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1. Labor

Mr. Thomas notes that “Lashify 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.” CX-2101C at Q/A 200. As noted above, expenses related to warehousing, distribution, and quality control are not appropriately considered in the analysis, at least as to the ’984 and D’416 patents.⁷⁰ Additionally, Lashify did not meet its burden to establish significant qualifying expenses in other areas, such that its sales and marketing expenses could be included in the analysis for any of the asserted patents. The undersigned is therefore unable to rely on Mr. Thomas’s analysis, which includes expenses related to warehousing, distribution, quality control, and sales and marketing for each of the asserted patents.⁷¹ For these reasons, the undersigned cannot find that Lashify has met its burden to establish that it made significant investments in labor.

2. Capital

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. Certain of the

⁷⁰ Additionally, Mr. Thomas does not specify how much labor is attributable to the finishing step performed on the Fuse Control Wand. Instead, he only calculates the labor expenses related to warehousing as a whole. *See* CX-2101C at Q/A 206; CDX-0005C at Schedule 7, 7.1. As such, the evidence does not show how much of the labor expense could appropriately be included in the analysis for the D’664 patent.

⁷¹ As with respect to plant and equipment, Mr. Thomas did not allocate investments to the Asserted Patents until the final step of his analysis. *See* CX-2101C at Q/As 201. 224.

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expenses within these categories are non-qualifying expenses that should have been excluded from the analysis.⁷²

The majority of these expenses relate to sales and marketing. Under the category “Marketing & Creative,” Mr. Thomas identifies [REDACTED] million in expenditures, the bulk of which are in [REDACTED]. See CDX-0005C at Schedule 8 (finding that [REDACTED] is attributable to [REDACTED]). Mr. Thomas identifies an additional [REDACTED] within the category of “Processing Fees,” related to the sale of the products online. *Id.* (identifying expense for [REDACTED] [REDACTED]).

As the Commission recently stated: “No Commission precedent allows complainant to rely substantially on . . . promotion, marketing, and sales expenses to satisfy section 337(a)(3).” *In Vitro*, Comm’n Op. at 23. Moreover, as noted above, sales and marketing expenditures can only be considered if Lashify can establish other significant qualifying expenditures. The undersigned finds that Lashify has not met this burden.

The next largest category of expenditures is “Shipping, Freight, & Materials.” For this category, Mr. Thomas included [REDACTED] for “outbound product freight,” [REDACTED] for “paid shipping” and [REDACTED] for “shipping insurance.” CDX-0005C at Schedule 8. Mr. Thomas also included [REDACTED] in expenses related to “[REDACTED]” under the “Office/General Administrative” expenses. *Id.* As noted above, costs related to warehousing and distribution are not qualifying expenditures for the ’984 patent. Accordingly, Mr. Thomas should have removed these expenses when calculating Lashify’s capital investments for the ’984 patent.

⁷² Mr. Thomas did not allocate expenses to each of the asserted patents until after conducting this step. CX-2101C at Q/As 225-227. 237. Accordingly, the undersigned findings that Mr. Thomas improperly included certain non-qualifying expenses impacts the analysis for each of the Asserted Patents.

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Mr. Thomas also identifies expenses of [REDACTED] for “Meals.” Lashify has not demonstrated how “meals” constitute a qualifying domestic industry expenditure.

The final category is [REDACTED] in research and development expenses. While these expenses are properly considered in the analysis, as explained below, the undersigned finds that Lashify has not established that this investment is significant or substantial.

For these reasons, the undersigned cannot find that Lashify has met its burden to establish that it made significant investments in capital.

3. Conclusion

Accordingly, the undersigned finds that Lashify has not established that it meets the domestic industry requirement under subsection (B).

E. Research and Development

Lashify asserts that it has made significant investments in research and development under section 337(a)(3)(C). CIB at 106. Lashify argues that it “has conducted, and continues to conduct, substantial domestic engineering, R&D, and design activities in the U.S. that enable exploitation of the Lashify system, and the components of the Lashify system specifically protected by the Asserted Patents.” *Id.* Under its second alternative allocation, Lashify claims the following R&D expenditures: (1) [REDACTED] for the ’984 patent; (2) [REDACTED] for the D’416 patent; and (3) [REDACTED] for the D’664 patent. *Id.*; *see also* CX-2101C at Q/A 258; CDX-0005C at Schedule 9.2. In order to calculate R&D expenditures, 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.” CX-2101C at Q/A 239.

