

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN ELECTRONIC CANDLE
PRODUCTS AND COMPONENTS
THEREOF**

Investigation No. 337-TA-1195

COMMISSION OPINION

On May 19, 2021, the Commission determined to review the presiding administrative law judge’s (“ALJ”) initial determination (“ID”) (Order 41), granting the motion of complainants L&L Candle Company LLC of Brea, California (“L&L”) and Sotera Tschetter, Inc. of St. Paul, Minnesota (“Sotera”) (collectively, “Complainants”) for summary determination of violation by five defaulting respondents. On review, the Commission has determined that the Complainants have failed to show that they are entitled to a summary determination that they satisfied the economic prong of the domestic industry requirement. The Commission therefore remands the investigation to the ALJ for further proceedings. This opinion sets forth the Commission’s reasoning in support of that determination.

I. BACKGROUND

A. Procedural History

The Commission instituted this investigation on April 6, 2020, based on a complaint filed by Complainants. 85 Fed. Reg. 19158-59 (Apr. 6, 2020). The complaint alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic candle products and components thereof by reason of infringement of one or more of claims 1-6, 10, 12-15, 17-19, and 28 of U.S. Patent No. 8,550,660 (“the ’660 patent”); claims 1-15 of U.S. Patent No. 9,366,402 (“the ’402 patent”);

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claims 1-4, 6-12, 14-18, 20-25, 27, and 28 of U.S. Patent No. 9,512,971 (“the ’971 patent”); claims 1-7, 10-14, 17, 18, 22, 24, 25, 27, and 29 of U.S. Patent No. 9,523,471 (“the ’471 patent”); and claims 1-5, 7, 8, 10-12, 15, 17, 21 and 22 of U.S. Patent No. 10,533,718 (“the ’718 patent”). *Id.*

The notice of investigation named as respondents The Gerson Company of Olathe, Kansas; Gerson International (H.K.) Ltd. of Hong Kong; Sterno Home Inc. of Coquitlam, Canada; Ningbo Huamao International Trading Co., Ltd. of Ningbo City, China; Ningbo Yinzhou Langsheng Artware Co., Ltd of Ningbo City, China; Lifetime Brands, Inc. of Garden City, New York; Scott Brothers Entertainment, Inc. of Las Vegas, Nevada; Nantong Ya Tai Candle Arts & Crafts Co., Ltd. of San Gabriel, California; NapaStyle, Inc. of Napa, California; Veraflame International, Inc. of Vancouver, Canada (“Veraflame”); MerchSource, LLC of Irvine, California; Ningbo Mascube Import Export Company of Ningbo City, China (“Ningbo Mascube”); Decorware International Inc. dba Decorware Inc. of Rancho Cucamonga, California; Shenzhen Goldenwell Smart Technology Co., Ltd. of Shenzhen City, China; Shenzhen Ksperway Technology Co., Ltd. of Shenzhen City, China; Ningbo Shanhuang Electric Appliance Co. of Ningbo City, China (“Ningbo Shanhuang”); Yiwu Shengda Art Co., Ltd. of Yiwu City, China (“Yiwu Shengda”); Shenzhen Tongfang Optoelectronic Technology Co., Ltd. of Shenzhen City, China; TFL Candles of Shenzhen City, China; Guangdong Tongfang Lighting Co., Ltd. of Hong Kong; Tongfang Optoelectronic Company of Hong Kong; and Virtual Candles Limited of Kent, United Kingdom (“Virtual Candles”). *Id.* at 19159. The Office of Unfair Import Investigations (“OUII”) is also a party to the investigation. *Id.*

The Commission terminated five respondents from the investigation based on consent

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orders.¹ The Commission terminated eight other respondents from the investigation based on settlement.² The Commission further terminated three respondents from the investigation based on Complainants' partial withdrawal of the complaint due to the failure to serve those entities with the complaint and notice of investigation.³ Finally, the Commission terminated one respondent from the investigation based on a summary determination that Complainants failed to establish the importation requirement with respect to that respondent.⁴

With respect to the five remaining respondents, the Commission found Veraflame, Ningbo Mascube, Virtual Candles, Yiwu Shengda, and Ningbo Shanhuang (collectively, "the Defaulting Respondents") in default for failing to respond to the complaint and notice of investigation and for failing to show cause why they had not done so, or for failing to participate in discovery.⁵

