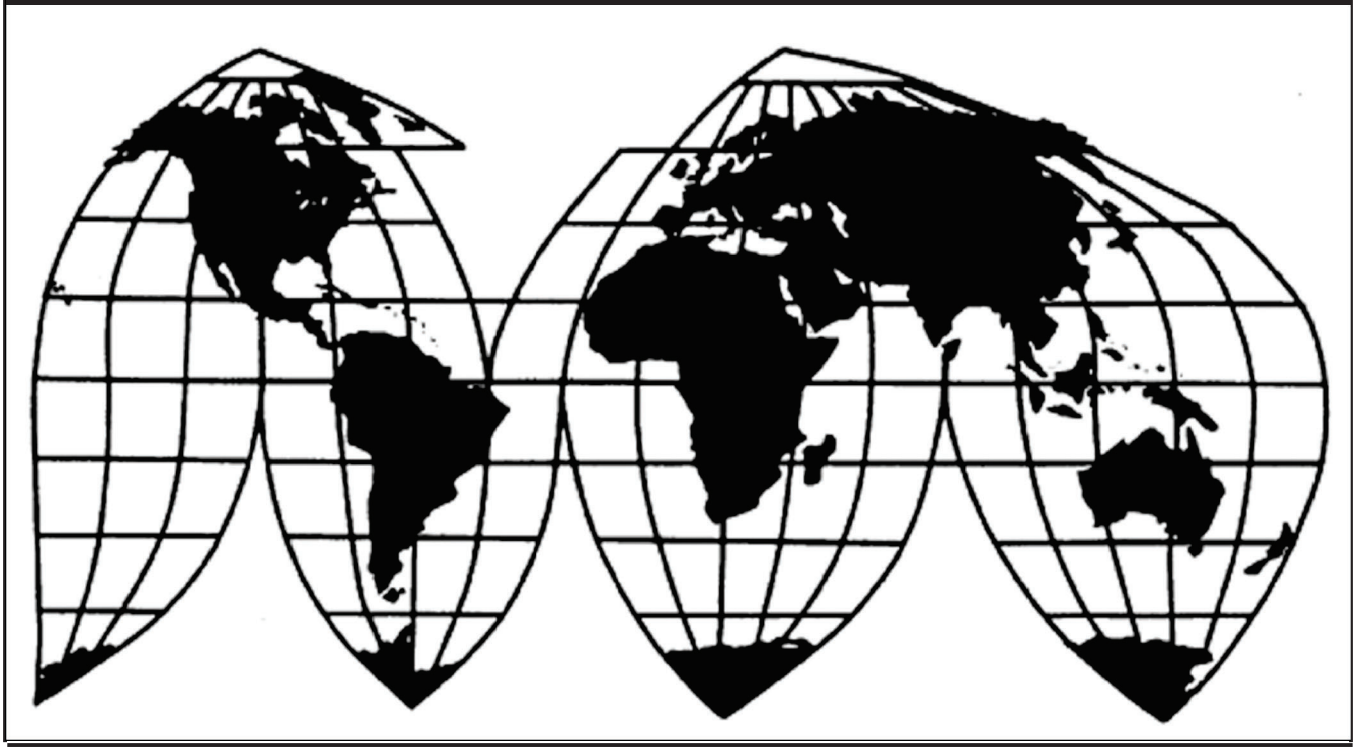
In the Matter of

CERTAIN CARBURETORS AND PRODUCTS CONTAINING SUCH CARBURETORS

337-TA-1123

Publication 5080 **June 2020**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN CARBURETORS AND PRODUCTS CONTAINING SUCH CARBURETORS**	**Investigation No. 337-TA-1123**

NOTICE OF COMMISSION DECISION TO REVIEW IN PART AN INITIAL DETERMINATION FINDING COMPLAINANT FAILED TO SATISFY THE ECONOMIC PRONG OF THE DOMESTIC INDUSTRY REQUIREMENT; TERMINATION OF THE INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the administrative law judge's ("ALJ") initial determination ("ID"), which grants respondents' motion for summary determination that the complainant failed to satisfy the economic prong of the domestic industry requirement as to U.S. Patent Nos. 6,394,424 ("the '424 patent"); 6,439,547 ("the '547 patent"); 6,533,254 ("the '254 patent"); and 7,070,173 ("the '173 patent). On review, the Commission affirms with modification the ID's finding that respondents are entitled to summary determination that the complainant failed to satisfy the domestic industry requirement. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Lynde Herzbach, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-3228. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 20, 2018, based on a complaint filed by Walbro, LLC ("Walbro") of Tucson, Arizona. 83 *Fed. Reg.* 34614-615 (July 20, 2018). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("section 337") based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain carburetors and products containing such carburetors by reason of infringement of one or more claims of the '424 patent; the '547 patent; the '254 patent; the '173 patent, and U.S. Patent No. 6,540,212 ("the '212 patent). *Id.* The complaint also alleges that an industry in the United States exists as required by 19 U.S.C. 1337(a)(2). 83 *Fed. Reg.* 34614-615. The notice of investigation names thirty-five (35) respondents. *Id.* The Office of Unfair Import Investigations ("OUII") is also a party to the investigation. *Id.*

The Commission previously terminated the '212 patent from the investigation. Order No. 72 (Aug. 5, 2019), *not reviewed*, Notice (Aug. 22, 2019).

On June 25, 2019, respondents Amazon.com, Inc.; Lowe's Companies, Inc.; Menard, Inc.; Techtronic Industries Co. Ltd.; The Home Depot, Inc.; Tractor Supply Company; Walmart, Inc.; and Zhejiang Ruixing Carburetor Manufacturing Co., Ltd. (collectively, "Respondents"), as well as Cabela's LLC and Thunderbay Products, filed a motion for summary determination that Walbro failed to satisfy the economic prong of the domestic industry requirement. ID at 1. On July 12, 2019, Walbro opposed the motion. *Id.* OUII did not submit a response to the motion. *Id.*

On August 7, 2019, the Commission terminated Cabela's LLC from the investigation due to settlement. Order No. 75 (Aug. 7, 2019), *not reviewed*, Notice (Aug. 22, 2019). On July 10, 2019, the Commission also terminated Thunderbay Products from the investigation based on a stipulated consent order and entry of a consent order. Order No. 65 (July 10, 2019), *not reviewed*, Notice (July 23, 2019).

On August 12, 2019, the ALJ issued the subject ID granting Respondents' motion for summary determination that Walbro failed to satisfy the economic prong of the domestic industry requirement. *See* ID.

On August 22, 2019, Walbro filed a petition for review of the ID.

On August 29, 2019, Respondents and OUII both filed responses to Walbro's petition for review.

The Commission has determined to review the subject ID in part. First, the Commission notes that Walbro's petition states that it no longer asserts the '547 patent in this investigation; and Walbro has abandoned its claim of a domestic industry with respect to the '547 patent by failing to seek Commission review. *See* Walbro petition at 1; *see also* 19 C.F.R. 210.43(b)(2). Second, the Commission affirms the ID's finding that respondents are entitled to summary determination that Walbro failed to satisfy the domestic industry requirement. However, the Commission declines to adopt certain statements on pages 4, 5, and 6 in the ID that could be

misinterpreted as applying a minimum threshold and as inconsistent with the flexible approach to domestic industry analysis. The investigation is terminated.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: October 11, 2019

CERTAIN CARBURETORS AND PRODUCTS CONTAINING SUCH CARBURETORS **Inv. No. 337-TA-1123**

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, **Vu Bui, Esq.**, and the following parties as indicated, on **October 11, 2019**.

Lisa R. Barton, Secretary
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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN CARBURETORS AND PRODUCTS CONTAINING SUCH CARBURETORS**	**Investigation No. 337-TA-1123**

COMMISSION OPINION

On August 12, 2019, the presiding administrative law judge ("ALJ") issued an initial determination ("ID") (Order No. 77) granting respondents' motion for summary determination that complainant Walbro, LLC ("Walbro") failed to satisfy the economic prong of the domestic industry requirement under section 337(a)(3) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337(a)(3) ("section 337").

Having considered the ID and the parties' submissions, the Commission has determined to review the ID in part. On review, the Commission affirms with modified reasoning the ID's conclusion that respondents are entitled to summary determination that Walbro's activities and investments are not significant or substantial as a matter of law. Thus, Walbro cannot satisfy the domestic industry requirement with respect to articles protected by U.S. Patent Nos. 6,394,424 ("the '424 patent"); 6,533,254 ("the '254 patent"); and 7,070,173 ("the '173 patent") (collectively, the "Asserted Patents").[1] As discussed below, the Commission declines to adopt

[1] We note that Walbro filed a petition for review that states Walbro no longer asserts the '547 patent. *See* Complainant Walbro's Petition for Review (Aug. 22, 2019) ("WPet.") at 1. In addition, Walbro's petition does not include any evidence related to the '547 patent and addresses only the '424 patent, '254 patent, and '173 patent. *See, e.g., id.* at 5-7, 11-12, 14-19. Under Commission Rule 210.43(b) "[a]ny issue not raised in a petition for review will be deemed to have been abandoned by the petitioning party and may be disregarded by the Commission . . . ." 19 C.F.R. § 210.43(b). Therefore, Walbro has abandoned the asserted claims of the '547 patent by failing to seek Commission review, and this Opinion does not summarize

certain statements in the ID's analysis of the domestic industry arguments that may be interpreted as requiring a minimum investment threshold or suggesting a focus on facts other than the patented articles. Because respondents are entitled to summary determination that Walbro failed to satisfy the domestic industry requirement, the Commission finds that respondents have not violated section 337 with respect to the Asserted Patents.

I. BACKGROUND

The Commission instituted this investigation on July 20, 2018, based on a complaint filed by Walbro of Tucson, Arizona. 83 *Fed. Reg.* 34614-615 (July 20, 2018). The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain carburetors and products containing such carburetors by reason of infringement of one or more claims of the '424 patent, the '254 patent, the '173 patent, and U.S. Patent Nos. 6,439,547 ("the '547 patent") and 6,540,212.[2] *Id.* The complaint also alleges that an industry related to articles protected by the Asserted Patents exists in the United States. *Id.* The notice of investigation names thirty-five (35) respondents. *Id.* The Office of Unfair Import Investigations ("OUII") is also a party to the investigation. *Id.*

On June 25, 2019, respondents Amazon.com, Inc. of Seattle, Washington; Cabela's LLC[3] of Sidney, Nebraska; Lowe's Companies, Inc. of Mooresville, North Carolina; Menard, Inc. of

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or review the ID's findings with respect to the '547 patent. *See* WPet. at 1; 19 C.F.R. § 210.43(b)(2); *see also Broadcom Corp. v. U.S. Int'l Trade Comm'n*, 542 F.3d 894, 901 (Fed. Cir. 2008) (finding that an appellant had waived an argument not presented in a petition for review to the Commission).

[2] The Commission terminated U.S. Patent No. 6,540,212 from the investigation on August 5, 2019. Order No. 72 (Aug. 5, 2019), *not reviewed*, Notice (Aug. 22, 2019).

[3] The Commission later terminated Cabela's LLC from the investigation due to settlement. Order No. 75 (Aug. 7, 2019), *not reviewed*, Notice (Aug. 22, 2019).

Eau Claire, Wisconsin; Techtronic Industries Co. Ltd. of Kwai Chung, Hong Kong; The Home Depot, Inc. of Atlanta, Georgia; Thunderbay Products[4] of Clayton, Wisconsin; Tractor Supply Company of Brentwood, Tennessee; Walmart, Inc. of Bentonville, Arkansas; and Zhejiang Ruixing Carburetor Manufacturing Co., Ltd. of Zhejiang, China (collectively, "Respondents") filed a motion seeking summary determination that Walbro failed to satisfy the economic prong of the domestic industry requirement.[5] ID at 1. On July 12, 2019, Walbro opposed the motion.[6] *Id.* OUII did not submit a response to the motion. *Id.*

On August 12, 2019, the ALJ issued the subject ID granting Respondents' motion. *See* ID. For purposes of summary determination, the ID assumes that Walbro's calculations of its investments are correct. *Id.* at 2. The ID analyzes the available evidence[7] for each of the Asserted Patents and calculates the percentages of Walbro's domestic industry investments compared to Walbro's U.S. sales and worldwide sales of the domestic industry products. *Id.* at 5-6. The ID finds that Walbro's investments, when considered in context, are not significant or substantial. *Id.* at 5-7.

On August 22, 2019, Walbro filed a petition for review of the ID. *See* WPet. As noted above, Walbro abandoned the asserted claims of the '547 patent. *Id.* at 1; 19 C.F.R.

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[4] The Commission later terminated Thunderbay Products from the investigation based on a stipulated consent order and entry of a consent order. Order No. 65 (July 10, 2019), *not reviewed*, Notice (July 23, 2019).

[5] Respondents' Motion for Summary Determination That Walbro Fails to Satisfy the Domestic Industry Economic Prong and Memorandum of Points and Authorities Supporting the Motion (June 25, 2019) ("Resp. Mem.").

[6] Complainant Walbro's Opposition to Respondents' Motion for Summary Determination That Walbro Fails to Satisfy the Domestic Industry Prong (July 12, 2019) ("WOpp."); Walbro's Responses to Respondents' Statement of Undisputed Facts (July 12, 2019) ("Walbro's Responses to SUF").

[7] The ID notes that discovery is closed and, therefore, Walbro cannot provide additional evidence. ID at 5.

§ 210.43(b)(2). On August 29, 2019, Respondents and OUII both filed responses to Walbro's petition for review.[8]

II. LEGAL STANDARDS

A. Standard of Review of the ID

The Commission may review an ID either upon petition by one of the parties or on its own motion. *See* 19 C.F.R. §§ 210.43, 210.44. The Commission will grant a petition for review, in whole or in part, where it appears:

(i) that a finding or conclusion of material fact is clearly erroneous;

(ii) that a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or

(iii) that the determination is one affecting Commission policy.

19 C.F.R. § 210.43(b)(1), 210.43(d)(2).

The Commission's review will encompass those issues for which at least one participating Commissioner has voted for review. *See* 19 C.F.R. § 210.43(d)(3). Any issue that is not raised in a petition for review is deemed to have been abandoned by the petitioning party and may be disregarded by the Commission, unless the Commission chooses to review the issue on its own initiative. *See* 19 C.F.R. § 210.43(b)(2).

Once the Commission determines to review an initial determination, its review is conducted *de novo*. *Certain Polyethylene Terephthalate Yarn and Prods. Containing Same*, Inv. No. 337-TA-457, Comm'n Op. at 9 (June 18, 2002). Upon review, the "Commission has 'all the powers which it would have in making the initial determination,' except where the issues are

[8] Respondents' Opposition to Complainant's Petition for Review (August 29, 2019) ("Resp. Opp."); Response of the Office of Unfair Import Investigations to Complainant Walbro, LLC's Petition for Review (August 29, 2019) ("IAResponse").

limited on notice or by rule." *Certain Flash Memory Circuits and Prods. Containing Same,* Inv. No. 337-TA-382, USITC Pub. 3046, Comm'n Op. at 9-10 (July 1997) (quoting *Certain Acid-Washed Denim Garments and Accessories,* Inv. No. 337-TA-324, Comm'n Op. at 5 (Nov. 1992)). Commission practice in this regard is consistent with the Administrative Procedure Act. *Certain EPROM, EEPROM, Flash Memory, and Flash Microcontroller Semiconductor Devices and Prods. Containing Same,* Inv. No. 337-TA-395, Comm'n Op. at 6 (Dec. 11, 2000) ("*EPROM*"); *see also* 5 U.S.C. § 557(b).

