be correct” to claim as business expenses facilities that double as [REDACTED]. RPet. Reply⁶⁵ at 94.

⁶⁵ Response to Complainant’s 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 Co., 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”).

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Commissioners Karpel and Schmidlein agree with the FID's conclusion that these plant and equipment data are unreliable to the extent that they appear to credit facility expenditures for personal use [REDACTED]. While recognizing that Lashify, like many start-ups, began in Ms. Lotti's residence, and that business use of a residence may contribute to plant and equipment expenditures under subsection 337(a)(3)(A), Ms. Lotti also used [REDACTED] for non-business activities and such use should not be attributed to plant and equipment expenditures for the domestic industry.⁶⁶ Similarly, if an office building were used for 8 hours per day for domestic industry activities and for 16 hours a day for personal use or for non-DI business activities, expenditures associated with those 16 hours of non-DI activity use would not count toward complainant's DI investments. Lacking an appropriate basis to segregate out personal expenditures for the two facilities, Commissioners Karpel and Schmidlein find that Lashify failed to provide a reliable quantification of its plant and equipment expenditures on this ground and therefore has failed to meet its burden to show significant investments in plant and equipment under subsection 337(a)(3)(A).

ii. Labor and Capital Expenditures

The FID did not consider Lashify's first alternative allocation relating to its labor and capital expenditures as discussed above. However, Commissioners Karpel and Schmidlein find, based on the analysis of the facts here, that Lashify's domestic industry with respect to the articles protected by the D'614 and D'664 patents is more closely reflected in Lashify's first alternative allocation of Lashify's domestic industry investments.

⁶⁶ In *Loom Kits*, for example, the Commission credited expenditures for complainant's personal residence where the record showed complainant used his personal residence to conduct DI-activities; however, it counted only the portion of the personal residence expenditures (complainant estimated these were 25% of his total personal residence expenses) attributable to DI activities. *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op. at 6 (June 26, 2015).

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Dr. Thomas's first alternative allocation for Lashify's employment of labor, like the second alternative allocation considered by the CALJ, takes into consideration Lashify employees and contractors who have performed at least the following activities in the United States: research and development, engineering, finishing, manufacturing, including sourcing and procurement, quality control, logistics, fulfillment, marketing and education, including customer service and support. CX-2101C at Q/A 200. Mr. Thomas estimated that Lashify's total labor expenditures for the domestic industry for the period of 2017 through September 9, 2020 were approximately [REDACTED]. *Id.* at Q/A 210. Mr. Thomas adjusted this total to remove three employees who solely perform administrative and finance duties to thereafter arrive at a total domestic industry labor expenditure of [REDACTED]. *See id.* at Q/A 212, 215-16. For the first alternative sales-based allocation, Mr. Thomas includes sales of the Lashify Control Kit plus standalone sales of the components that specifically practice each of the Asserted Patents. *Id.* at Q/A 220. Mr. Thomas calculates that "[t]his alternative allocation results in domestic labor expenditures from 2017 through September 9, 2020, of approximately [REDACTED] for the '984 Patent; approximately [REDACTED] for the '416 Patent; and approximately [REDACTED] for the '664 Patent." *Id.* at Q/A 221.

In determining Lashify's amount of capital expenditures, Mr. Thomas included the following categories: (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. CX-2101C at Q/A 227.⁶⁷ Mr. Thomas estimated that "from 2017 through September 9, 2020, Lashify's domestic industry capital

⁶⁷ With the exception of R&D, the FID excludes these expenditures as non-qualifying on the same grounds as were discussed above regarding plant and equipment. FID at 133-35 & n.72.

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expenditures totaled approximately [REDACTED].” CX-2101C at Q/A 228. Applying the same sales-based allocation, Mr. Thomas estimates “domestic capital expenditures from 2017 through September 9, 2020, of approximately [REDACTED] for the ’984 Patent; approximately [REDACTED] for the ’416 Patent; and approximately [REDACTED] for the ’664 Patent. *Id.* at Q/A 234.

As noted above, neither Respondents nor OUII specifically addressed labor under subsection (B); instead they argued generally for exclusion of various expenditure categories. *See* FID at 132. Furthermore, while the FID indicated that OUII addressed Lashify’s calculations with respect to capital expenditures, the FID continued to note OUII’s argument for exclusion of most of the expenditure categories, as well as staff’s conclusion “that only R&D is a cognizable expenditure.” *Id.* (citing OUIIIB at 83-87).

As with plant and equipment under subsection (A), the FID rejects Lashify’s labor expenditures under subsection (B) related to warehousing, distribution, and quality control as not appropriately considered in the domestic industry 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. FID at 133 & n.71. The FID also finds that Lashify failed to justify sales and marketing expenses for any patent. *Id.* at 133. Because Mr. Thomas’s analysis includes these categories of expenditures and does not allocate the warehouse expenses associated with the finishing step for the Fuse Control Wand to the D’664 patent alone, the FID could not rely upon that analysis. *Id.* at 133 & n.70. Thus, the FID finds Lashify did not meet its burden to establish significant investments in labor. *Id.*

With regard to capital under subsection (B), the FID finds the majority of the expenses relate to sales and marketing, which “can only be considered if Lashify can establish other significant qualifying expenditures,” and it failed to meet its burden to do so. *Id.* at 134. The

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next largest category was shipping and freight charges, and included car and truck expenses, which the FID finds should have been removed when calculating expenditures for the '984 patent because they were within the category of warehouse and distribution. *Id.*⁶⁸ The FID finds that the research and development expenses of ██████████ 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).