¹ Order No. 7 (May 4, 2020), *unreviewed by* Comm'n Notice (Jun. 3, 2020) (terminating the investigation with respect to Shenzhen Tongfang Optoelectronic Technology Co., Ltd.; TFL Candles; Guandong Tongfang Lighting Co., Ltd.; and Tongfang Optoelectronic Company based on consent orders); Order No. 37 (Dec. 17, 2020), *unreviewed by* Comm'n Notice (Jan. 5, 2021) (terminating the investigation with respect to Nantong Ya Tai Candle Arts & Crafts Co., Ltd. based on a consent order and a settlement agreement).

² Order No. 12 (Jun. 15, 2020), *unreviewed by* Comm'n Notice (Jun. 20, 2020) (terminating The Gerson Company and Gerson International (H.K.) Ltd. based on settlement); Order No. 15 (Jul. 15, 2020), *unreviewed by* Comm'n Notice (Aug. 5, 2020) (terminating Merchsource, LLC based on settlement); Order No. 29 (Oct. 19, 2020), *unreviewed by* Comm'n Notice (Nov. 2, 2020) (terminating Decorware International Inc. based on settlement); Order No. 38 (Dec. 18, 2020), *unreviewed by* Comm'n Notice (Jan. 5, 2021) (terminating Sterno Home Inc., Ningbo Huamao International Trading Co., Ltd., and Ningbo Yinzhou Langsheng Artware Co., Ltd. based on settlement); Order No. 39 (Dec. 18, 2020), *unreviewed by* Comm'n Notice (Jan. 5, 2021) (terminating Lifetime Brands, Inc. based on settlement).

³ Order No. 35 (Nov. 13, 2020), *unreviewed by* Comm'n Notice (Nov. 30, 2020) (terminating NapaStyle, Inc., Shenzhen Goldenwell Smart Technology Co., Ltd., and Shezen Ksperway Technology Co., Ltd. based on partial withdrawal of the complaint).

⁴ Order No. 17 (Jul. 28, 2020), *unreviewed by* Comm'n Notice (Aug. 28, 2020) (terminating Scott Brothers Entertainment Inc. based on summary determination of no violation).

⁵ Order No. 14 (Jul. 8, 2020), *unreviewed by* Comm'n Notice (Aug. 3, 2020) (finding Veraflame, Mascube, and Virtual Candles in default); Order No. 33 (Nov. 12, 2020), *unreviewed by*

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On November 13, 2020, Complainants moved for a summary determination of violation and for a recommendation for the issuance of a general exclusion order (“GEO”).⁶ On December 4, 2020, OUII filed a response that questioned whether Complainants had satisfied the economic prong of the domestic industry requirement, but otherwise supported a finding of violation of section 337 and issuing a GEO.⁷ On December 9, 2020, Complainants filed a reply in support of their motion.⁸

On April 2, 2021, the ALJ issued the subject ID and granted Complainants’ motion for summary determination of violation by each of the five Defaulting Respondents. Order No. 41 (Apr. 2, 2021). Although the ALJ rejected some of Complainants’ importation arguments, the ALJ found that Complainants satisfied the importation requirement with respect to at least one product by each Defaulting Respondent. *Id.* at 19-23. The ALJ also found that Complainants provided claim charts and expert testimony that established infringement for at least one product for each of the five Defaulting Respondents. *Id.* at 27-35, 43-48, 55-63, 69-76. The ALJ further found that Complainants provided claim charts and expert testimony that they satisfied the technical prong of the domestic industry requirement for each of the ’402, ’971, ’471, and ’718 patents. *Id.* at 35-38, 48-51, 63-66, 76-79. Finally, the ALJ found that Complainants satisfied

Comm’n Notice (Nov. 30, 2020) (finding Yiwu Shengda and Ningbo Shanhuang in default).

⁶ Complainants’ Motion for Summary Determination of Violations by the Defaulting Respondents, for the Existence of a Domestic Industry, for a General Exclusion Order, and for a Recommended Determination on Remedy and Bonding (Dec. 4, 2020) (“MSD Mot.”).