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). Further, the Commission "may take no position on specific issues or portions of the initial determination," and "may make any findings or conclusions that in its judgment are proper based on the record in the proceeding." *Id.* This rule reflects the fact that the Commission is not an appellate court, but is the body responsible for making the final agency decision. On appeal, only the Commission's final decision is at issue. *See Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1349 (Fed. Cir. 2010); *EPROM* at 6 (citing *Fischer & Porter Co. v. U.S. Int'l Trade Comm'n*, 831 F.2d 1574, 1576-77 (Fed. Cir. 1987)).

B. Standards for Summary Determination

Under Commission Rule 210.18, summary determination "shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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(b); *see also DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Wenger Mfg, Inc. v. Coating Machinery Systems, Inc.*, 239 F.3d 1225, 1231 (Fed. Cir. 2001). "[I]n deciding a motion

for summary judgment, 'the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Liebel-Flarsheim Co. v. Medrad, Inc.*, 481 F.3d 1371, 1377 (Fed. Cir. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

A party moving for summary determination "has the initial responsibility of identifying the legal basis of its motion, and of pointing to those portions of the record that it believes demonstrate the absence of a genuine issue of material fact." *See Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1046 (Fed. Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). A respondent seeking summary determination that a complainant cannot establish that its investments and activities are sufficient to satisfy the domestic industry requirement may meet its initial burden "either by providing evidence that would preclude a finding" that the complainant's investments are significant or substantial "or by showing that the evidence on file fails to establish a material issue of fact essential to" the complainant's case. *Cf. Novartis*, 271 F.3d at 1046 (discussing the legal standards for summary judgment); *see also* 19 U.S.C. § 1337(a)(3) (requiring "significant" or "substantial" investments or employment). Once the respondent "has made this showing, the burden shifts to the nonmovant [(*i.e.*, the complainant)] to designate specific facts showing that there is a genuine issue for trial." *Id.* (citing *Celotex*, 477 U.S. at 324).

The trier of fact should "assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial." *EMI Group North America, Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998). "In other words, '[s]ummary judgment is authorized when it is quite clear what the truth is,' [citations omitted], and the law requires judgment in favor of the movant based upon facts

not in genuine dispute." *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993).

C. The Domestic Industry Requirement

Under Commission precedent, the domestic industry requirement of section 337 consists of an "economic prong" and a "technical prong." *See, e.g., Alloc, Inc. v. Intl Trade Comm'n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). To satisfy the technical prong, a complainant must show that its products practice the asserted patents. *See Crocs, Inc. v. Int'l Trade Comm'n*, 598 F.3d 1294, 1307 (Fed. Cir. 2010) (discussing 19 U.S.C. § 1337(a)(2)).

The economic prong of the domestic industry requirement is satisfied when it is determined that sufficient economic activities and investments set forth in subparagraphs (A), (B), or (C) of section 337(a)(3) have taken place or are taking place with respect to the articles protected by the asserted patent. *Certain Variable Speed Wind Turbines & Components Thereof*, Inv. No. 337-TA-376, Comm'n Op. at 21 (Nov. 1996) ("*Wind Turbines*").

Section 337(a)(3) provides that:

> [A]n 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). Satisfaction of any one subparagraph is sufficient to meet the domestic industry requirement. *Wind Turbines*, Comm'n Op. at 15.

The Federal Circuit has clarified that "qualitative factors alone are insufficient to show 'significant investment in plant and equipment' and 'significant employment of labor or capital' under prongs (A) and (B) of the § 337 domestic industry requirement." *Lelo Inc. v. Int'l Trade*

Comm'n, 786 F.3d 879, 885 (Fed. Cir. 2015). There is no threshold monetary amount that a complainant must meet. *See Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 25-26 (May 16, 2008) ("*Stringed Musical Instruments*") ("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."); *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm'n Op. at 39 (Aug. 1, 2007) ("*Male Prophylactics*") ("[T]here is no mathematical threshold test."). Rather, the 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) ("*Printing Devices*"). "The determination takes into account the nature of the investment and/or employment activities, the industry in question, and the complainant's relative size." *Id.* Thus, evidence to "substantiate the significance of [a complainant's] activities with respect to the [domestic industry articles protected by the asserted patent]" is required. *Certain Solid State Storage Drives, Stacked Elecs. Components, & Prods. Containing Same*, Inv. No. 337-TA-1097, Comm'n Op. at 33 (June 29, 2018).

As the Federal Circuit noted in *Lelo*, the Commission "[has] found that the word 'significant' denote[s] 'an assessment of the *relative* importance of the domestic activities.'" *Lelo*, 786 F.3d at 883-84 (emphasis added) (quoting *Certain Concealed Cabinet Hinges and Mounting Plates,* Inv. No. 337-TA-289, 1990 WL 10608981, Comm'n Op. at 11 (Jan. 8, 1990) ("*Cabinet Hinges*")). In *Certain Optoelectronic Devices*, the Commission stated the following regarding the context of a complainant's domestic expenditures:

> As we held in *Certain Printing and Imaging Devices*, 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 Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm'n Op. at 27 (Feb. 17, 2011) ("*Printing Devices*") (quoting *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm'n Op. at 39 (Aug. 1, 2007)). There are a number of factors and approaches taken by the Commission in making this determination. For example, comparing complainant's domestic expenditures to its foreign expenditures is one of the possible factors that the Commission could but, contrary to Respondents' argument, is not required to consider. *Id.* at 27-28. *Accord, Certain Encapsulated Integrated Circuit Devices and Products Containing Same*, Inv. No. 337-TA-501, Comm'n Op. at 33 (Apr. 4, 2014).

Certain Optoelectronic Devices for Fiber Optic Communications, Inv. No 337-TA-860, Comm'n Op. at 18-19 (May 9, 2014). Beyond using sales for allocating the absolute amount of investments, the Commission has also compared those investments to sales of protected articles in order to consider the context of a complainant's domestic industry investments among other evidence. *See, e.g.*, *Certain Automated Teller Machines, ATM Modules, Components Thereof and Products Containing Same*, Inv. No. 337-TA-972, Final ID at 190-91 (Feb. 1, 2017) (public version) ("*Automated Teller Machines*"), *unreviewed on '010 patent findings*, Notice at 3 (Jan. 30, 2017) (finding low quantitative proportion of field service labor investments compared to sales revenues and manufacturing costs, and that qualitative evidence weighs against the significance of the investments in view of discontinuation of the module that practices the '010 patent product, decline in the number of in-service ATMs using the module, and that the service performed doesn't relate to the '010 patent); *Certain Table Saws Incorporating Active Injury Mitigation Technology and Components Thereof*, Inv. No. 337-TA-965, Order No. 10, ID at 17 (Apr. 27, 2016) (public version) (finding quantitative significance of labor costs based on the fact that these costs account for 11 percent to 19 percent of complainant's gross sales, and that nearly half of all labor costs supported R&D, in addition to qualitative significance of the claimed labor to continued development, improvement, production and sales of DI products), *not reviewed*, Notice (Apr. 21, 2016).

In *Lelo*, the Federal Circuit noted that the Commission found the complainant's investments were quantitatively "modest," which the court took to mean "insignificant." *Lelo*, 786 F.3d at 885. The court agreed with the Commission's finding that investment and employment under subparagraphs (A) and (B) were modest and insignificant, but said the Commission erred when it "disregarded the quantitative data to reach its domestic industry finding based on qualitative data." *Id.* "Qualitative factors cannot compensate for quantitative data that indicate insignificant investment and employment." *Id.* It then reversed the Commission's determination and held that the complainant did not satisfy the domestic industry requirement of section 337. *Id.*

III. WALBRO'S DOMESTIC INDUSTRY EVIDENCE

For each of the Asserted Patents, Walbro claims the existence of a domestic industry under section 337(a)(3), subparagraphs (A), (B), and (C). WPet. at 18-20; *see also* WOpp. at 13-19. As the ID notes, for purposes of summary determination, it assumes that Walbro's calculations of its investments are correct. ID at 2; *see also Liebel-Flarsheim*, 481 F.3d at 1377. Further, for purposes of their Motion for Summary Determination, Respondents do not take issue with the ID's assumption that Walbro's domestic industry investments are correct and properly allocated. Resp. Opp. at 16.

Walbro claims 193 carburetors are part of its domestic industry ("DI carburetors"), and Walbro further alleges that each of the DI carburetors practices only one patent. Resp. Mem. at 2; WOpp. Ex. B; Walbro's Responses to SUF at ¶ 9; *see also* Resp. Mem. at 3 (citing Resp. Mem. Ex. E at 1008:16-20).[9]

[9] A carburetor is a component that mixes air and fuel in a small gasoline engine. *See* Compl. at 18. Carburetors are used in a wide variety of products, such as chainsaws, leaf

Walbro's domestic industry allegations rely on both quantitative and qualitative factors. WOpp. at 9-19; WPet. at 18-20. Walbro calculates its domestic industry investments using a sales-based allocation for each Asserted Patent. WPet. at 12-20; Resp. Mem. at 3-7; *see also* ID at 4-7. Walbro's sales-based allocations are calculated "by determining the percentage of revenue attributed to the domestic industry products from FY2010 to FY2018 compared to Walbro's total revenue over that same period."[10] Walbro's Responses to SUF ¶ 15; WOpp. Ex. A (Van Allen Declaration) at 3-4; WPet. at 12-20. Walbro then multiplied these percentages by Walbro's aggregated expenses to calculate an allocated investment amount for each patent. *Id.*

Walbro's investments include employee salaries, equipment expenses, and facility expenses. WPet. at 12-20; Resp. Mem. at 3-7; *see also* ID at 4-7. While Respondents do not take issue with the ID's assumption that Walbro's calculations of its investments are correct, they "submit that Walbro's domestic industry allegations are actually far less significant than those already found insignificant" in the ID. Resp. Opp. at 16. Respondents' motion argues that Walbro's investments are too attenuated from the DI carburetors and improperly include unrelated investments. Resp. Mot. at 11-16. For example, Respondents argue that for Walbro's equipment expenses, Walbro includes purchases made in 1968 and through the intervening decades, but Walbro allegedly does not take into account any depreciation of the equipment. *Id.* at 5; *see also* WOpp. Ex. A. However, for purposes of reviewing the ID's grant of summary determination in this investigation, the Commission will accept, *arguendo*, that all of Walbro's

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blowers, law trimmers, electricity generators, and dirt bikes. *Id.*; *see also* Notice of Institution of Investigation.

[10] In other words, Walbro divided the total sales revenue for articles allegedly protected by the Asserted Patents by Walbro's total revenue for all products in order to obtain an allocation percentage for each Asserted Patent. Walbro's Responses to SUF ¶ 15; WOpp. Ex. A (Van Allen Declaration) at 3-4; WPet. at 12-20.

claimed expenses are cognizable investments pursuant to Federal Circuit precedent. *See Liebel-Flarsheim*, 481 F.3d at 1377.

Walbro also includes expenditures relating to its calibration activities in both its quantitative factors, including investment dollar amounts under subparagraphs (A), (B), and (C), and its qualitative factors. WOpp. at 12, 13, 17, 19; *see also id.* at 9-12; Walbro's Responses to SUF ¶¶ 52-70.[11] For example, in Walbro's petition, several headings in the section regarding Walbro's quantitative investments include calibration activities, such as the following:

- Walbro's **Calibration Activities** Require Significant Investment in Plant and Equipment Under Section 337(a)(3)(A)
- Walbro's **Calibration Activities** Require Significant Investment in Labor Under Section 337(a)(3)(B)
- Walbro's **Calibration Activities** Require Significant Investments in Exploitation of Engineering, Research & Development Under Section 337(a)(3)(C)

WPet. at 11-17 (emphasis added). As further described below, Walbro's investments in subparagraphs (A), (B), and (C) as stated in Chart A (WOpp. at 18; ID at 4) include amounts of quantitative investments in calibration activities. *See* WOpp. at 13, 16-17, 19; WPet. at 12-17, 19 ("a significant portion of Walbro's domestic investments and activities relate to the carburetor calibration work").

[11] Walbro contends that "[c]alibration is the iterative process by which Walbro's engineers develop and adjust the prototypes for a carburetor are adjusted (sic), often dozens of times, until they are able to meet specific criteria of emissions compliance and satisfactory engine performance over a wide range of engine speeds, temperatures, and differing altitudes at which the engines operate." WPet. at 9. Walbro further argues that "calibration is vital to the development and manufacturing of carburetors" and is allegedly necessary to produce a saleable product. *Id.* at 9-11.

Chart A[12] (shown below) summarizes Walbro's domestic industry investments for each Asserted Patent according to subparagraphs (A), (B), and (C):

Chart A: Walbro's Domestic Industry Investments

Sections 337(a)(3)(A), (B), and (C)	'424 Patent	'173 Patent	'254 Patent
Plant & Equipment	[redacted]	[redacted]	[redacted]
Labor & Capital	[redacted]	[redacted]	[redacted]
Engineering, Research and Development	[redacted]	[redacted]	[redacted]
TOTAL	[redacted]	[redacted]	[redacted]

WPet. at 5, 18; ID at 4. Walbro's opposition argues the allegedly relevant domestic expenditures "are significant in absolute terms." *Id.* Yet, other than the sales-based allocation of its investments, Walbro fails to provide any other context for its domestic industry investments. WPet. at 18-20; Resp. Mem. at 3-7; *see also* ID at 4-7.

Walbro also relies on qualitative factors, such as the declining carburetor industry and the "essentiality" of its calibration activities. WPet. at 19-20, 26-31; WOpp. at 19-20; ID at 7. However, Walbro did not provide any comparisons or explanations of added value for its alleged qualitative factors. *Id.*

Walbro's opposition also provides Walbro's U.S. sales of DI carburetors and worldwide sales of DI carburetors. WOpp. at 16, 19-20; Walbro's Responses to SUF at ¶ 37 (citing WOpp. Ex. A, VanAllen Decl. at ¶¶ 7-10). From 2010 to 2018, Walbro's global sales of all products was [redacted]. *Id.* In that same time period, Walbro's global sales of DI carburetors was

[12] This opinion uses the charts in Walbro's petition for consistency. *See* WPet. at 5-7, 18; *see also* ID at 4-6. In addition, as noted in Walbro's petition, the financial data for the '547 patent, which appears in the corresponding tables in the ID, has been deleted in the tables in Walbro's petition. WPet. at 5, n.1.

[redacted] in the original equipment manufacturer market and [redacted] in the aftermarket. *Id.* Walbro allocated its global sales of DI carburetors for that time period as follows:

Chart D: Global Sales of DI Carburetors

'424 Patent	'173 Patent	'254 Patent
[redacted]	[redacted]	[redacted]

WPet. at 6; WOpp. Ex. A (VanAllen Decl.) at ¶ 8; *see also* ID at 6. From 2010 to 2018, Walbro's total U.S. sales of DI carburetors was [redacted], which it allocated to each Asserted Patent as follows:

Chart B: U.S. Sales of DI Carburetors

'424 Patent	'173 Patent	'254 Patent
[redacted]	[redacted]	[redacted]

WPet. at 5; WOpp. Ex. A (VanAllen Decl.) at ¶ 8; *see also* ID at 5. However, Walbro does not use the DI sales information, or any other information, to provide further context for its domestic industry investments. *Id.*

IV. ANALYSIS

The Commission affirms the ID's conclusion that respondents are entitled to summary determination as a matter of law that Walbro's alleged investments[13] in the articles protected by the Asserted Patents are insignificant and insubstantial. However, because the ID includes certain statements that could be misinterpreted as implementing new legal standards, the Commission declines to adopt certain statements in the ID's analysis, as discussed below.

[13] For purposes of summary determination, the ID assumes that Walbro's calculations of its investments are correct. ID at 2. As noted above, Respondents do not take issue with the ID's assumption for purposes of summary determination. Resp. Opp. at 16.

A. Walbro's Alleged Investments are Insignificant and Insubstantial

The ID recognizes that "it is inappropriate to rely on the numbers [in Chart A] in their absolute terms" and correctly finds that Walbro's investments must be viewed in their proper context. *Id.* at 4. The ALJ evaluated the available evidence and found two pieces of relevant data to provide context as to whether Walbro's domestic industry investments are "significant" or "substantial": (1) Walbro's U.S. sales of the DI carburetors; and (2) Walbro's worldwide sales of the DI carburetors. *Id.* at 5-6.