Lashify challenges the FID's rejection of these expenditures on factual and legal grounds.^{69 70} As to factual error, Lashify contends that the FID erred because the undisputed evidence shows R&D has been, and continues to be, conducted at all four Lashify facilities. CPet. at 70. As to legal error, Lashify argues that warehousing and distribution "can be considered as part of Lashify's domestic industry when accompanied by qualifying activities in R&D. Such is the case here." *Id.* at 73. Lashify notes that the ID erred in excluding these expenditures because "the guiding principle is whether the asserted expenditures satisfy the plain language of the statute. *Solid State Storage Devices* [sic] at 14."⁷¹ These activities meet the

⁶⁸ The FID also addressed claimed expenses for meals and found "Mr. Thomas also identifies expenses of ██████████ for 'Meals.' Lashify has not demonstrated how 'meals' constitute a qualifying domestic industry expenditure." FID at 135.

⁶⁹ CPet. at 81 ("Just as the CALJ disregarded the entirety of Lashify's plant and equipment investments, he similarly erred in improperly excluding all of Lashify's labor investments rather than quantifying Lashify's labor investment based on the record evidence.") (footnote omitted).

⁷⁰ CPet. at 89 ("In much the same way as he did for Lashify's domestic industry investments through plant and equipment and labor, the CALJ improperly excluded virtually all of Lashify's capital investments.") (footnote omitted).

⁷¹ CPet. at 75 (quoting *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing Same*, Inv. No. 337-TA-1097, Comm'n Op. at 14 (June 29, 2018) (Public Version)).

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statutory language, according to Lashify, because they are conducted “with respect to” the domestic industry articles and the undisputed evidence shows Lashify does in fact handle, inspect, package, and ship all of its products after receiving them at the warehouse. *Id.* at 75.

Lashify contends that, as with plant and equipment, the FID erred when it failed to credit Lashify’s investments in labor allocated to R&D.⁷² Lashify further contends that the FID’s categorical exclusion of its labor⁷³ and capital⁷⁴ investments as non-qualifying was erroneous for the same reasons Lashify discussed in connection with plant and equipment.

Respondents reply that Lashify’s activities are no different than those that were rejected in *In Vitro Fertilization*. RPet. Reply at 80-81 (citing *In Vitro Fertilization*, Comm’n Op. at 24–25 (“Consistent with Commission precedent, the Commission does not credit expenses that are not cognizable under section 337(a)(3) or that are not sufficiently related to the protected article.”)); *see also* RIB at 90-91 (urging that Lashify’s non-manufacturing activities that do not “make the eyelash products saleable” should be rejected as “typical activities of a mere importer.”). For example, Respondents criticize evidence that Lashify’s cosmetic packaging

⁷² *See, e.g.*, CPet. at 81 (“Lashify presented evidence of its investments in labor through its research and development activities. Just as he did for Lashify’s plant and equipment investments, the CALJ limited Lashify’s labor investments to only those allocated to R&D as part of Lashify’s domestic industry showing under Subsection (C). But Lashify’s R&D labor relating to the domestic industry products qualifies under both Section 337(a)(3)(B) and (C), and it was error not to consider that R&D labor under Section 337(a)(3)(B).”) (citations omitted).

⁷³ CPet. at 87 (“For the same reasons discussed above in connection with Lashify’s plant and equipment investments, the CALJ erred in rejecting Lashify’s labor investments allocated to non-R&D activities. . . . Moreover, the undisputed evidence shows that Lashify conducted qualifying R&D which, under Commission authority, warrants crediting Lashify’s investments in other non-R&D activities conducted with respect to the domestic industry products”) (citations omitted).

⁷⁴ CPet. at 89 (“Despite crediting Lashify with capital investments dedicated to R&D, the CALJ categorically excluded all other capital investments as non-qualifying domestic industry expenditures. For the same reasons discussed above in connection with Lashify’s investments and plant and equipment and labor, the CALJ’s categorical exclusion of these investments made with respect to the domestic industry products was erroneous.”) (footnote omitted).

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with respect to its Control Kits adds to the “overall look and feel of the products” so as to “elevat[e] the overall look and feel of the products within Lashify’s eyelash-extension system” and “provide[] Lashify’s customers with the best possible user experience.” RIB at 92 (quoting CX-2101C (Thomas) at Q/A 107, 116) (brackets in original).