⁷ Commission Investigative Staff’s Response to Complainants’ Motion for Summary Determination of Violations by the Defaulting Respondents, for the Existence of a Domestic Industry, for a General Exclusion Order, and for a Recommended Determination on Remedy and Bonding (Nov. 13, 2020) (“OUII Resp.”).

⁸ Complainants’ Reply in Support of its Motion for Summary Determination of Violations by the Defaulting Respondents, for the Existence of a Domestic Industry, for a General Exclusion Order, and for a Recommended Determination on Remedy and Bonding (Dec. 9, 2020) (“MSD Rep.”).

the economic prong of the domestic industry requirement under subsections 337(a)(3)(A), (B), and (C). *Id.* at 80-87. No party petitioned for review of the ID.

On May 19, 2021, the Commission determined on its own motion to review the ID's finding that Complainants satisfied the economic prong of the domestic industry requirement. 86 Fed. Reg. 28143-46 (May 25, 2021). The Commission sought briefing on four issues under review and on remedy, the public interest, and bonding. *Id.*

On June 8, 2021, Complainants⁹ and OUII¹⁰ provided submissions in response to the notice. On June 21, 2021, Complainants¹¹ and OUII¹² provided reply submissions. No submissions from the public were received.

B. The Asserted Patents

The four remaining patents in this investigation are all generally related to the structure of artificial candles that simulate flames.¹³ All four patents name Xiaofeng Li as the sole inventor.

C. The Accused Products

The accused articles are artificial candles that simulate a flame effect using electronic components. ID at 15. The accused articles and their infringement, however, are not issues

⁹ Complainants' Initial Submission Regarding the Issues Under Review and Remedy, Bonding, and the Public Interest (Jun. 8, 2021) ("Compl. Init. Sub.").

¹⁰ Response of the Office of Unfair Import Investigations to the Commission's Request for Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding (Jun. 8, 2021).

¹¹ Complainants' Response to the Office of Unfair Import Investigations' Written Submission on the Issues Under Review and on Remedy, the Public Interest, and Bonding (Jun. 21, 2021).

¹² Reply of the Office of Unfair Import Investigations to the Private Parties' Response to the Commission's Request for Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding (Jun. 21, 2021).

¹³ The '660 patent was not asserted against any of the Defaulting Respondents and was therefore abandoned for the purposes of seeking a violation against the Defaulting Respondents and for seeking a GEO. MSD Mot. at 3 n. 2.

under Commission review.

D. The Domestic Industry Products

The asserted domestic industry articles are Complainants' electronic candle products. The Commission did not review the ID's findings that Complainants' v-wire domestic industry products practiced claims of the '402, '471, and '718 patents, that Complainants' pin & socket products practiced claims of the '402 patent, and that Complainants' pillar-style pin & socket product practiced claims of the '971 and '718 patent. ID at 38, 51, 66, 79.

II. COMMISSION REVIEW OF THE ID

When the Commission reviews an initial determination, in whole or in part, it reviews the determination *de novo*. *Certain Soft-Edged Trampolines and Components Thereof*, Inv. No. 337-TA-908, Comm'n Op. at 4 (May 1, 2015). 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.*

A complainant has the burden to establish that it satisfied the domestic industry requirement. *See, e.g., Certain Set-Top Boxes and Components Thereof*, Inv. No. 337-TA-454, Initial Determination at 294 (Jun. 21, 2002) (unreviewed by Commission in relevant part); *see also* 19 C.F.R. § 210.37(a) ("The proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto."). In order to obtain a GEO, the complainant must establish a violation by "substantial, reliable, and probative evidence." 19 C.F.R. § 210.16(c)(2). A summary determination motion shall be granted only if "there is no genuine

issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.” 19 C.F.R. § 210.18(a).

III. ANALYSIS

The Commission has determined that Complainants have failed to establish a violation of section 337 because they failed to show, based on the evidence presented, that they are entitled to summary determination that the economic prong of the domestic industry requirement is met under Commission Rule 210.18. The Commission therefore vacates the ID’s finding that Complainants are entitled to summary determination with respect to the economic prong of the domestic industry requirement, vacates the grant of summary determination of violation, and remands the investigation to an ALJ for further proceedings consistent with this opinion. Any findings, conclusions, and supporting analysis by the ALJ that are under review and are not inconsistent with our analysis and conclusions below are affirmed.