The ID first analyzes the quantitative factors. *Id.* at 3-7. For each of the asserted patents, the ID calculates: (1) the percentage of Walbro's domestic industry investments compared to its U.S. sales of DI carburetors (Chart C); and (2) the percentage of Walbro's domestic industry investments compared to its worldwide sales of DI carburetors (Chart E). *Id.* at 3-7.

Chart C: Percentage of U.S. Investments Compared to U.S. Sales

	'424 Patent	'173 Patent	'254 Patent
Plant & Equipment	[redacted]	[redacted]	[redacted]
Labor & Capital	[redacted]	[redacted]	[redacted]
Engineering, Research and Development	[redacted]	[redacted]	[redacted]

Chart E: Percentage of U.S. Investments Compared to [Worldwide] Sales[14]

	'424 Patent	'173 Patent	'254 Patent
Plant & Equipment	[redacted]	[redacted]	[redacted]
Labor & Capital	[redacted]	[redacted]	[redacted]
Engineering, Research and Development	[redacted]	[redacted]	[redacted]

[14] There is a typo in the ID's title of Chart E. ID at 6. The title in the ID is, "Chart E: Percentage of U.S. Investments Compared to U.S. Sales." *Id.* However, from the context of the analysis, it is clear that Chart E actually shows a comparison to worldwide sales of DI carburetors. *Id.*

See ID at 5-6; WPet. at 6-7. The ID uses sales of DI carburetors to provide context to the absolute values of Walbro's investments. *Id.* at 4-6 (citing WOpp. at 18-19; Walbro's Responses to SUF ¶ 37). The ID notes that Walbro does not provide, or appear to possess, evidence of its foreign-related investments for the Asserted Patents. *Id.* at 3, 5 n.5.

Regarding Chart C (percentage of U.S. investments compared to U.S. sales), the ID finds that the majority of Walbro's investments are [redacted] of its U.S sales of DI carburetors. ID at 5. The ID finds that "such investments[15] are not significant or substantial." *Id.* at 6. The ID further notes that only Walbro's investments in labor and capital (for subparagraph (B)) are [redacted] as compared to U.S. sales of DI carburetors. ID at 6. The ID finds these investments in labor and capital are not significant, however, when viewed in light of Walbro's worldwide sales of DI carburetors. *Id.*

Chart E lists the calculated percentages of Walbro's domestic investments compared to the worldwide sales of DI carburetors. ID at 6-7. The ID finds that the labor and capital percentages for products protected by the '424 patent, '173 patent, and '254 patent are [redacted] of worldwide sales of DI carburetors. *Id.* at 7.

Based on the information outlined above, the ID finds that Walbro's investments are neither "significant" nor "substantial." *Id.* at 6-7. The ID declines to address the qualitative factors Walbro raised because it had already concluded that Walbro's investments were quantitatively insignificant. *Id.* at 7.

[15] The ID appears to be referring to Walbro's investments in "Plant & Equipment" and "Engineering, Research and Development," because those investments comprise [redacted] of U.S. sales and the next paragraph specifically states, "[o]nly Walbro's investments in labor and capital are [redacted]." ID at 5-6.

As discussed below, we agree with the ID's conclusion that Walbro's domestic investments with respect to the Asserted Patents are not significant or substantial when considered in light of the only contextual information in the record, *i.e.*, Walbro's U.S. sales and worldwide sales of DI carburetors.

1. Walbro's Reliance on Absolute Values of Investments Without Context is Insufficient

Walbro's reliance on the numerical amounts, which the ID refers to as "absolute values," of its domestic investments fails to evaluate significance based on any context of Walbro's operations, the marketplace, or the industry in question. *See* ID at 3-5. The Commission must assess the *relative* importance of the domestic activities. *Lelo*, 786 F.3d at 883; *Cabinet Hinges*, Comm'n Op. at 32. Here, the ID's comparison of Walbro's U.S. and global sales of the DI carburetors provides some context to analyze whether Walbro's investments are significant or substantial. *Id.*; *see also* ID at 3-7.

Walbro used a sales-based allocation to determine its domestic industry investments as to each patent. WOpp. at 13-17. The use of a sales-based allocation is one acceptable way to determine the numerical value of domestic industry investments for each Asserted Patent. *See* 19 U.S.C. § 1337(a)(3); *Certain Mobile Device Holders and Components Thereof*, Inv. No. 337-TA-1028, Comm'n Op. at 18-19 (Mar. 22, 2018). However, Walbro has cited no case in which the Commission determined the quantitative significance of a complainant's domestic industry investments based solely on the absolute value of those investments. *See* WPet.; *see also* *Certain Collapsible Sockets for Mobile Electronic Devices and Components Thereof*, Comm'n Op. at 20, n.13 (July 9, 2018) ("*Collapsible Sockets*") (noting that OUII pointed to no instances in which the Commission has determined the quantitative significance of each of the asserted

investments based solely on the absolute values of investments determined using a sales-based allocation).

As noted above, the Commission has instead sought to place the value of domestic investments in the context of the relevant marketplace, such as by comparing a complainant's domestic expenditures to its foreign expenditures or considering the value added to the product from a complainant's activities in the United States. Here, it was appropriate for the ID to consider how Walbro's U.S. expenditures are attributable to its protected articles compared to its U.S. and worldwide sales of these products, and to decline to find quantitative significance based solely on the absolute value of the domestic industry investments devoid of any context. *See* ID at 3-4.

2. Walbro Failed to Provide Any Evidence Other Than Sales of DI Carburetors to Use for Context

As prior Commission opinions recognize, "the magnitude of the investment cannot be assessed without consideration of the nature and importance of the complainant's activities to the patented products in the context of the marketplace or industry in question." *Printing Devices*, Comm'n Op. at 31. For example, in *Printing Devices*, the Commission found complainant's employment of labor devoted to the service and repair of its domestic industry products was insufficient to support its claim that those expenses were "significant" because it failed to show a comparison of its domestic industry activities with its foreign activities. *Id.* at 32. The Commission found the complainant in that case also failed to submit "evidence to show how its domestic activities add any value to the completed saleable product, or to demonstrate the nature and relative importance of its activities to the articles protected by the patent (in view of the relevant industry or marketplace)." *Id.*

The Commission has considered, among other things, the value added to the article in the United States by the domestic activities. *See, e.g., Cabinet Hinges*, Comm'n Op. at 32 ("'significance' as used in the statute denotes an assessment of the relative importance of the domestic activities"). The Commission has also assessed the relative domestic contribution to the protected article by comparing complainant's product-related domestic activities to its product-related foreign activities. *See, e.g., Male Prophylactics*, Comm'n Op. at 43 (finding that complainant's undertakings, measured on a comparative basis, created meaningful value added to the unfinished imported product). Depending upon the particular company, industry, and marketplace in question, other contextual facts could be relevant in assessing whether the domestic industry investments and activities with respect to the protected articles are quantitatively significant or substantial.

In this case, Walbro failed to submit evidence or arguments to substantiate the nature and significance of its domestic activities with respect to the DI carburetors. *See generally* WOpp.; WPet. Walbro failed to provide context of the company's operations, the marketplace, or the industry in question necessary to understand whether the value of its domestic activities is significant or substantial. *Id.* Nor does Walbro demonstrate whether and to what extent its domestic activities add value to its imported products. *Id.* Walbro further failed to provide any evidence related to its foreign activities. ID at 3.

Walbro's failure to submit such evidence and arguments means the Commission's assessment of quantitative significance or substantiality is limited to the only available evidence of record – Walbro's sales of DI carburetors.

3. Walbro's Sales of the DI Carburetors Provide Context to Assess Whether Walbro's Domestic Industry Investments are Significant or Substantial

In its petition, Walbro argues that the "expenditures [in Chart A] are quantitatively significant" and "[t]he expenditures are also quantitatively significant relative to Walbro's overall operations." WPet. at 18. Walbro then cites the U.S. sales of DI carburetors to allegedly "show the relative importance of Walbro's expenditures as they are directly tied to the development and production of carburetors practicing the asserted patents." *Id.* Thus, Walbro does not dispute that the U.S. sales of DI carburetors are useful measures by which the "relative importance" or "significance" of Walbro's investments in the domestic industry can be evaluated. *Id.*

The Commission has previously used sales of protected articles in order to consider the context of a complainant's domestic industry investments. *See, e.g., Automated Teller Machines*, Final ID at 190-91 (public version) (proportion of labor to revenue for domestic industry product was too low and not quantitatively significant); *Certain Table Saws*, Inv. No. 337-TA-965, Order No. 10, ID at 17 (public version) (finding quantitative significance of labor costs amounting to 11 percent to 19 percent of complainant's gross sales). Further, Walbro's petition recognizes "the word 'significant' denote[s] '***an assessment of the relative importance of the domestic activities***,'" yet Walbro failed to provide such an assessment. WPet. at 23 (emphasis in original) (citing *Lelo*, 786 F.3d at 883). In fact, it was not until the ID that any assessment of the domestic investments was conducted, and such assessment was the result of the ALJ's own review of the available evidence.

In the record of this investigation, Walbro's U.S. and worldwide sales of DI carburetors provide the only option with which to analyze the significance of Walbro's domestic investments. The ID's calculated percentages of Walbro's investments to its sales of DI

carburetors are found in Charts C and E in the ID. ID at 5-6. As noted above, the ratios of Walbro's labor and capital investments with respect to the '424, '173, and '254 patents to its U.S. sales of DI carburetors peak [redacted], and the ratios of its domestic investments to worldwide sales of DI carburetors peak [redacted].[16] *Id.*

Walbro also attempts to rely on the "TOTAL" amount of investments for each Asserted Patent by adding together the three investment values for subparagraphs (A), (B), and (C). WPet. at 18. However, the total of the amounts in the three subparagraphs represents double- and triple-counting of investments included in multiple subparagraph categories. WOpp. at 13-17; WPet. at 12-19. For example, Walbro includes certain capital investments (*see* WOpp. at 13, first chart) as part of its investments under each of subparagraphs (A), (B), and (C). *Id.* at 13-17; WPet. at 12-19. Thus, Walbro's reliance on the total amounts is improper.

4. The ID Did Not Ignore Walbro's Calibration Activities in Considering its Quantitative Factors

Walbro claims the ID fails to properly consider its calibration activities in its quantitative analysis. WPet. at 23-24. However, Walbro's investments as stated in Chart A (WOpp. at 18; ID at 4) include amounts of quantitative investments in calibration activities. *See* WOpp. at 13, 16-17, 19; WPet. at 12-17, 19 ("a significant portion of Walbro's domestic investments and activities relate to the carburetor calibration work").[17]

For instance, Walbro's investments in "facilities and equipment" include investments for "engineering, R&D, and *calibration activities*." *Id.* at 17 (emphasis added). Walbro's estimate

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[16] As stated above, Walbro's petition for review states that it no longer asserts the '547 patent in this investigation.

[17] Walbro relies on its domestic industry investments related to calibration as both a quantitative and qualitative factor under subparagraphs (A), (B), and (C). WOpp. at 12, 13, 17, 19; *see also id.* at 9-12; Walbro's Responses to SUF ¶¶ 52-70; WPet. at 11-17 (headings describe inclusion of "Calibration Activities").

of square footage in its Cass City, Michigan facility includes areas of the facility used for "engineering, research, development and *calibration*" of DI carburetors. *Id.* (emphasis added). Walbro's total capital investment in equipment at the Cass City facility includes equipment for "engineering, R&D, and *calibration*." *Id.* (emphasis added). Walbro asserts that it "has a group of about [redacted] at the Cass City, Michigan facility, who are responsible for the *calibration work* for those customers having a primary place of business in North America and parts of Europe." WOpp. Ex. A, VanAllen Decl. at ¶ 56. Walbro includes costs associated with the [redacted] in its labor and capital investments (subparagraph B) and engineering, research, and development investments (subparagraph C). WOpp. at 11, 14-19. Walbro's argument, therefore, is inconsistent with the record evidence.

B. The ID Did Not Err in Declining to Consider Walbro's Qualitative Factors

Walbro argues that the ID failed to give proper weight to the qualitative evidence cited by Walbro in support of its arguments that its economic activities in the United States are "significant." WPet. at 2-3, 26-28. Walbro asserts that *Lelo* does not stand for the proposition that the qualitative analysis is unnecessary unless a complaint's domestic investments are quantitatively significant. *Id.* at 2-3. Walbro contends that *Lelo* simply requires "quantitative analysis to determine whether an investment is significant, and prohibit[s] the sole reliance on qualitative evidence ***in the absence*** of quantitative data." WPet. at 26 (emphasis in original). Walbro argues that the ID's approach would mean that qualitative factors regarding the significance of domestic industry activities would never factor into the analysis, since if investments are determined to be insignificant based on quantitative factors, qualitative factors will not be considered. *Id.* at 27. Similarly, Walbro further argues that if investments are determined to be quantitatively significant, there would be no point in going on to consider qualitative factors. *Id.* at 27-28.

We disagree that the ID errs in declining to evaluate Walbro's qualitative factors, given the ID's quantitative assessment and conclusion that Walbro's investments are insignificant. The Federal Circuit's decision in *Lelo* found that once the Commission had concluded based on a quantitative assessment that a complainant's investments were "insignificant," the Commission could not then disregard that conclusion and use qualitative factors to compensate for the quantitative data that indicated that the investments were not significant. *Lelo,* 786 F.3d at 885. As such, the ID correctly concludes that due to its finding that Walbro's investments are insignificant based on a quantitative assessment, there is no need to evaluate Walbro's cited qualitative factors.

With regard to Walbro's argument that the ID's approach would essentially render qualitative factors useless in assessing whether investments are significant, we disagree that the situation is binary, as Walbro asserts. There may be facts and circumstances where, based on an assessment of quantitative information, it remains unclear whether a complainant's investments are significant or not. In such cases, resorting to qualitative factors that may indicate significance could be relevant to the evaluation. We do not view the Federal Circuit in *Lelo* as precluding the Commission from considering qualitative factors; rather it precludes the Commission from relying on qualitative factors alone to support a finding that investments are significant when quantitative factors show that the complainant's investments are insignificant. In other words, "qualitative factors cannot compensate for quantitative factors that indicate insignificant investment." *Lelo*, 786 F.3d at 885.

The Commission disagrees with Walbro's interpretation of *Lelo's* holding that "*Lelo* states only that a complainant cannot rely on qualitative evidence alone to satisfy the economic prong, ***in the absence*** of quantitative evidence." WPet. at 3 (emphasis in original); *see Lelo*, 786

F.3d at 885; *see also* Resp. Opp. at 10-11; IAResponse at 8-10. There was no absence of quantitative evidence in *Lelo*. *Lelo*, 786 F.3d at 885. Rather, the Federal Circuit noted the Commission's observation that the complainant's investments and employment under subparagraphs (A) and (B) were "quantitatively 'modest,'" which it took to mean "insignificant." *Id.* The Federal Circuit also specifically held that "qualitative factors alone are insufficient." *Id.*

Indeed, the Commission and the Federal Circuit considered evidence as to both quantitative and qualitative factors in arriving at their decisions. 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). Similarly, in this case, the ID finds that the evidence of record leads to the conclusion that Walbro's investments are insignificant under the statute. Qualitative evidence could not alter this conclusion, and thus need not be considered. This is not to say that qualitative evidence would be irrelevant or bear no weight in all cases, as Walbro contends.

In its petition, Walbro cites several Commission opinions and an order that allegedly support its interpretation of *Lelo*. WPet. at 26-27. As discussed below, each of the cited cases turn on the individual facts presented therein and none supports the conclusion that consideration of qualitative factors are required when quantitative factors show that the investments are undoubtedly insignificant. *See id.*; *see also* Resp. Opp. at 14-15.