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Respondents argue that Lashify's R&D investments are insignificant and insubstantial. RIB at 95. Respondents note that R&D "accounts for [REDACTED] of Lashify's capitalized expenditures." *Id.* Respondents further note that "even if one accepts at face value all of the investments that Lashify has declared", Lashify's investments in R&D account for between [REDACTED] % and [REDACTED] % of its revenue in the Gossamer lashes. *Id.* at 95-97. Finally, Respondents argue that Lashify's R&D allocations are overstated and unreliable. *Id.* at 98.

Staff states that "while some of the proffered expenditures within the R&D category could qualify as domestic industry investments, these expenditures are neither quantitatively nor even qualitatively significant and/or substantial in the context of Lashify's operations, the marketplace, or the eyelash industry." SIB at 88. Staff also asserts that Lashify has failed to establish a nexus between its R&D investments and the '984 patent. *Id.* at 90.

1. Nexus

As an initial matter, the undersigned finds that Lashify has not established that its R&D expenses have the required nexus to the Asserted Patents. Lashify asserts only that the R&D expenses "enable exploitation of the Lashify system," and does not link R&D to the articles protected by the patents. *See* CIB at 106-107. Nor does Mr. Thomas address nexus in his testimony. Although Mr. Thomas states that the R&D relates generally to the "Lashify system," he does not specify on which products Lashify conducts R&D. It is therefore possible that all of the R&D conducted by Lashify relates to products other than those appropriately considered in the domestic industry analysis.⁷³ Without additional information, the undersigned finds that Lashify has not met

⁷³ 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* CX-2091C at Q/A 177 (testimony from Ms. Lotti that "the initial research and development of the Gossamer lashes and the Fuse Control Wand occurred before Lashify launched the domestic industry products"); *see also* RX-1690C at Q/As 61-62 (testifying that the products were launched in approximately November 2017 and that the evidence shows that [REDACTED] since that time).

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its burden in establishing that the nexus requirement has been satisfied. *See 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 supported by a demonstration of ‘nexus’ between the investments and the patent right.”).

2. Plant and Equipment

For the domestic industry plant and equipment expenditures allocated to R&D, Mr. Thomas “determined that approximately [REDACTED] of Lashify’s plant and equipment expenditures [of [REDACTED]] are for engineering, research, and development domestic industry activities in 2018, 2019, and 2020 (through September 9), respectively.” CX-2101C at Q/A 241; *see also id.* at Q/A 240. Mr. Thomas therefore concluded that Lashify has invested [REDACTED] in plant and equipment, specifically related to R&D. *Id.* at Q/A 244; *see also* CDX-0005C at Schedule 9.

Mr. Thomas’s calculations make several assumptions which the undersigned finds unreliable. First, as noted above, Mr. Thomas starts with the assumption that nearly 100% of the rent for the Sunset Plaza Facility and New York Facility should be attributed to Lashify’s domestic industry activities. Given that these are [REDACTED], the undersigned finds that this assumption is unsupported.

Second, Mr. Thomas’s analysis assumes that R&D is conducted at each of the four facilities. Lashify has not established that this is true. Ms. Lotti herself testified that “[a]ll or nearly all of the efforts and investments I made to develop the products that comprise the Lashify System were made at the Sunset Plaza Facility.” CX-2091C at Q/A 145. Additionally the evidence shows that the Laurel Canyon Facility was primarily used for storage and warehousing. *Id.* at Q/A 147. As such, Mr. Thomas’s allocation of [REDACTED] of the Laurel Canyon Facility’s rent to R&D is not

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supported by the evidence. *See also* RX-1690C at Q/A 87 (testimony from Respondents' expert that approximately [REDACTED] total square feet can be allocated to R&D). For these reasons, the undersigned cannot rely on Mr. Thomas's calculations for plant and equipment expenditures allocated to R&D.⁷⁴

3. Labor

Mr. Thomas testified that "[b]ased on a conversation with Ms. Lotti . . . the employee and consulting employees associated with R&D activities on the Lashify system include [REDACTED]

[REDACTED]" CX-2101C at Q/A 247. Mr. Thomas concluded that the entirety of [REDACTED]

[REDACTED].⁷⁵ *Id.* Mr. Thomas "then divided the total gross pay for Lashify's R&D employee activities and contractors by Lashify's total gross pay for employees and contractors" and concluded that "approximately [REDACTED], [REDACTED], and [REDACTED] of Lashify's domestic labor expenditures are for domestic industry R&D activities in 2018, 2019, and 2020 (through September 9), respectively." *Id.* at Q/A 248. After applying these percentages to Lashify's domestic labor expenditures, Mr. Thomas concluded that Lashify incurred [REDACTED] million in labor expenses allocated to R&D. *Id.* at Q/A 249; *see also* CDX-0005C at Schedule 9.