A. Motion to Reopen the Record

The Commission sought briefing on whether Complainants failed to submit dozens of exhibits cited in the declaration of their economic expert, Dr. Seth Kaplan (“Kaplan Decl.”), and whether the Commission should entertain a motion to supplement the record with the omitted exhibits. 86 Fed. Reg. at 28144-45. Complainants acknowledged that they failed to submit 38 exhibits cited in the Kaplan Declaration as well as 41 additional exhibits cited in other declarations. Compl. Init. Sub. at 4, Ex. B.

On June 11, 2021, Complainants filed an unopposed motion to reopen the record pursuant to Commission Rule 210.15 (19 C.F.R. § 210.15) and to admit those 79 documents. Complainants argued that good cause exists for their motion because the omissions were inadvertent and did not cause prejudice because the remaining respondents have defaulted.

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The Commission has determined to grant Complainants' motion. The Commission finds that the omissions were inadvertent. Because all remaining respondents have defaulted and OUII consented to the motion, the Commission finds that granting the motion will not prejudice any of the parties. Accordingly, the Commission finds good cause to reopen the record to admit the 79 documents referred to in Complainants' motion.

B. Complainants Failed to Show That They Are Entitled to Summary Determination with Respect to Their Alleged "ERDD" Investments

The economic prong of the domestic industry requirement of section 337 can be satisfied through an evidentiary showing that, with respect to articles protected by the patent, the complainant has made significant or substantial investments in at least one of the following categories: "plant and equipment," "labor or capital," or "exploitation, including engineering, research and development, or licensing." 19 U.S.C. § 1337(A)(3). Congress did not intend to protect mere importers under section 337. *Schaper Mfg. Co. v. U.S. Int'l Trade Comm'n*, 717 F.2d 1368, 1373 (Fed. Cir. 1983). Commission precedent requires that the evidence show qualifying investments in these categories with respect to the protected article.

When a complainant has investments or employment that are not solely directed to the domestic industry articles, the Commission requires that the complainant allocate the portion of those investments that are attributable to those domestic industry products. *See, e.g., Certain Earpiece Devices and Components Thereof*, Inv. No. 337-TA-1121, USITC Pub. 5078, Comm'n Op. at 18 (Nov. 8, 2019) (finding that the complainant "needed to provide an allocation of its investments relevant to the subset of domestic industry products that practice the [] patent").

Here, Complainants acknowledge that their investments and employments are directed in part to products unrelated to the asserted patents. Kaplan Decl. at ¶¶ 28, 40. Accordingly, Complainants allocate their alleged domestic industry investments by: (1) calculating their total

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alleged plant and equipment under Prong A and total labor and capital expenses under Prong B; (2) stating what percentage of those activities under Prongs A and B are directed Complainants' coined term "engineering, research, design, and development" ("ERDD") activities, and multiplying the total expenses under each prong by the ERDD percentages; and (3) calculating what portion of those ERDD activities are attributable to each patent using a sales-based allocation of the products that practice each patent. Kaplan Decl. at ¶¶ 26, 28-29, 35, 41-48. For Prong C expenditures, Complainants added together expenditures under Prongs A and B and excluded Sotera's plant expenditures to avoid potential double counting. *Id.* at 49.

In examining the evidence presented by Complainants, it is not clear what activities are associated with the ERDD activities on which Complainants base their assertion of a domestic industry, including whether these activities encompass sales and marketing. It is also not clear whether these activities and associated expenditures qualify for consideration toward the economic prong or how the expenses for these activities calculated by Complainants' expert fit within the statutory categories set forth in subsection 337(a)(3). In view of this lack of clarity, Complainants have failed to show they are entitled to summary determination and the Commission remands to the ALJ for further proceedings.

It is not clear what activities fall within the category of ERDD coined by complainants. Complainants assert that their "product development and design process include a number of activities undertaken by L&L and Sotera." As examples, Complainants cite the following:

- attending trade shows in Europe, Asia, and the United States to assess the latest fashion trends for incorporation into products for 2021;
- interacting with key personnel at large purchasers, frequently in person at industry trade shows, to convey anticipated colors, fragrances, styles, features, and/or technologies that L&L is considering, and to get purchaser input on these product attributes;

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- designing, modifying, and producing of enhancements for electronic candles using computers and “3D” printers;
- designing and executing product display consistent with fashion trends and purchaser desires; and
- collaborating with L&L’s various partners on the development and testing of potential product enhancements.