For example, Walbro claims that in *Collapsible Sockets* the Commission allegedly determined that, even after *Lelo*, qualitative evidence may still be relied upon to support a finding that a complainant's investments are significant. WPet. at 26 (citing *Collapsible Sockets,* Comm'n Op. at 20). In *Collapsible Sockets*, the Commission considered both qualitative and

quantitative evidence of record. The Commission first found that "[b]oth the absolute and percentage amounts are quantitatively significant" before confirming that the complainant's "qualitative evidence, while not sufficient on its own, supports a finding of significant employment of labor and capital." *Collapsible Sockets*, Comm'n Op. at 20 (emphasis added). The qualitative evidence supported finding the same conclusion as the quantitative analysis, and the Commission specifically noted that the qualitative evidence would not be sufficient on its own. *Id.*

Walbro's reliance on *LED Lighting* is similarly misplaced. WPet. at 26 (citing *Certain LED Lighting Devices, LED Power Supplies, and Components Thereof*, Inv. No. 337-TA-1081, Order No. 54 (July 24, 2018) ("*LED Lighting*"). In *LED Lighting*, the complainant was a large multi-national corporation that produced detailed quantitative evidence that was allocated according to patent and specific activity. *LED Lighting*, Order No. 54 at 7. The evidence provided enough context such that summary determination of no domestic industry was denied. *Id.* Further, in its final opinion in *LED Lighting*, the Commission took no position on whether the complainants satisfied the economic prong of the domestic industry requirement because the Commission found that the complainants failed to show that respondents infringed the asserted patents. *LED Lighting*, Comm'n Op. at 32.

Here, the ID appropriately declines to address Walbro's qualitative factors because Walbro's quantitative investments are insignificant. ID at 4-7; *Lelo*, 786 F.3d at 885. Qualitative factors may be relevant in particular cases but "cannot compensate for quantitative data that indicate insignificant investment and employment." *Lelo*, 786 F.3d at 885.

Walbro's argument that the "declining carburetor industry" should have been considered as a qualitative factor is unconvincing. WPet. at 7. If Walbro makes fewer sales due to a

declining industry but still incurs the same investment costs, then the percentages of its domestic industry investments compared to its sales would increase over time. Walbro did not provide year-by-year information for its investments and never explains how the allegedly "declining carburetor industry" supports its argument that it has made significant or substantial investments in its DI carburetors in the U.S. *See* WPet. at 26-31.

Accordingly, because Walbro's quantitative investments are insignificant and insubstantial, the qualitative factors need not be addressed. *See* ID at 7.

C. The Commission Declines to Adopt a Minimum Threshold Amount or Percentage in Determining the Significance of DI Investments

The ID states, "[t]he [ALJ] was unable to locate any opinion in the past four years in which the Commission has held that an investment amounting to less than 5% of sales qualified as 'significant' or 'substantial.'" ID at 5-6. We believe that the ID uses that percentage not as a threshold, but as confirmation that its conclusion that Walbro's low percentages are insignificant comports with Commission precedent. *Id.*; *see also* Resp. Opp. at 8-10; IAResponse at 3-8. Nonetheless, we find it unnecessary to compare other, unnamed Commission opinions[18] to the analysis in this investigation because the domestic industry requirement is analyzed on a case-by-case basis, including "an examination of the facts in each investigation, the article of commerce, and the realities of the marketplace." *See Male Prophylactic Devices*, Comm'n Op. at 39.

[18] The ID states that "[b]ecause the investment amounts and corresponding percentages are deemed confidential in these opinions, the undersigned cannot cite to any specific opinion to support this statement." ID at 6, n.6.

The ID also states in footnote 4 that, "[i]n order for the word 'significant' to have any meaning at all, [redacted] cannot qualify." ID at 4, n.4.[19] However, to the extent that this statement could be construed as implementing a minimum threshold amount of investment, the Commission does not adopt it. There is no requirement that proof of the economic prong is dependent on a "minimum monetary expenditure." *See Certain Video Displays, Components Thereof and Products Containing the Same*, Inv. No. 337-TA-687, Order No. 20 at 5 (May 20, 2010) (quoting *Stringed Musical Instruments*, Comm'n Op. at 25-26).

Accordingly, the Commission declines to adopt the following statements in the ID:

- "The undersigned was unable to locate any opinion in the past four years in which the Commission has held that an investment amounting to less than 5% of sales qualified as 'significant' or 'substantial.'" (ID at 5-6); and
- "In order for the word 'significant' to have any meaning at all, [redacted] cannot qualify." (ID at 4, n.4).

However, the determination to decline adopting these statements does not change the ultimate result.

D. Analysis of the Economic Prong Uses a Flexible Approach

The ID correctly observes that "context is particularly important" in a domestic industry analysis. ID at 4. However, the ID goes on to state, "[j]ust as the Commission does not penalize a small business for making only small investments (in terms of dollar amounts), large multinational companies should be expected to invest larger dollar amounts in order for their investments to be deemed 'significant' or 'substantial.'" *Id.* We decline to adopt this statement

[19] We note that the statement in footnote 4 relates to Walbro's plant and equipment investments for articles protected by the '547 patent, which Walbro has abandoned in this investigation. ID at 4, n.4; WPet. at 1; 19 C.F.R. § 210.43(b). Yet, regardless of the abandonment of the '547 patent, any requirement of a minimum threshold amount of investment for an asserted patent is improper.

insofar as it does not reflect the flexible approach that is used in analyzing whether a complainant has satisfied the domestic industry requirement.

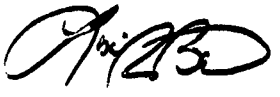
Significance is based on the marketplace conditions regarding the articles protected by the Asserted Patents. The fact that a complainant may have substantial sales of other products is not pertinent to this analysis.

Accordingly, we decline to adopt the ID's statement that "large multinational companies should be expected to invest larger dollar amounts in order for their investments to be deemed 'significant' or 'substantial.'" ID at 4.

V. CONCLUSION

The Commission has determined to affirm, with the modified reasoning detailed above, the ID's conclusion that respondents are entitled to summary determination that Walbro's activities and investments are not significant or substantial to establish the statutory domestic industry requirement with respect to the articles protected by the Asserted Patents. Accordingly, the investigation is terminated with a finding of no violation of section 337.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: October 28, 2019

CERTAIN CARBURETORS AND PRODUCTS CONTAINING SUCH CARBURETORS **Inv. No. 337-TA-1123**

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **Order, Commission** has been served by hand upon the Commission Investigative Attorney, **Vu Bui, Esq.**, and the following parties as indicated, on **October 28, 2019**.

Lisa R. Barton, Secretary
U.S. International Trade Commission
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Washington, DC 20436

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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN CARBURETORS AND PRODUCTS CONTAINING SUCH CARBURETORS	**Inv. No. 337-TA-1123**

ORDER NO. 77: INITIAL DETERMINATION GRANTING RESPONDENTS' MOTION FOR SUMMARY DETERMINATION THAT WALBRO FAILS TO SATISFY THE DOMESTIC INDUSTRY ECONOMIC PRONG AND STAYING THE PROCEDURAL SCHEDULE

(August 12, 2019)

On June 25, 2019, Respondents Amazon.com, Inc., Cabela's LLC,[1] Lowe's Companies, Inc., Menard, Inc., Techtronic Industries Co. Ltd., The Home Depot, Inc., Thunderbay Products,[2] Tractor Supply Company, Walmart, Inc., and Zhejiang Ruixing Carburetor Manufacturing Co., Ltd. (collectively, "Respondents") moved (1123-053) for summary determination that Complainant Walbro, LLC ("Walbro") has failed to satisfy the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3). On July 12, 2019, Walbro opposed the motion. The Commission Investigative Staff did not submit a response.

Summary determination is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a determination as a matter of law. *See* 19 C.F.R. § 210.18(b). In determining whether there is a genuine issue of material fact, "the evidence must be viewed in the light most favorable to the party opposing the motion with doubts resolved in favor of the non-movant." *Crown Operations Int'l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir.

[1] Walbro and Cabela's LLC jointly moved to terminate the Investigation based on a settlement agreement on July 29, 2019. (Mot No. 1123-065.) The undersigned granted this motion. (Order No. 75 (Aug. 7, 2019).)

[2] Thunderbay Products moved to terminate this Investigation based on a consent order, which the undersigned granted. (Order No. 65 (July 10, 2019).) On July 23, 2019, the Commission determined not to review this decision. (Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Thunderbay Products Based on a Consent Order Stipulation (July 23, 2019).)

2002) (citations omitted); *see also Paragon Podiatry Lab., Inc. v. KLM Labs, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993) ("In other words, '[s]ummary judgement is authorized when it is quite clear what the truth is, and the law requires judgment in favor of the movant based upon facts not in genuine dispute.") (citations omitted).

Respondents argue that there are several defects in Walbro's domestic industry analysis.[3] For purposes of summary determination, the undersigned will assume that Walbro's calculations of its investments are correct. This decision therefore addresses only the question of whether Walbro established that its domestic industry investments are "significant" or "substantial."

I. Legal Background

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." 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

[3] Respondents argue that: (1) Walbro's sales-based allocation does not accurately reflect the investment in the domestic industry products; (2) Walbro lacks evidence of investment in employees directly working on domestic industry carburetors; (3) Walbro lacks evidence that equipment, such as water coolers and landscaping costs, relates to the domestic industry products; (4) Walbro's facility investments improperly count areas used for other products; and (5) Walbro has no evidence of a nexus to the asserted patents under sub-prong (C). (Mem. at 12-16.)

employment of labor or capital.'"). There is no threshold amount that a complainant must meet. *See Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 25-26 (May 16, 2008) ("*Stringed Musical Instruments*") ("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.'"); *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm'n Op. at 39 (Aug. 1, 2007) ("[T]here is no mathematical threshold test."). Rather, the 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.*

II. Quantitative Analysis

Respondents argue that Walbro has "failed to demonstrate that its investments are quantitatively significant or substantial." (Mem. at 19.) According to Respondents, "Walbro [provided] limited information that can act as a benchmark." (*Id.*) Specifically, Walbro failed to provide any evidence of its foreign-related investments and employment activities. (*Id.* at 20.)

Respondents also assert that Walbro's investments are quantitatively insignificant when compared to its worldwide revenue for its domestic industry products. Respondents note that "Walbro's alleged plant and equipment investment represents less than [redacted] of its worldwide carburetor revenue and less that [redacted] of its worldwide revenue for all products." (*Id.* at 21-22.)

Walbro argues that its expenditures "are significant in absolute terms." (Opp. at 18.) Walbro contends that its "expenditures are also quantitatively significant relative to Walbro's overall operations." (*Id.*) Walbro notes, for example, that for the '546 patent, its expenses associated with processing the carburetors in the United States amount to [redacted] of sales. (*Id.*)

Walbro's domestic industry investments are as follows:

Chart A: Walbro's Domestic Industry Investments

Sections 337(a)(3)(A) and (B)	'424 Patent	'547 Patent	'173 Patent	'254 Patent
Plant & Equipment	[redacted]	[redacted]	[redacted]	[redacted]
Labor & Capital	[redacted]	[redacted]	[redacted]	[redacted]
Engineering, Research and Development	[redacted]	[redacted]	[redacted]	[redacted]
TOTAL	[redacted]	[redacted]	[redacted]	[redacted]

(Opp. at 18.) As shown in Chart A, Walbro's investments range from [redacted].

The undersigned first finds that it is inappropriate to rely on the numbers in their absolute terms. Walbro's investments include dollar amounts which may appear large,[4] but these numbers must be viewed in their proper context. As the Commission has explained, "[t]he requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant's relative size." *Stringed Musical Instruments*, Comm'n Op. at 25-26. Thus, evidence to "substantiate the significance of [a complainant's] activities with respect to the [domestic industry products]" is required. *Certain Solid State Storage Drives, Stacked Elecs. Components, & Prods. Containing Same*, Inv. No. 337-TA-1097, Comm'n Op. at 33 (June 29, 2018).

Here, context is particularly important. Walbro is a large, multinational company with worldwide revenue totaling [redacted] for the relevant timeframe. (Walbro's Responses to Respondents' Statement of Undisputed Facts at ¶ 3.) Just as the Commission does not penalize a small business for making only small investments (in terms of dollar amounts), large multinational companies should be expected to invest larger dollar amounts in order for their investments to be deemed "significant" or "substantial."

[4] As shown in Chart A, however, Walbro relies on an investment of [redacted] for plant and equipment for the '547 patent. In order for the word "significant" to have any meaning at all, this investment cannot qualify.

Here, there are two pieces of data to provide context for Walbro's investments and Walbro will not have a further opportunity to provide additional evidence.[5] Discovery is closed and exhibits, including witness statements, have been submitted. (Order No. 36.)

The first piece of data is U.S. sales of the domestic industry products. Such sales amount to [redacted] and are allocated by patent as follows:

Chart B: U.S. Sales

'424 Patent	'547 Patent	'173 Patent	'254 Patent
[redacted]	[redacted]	[redacted]	[redacted]

(Opp. at 19; *see also* (Walbro's Responses to Respondents' Statement of Undisputed Facts at ¶ 37).) Dividing Walbro's U.S. investments in Chart A by Walbro's U.S. sales in Chart B results in the following percentages:

Chart C: Percentage of U.S. Investments Compared to U.S. Sales

	'424 Patent	'547 Patent	'173 Patent	'254 Patent
Plant & Equipment	[redacted]	[redacted]	[redacted]	[redacted]
Labor & Capital	[redacted]	[redacted]	[redacted]	[redacted]
Engineering, Research and Development	[redacted]	[redacted]	[redacted]	[redacted]

As seen in Chart C, the majority of Walbro's investments are less than [redacted] of its U.S. sales of the products that practice each patent. The undersigned was unable to locate any opinion in the past four years in which the Commission has held that an investment amounting to less than 5% of

[5] Walbro does not introduce evidence of its foreign-related investments for the patents-in-suit and does not appear to have this information. During his deposition, Walbro's 30(b)(6) witness [redacted] (Mot. Ex. A at 607:7-608:8; Ex. E at 1126:3-1132:14.) In its Responses to Respondents' Statement of Undisputed Facts, Walbro admitted that it "did not take into account monetary investments outside of the United States," including engineering activity, plant and facility expenses, equipment investments, and labor expenses. (Walbro's Responses to Respondents' Statement of Undisputed Facts at ¶¶ 39-57.)

sales qualified as "significant" or "substantial." Accordingly, the undersigned finds that such investments are not significant or substantial.

Only Walbro's investments in labor and capital are above [redacted] when compared to its U.S. sales and only one category – the [redacted] labor and capital investment for the '547 patent amounting to [redacted] of U.S. sales – constitutes a percentage that the Commission has deemed significant in the past.[6] The undersigned finds, however, that comparing Walbro's domestic investments to its U.S. sales is misleading. When viewed in its proper context, Walbro's [redacted] investment does not qualify as "significant."

The context of the [redacted] investment is understood by reviewing the second piece of data in the record — Walbro's worldwide sales of the domestic industry products. Such sales amount to [redacted] and are allocated by patent as follows:

Chart D: Worldwide Sales

'424 Patent	'547 Patent	'173 Patent	'254 Patent
[redacted]	[redacted]	[redacted]	[redacted]

(Walbro's Responses to Respondents' Statement of Undisputed Facts at ¶ 37.) Dividing Walbro's U.S. investments in Chart A by Walbro's worldwide sales in Chart D results in the following percentages:

Chart E: Percentage of U.S. Investments Compared to U.S. Sales

	'424 Patent	'547 Patent	'173 Patent	'254 Patent
Plant & Equipment	[redacted]	[redacted]	[redacted]	[redacted]
Labor & Capital	[redacted]	[redacted]	[redacted]	[redacted]
Engineering, Research and Development	[redacted]	[redacted]	[redacted]	[redacted]

[6] Because the investment amounts and corresponding percentages are deemed confidential in these opinions, the undersigned cannot cite to any specific opinion to support this statement.