The Commission Majority states that it declines to credit Lashify’s domestic industry analysis under subsection (B) for two reasons: (1) Lashify’s failure “to provide evidence or reliable expert opinion to support its analysis for the majority of the alleged labor and capital expenditures;” and (2) as to R&D labor, after excluding all of Lashify’s asserted investments other than certain R&D expenditures, Lashify’s failure, “to establish that this domestic investment was significant or substantial.” Comm’n Op. at 54. However, what the Majority characterizes as a failure to provide evidence “to support its analysis for the majority of alleged labor and capital expenditures,” comes down to its affirmation of the ID’s finding that the majority of Lashify’s asserted investments under subsection (B) are not cognizable. *See* Comm’n Op. at 46 n.36.

Commissioners Karpel and Schmidlein determine that the FID erred in finding Lashify’s labor expenditures to be unreliable on the ground that Mr. Thomas’s calculated expenses included amounts relating to warehousing, distribution, quality control, and sales and marketing for each of the asserted patents. As the FID acknowledged, Lashify claimed labor expenses for “Lashify employees and contractors in the United States [who] 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.” FID at 133 (citing CX-2101C at Q/A 200). Commissioners Karpel and Schmidlein disagree that these labor expenditures are categorically

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excluded as non-qualifying investments under subsection 337(a)(3)(B). Likewise, the FID erred in finding R&D to be the only capital expenditures that qualify for inclusion under subsection 337(a)(3)(B). As discussed above, Mr. Thomas's first alternative allocation provides an appropriate basis to render a judgment as to Lashify's investments under subsection 337(a)(3)(B).

Commissioners Karpel and Schmidlein note that the statutory language of subsections (A) and (B) can include non-manufacturing activities and the Commission has counted such expenses in prior determinations. There is no statutory prohibition against inclusion of these types of expenses; rather, the key is whether the expenses properly fall within (A) or (B). As the Commission stated in *Solid State Storage Drives*, “. . . the text of the statute, the legislative history, and Commission precedent do not support narrowing subsections (A) and (B) to exclude non-manufacturing activities, such as investments in engineering and research and development. Rather, the guiding principle is whether the asserted expenditures satisfy the plain language of the statute.” *Certain Solid State Storage Drives, Stacked Components, and Products Containing Same*, Inv. No. 337-TA-1097, Comm'n Op. at 14 (June 29, 2018) (Public Version).

Based on these principles, the ID erred in categorically rejecting Lashify's claimed expenditures in *inter alia* warehousing and distribution without analyzing whether the evidence as to these expenditures met the language of the statute. Lashify's claimed expenditures are for labor and capital with respect to articles protected by the D'416 patent and the D'664 patent and all occur in the United States. There is no statutory basis to categorically exclude certain of Lashify's claimed expenditures as they satisfy the statutory requirement that they be investments in “labor or capital” “with respect to articles protected by the patent.” Nor could there be as the Commission has included such activities among expenditures it has credited toward satisfaction

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of the domestic industry requirement in prior determinations. *See, e.g., Certain Toner Supply Containers and Components Thereof (I)*, Inv. No. 337-TA-1259, Comm'n Op. at 9-11 (Aug. 19, 2022) (Public Version) (crediting warehousing and storage expenses among other expenses); *Certain Toner Supply Containers and Components Thereof (II)*, Inv. No. 337-TA-1260, Comm'n Op. at 7-8 (Aug. 3, 2022) (Public Version) (crediting warehousing and packaging among other expenses); *Certain Batteries and Products Containing Same*, Inv. No. 337-TA-1244, Comm'n Op. at 12 (crediting packaging among other labor expenses). To the extent that the Majority would treat investments in such activities differently if the complainant also has manufacturing investments, this would only reinforce the correctness of an approach that examines the nature and extent of complainant's investments as a whole rather than an approach like the ID or Majority's that categorically excludes certain types of investments in plant and equipment or labor or capital as non-cognizable domestic industry investments.

The FID also errs in deeming Lashify's quality control investments unreliable because they amount to "cursory checks of its products to make sure that they were not damaged during shipment" akin to what "a normal importer would perform upon receipt." FID at 130 (citing *Schaper Mfg. Co. v. U.S. Int'l Trade Comm'n*, 717 F.2d 1368, 1372-1373 (Fed. Cir. 1983)) (other citation omitted). That a "normal importer" might perform some activities does not require automatic rejection of an expense category, however. Commissioners Karpel and Schmidlein therefore disagree that inclusion of warehousing, distribution, or quality control activities at Lashify's facilities renders Mr. Thomas's allocation unreliable.

With respect to sales and marketing, it is well-understood that a domestic industry cannot be predicated upon sales and marketing alone. *See Certain Collapsible Sockets for Mobile Elec. Devices & Components Thereof*, Inv. No. 337-TA-1056, Comm'n Op. at 19 (July 9, 2018)

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(citing H.R. REP. NO. 100-40, at 157 (1987)); *see also* S. REP. 100-71, at 129 (1987). That Lashify employees conduct sales and marketing as part of their activities does not constitute grounds for categorical rejection or deeming investments to be unreliable. Rather, assessment of a complainant's domestic industry under subsections (A) and (B) calls for a case-by-case factual analysis. *Collapsible Sockets*, Comm'n Op. at 19 (citing *Certain Air Mattress Systems, Components Thereof and Methods of Using the Same*, Comm'n Op. at 44-47 (June 20, 2017); *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Final ID at 104-09 (July 10, 2012), *unreviewed in relevant part*, Notice at 3. (Aug. 30, 2012)). In *Collapsible Sockets*, for example, the Commission noted: "While Popsockets has included sales and marketing expenditures, it has 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 operation management, which are sufficient to establish the existence of a domestic industry under subsection (B)." *Collapsible Sockets*, Comm'n Op. at 19-20.