Kaplan Declaration at ¶ 24; Compl. Int. Sub. at 11-12. Complainants also explain that they engage in testing of DI products, including testing of prototypes, “golden sample” testing, and “testing of competitors products, as well as customer service.” Kaplan Declaration at ¶¶ 25, 39, 46; Compl. Int. Sub at 12-13. Complainants also appear to include activities such as “technical marketing” and “packaging and marketing materials” within the category of ERDD, although the record is not clear on this point. *Compare* Compl. Init. Sub at 13, 17-18, 21, 32 *with* Kaplan Declaration at ¶¶ 61, 75.

It cannot be assumed that by simply categorizing activities as “engineering, research, development, and design” that the asserted activities may properly be considered as the type of activities covered by subsection 337(a)(3)(C). In this investigation, it is unclear whether Complainants’ ERDD activities may fairly be considered engineering, research, design, or development, or other activities that may count toward satisfying the domestic industry requirement under subsection 337(a)(3)(A), (B), and (C). For example, sales and marketing investments alone are not sufficient to demonstrate the existence of a domestic industry.¹⁴ However, as noted above, Complainants appear to have included sales and marketing with the

¹⁴ In a recent investigation, the Commission stated that “sales and marketing of the product . . . [is] not typically credited [] when determining whether a domestic industry exists.” *Certain Bone Cements, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-1153, Comm’n Op. at 22 (Jan. 25, 2021).

category of ERDD expenses.¹⁵ Complainants also state that their ERDD investments include “attending trade shows,” “interacting with key personnel at large purchasers,” “designing and executing product display,” and “otherwise promoting the sales and market acceptance of L&L’s electronic candles.” Compl. Init. Sub. at 11-12; Kaplan Decl. at ¶ 75. It is unclear whether or to what extent these investments may be cognizable under the statute.

The confusion extends to Complainants’ labor expenses. Complainants state that their fourteen employees with “sales” and/or “marketing” in their titles spend between 50 and 100 percent of their time on “engineering, research, development, or design” activity. CX-0257C. Complainants also contend that all of their employees with “customer service” in their titles spend 100 percent of their time on ERDD activities. CX-0257C. Complainants do not, however, provide any evidence that these employees perform activities in engineering, research, development, and design consistent with the asserted time allocations.

Compounding the lack of clarity, Complainants do not offer quantitative data such that the Commission could determine at this stage the total investment attributable to the activities that might properly fall within the statutory categories. Accordingly, the Commission finds factual disputes preclude summary determination, and remands the investigation to the ALJ.

C. Investments in Plant and Equipment

A complainant can satisfy the domestic industry requirement through “significant investment in plant and equipment” that is “with respect to the articles protected by the patent.” 19 U.S.C. § 1337(a)(3)(A). In addition to the ERDD issues discussed above, the record evidence

¹⁵ Compl. Init. Sub. at 13 (describing “domestic ERDD activities such as . . . marketing materials.”); *id.* at 21 (referring to “ERDD work . . . technically marketing those features back to the customers that desire them”); *id.* at 32 (“Complainants’ marketing is a part of the design, development, and production process”).

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does not demonstrate by substantial, reliable, and probative evidence that Complainants are entitled to summary determination of the economic prong of the domestic industry requirement under subsection 337(a)(3)(A).