As shown in Chart E, Walbro investment of [redacted] for labor and capital for products practicing the '547 patent is clearly minimal, as it amounts to only [redacted] of Walbro's worldwide sales for these products. Walbro's labor and capital investments for its other patents are also all below [redacted]. The undersigned finds that Walbro's labor and capital investments therefore do not qualify as either "significant" or "substantial."

2. Qualitative Analysis

Walbro argues that the undersigned should consider other factors, such as the declining carburetor industry and the fact that Walbro's investments "are critical to the [sic] Walbro's Domestic Industry Products and represent significant added value indeed." (Opp. at 18-19.) Likewise, Walbro asserts that the activity it performs in the United States – calibration – is necessary for a sellable carburetor. (*Id.* at 24-25.) The Federal Circuit has held, however that "[q]ualitative factors cannot compensate for quantitative data that indicate insignificant investment and employment." *Lelo*, 786 F.3d at 885. Because the undersigned has concluded that Walbro's investments are quantitatively insignificant, the qualitative factors need not be addressed.

For the reasons stated above, Respondents' motion (1123-053) is hereby granted. In light of this finding, the procedural schedule in this Investigation is hereby stayed, pending review of this Initial Determination.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall be the determination of the Commission unless a party files a petition for review of the Initial Determination 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 herein.

Within seven days of the date of this document, the parties shall submit to the Office of the Administrative Law Judges a joint statement as to whether or not they seek to have any portion

of this document deleted from the public version. If the parties do seek to have portions of this document deleted from the public version, they must submit to this office a copy of this document with red brackets indicating the portion or portions asserted to contain confidential business information. The submission may be made by email and/or hard copy by the aforementioned date and need not be filed with the Commission Secretary.

SO ORDERED.

Charles E. Bullock
Chief Administrative Law Judge

CERTAIN CARBURETORS AND PRODUCTS CONTAINING SUCH CARBURETORS **Inv. No. 337-TA-1123**

Certificate of Service – Page 1

I, Lisa R. Barton, hereby certify that the attached **PUBLIC VERSION ORDER NO. 77** has been served by hand upon the Commission Investigative Attorney, Vu Bui, Esq., and the following parties as indicated, on **September 12, 2019**.

Lisa R. Barton, Secretary
U.S. International Trade Commission
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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN CARBURETORS AND PRODUCTS CONTAINING SUCH CARBURETORS	Inv. No. 337-TA-1123

ORDER 51: CONSTRUING THE TERMS OF THE ASSERTED CLAIMS OF THE PATENTS AT ISSUE

(May 13, 2019)

TABLE OF CONTENTS

I. INTRODUCTION

This Investigation was instituted by the Commission on July 17, 2018 to determine whether the importation, sale for importation, or sale within the United States after importation of certain carburetors and products containing such carburetors violates section 337 of the Tariff Act of 1930, as amended, due to infringement of U.S. Patent Nos. 6,394,424 ("the '424 patent"), 6,439,547 ("the '547 patent"), 6,533,254 ("the '254 Patent") 6,540,212 ("the '212 patent") and 7,070,173 ("the '173 patent"). *See* 83 Fed. Reg. 34,614 (July 20, 2018). Walbro, LLC ("Walbro")[1] is the Complainant. The named Respondents are Ruixing Carburetor, Manufacturing Co., Ltd.; Huayi Mechanical and Electrical Co., Ltd.;[2] Tillotson; Fujian Hualong Carburetor Co., Ltd.; Fuding Guangda General, Machinery Co., Ltd.; Wuyi Henghai Tools Co., Ltd.; Fuding Youyi Trade Co., Ltd.; Amazon.com, Inc.; Amerisun Inc.; Ardisam, Inc.; Buffalo Corporation; Cabela's LLC;[3] Champion Power Equipment, Inc.; Feldmann Eng. & Mfg. Co., Ltd.; FNA Group, Inc.; Frictionless World, LLC; Generac Power Systems, Inc.; Husqvarna Professional Products, Inc.; Imperial Industry Supply Co. d/b/a DuroMax Power Equipment; Kmart Corporation; Lowe's Companies, Inc.; MAT Industries, LLC; Menards, Inc.; MTD Products Inc.;[4] North American Tool Industries; Northern Tool & Equipment Co., Inc.; QV Tools LLC; Sears, Roebuck and Co.; Target Corporation; Techtronic Industries (Dongguan) Co., Ltd.;[5] The Home Depot, Inc.;[6] Thunderbay

---

[1] Walbro is the owner by assignment to the five patents at issue in this Investigation. (Compl. at ¶¶ 5.3, 5.10, 5.17, 5.24, and 5.31; Compl. Exs. 6-10.)

[2] The undersigned granted Walbro's motion to amend the Complaint and Notice of Investigation to substitute this Respondent for the previously-named Huayi Carburetor Factory. (Order No. 50 (Apr. 25, 2019).)

[3] The undersigned granted Walbro's motion to amend the Complaint and Notice of Investigation to correct the corporate name from Cabela's Incorporated. (*Id.*)

[4] MTD Products Inc. recently moved to terminate the Investigation as to MTD based on a consent order. (Motion No. 1123-041 (filed May 1, 2019).)

[5] The undersigned granted Walbro's motion to amend the Complaint and Notice of Investigation to substitute this Respondent for the previously-named Techtronics Industries Co. Ltd. of Hong Kong d/b/a Techtronic Industries Power Equipment. (Order No. 50 (Apr. 25, 2019).)

[6] Walbro recently moved to amend the Complaint and Notice of Investigation to substitute "Home Depot Product Authority LLC" and "Home Depot U.S.A., Inc." for this Respondent. (Motion No. 1123-042 (filed May 8, 2019).)

Products; Tool Tuff Direct LLC; Tractor Supply Company; and Walmart Inc. (collectively, "Respondents").[7] The Commission Investigative Staff ("Staff") is also a party to the Investigation.

The parties did not submit any claim terms from the '254 patent or the '212 patent for construction. (JC at 1.) Accordingly, only the '424 patent, the '547 patent, and the '173 patent (collectively, "the Asserted Patents") are discussed in this Order. Pursuant to Ground Rule 6, a *Markman* hearing was held on November 28, 2018. After the hearing and pursuant to Order No. 11, the parties submitted an updated Joint Claim Construction Chart.[8]

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[7]Since the institution of this Investigation, a number of respondents have been found in default and others have been terminated based on a consent order stipulation or settlement agreements. (See Order No. 49 (Apr. 25, 2019) (finding Respondents Wuyi Henghai Tools Co., Ltd., Tool Tuff Direct LLC, North American Tool Industries, Imperial Industrial Supply Co. d/b/a Duromax Power Equipment, and Fuding Guangda General Machinery Co., Ltd. in default)); Order No. 18 (Sept. 12, 2018); Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Fujian Hualong Carburetor Co. Ltd. Based on a Consent Order (Oct. 3, 2018); Order No. 21 (Sept. 24, 2018); Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent QV Tools Limited Liability Company LLC Based on a Consent Order Stipulation, a Proposed Consent Order, and Settlement Agreement (Oct. 15, 2018); Order Nos. 22 & 23 (Oct. 2, 2018); Notice of Comm'n Determination Not to Review Initial Determinations Terminating the Investigation as to Respondents Ardisam, Inc. and Champion Power Equip. Inc. Based on Consent Order Stipulations (Oct. 26, 2018); Order No. 29 (Nov. 5, 2018); Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Northern Tool & Equip. Co., Inc. Based on a Consent Order Stipulation (Nov. 28, 2018); Order No. 30 (Nov. 6, 2018); Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Amerisun, Inc. Based on a Consent Order Stipulation (Nov. 28, 2018); Order No. 31 (Nov. 13, 2018); Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent FNA Group, Inc. (Dec. 4, 2018); Order No. 33 (Dec. 18, 2018); Notice of Comm'n Determination to Extend the Date for Determining to Review an Initial Determination Terminating the Investigation as to Respondent MAT Industries, LLC Based on a Consent Order Stipulation and a Determination Not to Review the Initial Determination (Feb. 8, 2019); Order No. 34 (Jan. 29, 2019); Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondents Buffalo Corp. and Target Corp. Based on a Settlement Agreement (Feb. 13, 2019); Order No. 37 (Feb. 11, 2019); Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Frictionless World LLC Based on a Settlement Agreement (Mar. 5, 2019); Order No. 43 (Feb. 28, 2019); Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Husqvarna Professional Products, Inc. Based on a Consent Order Stipulation (Mar. 25, 2019); Order No. 45 (Mar. 26, 2019); Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Tillotson Based on a Settlement Agreement (Apr. 11, 2019).

[8] For convenience, the briefs and chart submitted by the parties are referred to hereafter as:

CMIB	Walbro's Initial *Markman* Brief
CMRB	Walbro's Reply *Markman* Brief
RMIB	Respondents' Initial *Markman* Brief
RMRB	Respondents' Reply *Markman* Brief
SMIB	Staff's Initial Markman Brief
JC	Updated Joint Proposed Claim Construction Chart

II. IN GENERAL

The claim terms construed in this Order are done so for the purposes of this section 337 Investigation. Those terms not in dispute need not be construed. *See Vanderlande Indus. Nederland BV v. Int'l Trade Comm'n*, 366 F.3d 1311, 1323 (Fed. Cir. 2004) (noting that the administrative law judge need only construe disputed claim terms).

III. RELEVANT LAW

"An infringement analysis entails two steps. The first step is determining the meaning and scope of the patent claims asserted to be infringed. The second step is comparing the properly construed claims to the device accused of infringing." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (*en banc*) (internal citations omitted), *aff'd*, 517 U.S. 370 (1996). Claim construction is a "matter of law exclusively for the court." *Id.* at 970-71. "The construction of claims is simply a way of elaborating the normally terse claim language in order to understand and explain, but not to change, the scope of the claims." *Embrex, Inc. v. Serv. Eng'g Corp.*, 216 F.3d 1343, 1347 (Fed. Cir. 2000).

Claim construction focuses on the intrinsic evidence, which consists of the claims themselves, the specification, and the prosecution history. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (*en banc*); *see also Markman*, 52 F.3d at 979. As the Federal Circuit in *Phillips* explained, courts must analyze each of these components to determine the "ordinary and customary meaning of a claim term" as understood by a person of ordinary skill in the art at the time of the invention. 415 F.3d at 1313. "Such intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language." *Bell Atl. Network Servs., Inc. v. Covad Commc'ns Grp., Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001).

"It is a 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the right to exclude.'" *Phillips*, 415 F.3d at 1312 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). "Quite apart from the written description and the prosecution history, the claims themselves provide substantial guidance as to the meaning of particular claims terms." *Id.* at 1314; *see also Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001) ("In construing claims, the analytical focus must begin and remain centered on the language of the claims themselves, for it is that language that the patentee chose to use to 'particularly point[ ] out and distinctly claim[ ] the subject matter which the patentee regards as his invention.'"). The context in which a term is used in an asserted claim can be "highly instructive." *Phillips*, 415 F.3d at 1314. Additionally, other claims in the same patent, asserted or unasserted, may also provide guidance as to the meaning of a claim term. *Id.*

The specification "is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term." *Id.* at 1315 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). "[T]he specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor's lexicography governs." *Id.* at 1316. "In other cases, the specification may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor." *Id.* As a general rule, however, the particular examples or embodiments discussed in the specification are not to be read into the claims as limitations. *Id.* at 1323. In the end, "[t]he construction that stays true to the claim language and most naturally aligns with the patent's description of the invention will be . . . the correct construction." *Id.* at 1316 (quoting *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1250 (Fed. Cir. 1998)).

In addition to the claims and the specification, the prosecution history should be examined, if in evidence. *Id.* at 1317; *see also Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 913 (Fed. Cir. 2004). The prosecution history can "often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." *Phillips*, 415 F.3d at 1317; *see also Chimie v. PPG Indus. Inc.*, 402 F.3d 1371, 1384 (Fed. Cir. 2005) ("The purpose of consulting the prosecution history in construing a claim is to 'exclude any interpretation that was disclaimed during prosecution.'").

When the intrinsic evidence does not establish the meaning of a claim, then extrinsic evidence (*i.e.*, all evidence external to the patent and the prosecution history, including dictionaries, inventor testimony, expert testimony, and learned treatises) may be considered. *Phillips*, 415 F.3d at 1317. Extrinsic evidence is generally viewed as less reliable than the patent itself and its prosecution history in determining how to define claim terms. *Id.* at 1317. "The court may receive extrinsic evidence to educate itself about the invention and the relevant technology, but the court may not use extrinsic evidence to arrive at a claim construction that is clearly at odds with the construction mandated by the intrinsic evidence." *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 977 (Fed. Cir. 1999).

If, after a review of the intrinsic and extrinsic evidence, a claim term remains ambiguous, the claim should be construed so as to maintain its validity. *Phillips*, 415 F.3d at 1327. Claims, however, cannot be judicially rewritten in order to fulfill the axiom of preserving their validity. *See Rhine v. Casio, Inc.*, 183 F.3d 1342, 1345 (Fed. Cir. 1999). Thus, "if the only claim construction that is consistent with the claim's language and the written description renders the claim invalid, then the axiom does not apply and the claim is simply invalid." *Id.*

A claim must also be definite. Pursuant to 35 U.S.C. § 112, second paragraph: "The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 U.S.C. § 112, ¶ 2. In *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014), the Supreme Court held that § 112, ¶ 2 requires "that a patent's claims, viewed in light of the specification and prosecution history inform those skilled in the art about the scope of the invention with reasonable certainty." (*Id.* at 2129.) A claim is required to "provide objective boundaries for those of skill in the art," and a claim term is indefinite if it "might mean several different things and no informed and confident choice is among the contending definitions." *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371 (Fed. Cir. 2014). A patent claim that is indefinite is invalid. 35 U.S.C. § 282(b)(3)(A).

IV. LEVEL OF ORDINARY SKILL IN THE ART

Walbro did not propose a level of ordinary skill in the art in its briefs. Its expert, Dr. William T. Cobb, Jr., did, however, opine on the issue in his expert report, submitted as an exhibit. Dr. Cobb submits that a person of ordinary skill in the art with respect to the Asserted Patents "would either have a Bachelor's degree in Mechanical Engineering or its equivalent and/or at least two years of practical experience designing carburetors for small engines." (CMIB Ex. D at ¶ 20.)

Respondents submit that a person of ordinary skill in the art with respect to the Asserted Patents has "at least (i) a bachelor's degree in mechanical engineering, or another related technical field and at least two (2) years of experience in the design of mechanical systems, mechanisms and devices; or (ii) a master's degree (or higher) in mechanical engineering or another related technical field." (RMIB at 8.) Respondents explain that "[t]hese requirements are not rigid, and superior qualifications with respect to either education or experience may compensate for a deficit in the other." (*Id.*)

Staff notes that "the difference in [the private parties'] proposals does not appear . . . to be significant enough to change or materially affect their positions." (SMIB at 7, 20, 29.) Staff submits that a person of ordinary skill in the art with respect to the Asserted Patents has "at least a bachelor's degree in mechanical engineering or another related technical field and at least two years of experience in the design of carburetors for small engines; and (ii) that superior qualifications with respect to either education or experience may compensate for a deficit in the other." (*Id.*)

The undersigned finds Respondents' proposal to best reflect the level of skill in the art at the time of the Asserted Patents. Accordingly, the undersigned finds that one of ordinary skill in the art would have at least "at least (i) a bachelor's degree in mechanical engineering, or another related technical field and at least two (2) years of experience in the design of mechanical systems, mechanisms and devices; or (ii) a master's degree (or higher) in mechanical engineering or another related technical field." The undersigned further finds that that superior qualifications with respect to either education or experience may compensate for a deficit in the other.