Neither can the FID's rejection of Mr. Thomas's data be justified on the ground that Lashify failed to "introduce evidence of significant expenditures in other qualifying activities" besides sales and marketing. FID at 130-31; *see also id.* at 133-34. Commissioners Karpel and Schmidlein cannot credit this rationale as it effectively nullifies Lashify's investments in research, engineering, design, and development of the articles protected by the D'416 and D'664 patents, and in finishing operations, sourcing and procurement of materials, quality control, logistics, fulfillment, and education, including customer service and support merely because Lashify's employees have invested in efforts to introduce to the U.S. market Lashify's new

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inventions that were developed in the United States. It bears repeating that as a U.S. start-up, Lashify's activities and investments with respect to the protected articles reflect, as discussed in detail above, a business developed and grown in the United States as a result of its founder's innovation efforts in the United States, which includes much more than merely sales and marketing alone. Commissioners Karpel and Schmidlein therefore disagree with the ID's finding that inclusion of these expenses is a basis to find Lashify's expert's allocation unreliable.

Concerns that a complainant could be a mere importer and therefore not afforded the protections of Section 337 is not something that can be evaluated by looking at complainant's asserted activities one by one and dismissing investments in activities that may also be undertaken by "mere importers." Rather, it is something that can only be evaluated looking at complainant's activities as a whole to determine if the nature and extent of those collective activities distinguish it from a "mere importer." *See In Vitro Fertilization*, Dissenting Views of Commissioners Schmidlein and Karpel, at 9-12. Nothing in the statutory language of subsection 337(a)(3) indicates that only certain types of investments in plant and equipment or labor or capital may contribute toward satisfying the domestic industry requirement. To be sure, the legislative history of Section 337 reflects its drafters' intent that Section 337 not be used to afford protections to "mere importers" or to businesses that engage in "sales and marketing alone" but nothing in that legislative history indicates that the means to give expression to this intent is to categorically reject certain types of investments in plant and equipment or labor or capital, particularly in the absence of any statutory basis for doing so. Rather, what the statutory text refers to is that investments in "plant and equipment" or "labor or capital" must be "significant," and the Commission has long evaluated whether investments are "significant" by examining the nature and extent of those investments. *See, e.g., Certain Printing & Imaging*

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Devices & Components Thereof, Inv. No. 337-TA-690, Comm'n Op. at 27 (Feb. 17, 2011); *Certain Modular Structural Sys.*, Inv. No. 337-TA-164, USITC Pub. No. 1668, Comm'n Op. at 13 (June 1984) (stating that it is necessary to determine “the nature and significance” of complainant’s activities in the United States with respect to the relevant product to determine “whether there is an industry ‘in the United States’ within the meaning of section 337”); *Certain Cube Puzzles*, Inv. No. 337-TA-112, USITC Pub. 1334, Comm'n Op. at 30 (Jan. 1983) (“We find that Ideal’s domestic activities are of *the appropriate nature and are significant enough* to conclude that their domestic business activities constitute an ‘industry . . . in the United States.’”) (ellipsis in original) (emphasis added) (footnotes omitted). Where the extent of a complainant’s investments in “plant and equipment” or “labor or capital” are quantitatively small, its investments may not be significant depending on, *inter alia*, the nature of complainant’s business, the stage of its development, and the type of protected articles involved. Or where the nature of complainant’s investments is in sales and marketing alone or in activities that taken as a whole fail to distinguish the complainant from a mere importer, the legislative history instructs that such investments would not be significant so as to satisfy the domestic industry requirement. But again, this later question cannot be answered simply by looking at a particular investment in a particular activity and then categorically rejecting the investment because a “mere importer” may engage in the activity too. Nor is there a statutory basis for such an approach as discussed above.

In declining to credit sales and marketing, the Majority reaches for support in certain portions of the legislative history of subsection 337(a)(3)(C) while omitting the most pertinent indication of congressional intent: the plain language of the statute itself. As we discuss here and in prior investigations, the plain language of Sections 337(a)(2) and (a)(3) contain no words

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of restriction that prohibit the Commission from counting certain types of investments in plant and equipment, the employment of labor or capital, or the exploitation of IP rights in the United States toward satisfaction of the domestic industry requirement. *See In Vitro Fertilization, Dissenting Views of Commissioners Schmidlein and Karpel.*

Nor does the legislative history, cited by the Majority, support the position that investments in sales and marketing should never be credited, or that such investments can only be credited after an evaluation that other qualifying investments are independently sufficient, with respect to satisfaction of the domestic industry requirement. More specifically, a change in the wording from one bill to another in 1986, where the words “sales and marketing” were deleted from the latter of those bills and did not appear in what was eventually enacted as Section 337(a)(3)(C), does not call for such exclusion. From this deletion, the Majority imputes to Congress the intent to effect either a total ban against consideration of sales and marketing under all three prongs of Section 337(a)(3)(A) through (C) (Commissioner Kearns), or a partial ban under all three prongs of Section 337(a)(3)(A) through (C) depending on whether other “qualifying” expenditures exist (Chair Johanson and Commissioner Stayin). *See Comm’n Op.* at 33-34. The Committee Reports, however, explain this change quite clearly: under the new provision, which was ultimately enacted as subsection 337(a)(3)(C), marketing and sales could not *alone* form the basis for a domestic industry. *See H. Rep. No. 100-40, Pt. 1, at 157 (1987)* (“Marketing and sales in the United States alone would not, however, be sufficient to meet this test.”); *S. Rep. 100-71, at 29 (1987)* (same). Had “sales and marketing” not been deleted from the enumerated list, substantial investments in sales and marketing alone may have satisfied the domestic industry requirement under subsection (C), as subsection (C) would have expressly called out sales and marketing as a type of “substantial investment[] in [the IP’s] exploitation”.

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But the opposite is not true. Use of the word “including” does not connote a closed list of the types of exploitation of IP rights that may count toward satisfaction of the domestic industry requirement under subsection (C). The exploitation types listed are illustrative, not finite. Thus, deletion of sales and marketing from such an illustrative list is consistent with the intent expressed by Congress that sales and marketing alone not satisfy the domestic industry requirement and the necessary corollary that sales and marketing together with other activities in the United States may.⁷⁵ It is not, however, justification for reading into the statute a prohibition on certain types of investments in plant and equipment, employment of labor or capital, or exploitation of IP rights that is not in the statutory text.

Before turning to whether Lashify’s employment of labor and capital is significant, we address OUII’s and Respondents’ contention, reflected in the Majority’s view, that the Federal Circuit’s decision in *Schaper* justifies an approach that categorically rejects certain types of investments in plant and equipment, or labor or capital based on a mere importer test.⁷⁶ See

⁷⁵ While two Commissioners in the Majority are of the view that sales and marketing investments together with other investments may count toward satisfaction of the domestic industry, as explained above, their approach would exclude sales and marketing investments based on the amount of other “qualifying investments,” never reaching the question of whether the nature and extent of complainant’s activities under subsections (A), (B), or (C) as a whole are “significant” or “substantial”.

⁷⁶ For example, Respondents assert that after 1988, the only businesses other than U.S. manufacturers protected by the statute are small businesses that lack capital to invest in U.S. manufacturing:

And when Congress expanded Section 337 in 1988 to include “engineering, research and development, [and] licensing” as separate grounds for satisfying this requirement, it made clear that these non-manufacturing activities were added “to enable universities and small businesses who *do not have the capital to actually make the good in the United States* to still have access to the ITC forum for the protection of their rights.”

Respondents’ IR at 2 (citing 132 Cong. Rec. 7119 (1986)) (emphasis in Respondents’ IR). As Lashify falls into neither category, Respondents conclude Lashify is outside the realm of industries protected by Section 337. *Id.* at 2-3. This unduly narrow view of Section 337

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Comm'n Op. at 53-54. The findings in *Schaper* pre-date the current version of Section 337 and reflected an interpretation of the pre-1988 version of the statute that satisfaction of the domestic industry requirement required a showing of production in the United States. 717 F.2d at 1372-73; *see also InterDigital Communications, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1300 (Fed. Cir. 2013) ("*InterDigital*"); *see also* Respondents' IR at 2 ("Prior to 1988, a complainant was required to be engaged in the domestic manufacture of a product to satisfy the economic prong of the domestic industry requirement."). In adopting the 1988 (and current) version of the statute, legislators criticized this unduly narrow interpretation and sought to ensure Section 337 protections even though the domestic industry product was not produced in the United States, provided complainant could show significant investments in plant and equipment, labor or capital or the exploitation of the asserted IP right, including engineering, research and development and licensing. Thus, we do not view the *Schaper* court's approach to considering whether the complainant in that case satisfied the domestic industry requirement particularly instructive in understanding the proper interpretation and application of the current Section 337 statutory text. However, the principle from *Schaper* that Section 337 does not protect mere importers was reaffirmed in adopting the 1988 version of the statute and remains an important principle today. The current version of Section 337 is drafted in a way to give expression to that principle by requiring that complainant's investments be "significant" or "substantial," which involves both a quantitative and qualitative assessment of the nature and extent of complainant's investments under subsections 337(a)(3)(A)-(C).

protection is not supported by the text of Section 337, its legislative history, or Commission precedent.

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The Commission has used a number of approaches to ensure that the domestic industry requirement is applied in a manner that is both flexible and adherent to the express Congressional intent of strengthening the protection of IP rights, while also cutting off access to the statute's protections for companies that have little, if any, connection to the United States economy other than owning U.S. IP rights. As the Senate Report states:

Although the injury test has been eliminated for certain intellectual property rights cases, a complainant must still establish that a U.S. industry relating to the articles or intellectual property right concerned "exists or is in the process of being established." This requirement was maintained in order to preclude holders of U.S. intellectual property rights who have no contact with the United States other than owning such intellectual property rights from utilizing section 337. The ITC is to adjudicate trade disputes between U.S. industries and those who seek to import goods from abroad. Retention of the requirement that the statute be utilized on behalf of an industry in the United States retains that essential nexus.

S. REP. NO. 100-71, at 129 (1987); *see also John Mezzalingua Assocs., Inc. v. Int'l Trade Comm'n*, 660 F.3d 1322, 1328 (Fed. Cir. 2011) ("The purpose of the Commission is to adjudicate trade disputes between U.S. industries and those who seek to import goods from abroad. . . ." (quoting, in part, H.R. Rep. No. 100-40, at 157)). For example, where production occurs overseas, the Commission has sometimes found it useful to observe that certain activities tend to be associated with those businesses that do not exist as domestic industries or are not in the process of establishing an industry. *See, e.g., Certain Bone Cements, Components Thereof and Products Containing the Same*, Inv. No. 337-TA-1153, Comm'n Op. at 22 (Jan. 25, 2021) ("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

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indistinguishable from those of a mere importer and has not typically credited them when determining whether a domestic industry exists.”). But recent decisions have shown that such Commission observations as in *Bone Cements*, even when introduced with the caveat that there is “no bright line rule,” have had the unintended consequence of being invoked as a talisman to whittle down the investments of companies who have invested in the statutory categories and would otherwise be protected by the statute. *See* OUII IR⁷⁷ at 6.

In conclusion, Commissioners Karpel and Schmidlein find that the ID erred in finding Lashify’s labor expenditures to be unreliable on the ground that Mr. Thomas’s calculated expenses included amounts relating to warehousing, distribution, quality control, and sales and marketing for each of the asserted patents. Likewise, in their view, the FID erred in finding R&D to be the only capital expenditures that qualify for inclusion under subsection 337(a)(3)(B). Commissioners Karpel and Schmidlein find that Complainant’s asserted labor and capital expenditures with respect to the D’664 and D’416 patents are qualifying investments under subsection 337(a)(3)(B) and that Mr. Thomas’s first alternative allocation provides a reasonable estimate of Lashify’s U.S. investments in labor and capital. The following thus provides their examination of whether the claimed labor and capital investments are significant under subsection 337(a)(3)(B).

d. Significance of Lashify’s Investments under Subsection (B)

In determining whether the above investments are significant, the Federal Circuit has clarified that a quantitative analysis must be performed to make this determination. *Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879, 883 (Fed. Cir. 2015). There is no threshold amount that a complainant must meet. *See Certain Stringed Musical Instruments & Components Thereof*, Inv.

⁷⁷ Submission of the Office of Unfair Import Investigations in Response to the Commission’s Notice (Feb. 3, 2022) (“OUII IR”).

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No. 337-TA-586, Comm'n Op. at 25-26 (May 16, 2008); *Male Prophylactic Devices*, Comm'n Op. at 39. Rather, the significance inquiry depends on “the facts in each investigation, the article of commerce, and the realities 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.* (citation omitted). And, as discussed above, this significance analysis takes into account the admonition that Section 337 does not protect mere importers. *See Schaper Mfg. Co. v. Int'l Trade Comm'n*, 717 F.2d 1368, 1372-73 (Fed. Cir. 1983).

Commissioners Karpel and Schmidlein find that the data and allocations Mr. Thomas provided demonstrate that Lashify’s employment of labor and capital with respect to the articles protected by the D’614 and D’664 patents are quantitatively significant. *See Lelo Inc. v. Int'l Trade Comm'n*, 786 F.3d 879, 883 (Fed. Cir. 2015) (requiring “a quantitative analysis” in determining whether a complainant satisfies the domestic industry requirement under subsection 337(a)(3) and reasoning that “the terms ‘significant’ and ‘substantial’ refer to an increase in quantity, or to a benchmark in numbers.”); *Certain Carburetors & Prods. Containing Such Carburetors* (“*Carburetors*”), Inv. No. 337-TA-1123, Comm'n Op. at 15-20, 23-24 (Oct. 28, 2019) (“The Federal Circuit, however, found under the facts presented in *Lelo* that qualitative factors alone could not demonstrate significance where the quantitative data showed that the complainant's investments were insignificant under section 337(a)(3)(A) or (B).”).