Complainants' assertions that its facilities and equipment are used to perform ERDD for the domestic industry products are largely unsupported by record evidence. For example, Complainants only vaguely assert that their facilities are used to "execute and develop their business in the DI products" or "to perform research and customer service as well as design." Complainant's Motion for SD at 114; Kaplan Decl. at ¶ 39. Dr. Kaplan provided room-by-room ERDD percentages for L&L's Lunar St. Brea facility, but Complainants failed to substantiate what activities are performed in those rooms beyond asserting that they involve ERDD, or how such activities relate to the domestic industry products. *Id.* at ¶ 43-44. Complainants also failed to provide evidence that the investments in L&L's Eden Prairie, Mercury Ln. Brea, or St. Paul facilities relate to the domestic industry products. *Id.* at ¶ 58 (describing those as "relevant facilities" without any evidence as to how those facilities relate to the domestic industry products). For equipment, Complainants assert that they invested in "Telephone," "Computer & Technical," "Software Expense," "Office Supplies," and "Depreciation," but fail to explain what activities that "equipment" supports or how the "equipment" relates to the domestic industry products. MSD Mot. at 115; Kaplan Decl. at ¶¶ 62-63; CX-0269C. Complainants also rely on ERDD percentages based on the square footage of L&L's Lunar St. Brea facility to allocate not only the Lunar St. Brea facility, but also the Eden Prairie facility, the Mercury Ln. Brea facility, and all equipment. Kaplan Decl. at ¶ 43 (using the Lunar St. ERDD value of 70.33% to allocate the entirety of Complainants' expenditures on rent and utilities, which includes all facilities); *id.* at ¶¶ 62-63 (using the same Lunar St. ERDD value to allocate all equipment expenditures). Dr.

Kaplan provides no evidence or explanation as to why it is reasonable to use the Lunar St. Brea facility to allocate investments in other facilities. The same issue is present with respect to complainants' equipment allocations. These evidentiary issues make the record insufficient to grant summary determination that Complainants satisfied the domestic industry requirement under subsection 337(a)(3)(A).

D. Investments in Labor or Capital

A complainant can satisfy the domestic industry requirement through "significant employment of labor or capital" that is "with respect to the articles protected by the patent." 19 U.S.C. § 1337(a)(3)(B). In addition to the broader ERDD issues discussed above, the record evidence does not demonstrate by substantial, reliable, and probative evidence that Complainants are entitled to summary determination of the economic prong of the domestic industry requirement under subsection 337(a)(3)(B).

Complainants state that employees "attend trade shows and work with key customers to determine, design, and develop the colors, styles, fragrances, features and/or technologies that customers want." Compl. Init. Sub. at 16. They also state that employees "perform testing to determine and develop how new technologies and designs operate, look and feel" as well as employees that perform "golden sample" testing. MSD Mot. at 116. Complainants' evidence of investment in labor relies upon multiplying each employee's compensation by the percentage that the employee works on ERDD activity. Kaplan Decl. at ¶¶ 28-29; CX-0257C.

Complainants, however, fail to substantiate what activities any of these employees do to justify their ERDD percentages or how such activities relate to the domestic industry products. Further, Complainants' only explanation as to how their labor values were derived is that they were "[p]rovided by complainant." CX-0257C. Complainants must provide more than conclusory

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assertions to meet its burden.

Dr. Kaplan fails to provide any indication as to how many employees or how much time was spent on testing or product design for the domestic industry products, instead only estimating labor expenditures for the broader category of “ERDD” activities. Nor does Dr. Kaplan provide a basis for the Commission to credit his proffered allocation, such as by showing that the employees’ job functions or job titles indicate that the employees predominantly spend time on testing or design of the domestic industry products. When Complainants were asked to categorize their employees by function, they did not provide testing or product design as categories.¹⁶ Complainants have no employees with job titles relating to testing and only a single employee with a title relating to “design,” who worked only in 2018. CX-0257C. The evidence also shows that sixteen of L&L’s thirty-one employees (including twelve of the twenty-one employed in the first quarter of 2020) have titles or functions in sales and/or marketing.¹⁷ While Complainants’ repeatedly state that employees’ functions are not limited by their job titles,¹⁸ Dr. Kaplan has provided no evidence that the claimed labor expenditures relate to qualifying activities. Complainants must provide credible evidence to show these employees engage in cognizable activity despite their job titles if they want to rely on these labor expenditures to show a domestic industry.

Additionally, Complainants state that their “product development and design process”

¹⁶ CX-0223C at 123-25 (describing three employees as “Executives,” four employees as “Products and Operations,” three employees as “Customer Service,” seven employees as “Sales and Marketing,” and four employees as “Accounting.”).

¹⁷ CX-0257C (listing fourteen employees with titles with “sales” or “marketing”); CX-0223C (stating that Ken Tsai also works in sales and marketing); Yang Decl. at ¶ 28 (stating that one of the Executives is the Vice President of Sales).