V. THE ASSERTED PATENTS

A. The '424 Patent

The '424 patent, entitled "Carburetor with Diaphragm Type Fuel Pump," issued on May 28, 2002 to George M. Pattullo and Thomas L. Schmidt. The '424 patent is assigned to Walbro Corporation. The '424 patent generally relates to "carburetors and more particularly to carburetors having a diaphragm type fuel pump." ('424 patent at 1:5-6.)

The '424 patent has 32 claims. Claims 1, 2, 16, 18, and 19 have been asserted in this Investigation. The asserted claims read as follows (with the first instance of the agreed-upon terms in *italics* and the first instance of the disputed terms highlighted in **bold**):

1. A carburetor comprising: a body; a fuel pump diaphragm carried by the body and defining in part a fuel chamber on one side of the fuel pump diaphragm and a pressure pulse chamber on the other side of the fuel pump diaphragm, the pressure pulse chamber communicating with a pressure pulse source to provide pressure pulses in the pressure pulse chamber to actuate the fuel pump diaphragm; an **air passage** communicating at one end with a fresh air supply and at its other end with the pressure pulse chamber to provide a supply of air to the pressure pulse chamber; and **in operation, the pressure pulse source causes air from the air passage to flow through the pressure pulse chamber to at least reduce the amount of liquid fuel therein**.

2. The carburetor of claim 1 wherein the air passage communicates at said other end with the lowest portion of the pressure pulse chamber relative to the standard operating position of the carburetor.

16. The carburetor of claim 1 which also comprises a fuel and air mixing passage formed through the body in communication with a low pressure source at one end and an air supply at its other end, and a pressure pulse passage communicating at one end with the pressure pulse chamber and at its other end with the pressure pulse source.

18. The carburetor of claim 1 which also comprises a pressure pulse passage communicating the pressure pulse chamber with the pressure pulse source and the ratio of the minimum diameter of the air passage to the minimum diameter of the pressure pulse passage is between 0.05:1 and 1.5:1.

19. The carburetor of claim 1 which also comprises a pressure pulse passage communicating the pressure pulse chamber with the pressure pulse source and the ratio of the minimum diameter of the air passage to the minimum diameter of the pressure pulse passage is between 0.25:1 and 1:1.

B. The '547 Patent

The '547 patent, entitled "Carburetor Throttle and Choke Control Mechanism," issued on August 27, 2002 to Eric L. King and George M. Pattullo. The '547 patent is assigned to Walbro Corporation. The '547 patent generally relates to "throttle and choke control mechanisms of carburetors for internal combustion engines, and more particularly to such a mechanism incorporating a choke-throttle, cold-start-setting latch mechanism that automatically positions the throttle valve slightly open when the choke valve is fully closed." ('547 at 1:5-10.)

The '547 patent has 21 claims. Claims 1 and 18 are at issue in this Investigation. The asserted claims read as follows (with the first instance of the agreed-upon terms in *italics* and the first instance of the disputed terms highlighted in **bold**):

1. In a carburetor throttle and choke control mechanism incorporating a choke-throttle cold-start setting latch mechanism that automatically positions a throttle valve **slightly open** at a fast idle position when the choke valve is swung from open to fully closed position, and comprising a rotatable choke shaft carrying a choke plate valve, a rotatable throttle shaft carrying a throttle plate valve, a choke lever fixed on said choke shaft for rotating said choke valve from open to closed, a throttle lever fixed on said throttle shaft for rotating said throttle valve from idle to open against the bias of a throttle return spring, and a fast idle latch lever journaled on said coke shaft biased by a fast idle return spring, which in turn biases said choke valve (via said choke lever and choke shaft) from fully closed to fully open and having a free end swingable in a travel path generally co-planar with and intersection the travel path of a free end of said throttle lever, a releasable latch on said free ends interengageable as a toggle that is held latched by said return springs in the choke-closed position of said choke valve and the fast idle position of said throttle valve, and wherein one of said choke and fast idle levers has a *tang operable to push couple via said tang* the other one of said choke and fast idle levers such that choke closing rotation of said choke lever imparts co-rotation of said fast idle lever toward latched condition, the improvement in combination therewith wherein said releasable latch is constructed and arranged such that during said interengagement aiding torque is created to thereby **angularly phase shift said fast idle lever relative to said choke lever** and thereby open a **gap** in said *push coupling* at least after further rotation of said choke valve has been blocked by **it reaching full closed position** and that remains as a gap in the latched position of said valves.

18. In a carburetor throttle and choke control mechanism incorporating a choke-throttle cold-start setting latch mechanism that automatically positions a throttle valve slightly open at a fast idle position when the choke valve is swing from open to fully closed position, and comprising a rotatable choke shaft carrying a choke plate valve, a rotatable throttle shaft carrying a throttle plate valve, a choke lever fixed on said choke shaft for rotating said choke valve from open to closed, a throttle lever fixed on said throttle shaft for rotating said throttle valve from closed to open against the bias of a throttle return spring, and a fast idle latch lever journalled on said choke shaft biased by a fast idle return spring, which in turn biases said choke valve (via said choke lever and choke shaft) from fully closed to fully open and having a free end swingable in a travel path generally co-planar with and intersecting the travel path of a free end of said throttle lever, a releasable latch on said free ends interengageable as a toggle that is held latched by said return springs in the choke-closed position of said choke valve and the fast idle position of said fast idle valve, and wherein one of said choke and fast idle levers has a tang operable to push couple via said tang the other one of said choke and throttle levers such that choke closing rotation of said choke lever imparts co-rotation of said fast idle lever toward latched condition, the improvement in combination therewith wherein said releasable latch is constructed and

arranged such that during said interengagement aiding torque is created to thereby angularly phase shift said fast idle lever relative to said choke lever and thereby open a gap in said push coupling and thereafter maintain such a push de-coupling that remains in the latched position of said valves.

C. The '173 Patent

The '173 patent, entitled "Carburetor Air-Fuel Mixture Adjustment Assembly," issued on July 4, 2006 to Paul J. Dow, Hiroki Ogasawara, Tetsuya Takahashi, Toshimasa Takahashi, and Giovanni Vimercati. The '173 patent is assigned to Walbro Engine Management, L.L.C. The '173 patent generally relates to "a carburetor fuel mixture adjustment assembly for adjusting the air-fuel ration of a fuel mixture to be supplied to an engine." ('173 patent at 1:15-17.)

The '173 patent has 65 claims. Claims 54-57, 60, and 62-65 are at issue in this Investigation. The asserted claims read as follows (with the first instance of the agreed-upon terms in *italics* and the first instance of the disputed terms highlighted in **bold**):

54. A rotary throttle valve carburetor, comprising:
a body defining a fuel and air mixing passage, a throttle valve chamber communicating with the fuel and air mixing passage and a fuel flow path communicating a supply of fuel with the fuel and air mixing passage; a throttle valve rotatably and axially movably received in the throttle valve chamber for movement between an idle position and wide open position to control fuel and air flow in the fuel and air mixing passage; and
a valve threadedly carried by the carburetor in communication with the fuel flow path to restrict fuel flow through at least a portion of the fuel flow path in at least on position of the throttle valve to control the flow rate of fuel from the carburetor when the throttle valve is in said at least one position, the valve including tool engaging portion by which the valve may be rotated and axially moved by way of its threads and the tool engaging portion is non-circular and adapted for use with a **specialized tool**.

55. The rotary throttle valve carburetor of claim 54 wherein the valve is carried by the throttle valve for movement with the throttle valve.

56. The rotary throttle valve carburetor of claim 55 wherein the fluid flow path includes a fuel nozzle with an orifice through which fuel is discharged from the nozzle to the fuel and air mixing passage and said valve at least partially restricts the orifice when the throttle valve is in its idle position.

57. The rotary throttle valve carburetor of claim 54 wherein the valve is carried by the carburetor body and restricts the maximum fluid flow through at least a portion of the fuel flow path.

60. The rotary throttle valve carburetor of claim 54 wherein the valve is adjustably carried by the throttle valve for movement with the throttle valve, and wherein the carburetor also comprises a second valve that is adjustably carried by the carburetor body to restrict the maximum fluid flow through at least a portion of the fuel flow path and both the valve carried by the throttle valve and the second valve include non-circular tool engaging portions by which the positions of each valve with respect to the fuel flow path may be adjusted.

62. The rotary throttle valve carburetor of claim 55 wherein the throttle valve includes a recess in which the tool engaging portion is disposed to limit access to the tool engaging portion.

63. The rotary throttle valve carburetor of claim 62 wherein the throttle valve surrounds the tool engaging portion.

64. The rotary throttle valve carburetor of claim 57 wherein the carburetor body includes a recess in which the tool engaging portion is disposed to limit access to the tool engaging portion.

65. The rotary throttle valve carburetor of claim 64 wherein the carburetor body surrounds the tool engaging portion.

VI. CLAIM CONSTRUCTION

A. Construction of the Agreed-Upon Claim Terms

The parties have agreed to the following constructions:

CLAIM TERM	RELEVANT CLAIMS	PARTIES' AGREED CONSTRUCTION
"tang operable to push coupling via said tang"	'547 Patent: Claims 1 and 18	"portion of a recited lever that is operable to apply a force via such portion"
"push coupling"	'547 Patent: Claims 1 and 18	"the contact between the choke and fast idle levers that applies a force"

(JC at 1.) The undersigned hereby adopts the parties' proposed constructions and shall construe the terms set forth above according to their agreed-to definitions.

B. Construction of the Disputed Claim Terms

1. "gap"

The term "gap" appears in claims 1 and 18 of the '547 patent. The parties disagree on the claim construction of this term and have proposed the following constructions:

WALBRO	RESPONDENTS	STAFF
break	intentional space	The Staff is of the view that this claim term does not require construction. If construction is required, however, then the Staff proposes that this claim term should be construed consistent with its plain and ordinary meaning, which is "space."

(JC at 2.)

Walbro asserts that "[t]he plain and ordinary meaning of 'gap' in the claims is 'break.'" (CMIB at 9.) Walbro notes, for example, that the term "gap" "first appears in the claims in connection with opening a gap in the push coupling." (*Id.*) Walbro explains that "[t]he key to the 'gap' in the push coupling is not necessarily a visible space or offset," but rather "the functional importance is that the 'push couple' force between the choke lever and the fast idle lever is broken." (*Id.*) Thus, "there is no pushing force between the choke lever and the fast idle lever" and "[t]he 'gap' only needs to be a break in the normal force between the two levers." (*Id.*) According to Walbro, "[m]ultiple locations in the '547 written description support [this] understanding," and "[t]he prosecution history of the '547 patent . . . is consistent." (*Id.* at 9-10.)

Walbro argues that "Respondents' construction adds a limitation to the claim that is not present and is not supported by the intrinsic record." (CMIB at 11.) According to Walbro, Respondents' proposed construction "seeks to introduce subjective intent," and is therefore

improper. (*Id.*) Finally, Walbro contends that Respondents' construction would render the claim indefinite as it would "depend solely on the unrestrained, subjective opinion of a particular individual purported to be practicing the invention." (*Id.*)

Respondents argue that "[t]he gap that is disclosed by the claims must be created between the choke lever and the fast idle lever." (RMIB at 10.) Respondents assert that the language of the claims reveals that the space between them must be deliberate such that "there is no 'push' contact between the levers." (*Id.*) Respondents explain that "[t]he specification further details that the gap, or intentional space, is created in response to a specific problem well known in the prior art; that is, stack up of manufacturing tolerances." (*Id.*) According to Respondents, "the plain and ordinary meaning of 'gap' would not capture the intent that is the focus of the invention, *i.e.*, the intentional creation of the space." (*Id.* at 14.) Respondents further contend that Walbro's proposed construction "is fundamentally incorrect because it could be impermissibly read to cover two touching surfaces despite a lack of a gap." (*Id.*)

Staff explains that "[t]he dispute over the claim term 'gap' appears . . . to center on how the 'gap' should be construed with respect to the 'push coupling.'" (SMIB at 10.) "In the Staff's view, the plain language of the claims and the disclosures in the specification require a 'gap' in the 'contact' between the choke and fast idle levers.'" (*Id.*) Staff explains that this understanding is supported by the parties' agreed-upon definition of "push coupling," as well as the specification. (*Id.* at 10-12.) Staff disagrees with the word "intentional" in Respondents' proposal, however, as this word is "unnecessary" and "introduce[s] ambiguity." (*Id.* at 12.)

The undersigned agrees that "gap" pertains to the gap in contact between the choke and fast idle levers, rather than a gap in the force. First, using the parties' agreed-upon construction of "push coupling" the phrase reads: "thereby open a gap in . . . the contact between the choke and

fast idle levers that applies a force." This understanding indicates that "gap" is a gap in the contact. An understanding of "gap" as a "break in force," would not be consistent with this agreed-upon definition of push coupling. (*See* RMRB Ex. B (explaining that "calling the 'gap' a 'break' makes little sense" in the context of the parties' agreed-upon construction of push coupling and noting that "[t]he gap must prevent the contact between the choke and fast idle levers in the push couple").)

The specification provides further support for this position. Both Figures 5 and 6 refer to "gap." Figure 5 notes: "GAP, LEVERS NOT IN CONTACT," while Figure 6 states "GAP STILL PRESENT." ('547 patent at Figs. 5, 6.) These figures therefore indicate that the gap is a physical space observable in a diagram. If "gap" instead referred to a gap in force, these figures would be incongruous. (*See* RMRB Ex. B (explaining that the figures "clearly show[] the gap is a physical space, between specific components (two levers), that is intentionally created through operation of the purported invention").)

The description of Figures 5 and 6 confirms this understanding. With respect to Figure 5, the specification teaches:

> Due to the strength of throttle lever biasing spring being much greater than that of the fast idle lever biasing spring, this reversal in applied torque forces from throttle lever 38 causes tang 74 to be forced down cam ram 66, to thereby accelerate rotation of fast idle lever 50 relative to choke lever 46. This in turn causes tang 52 to separate from push foot 54 to thereby *open up a "leading gap"* therebetween as shown in FIG. 5, as tang edge 76 reaches nested and lock-up position in "V-notch" 68.

('547 patent at 9:37-46) (emphasis added). Similarly, with respect to Figure 6, the specification states: "Note in FIG. 6 that there is still a gap present between the choke lever pusher foot 54 and fast idle lever tang 52, even though this gap has narrowed from that of the *momentary wide open*

gap of FIG. 5." (*Id.* at 9:61-65 (emphasis added).) These teachings are logical only if a person of ordinary skill in the art applies the understanding of "gap" as a space, rather than a break in force.[9]

The undersigned also agrees with Staff that the claim language requires an understanding of "gap" as a physical space. The claim language recites, in part: "interengagement aiding torque is created to thereby . . . *open the gap* in said push coupling..." ('547 patent, cl. 1, 18.) As Staff notes: "Considering the plain and ordinary meaning of the word 'open' . . . a correct claim construction requires a physical space that is opened in the contact between the choke and fast idle levers, not a break that is opened in the force." (Tr. at 54:18-22.).

The undersigned agrees with Walbro and Staff, however, that Respondents' proposal is problematic. The inclusion of the word "intentional" injects ambiguity into the claim, as it would require an examination as to the accused infringer's subjective intent. Moreover, there is no support in the specification for the requirement that the gap must be intentional.

Accordingly, the undersigned hereby construes the term "gap" as "***space***."

[9] The undersigned is not persuaded by Walbro's arguments that the specification provides support for its position. Walbro asserts that "the written description states that '[t]his cramming interengagement accelerates fast idle lever rotation relative to choke lever rotation and thereby opens up a leading gap so that there no longer is push contact between the choke lever finger and fast idle tang.'" (CMIB at 10 (quoting '547 patent at 6:35-38).) Walbro also cites the portion of the written description which states: "Hence fast idle tang 52 is not in a position to block slight counterclockwise rotation of choke lever 46 and hence, choke lever 44, much less to exert a push-back force therebetween." (*Id.* (citing '547 patent at 9:65-10:1).) Although these portions of the specification indicate that the gap may lead to a break in force, they do not mandate an understanding of "gap" as a break in force.