The Commission has looked to several different contextual indicators to determine whether a complainant’s investments and expenditures are sufficient to constitute a domestic industry. For instance, one methodological approach the Commission has used is “comparing

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complainant's domestic expenditures to its foreign expenditures." *Carburetors*, Comm'n Op. at 9 (indicating that "comparing complainant's domestic expenditures to its foreign expenditures is one of the possible factors that the Commission could but . . . is not required to consider") (quoting, in part, *Certain Optoelectronic Devices for Fiber Optic Communications*, Inv. No 337-TA-860, Comm'n Op. at 18-19 (May 9, 2014)). Other approaches have considered: (1) comparing the "sales of protected articles" to the domestic investments, and (2) considering "the value added to the article in the United States by the domestic activities." *Carburetors*, Comm'n Op. at 9, 19-20. For example, both before and after the current amendments to the statute, the Commission has accepted a "value-added" analysis to assess whether an industry in the United States exists. *See, e.g., Certain Cube Puzzles*, Inv. No. 337-TA-112, USITC Pub. 1334, Comm'n Op. at 30 (Jan. 1983) (significance of the domestic operations was shown by the fact that "approximately 50 percent of the value of the cube puzzle" is added in the United States by "Ideal's quality control, packaging and repair operations"); *Certain Airtight Cast-Iron Stoves*, Inv. No. 337-TA-69, USITC Pub. No. 1126, Comm'n Op. at 11 (Jan. 1981) (finding a domestic industry based on repair, testing, and installation activities because "the value added domestically is significant"); *Certain Airless Paint Spray Pumps & Components Thereof*, Inv. No. 337-TA-90, USITC Pub. No. 1199, Comm'n Op. at 10-11 (Nov. 1981) (finding that domestic investments in warranty repairs should be included in the domestic industry "[i]nasmuch as the value added to a product in the United States is a significant factor in determining whether the U.S. operation of a foreign corporation is part of the domestic industry . . ."); *Male Prophylactic Devices*, Comm'n Op. at 43 (finding that complainant's undertakings, measured on a comparative basis, created meaningful value added to the imported product).

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In its petition for review, Lashify argued that the FID never considered its evidence of significance because the CALJ erroneously rejected most of Lashify's domestic activities and associated investments but that if such investments are properly credited the Commission would find Lashify's investments significant. *See, e.g.*, CPet. at 79-81, 87-90.⁷⁸ As discussed above, Commissioners Karpel and Schmidlein disagree with the ID's approach of discrediting various categories of expenditures, as Lashify points out in its Petition, instead of assessing the nature and significance of the claimed investments to determine whether they are sufficient to meet the domestic industry requirement.

With regard to labor and capital, using Lashify's product revenue for each Asserted Patent (*see* CDX-005C.0053) and Lashify's DI investments for the first alternative allocation for its employment of labor and capital, the following chart summarizes the context for the proffered DI investments in labor and capital compared to revenue provided by Lashify:

⁷⁸ Lashify argued, for example:

As it did for plant and equipment, Lashify demonstrated the significance of its labor investments for each asserted patent under each proposed allocation. Those significance comparisons were never considered, however, because the CALJ erroneously rejected all of Lashify's domestic activities and associated investments for the reasons discussed above. The Commission should, after correctly crediting Lashify's qualifying activities and associated investments, find Lashify's labor investments significant.

CPet. at 88; and

As with the other statutory sub-categories of investments, the Commission should determine that Lashify's capital investments for activities conducted with respect to the domestic industry products are significant.

CPet. at 90.

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Percentage of Labor & Capital (Subsection (B)) Investments Compared to Revenue – First Alternative Allocation		
	Lashify’s Employment of Labor Compared to Revenue	Lashify’s Employment of Capital Compared to Revenue
'984 Patent	[REDACTED]	[REDACTED]
'664 Patent	[REDACTED]	[REDACTED]
'416 Patent	[REDACTED]	[REDACTED]

Considered in the context of Lashify’s revenue relating to the domestic industry with respect to the protected articles, Lashify’s employment of labor and capital is significant. *Id.*; *see also Carburetors*, Comm’n Op. at 15-16.

Lashify presented further evidence of the significance of its labor and capital investments compared to the cost of goods sold:

Percentage of Labor & Capital (Subsection (B)) Investments Compared to Cost of Goods Sold – First Alternative Allocation		
	Lashify’s Employment of Labor Compared to COGS	Lashify’s Employment of Capital Compared to COGS
'984 Patent	[REDACTED]	[REDACTED]
'664 Patent	[REDACTED]	[REDACTED]
'416 Patent	[REDACTED]	[REDACTED]

CIB at 109-110 (*see* Figs. 5-7). Respondents’ general criticism of a comparison of Lashify’s domestic investments to COGs was that “there are no domestic activities or domestically sourced

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components that could be relied upon to attribute additional value to the Gossamer Lashes, even in the few instances in which they are packaged in the Lashify Control Kit” based on their views of sales and marketing, warehousing and distribution, and premium packaging. RRB at 45-46. These criticisms are addressed above with regard to plant and equipment and apply with equal force to labor and capital. Considered in the context of Lashify’s cost of goods sold relating to the domestic industry with respect to the protected articles, Lashify’s employment of labor and capital is significant.

Additionally, when considering the increase in these labor and capital investments from 2017 to September 9, 2020, Commissioners Karpel and Schmidlein find the increased employment of labor and capital with respect to the domestic industry articles to be significant over this time period. *See Lelo*, 786 F.3d at 883 (“the terms ‘significant’ and ‘substantial’ refer to an increase in quantity, or to a benchmark in numbers.”). Specifically, capital expenditures related to domestic industry articles increased from ██████████ in 2017 to ██████████ in 2020 (1/1/2020 – 9/9/2020). CDX-0005C at 40. Likewise, labor expenditures related to the domestic industry articles increased from zero (\$0) in 2017 to ██████████ in 2020 (1/1/2020 – 9/9/2020). *Id.* at 33.

Commissioners Karpel and Schmidlein also find that Lashify’s employment of labor and capital is qualitatively significant. As recited above, Lashify built its business pertaining to its artificial eyelash system from the ground up, beginning with the work of a single individual, Ms. Lotti, who invented the patented articles and over a period of three years grew the business to employ 70 individuals as of September 9, 2020 when it filed its complaint. CIB at 3 (“Lashify’s revolutionary DIY eyelash system and the intellectual property rights that it is based on allowed Ms. Lotti’s one-person start-up to grow into a successful business that employs over 70 people,

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has over [REDACTED], and over [REDACTED] in annual U.S. sales for 2020, which is projected [REDACTED] in 2021.”). Lashify asserts that its domestic industry products “exist solely because of Lashify’s research, design, and development activities in the United States.” Lashify IR at 2. Lashify explains:

Working out of her home in Los Angeles, Ms. Lotti developed an entire suite of new products: a new type of tool she called the Fuse Control® Wand, a new type of lash extension she called the Gossamer®, a new type of lash storage she called the Gossamer® cartridge, and a new type of adhesive she called the Whisper Light™ Bond. Her conception of the Fuse Control® Wand involved countless prototypes made using a jewelry soldering tool, modeling clay, and other materials drawing on her past experience of making jewelry. She eventually created designs with a 3D printer in her California home and with the help of local businesses. Ms. Lotti also developed a new type of cartridge to store the Gossamer® lashes that was more attractive and luxurious than what was otherwise on the market and to work seamlessly with the Fuse Control® Wand. To turn the cartridge into a commercial product, Ms. Lotti led the creation of multiple rounds of CAD drawings, three-dimensional renderings, and 3D printed models—all in the U.S.

Id. at 3 (citations omitted). Lashify’s financial figures recited above do not reflect Ms. Lotti’s time and efforts from 2015 to 2017 as Lashify had no sales during that period.⁷⁹ As discussed in part 2.a. above, other than manufacturing, Lashify has performed all work necessary to create, develop, commercialize, distribute, sell, and support its DI products in the United States.

Lashify’s entrepreneurial success story around the invention, development and successful commercialization of domestic industry articles is akin to other start-ups that the Commission found to meet the domestic industry requirement in prior cases. *See, e.g., Certain Percussive Massage Devices*, Inv. No. 337-TA-1206, Comm’n Op. (Pub. Version) at 12-15 (Jan. 4, 2022) (finding the existence of a domestic industry under subsection (B) for a complainant that started as a small company, designed and developed its products in the United States, and grew its domestic industry based on the commercial success of the products). Like in that case, the DI

⁷⁹ *See also* Order No. 55 (Granting in Part Respondents’ Motion In Limine No. 1 to Preclude Lashify from Relying on Belated Domestic Industry Evidence).

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products here “would not exist without Hyperice’s domestic operations and spending” because “Hyperice designed and developed the DI Products in the United States.” *Id.* at 11, 14. Further as in that case, “the simultaneous growth in Hyperice’s number of employees and in Hyperice’s increase in sales of the DI Products’ is indicative of qualitative significance since ‘it can be inferred reasonably that Hyperice’s labor and capital expenditures contributed to the growth of the DI Product market.’” *Id.* at 11, 15 (citation omitted). Lashify’s activities were critical to the commercialization of the products, and its investments drove revenue for Lashify, increasing Lashify’s sales from \$0 to nearly [REDACTED] Lashify is not a company who has “no contact with the United States other than owning” intellectual property rights nor is it a “mere importer.” It is a company started and developed in the United States relying on the innovation and effort of its founder in the United States to develop and successfully market the domestic industry articles. Indeed, Lashify appears to typify a type of business the revisions to Section 337 in 1988 were designed to protect: “small businesses who do not have the capital to actually make the good in the United States” but nonetheless developed the domestic industry articles in the United States and have “a larger service industry exploiting the intellectual property right within the United States.” 132 Cong. Rec. H7119 (Apr. 10, 1986) (remarks of Congressman Kastenmeier).

e. Conclusion

Where Commissioners Karpel and Schmidlein, as explained above, are of the view both that Lashify’s domestic industry investments should be evaluated based on Lashify’s first alternative allocation, and that the evidence provided by Lashify supports a finding of a domestic industry under subsection 337(a)(3)(B), they need not take a position on whether Lashify satisfies the economic prong of the domestic industry requirement under subsection 337(a)(3)(C) based on the first alternative allocation.

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In conclusion, Commissioners Karpel and Schmidlein find that Lashify has established that a domestic industry relating to the articles protected by the D'416 and D'664 patents exists. The Commission has determined that all other elements of a violation as to these patents have been met. Accordingly, Commissioners Karpel and Schmidlein find a violation of Section 337 as to these patents.