¹⁸ MSD Mot. at 116; Compl. Init. Sub. at 16.

includes “attending trade shows in Europe, Asia, and the United States to assess the latest fashion trends for incorporation into products.” Kaplan Decl. at ¶ 24. Complainants cannot rely upon foreign activity as a part of their domestic industry.

E. Investments in Exploitation, Including Engineering, Research and Development, or Licensing

A complainant can satisfy the domestic industry requirement through “with respect to articles protected by the patent . . . substantial investment in its exploitation, including engineering, research and development, or licensing.” 19 U.S.C. § 1337(a)(3)(C). In addition to the general ERDD issues discussed above, the record evidence does not demonstrate by substantial, reliable, and probative evidence that Complainants are entitled to summary determination of the economic prong of the domestic industry requirement under subsection 337(a)(3)(C).

First, Complainants provide no explanation why their alleged subsection 337(a)(3)(C) investments satisfy the statutory language. Complainants simply assert without explanation that their alleged subsection 337(a)(3)(C) investments are the sum of all of the investments under subsections 337(a)(3)(A), (B), and (C). Kaplan Decl. at ¶ 81. But Complainants cannot simply sum up all of their investments, without identifying the specific investments in the statutory categories of engineering, research and development, licensing, or other forms of exploitation of the asserted patents.

Second, Complainants failed to show that their alleged activities are related to the patented invention. The Commission has found that, to satisfy the requirement of subsection 337(a)(3)(C), the complainant must “establish a nexus between the asserted patent and the U.S. investment in its exploitation.” *Certain Integrated Circuit Chips and Products Containing the Same*, Inv. No. 337-TA-859, Comm’n Op. at 38 (Aug. 22, 2014). The nexus may be “readily

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inferred” if the domestic industry article is “the physical embodiment of the asserted patent,” that is, if the domestic article is coextensive with the patented invention. *See id.* at 40-41 (discussing *Certain Portable Electronic Devices*, Inv. Nos. 337-TA-861 & 867 (patent covering a cell phone case); *Certain Foam Footwear*, Inv. No. 337-TA-567 (patents covering footwear)). That said, “there may be circumstances in which the domestic investment is so unrelated to the asserted patent that no nexus can be imputed.” *See Integrated Circuit Chips*, Comm’n Op., at 42-43.

Here, the asserted patents are directed to certain structural aspects of artificial candles,¹⁹ but the asserted U.S. investments are directed to determining the “colors, fragrances, styles, features, and/or technologies” for the candles.²⁰ Complainants contend that a nexus between the patents and investments should be inferred because their investments go towards developing products that practice the asserted patents. Compl. Init. Sub. at 25. Here, as OUII argued, Complainants have not provided evidence addressing how investments in aesthetic features of the product such as color, fragrance, and style or even the vaguely referenced “features” and “technologies” are sufficiently related to the patented technology directed to the structure of the candle. OUII Resp. at 35-37. Moreover, Complainants assert that the investments relate to “colors, fragrances, styles, features, **and/or** technologies” for the domestic industry products, which leaves unclear the extent to which Complainants are even asserting that the claimed investments relate to aesthetic features or technical features or both. On remand, Complainants

¹⁹ The asserted patents are directed to specific aspects of the structure of the candle—the relationship between the flame component, light-emitting element, and enclosure (’402 patent); the relationship between the shell, core, flame component, support element, and control circuitry (’972 patent); a rounded enclosure with an elongated element that pivots around a support rod with a lighting element in a notch (’472 patent); and the relationship between the enclosure, light source, flame component, lighting element, and control circuitry (’718 patent).

²⁰ Compl. Init. Sub. at 12.

must show a nexus between the investments and the patented features of its candles specifically if they seek to show a domestic industry under subsection 337(a)(3)(C).

F. Significance and Substantiality of the Investments

Once the Commission has determined which activities and related investments, employments, and exploitations contribute towards a domestic industry, the Commission then considers whether the investments, employments, and exploitations are significant or substantial. 19 U.S.C. § 1337(a)(3). The Commission has found that “whether investment activities are significant or substantial is not evaluated according to any rigid mathematical formula,” but rather, “entails an examination of the facts in each investigation, the article of commerce, and the realities of the marketplace.” *Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 8 (Oct. 28, 2019). Whether an investment is significant or substantial is not based on a “threshold monetary amount,” but rather depends on the facts of the investigation. *Id.* at 8. That significance and substantiality evaluation may employ any number of contextual indicators to prove that the investments are significant or substantial including, *inter alia*, comparing domestic investments to foreign investments, comparing domestic investments to domestic activities, or through the added value by the domestic investment. *Id.* at 9, 13.