2. "angularly phase shift said fast idle lever relative to said choke lever"

The term "angularly phase shift said fast idle lever relative to said choke lever" appears in claims 1 and 18 of the '547 patent. The parties disagree on the claim construction of this term and have proposed the following constructions:

WALBRO	RESPONDENTS	STAFF
angularly change position of at least one of the fast idle and choke levers relative to the other of the fast idle and choke levers	change the angular position of the fast idle lever with respect to the choke lever	The Staff is of the view that this claim term does not require construction. If construction is required however, then the Staff proposes that this claim term should be construed consistent with its plain and ordinary meaning, which is "change the angular position of the fast idle lever with respect to the choke lever."

(JC at 2.)

Walbro argues: "In view of the written description and claims, one of ordinary skill in the art would readily understand that this phase means to 'angularly change position of at least one of the fast idle and choke levers relative to the other of the fast idle and choke levers." (CMIB at 12.) Walbro explains: "In other words, the claim allows for an angular change of position of either one or both of the fast idle and choke levers relative to the other, creates a gap in the push coupling at least after the choke valve is fully or completely closed." (*Id.*) Walbro asserts that this understanding is supported by the specification, which "teaches that there are two sources for the claimed relative rotation: rotation of the fast idle lever and rotation of the choke valve." (*Id.* at 14.)

Respondents assert that "[b]ased on the language of the claims, a [person of ordinary skill in the art] would understand the aiding torque must shift or move the fast idle lever such that the

angle between it and the choke lever changes." (RMIB at 16.) Respondents explain that "[t]he fast idle lever and choke lever are, together, the 'push couple' disclosed in the claims, and each of the levers in the push couple is mounted on the choke shaft, and must be close enough such that one can exert a force on the other." (*Id.*) Thus, one of skill in the art "would understand that the appropriate angle addressed in this phrase is the angle between the fast idle lever and the choke lever" and that "only the movement of the fast idle lever can satisfy this claim element." (*Id.*)

Staff agrees with Respondents that "one of ordinary skill in the art would understand that the claim phrase at issue requires an angular change of position of the fast idle lever with respect to the choke lever." (SMIB at 13.) Staff explains that "there are two parts to the claim phrase at issue: (1) 'angularly phase shift said fast idle lever' and (ii) relative to said choke lever.'" (*Id.* at 14 (quoting Dubowsky Decl. ¶ 51).) Staff notes: "Further, 'the first part recites which lever has to move' and "the second part indicates that it is not sufficient to simply move, but that the fast idle lever must move relative to the choke lever to create a gap." (*Id.*) "Thus, 'if just the choke lever moves, the first part of the plain claim language cannot be met." (*Id.*)

The undersigned agrees with Respondents and Staff. As *Phillips* teaches, "[q]uite apart from the written description and the prosecution history, the claims themselves provide substantial guidance as to the meaning of particular claim terms." 415 F.3d at 1314. Here, claim 1 explicitly requires that the fast idle lever move "relative to said choke lever." ('547 patent, cls. 1, 18.) A person of ordinary skill in the art would understand that "if just the choke lever moves," the claim cannot be met. (Dubowsky Decl. at ¶ 51 (attached to RMIB).)

Walbro disputes this view and instead argues that the specification "teaches that both the choke valve and the fast idle lever may rotate in a manner relevant to this 'angular phase shift'

claim term." (CMIB at 12.) In support of this assertion, Walbro cites to four portions of the specification. First, Walbro cites the following:

> In one preferred but exemplary embodiment utilizing the aforementioned Pattullo flexible shaft feature, the choke shaft is made from a torsionally flexible material, such as Delrin® acetal plastic, that can be torsionally stressed to enable continued rotation of the shaft position carrying the fast idle lever after the choke valve reaches fall [sic] closure. This then produces further pivotal motion of the fast idle lever before it reaches latch-up engagement with the throttle lever.

('547 patent at 5:64-6:4.) This portion of the specification does not, as Walbro contends, demonstrate that the "choke shaft may unwind and thereby move the choke lever clockwise relative to the fast idle lever to provide the gap in the push coupling." (CMIB at 12). Instead, it merely suggests that the choke shaft is flexible, such that the fast idle lever can further pivot after the choke valve is closed. The specification does not teach that the choke valve can move the fast idle lever.

Next, Walbro cites the following:

> As also indicated previously, FIGS. 19, 20 and 21 are simplified diagrammatic views of a fourth embodiment "split linkage" carburetor equipped with a second embodiment type flexible choke shaft 242 and also a two-part choke lever made up of a choke arm 246 mounted on one axially extreme end of choke shaft 242 on one side of the carburetor. An associated choke lever pusher foot and hook part 254 is mounted on the other axially opposite end of choke shaft 242. These components thus function in the manner and in the mode of operation of the second embodiment system of FIGS. 9-11, and will provide reliable consistent full closure of the choke valve even though the flexible choke shaft 242 is rigidified by the insertion of valve plate 44 therethrough.

(*Id.* at 13:39-51.) Once again, this cited portion does not indicate that the choke lever moves to open a gap in the push coupling, but instead confirms only that the choke shaft is flexible.

Finally, Walbro states: "[I]n the Objects of the Invention, the written description states among other things that the invention may have a 'torsionally resilient choke shaft and choke valve plate subassembly" and "may be readily adaptable for use 'with a plastic choke shaft that is

torsionally resilient and twistable in its mode of operation." (CMIB at 12 (quoting '547 patent at 5:6-7, 5:23-24).) The fact that the choke shaft is flexible and twistable does not suggest that a person of ordinary skill in the art should disregard the clear language of the claim which requires that the fast idle lever move relative to the choke lever.

Accordingly, the undersigned hereby construes the term "angularly phase shift said fast idle lever relative to said choke lever" as "***change the angular position of the fast idle lever with respect to the choke lever***."

3. "slightly open"

The term "slightly open" appears in claims 1 and 18 of the '547 patent. The parties disagree on the claim construction of this term and have proposed the following constructions:

WALBRO	RESPONDENTS	STAFF
open from idle at a fast idle position	Indefinite	Absent any opinion(s) provided by one of ordinary skill in the art on the meaning of this claim term, and therefore the scope of the invention, the Staff is of the view that this claim term is indefinite under 35 U.S.C. § 112.

(JC at 3.)

Walbro argues that the term "slightly open" is "easily understood by one of ordinary skill in the art" when it is used in the context of the longer phrase "positions a throttle valve slightly open at a fast idle[10] position." (CMIB at 14.) Specifically, Walbro argues that "'slightly open at a

[10] Walbro asserts that "idle" and "fast idle" are common terms used by persons of ordinary skill in the art. (CMIB at 15.) Walbro explains that "[t]he idle engine speed is the slowest reliable running speed of the engine, which varies depending on application and the actual manufacturer's preference" and that "[a]t idle, the throttle would be referred to as 'cracked,' or barely open." (*Id.* at 16 (citing CMIB Ex. D at ¶ 39).) "Fast idle" is "above the idle speed but well below the normal operational speed of the unit." (*Id.*)

fast idle position' is a well-known construct to those skilled in the art." (CMRB at 7.) Walbro explains that one of skill would have understood that "the throttle position needed to attain a desired fast idle speed" and that this requires "that the throttle valve is opened a small amount relative to its idle position, typically 5 to 10 degrees, more or less, depending on the specific engine design." (CMIB at 16 (citing CMIB Ex. D at ¶ 40).) Walbro further explains: "Due to such engine and application variances, it would not be possible to place a precise numerical value on how far to open the throttle valve from the idle position to the fast idle position." (*Id.* at 16-17 (citing CMIB at ¶ 43).) Walbro asserts, rather, that one of ordinary skill in the art would have understood that there are methods of "determining a range for fast idle speed" and the corresponding throttle position, such as "operation of a centrifugal clutch used with many engine driven tools." (*Id.* at 16.) Finally, Walbro notes that other patent specifications include terms such as "slightly open or open a minor angle (i.e. slightly) in a fast idle position" and that the term "slightly open" is "one of common everyday parlance in the field." (*Id.* at 17.)

Respondents argue that "slightly open" is indefinite. (RMIB at 18.) Respondents explain that "slightly" "is a term of degree, which means that the patent must provide 'some standard for measuring that degree.'" (*Id.*) According to Respondents, "[t]he specification never discloses an angle or even an approximate angle that could be used as a standard of measure." (*Id.*) Respondents further contend that the specification does not provide any guidance in the figures nor does it provide a single example, instead requiring only that the throttle valve be at "the most beneficial angle" for starting the engine. (*Id.* at 19-20.)

Staff agrees with Respondents that the claim term is indefinite. (SMIB at 14.) Staff asserts that Walbro and its expert, Dr. Cobb, offer different meanings of the term and that "there remains a lack of clarity as to the precise meaning." (*Id.* at 16.) Staff notes, however, that, given that the

claims are Jepson claims and that the term is used in the preamble, the proper meaning of 'slightly open' need not be precise as apparently required by Respondents." (*Id.* at 17.)

"Slightly open" is a term of degree. Terms of degree are not inherently indefinite. *Biosig Instruments, Inc.*, 783 F.3d at 1378. Rather, "[c]laim language employing terms of degree has long been found definite where it provided enough certainty to one of skill in the art when read in the context of the invention." (*Id.* (internal quotations and citations omitted).) Additionally, "[a] patent need not teach, and preferably omits, what is well known in the art." *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1384 (Fed. Cir. 1986). Accordingly, if a person of ordinary skill in the art would understand how to determine the degree to which the valve is "slightly open," it need not be explained in the patent itself.

Respondents and Staff have not shown that "slightly open" in the context of the claims, "read in light of the specification delineating the patent, and the prosecution history, fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention." *Nautilus*, 134 S.Ct. at 2124. First, the undersigned finds that the term "slightly open" cannot be viewed in isolation. The term is part of the broader phrase "positions a throttle valve slightly open at a fast idle position." ('547 patent, cls. 1, 18.) The patent therefore informs one of ordinary skill in the art that the throttle is "slightly open" and is at a "fast idle position." Thus, the term "slightly open" is not untethered to any standard, but instead corresponds to the "fast idle position," such that the throttle valve must be open to the degree at which the fast idle position is maintained. If a person of ordinary skill in the art can determine the fast idle position, he/she can also determine the degree at which the throttle valve is "slightly open."

The intrinsic evidence confirms this. The specification equates "slightly open" with the "fast idle position," indicating that, when the throttle valve is "slightly open," it is in the fast idle

position. (*Id.* at 10:9-11 ("Note further in FIG. 6 that throttle valve 34 is at the preferred *slightly open angle (fast idle)* for starting the engine.") (emphasis added).) Additionally, Dr. Cobb's testimony confirms this understanding. He explains that "[t]he fast idle position is the position of the throttle valve that is open a few degrees from idle to aid in cold starting the engine." (CMIB Ex. D at ¶ 43 (citing '547 patent at 1:30-35, 1:41-46).) Dr. Cobb notes that "[e]ach manufacturer sets its fast idle position of the throttle valve and in such position, the throttle valve is open a small amount from the idle position."[11] (*Id.*) According to Dr. Cobb, "[t]he throttle position to attain" the fast idle speed would have been "understood by one working in the field at most any level." (*Id.* at ¶ 40.) Thus, the undersigned finds that if a person of ordinary skill in the art knows the "fast idle position," he will also know the degree to which the throttle valve is slightly open.[12]

When the full phrase is considered in the context of the claims, the undersigned finds that the term does not need further construction. Thus, the term "slightly open" should be given its plain and ordinary meaning.

[11] This statement explains why the patent does not provide a degree for "slightly open." (*See* CMIB at ¶ 43 ("As is well known, the actual position of the throttle valve at fast idle varies from engine to engine so it would not be possible to place a numerical value on how far to open a throttle.").)

[12] Although Respondents' expert, Dr. Dubowsky submitted both an Initial Expert Report on Claim Construction Issues and a rebuttal expert declaration, he did not opine on the meaning of "slightly open." Presumably, if Dr. Dubowsky believed that one of ordinary skill in the art would be unable to determine the fast idle position or the meaning of "slightly open" in the context of the patent, he would have so stated.

4. "it reaching full closed position"

The term "it reaching full closed position" appears in claim 1 of the '547 patent. The parties disagree on the claim construction of this term and have proposed the following constructions:

WALBRO	RESPONDENTS	STAFF
choke valve reaching full closed position	Indefinite	The Staff is of the view that this claim term does not require construction. If construction is required however, then the Staff proposes that this claim term should be construed consistent with its plain and ordinary meaning, which is "choke valve reaching full closed position."

(JC at 3.)

Walbro explains that the "it" in the phrase "it reaching full closed position" refers to the choke valve. (CMIB at 20.) Walbro notes that a person of ordinary skill in the art would know that "in carburetors with a choke valve having a valve plate, the valve plate is usually movable between a fully or wide open position and a full or completely closed position." (*Id.*) Walbro asserts that "the phrase choke valve 'reaching full closed position' is clear, definite, and readily known to and understood by persons of ordinary skill in the art." (*Id.* at 21.)

Respondents assert that the word 'it' in the phrase could refer to any of the following: releasable latch, fast idle lever, choke lever, push coupling, or choke valve. (RMIB at 22.) Respondents assert that because "it" "can be subject to multiple meanings, it is impermissibly ambiguous and a [person of ordinary skill in the art] would not be reasonably certain as to the claim scope." (*Id.* at 23.) Respondents further contend that if "it" refers to the choke valve "the

entire phrase at issue is redundant" and the immediately following phrase "makes little sense." (*Id.* at 22-23.)

Staff agrees with Walbro. (SMIB at 17.) Staff explains that "[a] plain reading . . . of the [] claim phrase would lead one of ordinary skill in the art to conclude that the word 'it' refers back immediately to the word 'choke valve.'" (*Id.* at 18.) Staff asserts that this reading is consistent with the specification. (*Id.* at 18-19.)

The undersigned agrees with Walbro and Staff. The claim is clear that whatever "it" is must reach a "full closed position." ('547 Patent, cl. 1.) Claim 1 repeatedly discloses that "it" is the choke valve which rotates between an open position and a closed position: "when the choke valve is swung from open to fully closed position," "a choke lever fixed on said choke shaft for rotating said choke valve from open to closed," "which in turn biases said choke valve (via said choke lever and choke shaft) from fully closed to fully open," and "a toggle that is held latched by said return springs in the choke-closed position of said choke valve." (*Id.*) Claim 1 does not indicate that any other component has a closed position.

Likewise, the specification consistently refers to the choke valve as having a closed position. (*See id.* at 6:5-7 ("Additionally or alternatively, the choke lever carries a resiliently flexible latch hook that is operable to resiliently pull the choke valve fully closed."); *id.* at 8:2-5 ("The control linkage can be operated to swing, via choke lever 46, choke valve 44 from its wide open position of FIG. 1 to its fully closed position of FIG. 6."), *id.* at 8: 55-60 ("Referring to FIGS. 1 and 2, the operator rotates choke valve 44, via the operation of the choke linkage coupled to the choke lever 46, to thereby rotate the choke valve 44 from its wide open position of FIG. 1 toward the full closed choke position, a first increment of such movement being shown in FIG. 2."); *id.* at 10:1-4 ("Note also that once the system condition of FIG. 6 has been established, choke valve 44

has been able to reach completely closed condition under the control of the choke control linkage."), *id.* at 11:59-63 ("During push coupling of foot 54 with tang 52 as choke lever 46 swings choke valve 44 towards closed position, the angular orientation of choke lever 46 relative to fast idle lever 50 may be considered to be zero degrees.").) As Walbro noted at the hearing: "The specification refers to the terms 'full closed' or 'fully closed' within the specification and claims 31 times. 31 times it refers to . . . the choke valve." (Tr. at 126:23-127:2.) In contrast, the specification never describes either the releasable latch,[13] fast idle lever, choke lever, or push coupling as having a full closed position. A person of ordinary skill in the art reading the claim, in view of the specification, would therefore understand that "it" refers to "choke valve."