Mr. Thomas's calculations are not supported by the evidence. Mr. Thomas relies on conversations with Ms. Lotti to calculate the amount of labor allocated to R&D. *See* CX-2101C at Q/A 246 ("[B]ased [on] information from Ms. Lotti, I calculated the gross pay for Lashify's

⁷⁴ Mr. Thomas did not allocate expenses to each of the Asserted Patents until the final step of his analysis. *See* CX-2101C at Q/A 239. As such, the undersigned's conclusion that he improperly included certain expenses applies to each of the Asserted Patents.

⁷⁵ Mr. Thomas also testifies that "[REDACTED] time is spent on R&D for the Lashify system, and [REDACTED] time is spent on R&D for the Lashify system." CX-2101C at Q/A 247.

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employees that perform R&D functions for the Lashify system.”); *see id.* at Q/A 247; CX-2091C at Q/A 138. Ms. Lotti does not provide any support for her estimates, however. Instead, she testifies that “[t]he estimates are based on personal knowledge and personal work done with those individuals in the areas of research and development of products.” CX-2101C at Q/A 134. She does not testify that she spoke to any of her employees to confirm the amount of time they spent on R&D, nor does Lashify cite to any testimony from the witnesses themselves.

Additionally, the evidence in the record contradicts Ms. Lotti’s statements. Despite testifying that [REDACTED] on R&D, Ms. Lotti also testifies that [REDACTED] *Id.* at Q/A 136. Likewise, Ms. Lotti testifies that [REDACTED] is spent on R&D. *Id.* at Q/A 133. The evidence shows, however, that [REDACTED] *Id.* at Q/As 4, 136; CX-2101C at Q/A 109; *see also* RX-1690C at Q/A 52. As such, it is inappropriate to include her salary, at least with respect to the ’984 patent.

Without 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.⁷⁶

For these reasons, the undersigned finds Mr. Thomas’s calculations with respect to labor unreliable.

4. Capital

Mr. Thomas “identified capital expenditures on Lashify’s P&L . . . that are directly related to research and development activities. These expenditures include ‘Product Testing,’ ‘Software

⁷⁶ Mr. Thomas did not allocate expenses to each of the Asserted Patents until the final step of his analysis. *See* CX-2101C at Q/A 239. As such, the undersigned’s conclusion that he improperly included certain expenses applies to each of the Asserted Patents.

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Development,’ and ‘Research and Development.” CX-2101C at Q/A 250. Mr. Thomas calculates that these expenditures total [REDACTED] *Id.* at Q/A 251.

Lashify has not demonstrated that [REDACTED] is a substantial investment.⁷⁷ Lashify argues only that its total R&D costs of [REDACTED] (’984 patent), [REDACTED] (D’416 patent), and [REDACTED] (D’664 patent) are substantial. *See* CIB at 109-110. It does not specifically argue that [REDACTED] is substantial. Without evidence to specifically place the [REDACTED] in context, the undersigned cannot find that the economic prong is met. *See Certain Carburetors & Prods. Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 17 (Oct. 28, 2019) (“The Commission must assess the relative importance of the domestic activities”).

Additionally, the evidence in the record suggests that this amount is not substantial. As Respondents and Staff note, the amount Lashify invested in R&D “accounts for just [REDACTED] [REDACTED] of Lashify’s capitalized expenditures (*i.e.*, [REDACTED] ÷ [REDACTED] = [REDACTED]).” RIB at 95 (citing CX-0005C at 36); *see also* SIB at 90. The undersigned finds that [REDACTED] is not “substantial.” Instead, as Staff notes, this [REDACTED] percentage is “consistent with what one would expect of a ‘mere importer.’” *Id.*

Accordingly, the undersigned finds that Lashify has not made substantial investments in capital expenditures related to R&D.

5. Conclusion

Accordingly, the undersigned finds that Lashify has not established that it meets the domestic industry requirement under subsection (C).

⁷⁷ The undersigned notes that this amount is not allocated among the Asserted Patents, but is instead the total investment. *See* CX-2101C at Q/A 239. Accordingly, this amount would be less when each patent is considered individually.

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F. Conclusion on Economic Prong

For the above reasons, the undersigned finds that Lashify has not satisfied the economic prong of the domestic industry requirement.

IX. CONCLUSIONS OF LAW

1. The importation or sale requirement of section 337 has been satisfied.
2. The KISS Accused Products, Hollyren Accused Products, Worldbeauty Glue-Based Accused Products, and Lilac Accused Products do not infringe claims 1, 9, 13, 23, 27, or 28 of U.S. Patent No. 10,721,984.
3. The TSD Worldbeauty Heat-Bonded Accused Product infringes claims 1, 9, 23, and 27 of U.S. Patent No. 10,721,984.
4. The TSD Worldbeauty Heat-Bonded Accused Product does not infringe claims 13 or 28 of U.S. Patent No. 10,721,984.
5. The TGSS Worldbeauty Heat-Bonded Accused Product infringes claims 1, 23, and 27 of U.S. Patent No. 10,721,984.
6. The TGSS Worldbeauty Heat-Bonded Accused Product does not infringe claims 9, 13, or 28 of U.S. Patent No. 10,721,984.
5. Respondents Alicia Zeng d/b/a Lilac St. and Artemis Family Beginnings, Inc. do not induce infringement of U.S. Patent No. 10,721,984.
6. The technical prong of the domestic industry requirement for U.S. Patent No. 10,721,984 has not been satisfied.
7. The asserted claims of U.S. Patent No. 10,721,984 are not invalid under 35 U.S.C § 103 for obviousness.
8. The asserted claims of U.S. Patent No. 10,721,984 are not invalid under 35 U.S.C. § 112 for lack of enablement or written description.
9. The Hollyren storage cartridge, Model No. DX02059G0004, infringes U.S. Design Patent No. D877,416.
10. The technical prong of the domestic industry requirement for U.S. Design Patent No. D877,416 has been satisfied.
11. The Hollyren applicator Model No. CX1514 infringes U.S. Design Patent No. D867,664.

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12. The technical prong of the domestic industry requirement for U.S. Design Patent No. D867,664 has been satisfied.
13. U.S. Design Patent No. D867,664 is not invalid as functional.
14. The economic prong of the domestic industry requirement has not been satisfied for the Asserted Patents.

X. RECOMMENDED DETERMINATION ON REMEDY

The Commission's Rules provide that, subsequent to an initial determination on violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, the administrative law judge shall issue a recommended determination concerning the appropriate remedy in the event that the Commission finds a violation of section 337, and the amount of bond to be posted by respondents during Presidential review of the Commission action under section 337(j). *See* 19 C.F.R. § 210.42(a)(1)(ii). The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986).

A. General Exclusion Order

Section 337(d)(2) provides that a general exclusion order ("GEO") may issue in cases where (a) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named respondents; or (b) there is a widespread pattern of violation of section 337 and it is difficult to identify the source of infringing products. 19 U.S.C. § 1337(d)(2). The statute essentially codifies Commission practice under *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, Comm'n Op. at 18-19, USITC Pub. 119 (Nov. 1981) ("*Spray Pumps*"). *See Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing the Same*, Inv. No. 337-TA-372 ("*Magnets*"), Comm'n Op. on Remedy, the Public Interest and Bonding at 5 (USITC Pub. 2964 (1996)) (statutory standards "do not differ

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significantly” from the standards set forth in *Spray Pumps*). In *Magnets*, the Commission confirmed that there are two requirements for a general exclusion order: (1) a “widespread pattern of unauthorized use;” and (2) “certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles.” *Id.* The focus now is primarily on the statutory language itself and not an analysis of the *Spray Pump* factors. *Ground Fault Circuit Interrupters & Prods. Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25 (Mar. 9, 2009).

Lashify submits that a GEO is appropriate in this Investigation. CIB at 111. Staff agrees and states: “If a violation is found, the evidence presented at trial demonstrates that both statutory criteria for the issuance of a [GEO] are satisfied.” SIB at 92.

Respondents disagree and argue that “Lashify has not and cannot satisfy the ‘heightened requirements of Section 337(d)(2)(A) or Section (d)(2)(B)’ necessary to obtain a GEO.” RIB at 112.

1. Circumvention of a Limited Exclusion Order

Lashify argues that “[t]he undisputed evidence demonstrates circumstances and market realities that present a real and substantial risk that manufacturers and/or importers of the Accused Products could easily circumvent a limited exclusion order.” CIB at 111. Lashify asserts: (1) “there is both established and growing demand for the products at issue”; (2) “well-established marketing and distribution networks for the products at issue already exist”; (3) “there are numerous non-respondent foreign manufacturers”; (4) “circumvention is made easier by the low barriers to entry into the artificial eyelash market”; (5) “circumvention is made easier due to complex distribution channels and corporate structures, and prevalent practices to obscure the source of the accused products”; and (6) “entry of limited exclusion orders against Respondents will create a void in the

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U.S. market, incentivizing potential new market participants to fill that void, which can be done with ease, either by importing existing foreign inventory or having existing foreign manufacturers copy the Lashify products.” *Id.* at 111-112. Staff agrees with Lashify and cites the same factors. SIB at 92-93.

Respondents state that Lashify has presented “no evidence that Respondents have circumvented, or aim to circumvent, an LEO.” RIB at 107 (citing *Certain Semiconductor Chips Having Synchronous Dynamic Random Access Memory Controllers*, Inv. No. 337-TA-661, Comm’n Op. at 12 (Aug. 10, 2010)). According to Respondents, the Commission “should be particularly cautious” in circumstances such as the ones presented here. *Id.* at 108. Respondents note that “the facts here establish that circumvention is unlikely.” *Id.* Respondents explain that all of the respondents have either actively participated in this Investigation or, in the case of one respondent, entered into a consent order. *Id.* at 109. Respondents further assert that they “have no incentive to circumvent an LEO when they already have commercially viable non-accused and non-infringing products.” *Id.*

“Under section 337(d)(2)(A), the Commission considers whether conditions are ripe for circumvention of a limited exclusion order.” *Certain Toner Cartridges, Components Thereof, & Systems Containing Same*, Inv. No. 337-TA-1174, Comm’n Op. at 16 (Dec. 17, 2020). “In determining whether conditions are ripe for circumvention, the Commission has considered whether it is difficult to identify sellers or manufacturers, whether previous attempts to address infringement have been unsuccessful, and whether infringing operations could be easily replicated.” *Id.*

The undersigned agrees with Respondents that Lashify has not established that a GEO is necessary to prevent circumvention of an LEO. While the evidence shows that there are other non-

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respondent foreign manufacturers with the capability of manufacturing eyelashes, the evidence does not demonstrate that any of the named Respondents would turn to these manufacturers in an effort to circumvent the LEO. *See Certain Self-Cleaning Litter Boxes & Components Thereof*, Inv. No. 337-TA-625, Comm’n Op. at 57 (Apr. 28, 2009) (“*Self-Cleaning Litter Boxes*”) (“The fatal shortcoming is the lack of correlative intent or likelihood of infringement by Respondents’ manufacturers or any other foreign manufacturers – the indicia of evidence that would warrant a general exclusion order. The existence of an opportunity to make infringing products is simply not enough to satisfy the requirements of subparagraph A.”). The undersigned further agrees that Lashify has not established that Respondents have an incentive to circumvent an LEO when there are already commercially viable products that are not accused of infringing Lashify’s Asserted Patents. *See* RX-1277C at 11-12 (explaining that there are lash models not accused of infringement); RX-0651C at 282:6-287:14 (testimony that certain Hollyren tweezers do not infringe the D’664 patent).

For these reasons, the undersigned finds that a GEO is not necessary to prevent circumvention of an LEO directed to the Respondents.

2. Widespread Pattern of Unauthorized Use

Lashify asserts that “Respondents and various third parties have ignored warnings to cease and desist their infringing activity by continuing to offer the infringing products for sale.” CIB at 113. Lashify further argues: “Entry into the market for artificial eyelashes has been relatively easy, based on at least the ease of establishing new companies through which infringing products can be sold, . . . the low production cost of infringing products, . . . and the low barriers to market entry based on ease of assembly and inventory immediately available for importation.” *Id.* at 113-114. Lashify notes that “[m]arket entry is made easier by Respondents’ and suppliers’ willingness to

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copy Lashify's products" and that "there is a pattern of sales via online marketplaces." *Id.* at 114. According to Lashify: "This pattern is exacerbated because identifying the source of the products is difficult as their relative size and cost allows them to be imported easily, including without detection from Customs." *Id.* Staff agrees with Lashify. SIB at 93.

Respondents assert that Lashify has not established a pattern of violation because "identifying the source of infringing goods in this case appears straightforward." RIB at 107 (quoting *Synchronous DRAM Controllers*, Comm'n Op. at 12). Respondents further argue that Lashify "did not show that any non-respondent imported and sold products that infringe the Asserted Patents." *Id.* at 110.⁷⁸

The undersigned agrees with Respondents that Lashify has not established that there is a widespread pattern of violation. In *Self-Cleaning Litter Boxes*, the Commission found that a GEO was not warranted because "the only evidence in the record of infringing imports is of Respondents' products. That is, Respondents accounted for all of the infringing imported products. Complainants have failed to identify a single act of importation that is unrelated to one of the Respondents." Comm'n Op. at 56. The Commission concluded: "Under the circumstances, this is not the sort of 'pattern of violation of this section' that paragraph B contemplates." *Id.*

Here, Lashify did not argue that any entity other than the named Respondents imported and sold products that infringe the Asserted Patents. *See* CIB at 110-115. Indeed, for the two design patents, Lashify only accused one Respondent of importing infringing articles. *See* Section I.D.1. Thus, as Respondents note, "there is not even a pattern of violation as to those patents among the named Respondents." RIB at 110. Accordingly, the undersigned cannot conclude that there is a widespread pattern of violation of section 337.

⁷⁸ Respondents also assert that Lashify has waived its arguments with respect to widespread pattern of unauthorized use. RIB at 110. Based on a review of Lashify's pre-hearing brief, the undersigned disagrees.

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3. Conclusion

For the above reasons, the undersigned recommends against a GEO.

B. Limited Exclusion Order

Under section 337(d), if the Commission determines that there is a violation of section 337, the Commission may issue a limited exclusion order (“LEO”) directed to a respondent’s infringing products. 19 U.S.C. § 1337(d). A limited exclusion order instructs the U.S. Customs and Border Protection to exclude from entry all articles that are covered by the patent at issue that originate from a named respondent in the investigation. *Fuji Photo Film Co. Ltd. v. Int’l Trade Comm’n*, 474 F.3d 1281, 1286 (Fed. Cir. 2007).

The parties agree that, if a violation is found, a limited exclusion order should issue. CIB at 110; RIB at 107; SIB at 94. Respondents request that any LEO “contain a provision allowing Respondents to certify to U.S. Customs and Border Protection (‘CBP’) that the goods they seek to import are exempt.” RIB at 112. Neither Lashify nor Staff address this request. The undersigned notes, however, that, at the request of CBP, all exclusion orders now contain a certification provision. Respondents have not established that this standard certification provision is insufficient.

Accordingly, should the Commission determine there is a violation, the undersigned recommends the issuance of a limited exclusion order covering the products found to infringe the Asserted Patents.

C. Cease and Desist Order

Under section 337(f)(1), the Commission may issue a cease-and-desist order (“CDO”) in addition to, or instead of, an exclusion order. 19 U.S.C. § 1337(f)(1). The Commission generally issues a CDO directed to a domestic respondent when there is a “commercially significant” amount

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of infringing, imported product in the United States that could be sold, thereby undercutting the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293 USITC Pub. 2391, Comm’n Op. on Remedy, the Public Interest and Bonding at 37-42 (June 1991); *Certain Condensers, Parts Thereof & Prods. Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334 (Remand), Comm’n Op. at 26-28, 1997 WL 817767 at *11-12 (U.S.I.T.C. Sept. 10, 1997).

Lashify requests issuance of a CDO “based on existing ‘commercially significant’ domestic inventory or the presence of and the ability to rapidly import, foreign inventory.” CIB at 110. Lashify notes that KISS, CVS, Ulta, Walmart, and Lilac maintain the following approximate days of inventory:

	Units	Approximate Value	Approximate Days of Inventory
Kiss Accused Products			
Kiss Accused Products (a)			
CVS Accused Products			
Ulta Accused Products			
Walmart Accused Products			
Lilac Accused Products			

Fig. 8: Respondents’ Domestic Inventory⁷¹⁸

Id. Lashify further states that “CDOs are also appropriate for Worldbeauty and Hollyren” as they “maintain commercially significant foreign inventories.” *Id.* at 111. According to Lashify, Worldbeauty and Hollyren “also have existing relationships with foreign manufacturers or suppliers that maintain commercially significant inventory that can be imported into or sold in the U.S. with minimal effort.” *Id.*

Respondents asserts that “Lashify has not carried its burden” to establish that Respondents maintain inventories of Accused Products in the U.S. RIB at 113. Respondents state that “Lashify’s own calculations show that KISS’s and Ultra’s Falscara Eyelashes and Starter Kits are in inventory

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for [REDACTED] *Id.* Respondents further note that “Hollyren/Xizi and Worldbeauty maintain no inventory of the accused products in the United States.” *Id.* “Nor are they engaged in any domestic operations that could undercut the remedy provided by an exclusion order.” *Id.* Finally, Respondents assert that “Lashify has failed to carry its burden to demonstrate that Lilac holds commercially significant domestic inventory because it has not limited its analysis to Lilac’s inventory of Accused Products.” *Id.* at 113-114. Instead, “Mr. Thomas’s analysis sweeps in staple articles used with Lilac’s non-infringing lashes.” *Id.*

Staff asserts that “cease and desist orders are appropriate for each of the domestic Respondents – KISS, CVS, Ulta, Walmart, and Lilac.” SIB at 94. Staff explains that “the evidence shows that the domestic Respondents each maintain commercially significant inventories of allegedly infringing products in the U.S. or have established domestic operations that are used to fulfill sales to their U.S. customers.” *Id.* Staff argues, however, that Lashify has not shown that cease and desist orders should issue against the foreign Respondents. *Id.*

If the Commission finds a violation, the undersigned recommends that a CDO issue against the KISS Respondents. The evidence demonstrates that the KISS Respondents’ inventory of Accused Products in the United States is commercially significant. Specifically, the evidence shows that (1) “[a]s of approximately November 19, 2020, KISS had inventory of Accused Products on hand in the U.S. of [REDACTED] with a total value of approximately [REDACTED] (2) as of September 2020, “CVS has inventory of Accused Products on hand in the U.S. of [REDACTED] [REDACTED] for a retail price of [REDACTED] (3) as of November 15, 2020 “Ulta had inventory of Accused Products on hand in the U.S. of [REDACTED] for a retail price of [REDACTED] and (4) as of November 4, 2020, “Walmart had inventory of Accused Products on hand in the U.S. of [REDACTED] with

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a value of approximately [REDACTED] CX-2101C at Q/As 461 (KISS), 469 (CVS), 477 (Ulta), and 485 (Walmart).

Respondents do not dispute these numbers, but instead assert that this inventory would last “for approximately [REDACTED] Respondents do not, however, support this argument with any evidence, other than the inventory numbers themselves.”⁷⁹ In contrast, Mr. Thomas opines that the inventory is enough to last [REDACTED] [REDACTED] (KISS Accused Products), between [REDACTED] [REDACTED] (CVS), between [REDACTED] (Ulta), and at least [REDACTED] (Walmart). CX-2101C at Q/As 462-464 (KISS), 471-473 (CVS), 480-481 (Ulta), 487-488 (Walmart). As such, the undersigned finds that Lashify has met its burden to show that the inventory of the KISS Respondents is commercially significant.

The undersigned recommends against a CDO for the remaining Respondents. As for Hollyren/Xizi and Worldbeauty, the evidence shows that these Respondents do not maintain any inventory in the United States. *See* CX-2101C at Q/A 497. Lashify has also not asserted that these Respondents engage in any domestic operations that could undercut the remedy provided by the exclusion order. As such, the undersigned finds that it is not appropriate to issue a CDO against Hollyren/Xizi or Worldbeauty.

The undersigned also recommends against a CDO for Lilac. Lashify has not established that Lilac has a commercially significant inventory in the United States. Mr. Thomas states that, as of March 23, 2020, “Lilac had inventory of Accused Products on hand in the U.S. of [REDACTED] units” with a value of “approximately [REDACTED].” CX-2101C at Q/A 491. As Respondents point out, however, this figure includes articles other than the Accused Products, such as glue, lash applicators, and models of lashes not at issue (Doe, Volume, and Hollywood). RIB at 114 (citing

⁷⁹ Respondents’ economic expert did not opine on CDOs.

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CDX-0005C at 71); *see also* RX-1277C at 2. Respondents note that, after removing these products, one is left with an inventory of only 5,148 Feather lashes. Lashify makes no assertion that such an amount is commercially significant. Without more, the undersigned finds that Lashify cannot meet its burden to show that it is entitled to a CDO against Lilac.

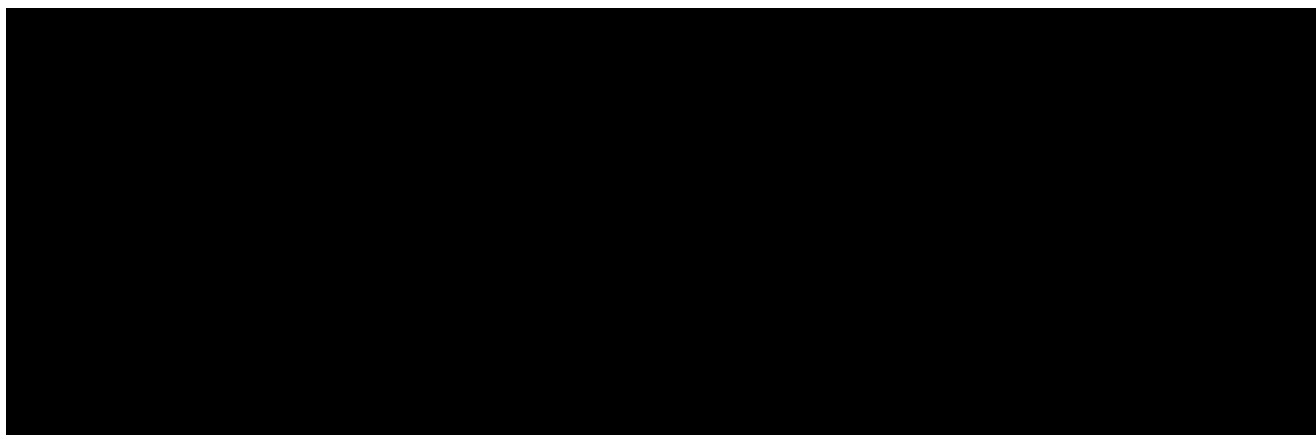
D. Bonding

Pursuant to section 337(j)(3), the Administrative Law Judge and the Commission must determine the amount of bond to be required of a respondent during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. 19 U.S.C. § 1337(j)(3). The purpose of the bond is to protect the complainant from any injury. 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. *See Microsphere Adhesives, Processes for Making Same, & Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. 2949, Comm'n Op. at 24 (Dec. 8, 1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecomm. Chips & Prods. Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41, 1993 WL 13033517, at *24 (U.S.I.T.C. June 22, 1993). A 100 percent bond has been required when no effective alternative existed. *See, e.g., Certain Flash Memory Circuits & Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (imposing a 100% bond when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

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Lashify asserts that the Commission “should set a bond based on the uncontested price differential between Respondents’ infringing products and Lashify’s domestic industry products, but no lower than 100%.” CIB at 115. Lashify states: “The necessary bond for the KISS Accused Products ranges between [REDACTED] when considering their prices to resellers such as CVS, Walmart, and Ulta, and ranges from [REDACTED] when considering their prices direct to consumers.” *Id.* For other Respondents, Lashify seeks a bond as set forth in the below chart:



Id.

Respondents assert that a 100% bond is appropriate. RIB at 114. Respondents disagree on the use of a price differential to calculate bond “because the DI Products are sold at different levels of commerce than the Accused Products.” *Id.* Respondents further note that “there are no licenses from which to derive a reasonable royalty rate.” *Id.* Respondents conclude: “In these circumstances, the bond rate should be set, at most, at 100%.” *Id.* at 114-115.

Staff recommends that a bond of 100% of the entered value of the infringing articles be imposed during the Presidential review period. SIB at 94.

The undersigned agrees that a 100% bond is appropriate. As Mr. Thomas acknowledges, “Lashify’s market prices are significantly higher than the market prices for Respondents’ Accused Products in the U.S.” CX-2101C at Q/A 263. As Respondents’ expert, Dr. Vander Veen, notes, “the magnitude of the difference in sales prices between the Asserted DI Products and the Accused

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Products indicates that these products are marketed towards different consumers.” RX-1690C at Q/A 139. Lashify is marketed as a “luxury” product. *Id.* at Q/A 140. “In contrast KISS sells its much lower-priced products to retailers such as Walmart, who emphasizes its focus on ‘price leadership,’ ‘everyday low prices,’ and helping consumers ‘save money and live better.’” *Id.*

Accordingly, if a violation of section 337 is found, the undersigned recommends that the Commission set the bond value at 100%.

XI. INITIAL DETERMINATION

Based on the foregoing, it is the Initial Determination of the undersigned that Respondent Qingdao LashBeauty Cosmetic Co., Ltd. d/b/a Worldbeauty infringes claims 1, 9, 23, and 27 of U.S. Patent No. 10,721,984; and Respondent Qingdao Hollyren Cosmetics Co., Ltd. d/b/a Hollyren infringes U.S. Design Patent Nos. D877,416 and D867,664. The undersigned has also determined that U.S. Patent No. 10,721,984 and U.S. Design Patent No. D867,664 are valid and that the domestic industry requirement has not been satisfied for the Asserted Patents.

The undersigned hereby certifies to the Commission this Initial Determination and the Recommended Determination. The Parties’ briefs⁸⁰, which include the final exhibits lists, are not certified as they are already in the Commission’s possession in accordance with Commission rules. 19 C.F.R. § 210.38(a).

The Secretary shall serve the confidential version of this Initial Determination upon counsel who are signatories to the Protective Order issued in this Investigation. A public version will be served at a later date.


⁸⁰ Any arguments from the Parties’ pre-hearing briefs incorporated by reference into the parties’ post-hearing briefs are stricken, unless otherwise discussed herein, as an improper attempt to circumvent the page limits imposed for post-hearing briefing.

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Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review pursuant to 19 C.F.R. § 210.43(a) or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination or certain issues therein.

Within ten days of the date of this document, the Parties must submit a statement to Bullock337@usitc.gov stating whether they seek to have any portion of this document redacted from the public version. The Parties shall attach to the statement a copy of a joint proposed public version of this document indicating with red brackets any portion asserted to contain confidential business.⁸¹ To the extent possible, the proposed redacting should be made electronically, in a PDF of the issued order, using the “Redact Tool” within Adobe Acrobat, wherein the proposed redactions are submitted as “marked” but not yet “applied.” The Parties’ submission concerning the public version of this document should not be filed with the Commission Secretary.

SO ORDERED.



Charles E. Bullock
Chief Administrative Law Judge

⁸¹ If the Parties submit excessive redactions, they may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a). *See* 19 C.F.R. § 201.6(a).