In their motion for a summary determination, Complainants contend that their investments are significant and substantial because they are “ongoing six- and seven-figure investments in ERDD activities,” and are “continuously ma[de] to develop business and maintain their status as an industry leader.” MSD Mot. at 119-20. Complainants emphasize that the artificial candle industry is a “design-based industry” that requires continuous improvements such as room-filling fragrances. *Id.* Likewise, Dr. Kaplan opined that the investments are

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significant because the artificial candle industry is a “design-based industry” in which continual improvements are made, and that L&L is an industry leader. Kaplan Decl. at ¶ 44. However, Complainants do not articulate why the “continuous” or “design-based” nature of the candle industry demonstrates the Complainants’ investments are qualitatively or quantitatively significant. On remand, if Complainants continue to rely on these theories, more explanation is necessary.

Based on the facts of the investigation, the Commission asked for briefing on several types of contextual analyses that may be relevant in evaluating the significance of Complainant’s investments.^{21, 22} In response to the Commission’s inquiry, Complainants stated that their domestic “ERDD investments” in articles that practice the ’402 patent constitute 2%, 3.5%, and 6% of their total cost of goods for subsections 337(a)(3)(A), (B), and (C), respectively, but did not explain why these percentages show significance. Compl. Init. Sub. at 20. For patents other than the ’402 patent, Complainants provide no quantitative analysis to support their contentions that their investments are significant or substantial. For example, Complainants did not address whether their investments are significant compared to foreign investments or provide a value-added analysis, despite the invitation in the Commission’s Whether to Review Notice to do so, or offer any other quantitative contextual analysis to show their investments are significant.

Complainants also did not address record evidence showing that they invested \$24 million in 2018 and \$19 million in 2019 in “plant, equipment, labor, and capital in Asia to manufacture its

²¹ The Commission majority does not view the Commission’s questions as reflecting any requirement that parties demonstrate significance using the approaches set forth in the questions.

²² Chair Kearns notes that, in his view, a proper contextual analysis for “significance” requires some comparison of domestic and foreign activities or investments where the domestic industry products benefit from both. This comparison can be through, for example, a comparison of domestic to foreign expenditures or a value-added analysis.

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products,” CX-0223C at 76, or that they had gross sales of \$38,710,946 in 2018, \$29,451,228 in 2019, and \$2,328,225 in the first quarter of 2020, CX-0229C, CX-0230C, or identify any other quantitative data the Commission might use to evaluate whether their investments are significant. Complainants cannot solely rely on a qualitative assessment to support their assertions that their investments are significant or substantial under subsection 337(a)(3); a contextual quantitative analysis based on record evidence is also required.

Complainants also contend that their overseas manufacturer, Shenzhen Liown Electronics Company, provides “minimal additional value to the products” because of the manufacturer’s “narrow role in fulfilling Complainants’ manufacturing orders.” Compl. Init. Sub. at 22. Complainants, however, ignore that Shenzhen Liown’s owner, Xiaofeng Li of Shenzhen, China, is the sole inventor of each of the four patents remaining in this investigation, the latest of which was filed in 2019 and issued in 2020. Yang Decl. at ¶¶ 15, 20; CX-0003; CX-0005; CX-0007; CX-0009. Shenzhen Liown’s inventive and design contributions may be relevant to an analysis of the significance of the value added by Complainants’ domestic activities towards the domestic industry products.

IV. CONCLUSION

For the reasons discussed above, the Commission finds that Complainants failed to show that they are entitled to summary determination that they satisfied the economic prong of the domestic industry requirement. The Commission therefore vacates the ID’s finding that Complainants are entitled to summary determination with respect to the economic prong of the domestic industry requirement, vacates the grant of summary determination of violation, and remands the investigation to an ALJ for further proceedings consistent with this opinion.

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By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', enclosed within a large, stylized circular flourish.

Lisa R. Barton
Secretary to the Commission

Issued: September 13, 2021