The undersigned does not agree with Respondents' arguments that this understanding cannot be correct. First, Respondents argue that "there is no need to explain that the choke valve has reached full close position, since the claim already requires that the choke valve be blocked." (RMIB at 22.) The phrase "it reaching full closed position" explains how the choke valve becomes blocked. It is not redundant and merely provides further details.

Second, Respondents argue that the phrase following "it" ("that remains as a gap in the latched position of said valves") has to modify the same noun as in the claimed phrase and that this phrase "makes little sense" if "it" refers to "choke valve." (RMIB at 22-23). Respondents provide no support for their position, however. Indeed, the claim itself specifies that the gap is "in said push coupling" ('547 patent, cl. 1 ("... and thereby open a gap in said push coupling") and not in whatever the "it" refers to. Respondents' argument is therefore based on an incorrect premise.

[13] The specification instead refers to the "fully latched position" when discussing the fast idle lever. (*See, e.g.*, '547 patent at Abstract (The U-shaped hook portion is resiliently flexible to act as a spring to develop a torque on the choke by pulling the choke valve full closed when said fast idle lever is moved to fully latched condition while flexing so that the gap remains between the pusher leg portion and the tang.").)

Accordingly, the undersigned hereby construes the term "it reaching full closed position" as "***choke valve reaching full closed position***."

5. "specialized tool"

The term "specialized tool" appears in claim 54 of the '173 patent. The parties disagree on the claim construction of this term and have proposed the following constructions:

WALBRO	RESPONDENTS	STAFF
a tool not normally available to end users of the carburetor	Indefinite	The Staff is of the view that this claim term does not require construction. If construction is required however, then the Staff proposes that this claim term should be construed consistent with its plain and ordinary meaning, which is "tool not normally available to end users of the carburetor."

(JC at 4.)

Walbro asserts that the term "specialized tool" "is well-known within the industry," and "means a tool not normally available to end users of the carburetor." (CMIB at 24.) Walbro explains that such an understanding is confirmed by the written description. (*Id.*) Walbro argues that other patents in the field use the same terminology. (*Id.* at 24-25.)

Respondents assert that the term is indefinite. (RMIB at 23.) Respondents note that the specification discloses a meaning for this term, but argue that "[e]ven if a claim term's definition can be reduced to words, the claim is still indefinite if a person of ordinary skill in the art cannot translate the definition into meaningfully precise claim scope." (*Id.* at 24 (quoting *Halliburton Energy Servs. v. M-I LLC*, 514 F.3d 1244, 1251 (Fed. Cir. 2008).)

Staff asserts that this term does not require construction, but that, if it does, Walbro's proposal is the correct one. (SMIB at 22.) Staff explains that "[t]his construction is consistent with the disclosures and the definition provided in the patent specification." (*Id.* at 23.) Staff notes that Complainant's expert, Dr. Cobb, agrees that "specialized tool" "would have been understood by those skill in the art." (*Id.* at 25 (citing CMIB Ex. D at ¶ 59).)

The evidence shows that a person of ordinary skill in the art would understand the scope of "specialized tool." First, the '173 patent specifically defines a specialized tool: "The non-circular head 28 requires an unconventional tool 60 (*not normally available to end users of the carburetor*), as shown in FIGS. 7 and 8 to engage the head 28 and rotatably adjust the needle valve body 18 within the receptacle 12." ('173 patent at 5:2-6 (emphasis added).) The patent also explains the rationale for requiring a specialized tool.

> The need for an unconventional specialized tool helps to ensure that the needle valve body 18 will not be adjusted by an end user from a factory setting required to comply with environmental standards and restrictions as may be governmentally mandated and/or to avoid adverse or deleterious engine operation.

(*Id.* at 5:6-11.) The patent further explains

> The recess 270 has an internal diameter and an axial depth sized to prevent readily available tools (such as a [sic] needle nose pliers) from engaging the head 260 of the high speed needle valve 250. In this manner, the head 260 is relatively closely surrounded by the carburetor body 202 which makes it difficult for anyone not having the specialized tool adapted for use with the high needle valve 250 to tamper with or change its factory set position.

(*Id.* at 12:23-30.)

The extrinsic evidence confirms that a person of ordinary skill in the art would understand this term in the manner the patent defines it. Walbro submitted testimony from its expert, Dr. Cobb, in which he explained:

> To one of ordinary skill in the art, the use of specialty tools for adjusting the air-fuel mixture control valves is common practice now and was at the time the

> application for the '173 patent was filed. Adjustment of the valves is required as the engines and carburetors fitted to the engines are not repeatable enough in production to have acceptable running and emissions performance without individual adjustment of the units.

(CMIB Ex. D at ¶ 55.) Dr. Cobb further explained:

> The specialty tools and the positions of the fuel control valves or needle valves are specifically designed to make adjustment difficult without the specific tool. The specialty tools are designed in concert with the carburetor components and were/are typically supplied from the carburetor manufacturer. These tools were not commonly available to the end user or public and were typically supplied by the carburetor producer to the engine producer for their use. There were also other limited sources for the tools such as needed for service of the units by service personnel and other people trained and aware of the emissions requirements.

(*Id.* at ¶ 57.) Thus, Dr. Cobb concluded that "specialized tool" "would have been understood by one of ordinary skill in the art at the time the application for the '173 patent was filed as meaning 'a tool not normally available to end users of the carburetor.'" (*Id.* at ¶ 59.)[14]

The undersigned is not persuaded by Respondents' arguments to the contrary. First, Respondents argue that the patent identifies only a single example of a specialized tool. (RMIB at 25.) Respondents' argument presumes, however, that a person of ordinary skill in the art could not otherwise understand the scope of the term and would instead need additional examples for a more complete view. Here, the evidence shows that one of skill would be informed of the scope and so additional examples are unnecessary. (CMIB Ex. D at ¶ 59.)

Respondents also assert that "[t]he specification . . . provides no guidance on how one of ordinary skill in the art can determine whether a tool is normally available or not." (RMIB at 25.) The patent specifically explains, however, that a "specialized tool" is different than "standard tools available to retail customers" and "readily available tools (such as [] needle nose pliers)." ('173 patent at 5:24, 12:51-52).) The patent need not provide additional guidance because a person of

[14] Respondents do not introduce their own expert testimony to rebut this. Although their expert submitted two declarations and an expert report, he did not opine on the meaning of this term.

ordinary skill in the art would not require it. *See Hybritech*, 802 F.2d at 1384 ("A patent need not teach, and preferably omits, what is well known in the art."). For example, Dr. Cobb explained that a person of ordinary skill in the art would understand that

> [w]hile access to these tools has become more wide spread, principally due to the very open distribution and sales of the internet in the present, the specialty tools would not be commonly available, in the sense that the specific adjustment tool would not be a commonly held general tool. But is instead a specific tool that is only reasonably used for the one purpose of adjusting the fuel control valve of a specific design of carburetor, and would have to be specifically sought out for that purpose.

(CMIB Ex. D at ¶ 58.) Thus, whether or not something is "readily available" is not "subject to 'the unpredictable vagaries of any one person's opinion,'" (*see* RMIB at 26), but instead is subject to the shared understanding of a person of ordinary skill in the art.[15]

Finally, Respondents complain that "the meaning of a specialized tool is a moving target that changes with time." (*Id.* at 26.) Respondents fail to note, however, that patent terms are to be construed from the perspective of a person of ordinary skill in the art *at the time of the patent application.*[16] *Nautilus*, 134 S. Ct. at 2130 (explaining that "the definiteness inquiry trains on the understanding of a skilled artisan at the time of the patent application"). Thus, whether a tool is "readily available" today is irrelevant. The correct perspective is whether a person of ordinary skill in the art would understand that the tool was readily available at the time the patent application was filed.

[15] In their reply brief, Respondents suggest that the understanding of "specialized tool" "depends on who the end user is (*e.g.*, a layperson or trained mechanic)." (RMRB at 13-14.) As explained *supra*, claims must be viewed from the perspective of a person of ordinary skill in the art.

[16] The cases cited by Respondents do not support its position. The first case, *Icon Health & Fitness, Inc. v. Polar Electro Oy*, 656 Fed. App'x 1008 (Fed. Cir. 2016), stands for the proposition that a term that "could vary from day-to-day and from person-to-person" was a moving target and rendered the term indefinite. *Id.* at 1016. This is not the situation presented here. In *Versata Software, Inc. v. Zoho Corp.*, 213 F. Supp. 3d 829 (W.D. Tex. 2016), the court specifically noted that a term's meaning cannot be viewed over time – as Respondents suggest – but instead must be interpreted as of the patent's effective filing date. *Id.* at 838.

Accordingly, the undersigned hereby construes the term "specialized tool" as "***a tool not normally available to end users of the carburetor***."

6. "air passage"

The term "air passage" appears in claims 1, 18, and 19 of the '424 patent. The parties disagree on the claim construction of this term and have proposed the following constructions:

WALBRO	RESPONDENTS	STAFF
a passage through which air may flow	A passage that allows air to flow	The Staff is of the view that this claim term does not require construction. If construction is required however, then the Staff proposes that this claim term should be construed consistent with its plain and ordinary meaning, which is "passage through which air may flow."

(JC at 5.)

Walbro asserts that "'[a]ir passage' should be given its plain and ordinary meaning of a passage through which air may flow." (CMIB at 29.) Walbro notes that "[n]othing in the specification is inconsistent" with this meaning and the specification "consistently uses the term air passage as a passage that provides an air flow to the pressure pulse chamber." (*Id.*)

Respondents originally proposed that this phrase be construed as "an opening that allows air to flow in or out." (RMIB at 27.) In the Joint Claim Construction Chart, however, Respondents stated: "In an attempt to narrow the issues between the parties on this term," Respondents adopted the compromise position of "a passage that allows air to flow." (JC at 5 n.1.) During the claim construction hearing, Respondents explained that "the quibble we have with Complainants' [sic] construction is that they have the word 'may' in" their proposal. (Tr. at 167:4-6.)

Staff agrees with Walbro. (SMIB at 31.) Staff asserts that "the plain language of the claims and the disclosures of the specification do not support limiting the meaning of 'passage' to the 'opening' [initially] proposed by Respondents." (*Id.* at 32.)

The parties' constructions differ in that Walbro and Staff propose "a passage ***through which*** air ***may*** flow" and Respondents propose "a passage ***that allows*** air ***to*** flow." The undersigned finds that Walbro and Staff's proposal is the correct one.

Respondents state that their main point of disagreement with Walbro's construction is with the word "may." Respondents explain:

> [T]he claim specifically says that the pressure pulse source causes air from the air passage to flow through the pressure pulse chamber. So it's causing that air in the air passage to come into the pressure pulse chamber. It's not a 'may.' It's that it's going to cause that to happen.

(Tr. at 167:7-12.) The undersigned disagrees with Respondents' position. Although the claim language requires that the air passage provides a supply of air to the pressure pulse chamber, the term "air passage" – standing in isolation – does not include this limitation. Moreover, Respondents do not point to anything in the specification indicating that the claim should be limited in this way.

Accordingly, the undersigned hereby construes the term "air passage" as "***a passage through which air may flow***."

7. "in operation, the pressure pulse source causes air from the air passage to flow through the pressure pulse chamber to at least reduce the amount of liquid fuel therein"

The term "in operation, the pressure pulse source causes air from the air passage to flow through the pressure chamber to at least reduce the amount of liquid fuel therein" appears in claim 1 of the '424 patent. The parties disagree on the claim construction of this term and have proposed the following constructions:

WALBRO	RESPONDENTS	STAFF
in operation of the carburetor, the pressures [sic] pulse source causes air from the air passage to flow through the pressure chamber to at least reduce the amount of liquid fuel therein	Indefinite	The Staff is of the view that this claim term does not require construction. If construction is required however, then the Staff proposes that this claim term should be construed consistent with its plain and ordinary meaning, which is the claim language itself.

(JC at 6.)

Respondents assert that "[t]he asserted claims of the '424 patent are invalid as indefinite because claim 1 covers both an apparatus and a method use of that apparatus." (RMIB at 31.) According to Respondents, "[c]laim 1 does not specify whether infringement occurs when the carburetor is created or when the carburetor is put into use, *i.e.*, 'in operation.'" (*Id.* at 32.)

Walbro explains that "the 'in operation' claim language is permissible functional language that merely recites a capability of the claimed structure to 'reduce the amount of liquid fuel contained [in the pressure pulse chamber]" when "the pressure pulse source causes air from the air passage to flow through the pressure pulse chamber." (CMRB at 22.)

Staff agrees with Walbro that this term is not indefinite. (SMIB at 34.) Staff notes: "Contrary to Respondents' contention, the word 'in operation' appearing at the beginning of the claim phrase at issue does not inject 'ambiguity as to when this [claim] limitation is met: when the carburetor is actually in operation or when the carburetor is merely capable of operating." (*Id.* (quoting RMIB at 32).) Staff further explains that "the words 'in operation' do not appear to the Staff to mix the claimed carburetor with a method of use of the claimed carburetor." (*Id.* at 36.)

The undersigned agrees with Walbro and Staff. The use of functional language tied to the structure of the claimed apparatus does not necessarily render a claim indefinite. *MasterMine Software, Inc. v. Microsoft* Corp, 874 F.3d 1307, 1313 (Fed. Cir. 2017) ("Apparatus claims are not necessarily indefinite for using functional language."). Here, the "in operation" claim language is permissible functional language that describes capabilities of the apparatus, as opposed to activities or actions of a user. *See id.* at 1316 ("The limitations at issue here focus . . . on the capabilities of the system, whereas the claims in [prior Federal Circuit decisions] focus on the specific actions performed by the user.")

The undersigned declines to adopt Walbro's proposal, however. Walbro adds the phrase "of the carburetor" after the words "in operation," but otherwise simply parrots the claim phrase. Given that the undersigned rejects Respondents' indefiniteness argument, the undersigned finds that the inclusion of the phrase "of the carburetor" is unnecessary. Instead, the undersigned agrees with Staff that this claim term does not require further construction and should be construed according to its plain and ordinary meaning.

Thus, the term "in operation, the pressure pulse source causes air from the air passage to flow through the pressure pulse chamber to at least reduce the amount of liquid fuel therein" should be given its plain and ordinary meaning.

SO ORDERED.

Charles E. Bullock
Chief Administrative Law Judge

CERTAIN CARBURETORS AND PRODUCTS CONTAINING SUCH CARBURETORS **Inv. No. 337-TA-1123**

Certificate of Service – Page 1

I, Lisa R. Barton, hereby certify that the attached **ORDER NO. 51** has been served by hand upon the Commission Investigative Attorney, Vu Bui, Esq., and the following parties as indicated, on **May 13, 2019**.

Lisa R. Barton, Secretary
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Feldmann Eng. & Mfg. Co., Inc. 520 Forest Avenue Sheboygan Falls, WI 53085	☐ Via Hand Delivery ☐ Via Express Delivery ☑ Via First Class Mail ☐ Other:_____
Imperial Industrial Supply Co. d/b/a Duromax Power Equipment 5800 Ontario Mills Parkway Ontario, CA 91764	☐ Via Hand Delivery ☐ Via Express Delivery ☑ Via First Class Mail ☐ Other:_____
North American Tool Industries 78 Commercial Road Huntington, IN 48750	☐ Via Hand Delivery ☐ Via Express Delivery ☑ Via First Class Mail ☐ Other:_____

Tool Tuff Direct LLC 15000 W. 44th Avenue Suite B. Golden, CO 80403	☐ Via Hand Delivery ☐ Via Express Delivery ☑ Via First Class Mail ☐ Other: